

**MEDIA ACCOUNTABILITY IN THE TWENTY-FIRST
CENTURY**

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By

Annabel Brody, B.A., LL.B.

School of Law

National University of Ireland, Galway

Head of School: Professor Willie Golden

Thesis Supervisor: Mrs. Marie McGonagle

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INTRODUCTION

The aim of this thesis is to provide a comprehensive examination, analysis and assessment of the strengths and weaknesses of the various methods currently used to ensure media accountability in Ireland and in other jurisdictions. The goal is to assess whether these are effective or whether alternative approaches need to be considered to achieve media accountability in the twenty-first century, in light of new technological developments and changing norms and values in society.

Major technological advances in the media field have increased the variety of media available and changed the way the traditional media exert power over people's lives. Technological developments have created the need for a greater understanding of how law, co-regulatory and self-regulatory mechanisms can best provide for transparent and independent systems of accountability.

Colin Scott (2000) defines accountability as 'the duty to give account for one's actions to some other persons or body.' Accountability, as it relates to the media, i.e. 'media accountability' is difficult to define. However, there are a number of key elements which must be in place in order to provide effective media accountability to the public. The main elements are responsibility, responsiveness and transparency. Firstly, the media must be responsible for their publications, i.e. the media must recognize that they have certain duties and responsibilities to the public and must be willing to adhere to certain standards, such as those set in place by legislation and media accountability mechanisms such as press councils and broadcasting complaints bodies. Secondly, the media must be responsive to the public, i.e. the media must be prepared to communicate with the public and, where standards are not upheld, be willing to rectify the matter in a proportionate manner. As such, the media must be answerable to the public. Thirdly, both the processes of journalism and media accountability mechanisms must be transparent. The public should be adequately informed, where appropriate, with regard to sources of information and reasons for publication of that information. Media accountability bodies must also ensure that their decision making function is transparent so that the public can see that decisions are being made in an impartial manner.

Accountability in the context of the media, however, must be compatible with freedom of expression. The Irish Constitution specifically mentions the media in Article 40.6.1, which provides for freedom of expression. This freedom is however subject to a number of restrictions. Freedom of expression is also protected under the European Convention of Human Rights under Article 10 and the International Covenant on Civil and Political Rights under Article 19. These rights are also subject to restrictions. This thesis considers alternative approaches to achieving media accountability which safeguard freedom of expression.

The thesis contemplates key conceptual questions such as: what are the principles underlying media regulation and accountability? What are the rights and duties of the media in this ever expanding ‘information age’ (McQuail; 2003)? Has the role of the media become distorted in light of technological developments such that traditional approaches are no longer appropriate?

In order to provide a broad canvas within which all the requisite questions can be addressed, this thesis traces the history and development of the media and the emergence and development of the concept of media accountability, relevant media law and regulatory approaches, as well as non-legal measures for regulating the media and for achieving media accountability to the public. It does so in a comparative framework, taking account of legal and non-legal approaches in other jurisdictions around the world.¹

METHODOLOGY

The principal methodology employed in this thesis has been the use of advanced legal research methods to enable an in-depth analysis of regulatory methods, which have been utilized in the media thus far. Sociological methodologies were also employed to a large extent to determine the underlying rationale of the need for media accountability in society. Communications methodologies have also

¹ The focus of this thesis is on forms of regulation and accountability. As such, competition law, copyright and substantive issues of complaints are outside the scope of this thesis. The importance of competition law in ensuring plurality and diversity in the media is briefly considered in Chapter 1.

been applied in the study of the development and technical advancement of mass communication.

Library based research and a thorough search of all available legal databases facilitated identification of materials relevant to issues of media accountability. This search also revealed other significant material available in libraries in academic institutions around the world, most notably in England and the USA. These materials were accessed through Inter Library Loans which is a service provided by the library at the National University of Ireland, Galway. Thorough examination of the materials located by these methods facilitated the compilation of a substantial bibliography. This methodology assisted in the identification at an early stage, of key theorists, academics, policy makers and researchers in this area. During the first year of research, I conducted an extensive search of all pertinent library bases from which I compiled an index of organizations, association, societies and individuals involved in the areas of media accountability and freedom of expression. In the early stages of my research, I also availed of the opportunity to spend a number of weeks in the library at New York University, which enabled me to obtain extensive information on media accountability mechanisms being used in the USA at present.

In order to get a more practical knowledge of the actual workings of certain media accountability mechanisms, I visited the English Independent newspaper and interviewed the Deputy Legal Advisor there. I also visited the Press Complaints Commission in London to see how it operates on a day-to-day basis. This exercise was extremely insightful as it gave me an in-depth look into the inner workings of the Commission, which could not have been attained through library based or Internet research. I also interviewed the former Deputy Director of the PCC, who provided me with invaluable information for my thesis, which could not have been acquired through other methods.

In August and September 2010, and June 2011, I spent a number of weeks researching at the offices of the Press Council of Ireland. The research involved a thorough examination of all of the complaints made to the PCI since it began processing complaints in January 2008. The aim of the study was to determine an overall profile of people who use the PCI, how are they using it, what are they

using it for and what they may use it for in the future. The results of my research at the PCI are examined in Chapter 4 and form an integral part of this thesis.

Finally, having attended a number of conferences in the UK and Ireland on the areas of media regulation and accountability during the course of my research, as both participant and speaker, I have made contacts and received valuable comments and criticism on my research from highly respected experts in the area of media accountability.

OUTLINE OF THESIS

Chapter one examines the development of the concept of media accountability. Media accountability to the public is a relatively new concept, which developed in the late nineteenth and twentieth centuries. It began as an obligation to church and state. As justifications for such obligations diminished, due to secularization and democratization, the focus turned to the public interest and an obligation on the part of the media to be accountable to the public.

Chapter one examines the historical development of the media and the theoretical origins of the concept of press freedom before analyzing the emergence of the concept of media accountability to the public. The chapter considers the developments of such concepts from a socio-political and legal perspective taking into account the changes in the relationship between the media and that of the State, church and society. In doing so, it considers the underlying rationale for media accountability to the public in the twenty-first century.

The *Four theories of the press*, which was written by four American theorists in 1956, categorizes the changes in the relationship between the press and society throughout history, from a socio-political perspective. This work considers four different social systems and analyzes the role and function of the press under each system.

The four theories range from the authoritarian and soviet communist theories, which emphasize control and censorship of the media in the interest of the authorities, to the libertarian theory, which advocates freedom of the press and

the importance of the individual, and the paternalistic social responsibility theory which addresses some of the shortcomings of the libertarian theory in light of its application to the mass media of the twentieth century.

Chapter one draws upon these four theories of the press as a framework for examining the effect of different social systems on the role and function of the press and its relationship with society.

Finally, this Chapter considers the emergence of a fifth theory of the press in response, most notably, to the internationalization of markets and convergence of the media. In recent years, the emphasis has shifted away from the application of social responsibility principles towards neo-liberalist principles which emphasize market forces and consumer sovereignty.

Chapter two is divided into two sections. Part one focuses on the role of law in providing for media accountability to the public in the twenty-first century and part two examines freedom of expression of the media under Article 10 of the European Court of Human Rights (ECHR).

Chapter two, part one, considers the role of law in providing for media accountability to the public. The traditional form of regulating the media is by statute or common law and is the standard form of regulation in the broadcast industry. Statute law sets out the powers and functions of regulatory bodies in the broadcast media in relation to a wide variety of issues, including economic matters such as licensing and funding, public interest concerns such as the protection of minors, plurality and diversity and general technical standards.

Part one involves an examination of how such public policy objectives are implemented in order to provide accountability to the public in the broadcast/audiovisual sector. In doing so, it examines key legal developments in broadcast/audiovisual regulation policy, which strengthened media accountability to the public at both domestic and European level through mechanisms such as public service broadcasting, complaints bodies, right of reply remedies and codes of standards.

Part one also considers the changing relationship between the audiovisual media and the public and whether the role of law, as well as the role of sector specific

laws, as in the broadcast sector, remains appropriate in providing for media accountability to the public in light of major technological advancements which have resulted, most notably, in media convergence.

Chapter two, part two examines freedom of expression of the media under Article 10 of the ECHR. The European Court of Human Rights (ECtHR), has paid particular attention to the interpretation of the ‘duties and responsibilities’ of journalists under Article 10(2). An examination of ECHR cases, setting out principles on what constitutes such ‘duties and responsibilities’ in this context, shows a number of inconsistencies which are examined in this section. In doing so, this section considers a number of cases which reflect a restrictive interpretation of the duties and responsibilities of the press under Article 10(2) and the consequent dangers that such restrictions may pose to freedom of the press. This section also considers whether these recent restrictive judgments are indicative of a more limited view of freedom of the press by the Court or whether they are an aberration from the Court’s well-established principles on the subject.

Chapter three examines the role of non-legal methods in providing for media accountability to the public. This chapter focuses particularly on self-regulation of the print media and includes a detailed examination of non-legal media accountability mechanisms such as press councils and press ombudsmen as well as newspaper ombudsmen and readers’ representatives. These mechanisms have been updated and adapted in light of calls for greater accountability from governments, as well as technological developments and changing norms and values in society. This chapter also considers the accountability of search engines; the main ‘gatekeepers’ of public information.

Chapter three is divided into three parts. Part one focuses on the role of press council systems in ensuring accountability to the public while section two examines the role played by national press ombudsmen working in conjunction with press councils and the role played by individual newspapers’ ombudsmen or readers’ representatives, i.e. an internal appointee who handles readers’ complaints in order to provide responsiveness and accountability to the public. Part three considers accountability of search engines; the main ‘gatekeepers’ of news and information in the twenty-first century.

Chapter three, part one, considers the role of press councils in ensuring media accountability to the public. While it is true that press councils can provide an excellent means of accountability to the public which does not unduly inhibit freedom of expression, the effectiveness of such bodies is dependent on a number of sensitive factors which are examined throughout this section. The ability of press councils in ensuring effective accountability has been the subject of hot debate since the establishment of the first press council in Sweden in 1916.

As well as this, the nature and role of press councils and similar bodies are changing and expanding in light of major technological developments in media communications, such as online services including the development of social networking sites, and calls from government to provide greater accountability to the public in response to these changes.

This section focuses on the changing structure and the possible future role and operation of press councils in light of these issues as called for by the UK Culture Media and Sport Committee on Press Standards, Privacy and Libel (hereafter the CMS report), which was prompted by the treatment of the McCann family by the British press and the failure of the Press Complaints Commission (PCC) to launch its own investigations into the matter and, more recently, the Leveson Inquiry into Culture, Practice and Ethics of the Press which was set up in 2011 in response to the phone hacking scandals in the UK press.

Also, the merging of the traditional print media with the new media has meant that many press councils have extended their remit to include online versions of member publications. Issues such as user-generated comments which appear on the websites of member publications have given rise to questions of editorial responsibility and how best to handle complaints arising from such content.

In order to ascertain the best practice of press councils and establish where changes and improvements could be made in response to all of these types of issues, this section provides an examination of a number of press councils with a view to determining their common strengths and weaknesses in terms of their independence, role, standards and resolution of complaints.

Chapter three, part two is further divided into two subsections. Subsection one examines the role played by national press ombudsmen working in conjunction with press councils, and subsection two considers the role played by individual newspapers' ombudsmen or readers' representatives.

Chapter three, part two, examines the strengths and weaknesses of each of these systems of accountability in order to determine whether they are effective or whether they need to be updated or adapted in light of technological developments and changing norms and values in society.

Chapter four of this thesis presents an analysis of data resulting from empirical research undertaken at the Press Council of Ireland (PCI) over a ten week period. The chapter is divided up into four sections based on four pivotal questions posed at the outset of the research of the PCI complaints system. The questions were as follows:

- 1) Who uses the PCI complaints system?
- 2) How is the system used?
- 3) What are the main types of complaints?
- 4) What are the current issues of concern?

I selected these four questions in order to determine an overall profile of people who use the PCI, how are they using it, what are they using it for and what they may use it for in the future.

In August and September 2010, and June 2011, I spent a number of weeks researching at the offices of the Press Council of Ireland. The research involved a thorough examination of all of the complaints made to the PCI since it began processing complaints in January 2008.

The first aim of my research was to determine an overall profile of the people who use the PCI's complaint system. The profile was composed from the following factors: gender; address; the complainant's involvement with the complaint, i.e. whether the complaint was made on behalf of the complainant, a third party or on behalf of a deceased relative; the status of the complainant, i.e. whether the complainant was a public or private person; and the occupation of the complainant.

In order to ascertain the second question posed, i.e. how is the PCI system used, I analysed the data based on the method of communication used by each complainant, i.e. whether by e-mail, website, telephone, letter, fax or in person.

With regard to answering the third question, i.e. what are the main types of complaints, I considered (a) the type of publication most complained of, i.e. whether national newspaper, regional newspaper or periodicals through an analysis of the data gathered from my research of the PCI complaints. I then examined (b) the issues which were most cited in complaints by analyzing the principles of the Code of Practice cited in complaints over the period, as well as statistics on principles complained of which I compiled from the PCI's annual reports from 2008-2011. I also compared these statistics with those of other press councils around the world in order to determine world-wide trends in the types of complaints made to press councils and whether the Irish system is in line with those trends.

The final aim of my research was to investigate key issues of concern being addressed by the PCI and other press councils around the world at present. I analysed the PCI complaints data under a number of areas which have been highlighted as issues of concern at the present time in a number of other press councils including: online issues, defamation of the deceased, privacy protection (particularly with regard to online protection) and children in the media.

Chapter 5 considers alternative approaches to achieving media accountability in the twenty-first century. Major technological developments in communications technology and the subsequent convergence of the media have led to a “paradigm shift” (Hoffman-Riem; 1986) in regulatory approaches to the broadcast media in particular. Reasons for more stringent regulation of the broadcast media, in contrast with the relatively light regulation of the print media, are based on historical rationales that are quickly becoming obsolete in light of continuing technological developments in the area. If the historical arguments for stricter regulation of the broadcast media are no longer valid, statutory regulation of the broadcast media may no longer be proportionate. As such, more proportionate regulatory measures may need to be put in place.

This chapter considers the strengths and weaknesses of alternative approaches to traditional command and control regulation in the audiovisual sector such as self and co-regulatory measures as well as audience empowerment mechanisms such as media literacy initiatives.

Chapter 5 is followed by the overall conclusions of the thesis, which identify elements that make for best practice of media accountability mechanisms in the twenty-first century, taking account of new media and ongoing developments. The conclusions also highlight developments and trends in regulation of the media and point to other latent or emerging possibilities for effective regulation and/or ensuring accountability.

CHAPTER 1

HISTORY OF MEDIA ACCOUNTABILITY

Media accountability to the public is a relatively new concept, which developed in the late nineteenth and twentieth centuries. When the notion of media accountability first developed it was as an obligation to church and state. In time, as justifications for such obligations diminished, due to secularization and democratization, the focus turned to the public interest and an obligation on the part of the media to be accountable to the public.¹

This section will examine the historical development of the media and the theoretical origins of the concept of press freedom before analyzing the emergence of the concept of media accountability to the public. This section will consider the development of such concepts from a socio-political and legal perspective taking into account the changes in the relationship between the media and the state, church and society. In doing so, this section will consider the underlying rationale for media accountability to the public as it exists in the early twenty-first century.

A theoretical framework categorizing the changes in the relationship between the press and society throughout history, from a socio-political perspective, was written by three American theorists, Fredrick S. Siebert, Theodore Peterson, and Wilbur Schramm and is entitled the *Four Theories of the Press*.² The 'Four Theories of the Press' consider four different social systems and analyze the role and function of the press under each system. The four theories range from the authoritarian and soviet-communist theories, which emphasize control and censorship of the media in the interest of the authorities; to the utopian libertarian theory, which advocates freedom of the press and the importance of the individual; and the practical and paternalistic social responsibility theory, which

¹ McQuail, Denis; *Media Accountability and Freedom of Publication*; (Oxford University Press, New York, 2003) p.40

² Siebert, S, Fred, Peterson, Theodore, Schramm, Wilbur; *Four Theories of the Press*, (University of Illinois Press, Urbana) 1956

addresses some of the shortcomings of the libertarian theory in light of their application to the mass media of the twentieth century.

This section will draw upon these four theories of the press as a framework for examining the effect of different social systems on the role and function of the press and its relationship with society.

The authoritarian theory and media accountability to the authorities

The ‘authoritarian theory’ is the oldest of the four theories and according to this theory “...the press as an institution, is controlled in its function and operation by organized society through another institution, government.”³ Under the authoritarian system, the media is therefore accountable to the authorities and not to the public. The authorities, under this regime, have the power to control the output of the media in favour of state objectives. The authoritarian theory has been the most widespread and persistent of the four theories and still exists to this day. Examples of authoritarian political thought can be seen from the works of Plato to Hitler and Mussolini.⁴

Media regulation under the authoritarian regime

The role of communications censor can be traced back to Rome in 434 BC.⁵ The role of censor at this time was to monitor publications and prohibit any material that might be offensive to the emperor or might undermine the authorities.⁶ Another important role of censor was to protect children against the potentially harmful effects of publication by censoring stories that may lead to immorality.⁷ In the *Republic*, Plato philosophizes that since children’s minds are so easily moulded, it should be of “utmost importance that the first stories children hear

³ Supra fn 2, p.6

⁴ Supra fn 2, p.16

⁵ Supra fn 1, p.23

⁶ Supra fn 1, p.23

⁷ Supra fn 1,p.23

shall aim at encouraging the highest excellence of character.”⁸ The acknowledgment of the negative impact that the media may have on children is also reflected in present day media regulation.⁹

In the *Republic*, Plato makes reference to the importance of literary education but considers that such education should be controlled or censored to make sure that God is not misrepresented¹⁰ and that such stories do not incite immoral behaviour.¹¹ Plato speaks of the need to “control story tellers”¹² in the interest of the republic, particularly with regard to the topics of theology and morality.

It is clear that methods of control on speech, later used for controlling the mass media, were in place in ancient Rome. There was an acute awareness of the powerful and potentially harmful effects of communication on the youth. It was feared that the impressionable minds of children could be easily corrupted by immoral or blasphemous stories. At this time emphasis was placed on the moral regulation of the media as well as the protection of the authorities.¹³

The invention of the printing press around the year 1450 meant that globally communication became more immediate and therefore more impactful.¹⁴ Historian, Elizabeth Eisenstein, set out the two most important consequences of the invention of the printing press: 1) the preservation of knowledge and 2) the criticism of authority.¹⁵ One obvious advantage of print was that it increases the durability of documents and ensures their permanency. As Eisenstein states:

⁸ Plato; *The Republic*; (translated by Desmond Lee) 2nd edition (Penguin Books, London, 1974) p.70

⁹ For example, codes of practice of press councils make special provision for the protection of children whether expressly or impliedly.

¹⁰ Supra fn. 8, p.70

¹¹ Supra fn. 8, p.80

¹² Supra fn. 8, p.80

¹³ This can be compared to the early days of independence in Ireland when censorship of films (Censorship of Films Act 1923) and censorship of publications (Censorship of Publications Act 1929) were particularly directed at protecting the children and youth of the country from immoral and harmful influences. For further details see McGonagle. Marie, *Media Law*; 2nd ed, (Thomson Roundhall; Dublin; 2003) at Chapter 9.

¹⁴ The invention of the printing press is accredited to Johann Gutenberg of Mainz, Germany whom the readers of the English *Sunday Times* voted ‘man of the millennium’ in 1999. (*Sunday Times*, 28th November, 1999) By 1500 there were more than 250 printing presses in operation in Europe. (See Inglis, Brian, *Freedom of the Press in Ireland 1784-1841*, (Faber and Faber, London, 1954) p.16

¹⁵ Cited in Briggs ASA, Burke, Peter, *A Social History of the Press- From Gutenberg to the Internet*, 3rd edition, (Polity Press, UK 2009), p.18

Prior to the invention of the printing press, people, for the most part, relied on oral accounts of news which was often exaggerated or adapted from town to town. The development of print has meant that historical accounts have become more accurate and can now be preserved for generations to come.¹⁶

Print has also facilitated the education of the masses. The increase in important books being written in the vernacular enabled the rise of a more knowledgeable and critical public.

The authorities quickly became aware of the power of this new technology and the potential danger it posed towards them. The Catholic Church in Rome passed a Bill against unlicensed printing and in England a number of mechanisms such as licensing requirements and taxes were put in place to control the press.¹⁷

Legal mechanisms for press control

By the end of the sixteenth century, the British government had developed a number of laws under which the media could be prosecuted. Such laws included: treason, scandalum magnatum, heresy, libel and licensing.¹⁸ There did not exist an overarching law to deal with the media but all of these laws were used as methods of controlling and disciplining the media.

The medieval act of treason was often invoked against the media if a publication was found to have offended the crown for example. In 1534, under the rule of Henry VIII, an act of parliament meant that treason could be committed “by words or in writing.”¹⁹ To convict the media of treason was however seen by many, including some of the judiciary, as an unduly harsh punishment and

¹⁶ Eisenstein, E.L., *A Printing Press as an Agent for Change*, Volume 1, (Cambridge University Press, Massachusetts, 1979) p.113

¹⁷ See Muller, Denis, *Media Accountability in a Liberal Democracy- An Examination of the Harlot's Perogative*, Doctoral Thesis, Centre of Public Policy, Department of Political Science, University of Melbourne, 2005. (See Part 1, Chapter 1, History and Legitimacy, Theories and Functions of the Press,p.3)

¹⁸ Hamburger, Philip, The Development of Seditious Libel and the Control of the Press, 1985, Volume 37, No.3, Stanford Law Review, p.668

¹⁹ Supra fn 17, p.667

therefore it was rarely invoked against the media. The common law offence of seditious libel was often used instead.²⁰

Another medieval statute, which was used to regulate the media, was *scandalum magnatum*. *Scandalum magnatum* was a series of acts that made defamation a statutory offence and dates back to 1275.²¹ *Scandalum magnatum* made it an offence to speak or write “false news”²² or “tales”²³ pertaining to the crown and was used as a tool by the authorities to maintain their position over the people.

The law of libel developed as another method of media regulation. Up until the late seventeenth century²⁴ written and verbal libels could be prosecuted under the same law. In the late fifteenth century libel was made a criminal offence by the Star Chamber, with the view to preventing “...the violent consequences of verbal attacks”²⁵. Soon after libel also became a tort actionable before the King’s Bench.²⁶ By the seventeenth century, only written defamation could be prosecuted under libel law.²⁷ This development was due to the permanent nature of written defamation which was perceived to cause greater injury to the defamed than verbal defamation.

All of these laws were introduced and developed to regulate the media, to enable the authorities to keep the media in check and under State control. This was because of the power of the media and their potential to exert influence over the public. It arose more from a sense of exercising control and censorship (focus on State, State controlling media) than any conception of accountability (focus on media, media having duties and responsibilities, i.e. having to ‘account’, to State and/or public) as such. It was very much the product of an age of authoritarianism, as outlined above by Siebert et al.

²⁰ In 1663, three men were found guilty of seditious libel who could just as easily have been found guilty of treason under the legislation at the time. The judge in this case, Lord Chief Justice Hyde, explained the reasoning behind the more lenient conviction of seditious libel as opposed to treason stating that the king’s intention is “to reform, not to ruin his subjects.” *Supra* fn 17, p.668

²¹ *Supra* fn. 17, p.668

²² *Supra* fn. 17, p.668

²³ *Supra* fn. 17, p.668

²⁴ McGonagle, Marie, *Media Law*; 2nd edition, (Thomson Round Hall; Dublin; 2003) p. 68

²⁵ *Supra* fn. 17, p.669

²⁶ *Supra* fn.17, p.669

²⁷ *Supra* fn 23, p.68

Another option for press censorship, which proved to be highly effective, was licensing. From the fifteenth century on, the Catholic Church had the power to license books and to prosecute printers of unlicensed books.²⁸ Censorship of the new media was of major concern at this time to all authorities throughout Europe. The Catholic Church developed an ‘Index of Prohibited Books’, which Catholics were forbidden to read.²⁹ The three main types of books, which were included in the index, were “the heretical, the immoral and the magical.”³⁰ In 1538, under the rule of Henry VIII, the power to license all publications was transferred to the state. The system of licensing ended in 1695 when the Licensing Act failed to be renewed.³¹

Licensing was undoubtedly the most powerful tool used by the authorities to control the press. Unlike the laws of treason and libel, it allowed the authorities to censor the press at pre-publication stage thereby ensuring maximum control over what could and could not be printed.

From direct control to indirect control

Newspapers began to be published on a regular basis at the beginning of the seventeenth century.³² Stamp duties, taxes on paper and taxes on advertisements were used as an indirect means of controlling the media and became known as ‘taxes on knowledge’. According to James Curran and Jean Seaton, there were two main reasons behind such taxes on the press: 1) the authorities, by raising the price of newspapers, made sure that only the wealthy could afford them and 2), that the cost of publishing was increased to ensure that only the wealthy and upper classes could afford to become newspaper proprietors.³³ These taxes were successful in their aim of excluding everyone but the very wealthy from both buying and owning newspapers. The authorities believed that the propertied classes would be more responsible with the management of newspapers than the

²⁸ Supra fn 17, p.672

²⁹ Supra fn 14, p.41

³⁰ Supra fn 14, p.41

³¹ Supra fn 14, p.42

³² Supra fn. 23, pp43-44

³³ Curran, James; Seaton, Jean, Power without Responsibility- the press, broadcasting and new media in Britain, 6th edition, (Routledge, London, 2003) p.7

poorer, uneducated population, which is a clear example of an authoritarian way of thinking. The so-called ‘taxes on knowledge’ were not abolished until 1861 and even then only after fervent political campaigning.³⁴

The development of libertarianism and the emergence of newspapers as the ‘fourth estate’

The rise in popularity of the daily newspaper meant that newspapers were becoming an increasing part of everyday life in the eighteenth century.³⁵

It has been estimated that fifteen million newspapers were sold in England in 1792.³⁶ The increase in popularity of newspapers, particularly daily newspapers, led to the rise of the concept of ‘public opinion’. The term ‘public opinion’ emerged in the mid eighteenth century.³⁷ German sociologist, Jurgen Habermas, later re-defined the development of ‘public opinion’ as the rise of the ‘public sphere,’ “...a zone for discourse in which ideas are explored and ‘a public view’ can be expressed.”³⁸ Newspapers played an important role in facilitating the growth of this concept.

By the nineteenth century, the concept of the public ‘masses’ emerged. Major advances in technology, most notably the use of steam, improved the capacity of the printing press to roll out large numbers of copies of newspapers and made it possible to reduce the unit price. As a result, newspapers became affordable to the ‘masses’: thus the emergence of the term ‘mass media’. The authorities began to take into consideration the will of the ‘masses’ and public opinion as democratic governments and political parties replaced authoritarian social systems. The emergence of democratic theory and recognition of the importance of the public will and public opinion paved the way for a gradual move away from control and censorship of the media by the State towards a theory of media accountability to the public.

³⁴ Supra fn 2, p. 25 (Unlicensed newspapers had begun to circulate and as they were cheaper they had greater appeal.)

³⁵ Supra fn. 14, p.58

³⁶ Supra fn. 14, p.58

³⁷ Supra fn. 14, p.1

³⁸ Supra fn. 14, p.2

The origins of libertarian theory

The emergence of libertarian theory can be traced back to mid-seventeenth century Britain when John Milton's *Aereopagitica* was written in 1644. In the *Aereopagitica*, Milton criticized censorship of the press and argued that the press should be free from government control for the good of society.³⁹ Milton is responsible for the development of the libertarian concepts of 'the open market of ideas' and 'the self-righting process'.⁴⁰ In England after the English Civil War (also referred to as the English Revolution) in 1688, Parliament gained supremacy over the monarchy.⁴¹ Libertarian political philosophy, which had developed in England, was adopted throughout the western world.⁴² The libertarian writings of English political theorist John Locke, were highly influential⁴³ to the development of democratic theory. Locke's theory of 'popular sovereignty' argued that power should lie with the people and that government was simply the "trustee"⁴⁴ elected by the people and to whom the people had given authority. This authority could be revoked if the will of the people was not satisfied. Locke's theories were among the driving forces behind the French and American Revolutions.⁴⁵ Locke's influence can be seen in the French Declaration on the Rights of Man and the American Declaration of Independence in which libertarian theories were put into practice.

The French Enlightenment in the eighteenth century, which was the catalyst for the French Revolution, spurred on an era of change in European and western political philosophy.⁴⁶ People began to question the power and role of the authorities. Logical reasoning, criticism and a new emphasis on the importance of the individual replaced old conservative notions of tradition and acceptance of the status quo.⁴⁷ A high emphasis was placed on the public and education of the

³⁹ Supra fn. 1, p.50

⁴⁰ Supra fn. 2, p.44

⁴¹ Supra fn 2, p.42

⁴² Supra fn.2, p.42

⁴³ Supra fn.2, p.43

⁴⁴ Supra fn.2, p.43 See also Ward, Lee, *John Locke and Modern Life*; (Cambridge University Press; New York; 2010)

⁴⁵ Supra fn 2, p.43

⁴⁶ Supra fn 14, p. 82

⁴⁷ See Supra fn 14, p.82

public. As such, the Enlightenment contributed greatly to the “acceptance”⁴⁸ of libertarian principles.⁴⁹ The eighteenth century saw a dramatic shift from the authoritarian social system of censorship and control of the press to the libertarian system of individual rights and freedoms. Siebert summed up the importance of the individual according to libertarian theory in the *Four Theories of the Press*, stating:

The important contributions of liberalism in this area were the insistence on the importance of the individual, the reliance on his powers of reasoning, and the concept of natural right, of which freedom of religion, speech and press became a part.⁵⁰

The ‘truth’ theory

Libertarian theory, as it applied to the media, asserted that the media should be free from government control and that the public should be exposed to different opinions and erroneous reports as well as correct ones. John Stuart Mill, in his famous essay, ‘On Liberty’ stresses the importance of providing the public with different opinions and conflicting reports, erroneous as well as factual, in order for the truth to emerge. Mill warned of the danger of restricting freedom of expression and of the importance of giving equal freedom to all:

If all mankind minus one were of one opinion, and only one person of a contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.⁵¹

⁴⁸ Supra fn 2, p.43

⁴⁹ Supra fn 2, p.43

⁵⁰ Supra fn 2, p.43

⁵¹ Mill, J.S, *On Liberty*, (David Campbell Publishers Ltd, London, 1992) pp 18,19. See also Barendt, Eric, *Freedom of Speech*; 2nd ed., (Oxford University Press; New York; 2005)

This ‘truth’ theory has been one of the most influential rationales for the protection of freedom of expression to date. The ‘truth’ argument was advanced in the US courts by Justice Holmes in *Abrams v US*⁵² in 1919 who stated, in his dissenting opinion, that truth must be judged in the competition of the market; “...the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”⁵³

The emergence of the press as the ‘Fourth Estate’

The concept of the press as the ‘fourth estate’ was first articulated in 1841 by Thomas Carlyle in reference to media presence in the British House of Commons.⁵⁴ In describing the press as the ‘fourth estate’, Carlyle was equating the importance of the press with the other three estates already established as being essential to the workings of an effective democracy, i.e. the executive, the legislature and the judiciary.⁵⁵ According to ‘fourth estate’ theory, the role of the press was to “...act as an indispensable link between public opinion and the governing institutes...”⁵⁶ The commerciality of the eighteenth century had provided newspapers with a new source of income, advertising.⁵⁷ This new revenue stream increased competition between newspapers to provide the public with a newspaper that fulfilled this ‘fourth estate’ role, i.e. an independent watchdog of society that provided an unbiased account of national and worldwide news and politics. McQuail refers to the emergence of a new role of the newspaper publishers and editors that developed with the ‘fourth estate’ concept, i.e. that of being responsible for the selection of information for public

⁵² 250 US 616, para.630 (1919) See also Nicol, Millar, Sharland, *Media Law and Human Rights*, second edition, (Oxford University Press, New York, 2009), p.3

⁵³ *Supra* fn 51, p.3 By this time a number of media proprietors had been elected to Parliament.

⁵⁴ *Supra* fn 1, p. 52

⁵⁵ *Supra* fn 1, p.52

⁵⁶ Boyce, George; Curran, James; Wingate, Pauline; eds, *Newspaper History from the Seventeenth Century to the Present Day*, (Constable, London, Sage Publishers. California, 1978) p. 21

⁵⁷ *Supra* fn. 1, p.20

dissemination.⁵⁸ McQuail argues that new responsibilities to the public are attached to this role stating that this:

[...] publisher-editorial role of the newspaper adds a new kind of autonomous and therefore *accountable* actor to the existing trio of author, state, and the public.⁵⁹

The press eagerly accepted this ‘fourth estate’ title as a manifestation and recognition of its importance in society. The nineteenth century press, for the most part, took on this important new role with a sense of responsibility to provide the public with accurate and factual information and to report on any abuses of power. McQuail acknowledges that today’s press in democratic societies do try to live up to their ‘fourth estate’ role but is critical of the ‘self assigned’⁶⁰ role in that it ‘overprivileges’⁶¹ the well established and largely concentrated media owners and does not confer the same privileges on the ordinary individual.⁶² McQuail argues that if the media are to claim this ‘fourth estate’ role, it brings with it a responsibility to provide the public with adequate and unbiased political news coverage and news that is in the public interest. Hence, the notion of accountability to the public.

Media regulation according to libertarian theory

From an eighteenth century legal perspective, two judges, Lord Mansfield and Chief Justice Blackstone condemned censorship of the press as illegal and stated that the role of law in this regard was to protect the public against abuses of the press.⁶³ Chief Justice Blackstone summarized the eighteenth century legal relationship with the press stating:

The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the

⁵⁸ The separate role of editor emerged, where previously printing had been essentially a one-man operation, and the one-man was printer, publisher, author and editor all rolled into one.

⁵⁹ Supra fn 1, p.34 emphasis added

⁶⁰ Supra fn 1, p.52

⁶¹ i.e. that the media has labeled itself as ‘the Fourth Estate’ See supra fn 1, p.52

⁶² Supra fn 1, p.52

⁶³ Supra fn 2 at 49

public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity...thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects.⁶⁴

Libertarian advocates and philosophers were reluctant to set out any restrictions on the freedom of the press but generally acknowledged that freedom of expression was not an absolute right.⁶⁵ For example, Milton acknowledged that the right to freedom of expression may be subject to limitations but he never set out any such restrictions in his works.⁶⁶ Mill went a step further in his development of the ‘harm principle’, i.e. that freedom of expression could be subject to restrictions if it caused harm to an individual.⁶⁷

According to libertarian theory, the media would be free from government control but subject to other means of control through a “capitalist system”⁶⁸ whereby privately owned media would compete for sales in an “open market”⁶⁹. Libertarian theorists failed to provide realistic and practical recommendations for the effective operation of libertarian principles in society and as such libertarian principles were unable to cope with the unprecedented technological developments in communications, which occurred towards the end of the nineteenth and beginning of the twentieth centuries.

The social responsibility theory and media accountability to the public

The social responsibility theory does not replace the libertarian theory; rather it is an extension of it. This theory attempts to adapt libertarian principles to the reality of the modern mass media in society. The social responsibility theory, like the other theories mentioned, is a theory that has developed over time based on

⁶⁴ (34:1326-27) Cited Supra fn 2, at 50

⁶⁵ Supra fn 2, p.54

⁶⁶ Supra fn 2, p.54

⁶⁷ See supra fn 51

⁶⁸ Supra fn 2, p. 52

⁶⁹ Supra fn 2, p.52

the ideas of many.⁷⁰ However, the emergence of this theory, as distinct from libertarian theory, has been attributed to the work of the US Commission on Freedom of the Press in its report on '*A Free and Responsible Press*' and on the work of Commission member, William Ernest Hocking, in his commissioned report entitled '*Freedom of the Press- A Framework of Principle*'.⁷¹

In many ways the libertarian theory was based on an overly-optimistic view of society and an unrealistic faith in the public's ability to decipher the truth from the erroneous reports. The social responsibility theory addresses the problems with libertarian theories as they relate to the modern mass media. The unprecedented development of communications technology at the beginning of the twentieth century, i.e. the invention of broadcasting and the motion picture, meant that libertarian principles which had applied exclusively to the print media had to be reassessed. Libertarian principles were largely incompatible with statutory regulation of broadcasting and film. Technological developments in communications technology, as well as a questioning of the inadequacies of libertarian principles by a more educated society, led to major criticisms of the performance of the press, particularly in light of the monopolistic tendencies of the press at the time, the concentration of ownership of media owners and an apparent emphasis on the financial profit of the press at the expense of the public interest. Peterson, co-author of the 'Four theories of the Press', summarises the main criticisms of the press in the twentieth century and categorizes them into seven main points. They are as follows:

- 1) The press has wielded its enormous power for its own ends. The owners have propagated their own opinions, especially in matters of politics and economics, at the expense of opposing views.
- 2) The press has been subservient to big business and at times has let advertisers control editorial policies and editorial content.
- 3) The press has resisted social change.
- 4) The press has often paid more attention to the superficial and sensational than to the significant in its coverage of current happenings, and its entertainment has often been lacking in substance.

⁷⁰ Supra fn. 2, p.75

⁷¹ Hocking, W. E, *Freedom of the Press- A Framework of Principle* (A Report from the Commission on Freedom of the Press), (University of Chicago Press, Illinois, 1947)

- 5) The press has endangered public morals.
- 6) The press has invaded the privacy of individuals without just cause.
- 7) The press is controlled by one socioeconomic class, loosely the “business class,” and access to the industry is difficult for the new-comer; therefore, the free and open market of idea is endangered.⁷²

Hocking, in his 1949 report, considers the relationship between the ‘issuer’ (the media) and the ‘audience’ (the public) and how this relationship has changed due to concentration of media ownership and market forces and other criticisms of the press as outlined above. Hocking advises that this change in the relationship means that the audience/public need to be adequately protected from the power of the media:

Since the consumer is no longer free not to consume, and can get what he requires only through existing press organs, protection of freedom of the issuer is no longer sufficient to protect automatically either the consumer or the community. The general policy of laissez faire in this field must be reconsidered.⁷³

Social responsibility theory acknowledges the important role of the press in democratic society; i.e. that of scrutinizers of government and watch-dog of society. The theory, however, criticizes the inadequacies of the press in the performance of this role.⁷⁴ Hocking accuses the press of the twentieth century of “exploiting”⁷⁵ the liberty it had been entrusted with at the expense of the public.⁷⁶

The right to information and the right to freedom of expression

Social responsibility theorists, such as Hocking, believed and still do believe that the privileged role of the press imposes on it certain responsibilities. It is not a legal obligation but rather a moral obligation to provide society with correct political news and coverage of world-wide events, i.e. the “news function”⁷⁷

⁷² Supra fn 2, p.78

⁷³ Supra fn. 71, p.225 The Hocking report was written in 1949 and is based on the media of the mid-twentieth century. This statement is not applicable to the media of the 21st century as will be considered throughout this thesis.

⁷⁴ Supra fn 2, p.74

⁷⁵ Supra fn 71, p. 77

⁷⁶ *ibid*

⁷⁷ Supra fn. 71 p.167

which, according to Hocking, involves standards which have been accepted by the media in democratic societies and should be generally accepted throughout the world.⁷⁸ Hocking's 'news function' is essentially an extension of the theory of the press as the 'fourth estate'. The idea of media responsibility to the public based on the public's right to know was an important new departure from libertarian principles and is the main element of the social responsibility theory.

Hocking considered the role of government under the social responsibility theory as that of "residual legatee of responsibility for an adequate press performance."⁷⁹ This essentially means that if the press does not fulfill their moral role as 'scrutinizers of government' and 'watchdog of society', then government may have to step in to regulate in the public interest. According to Hocking however, this government interference must be limited and must only be invoked in the public interest.⁸⁰ The term 'public interest' is nebulous and open to a number of interpretations. Despite uncertainty in defining the term, public interest objectives, as they relate to media regulation can be seen as protecting human rights and democratic values such as protection of minors, plurality and diversity. As such, regulation of the media can ensure that public interest objectives are protected with regard to both the interest of the public as a whole and the individual rights of members of the public. Public service broadcasting, which is discussed in detail in Chapter 2.1, is an example of how the state can ensure that both the public interest at large and individual rights are protected in broadcasting regulation at national level. The public interest also gains significance when dealing with the balancing of an individual's rights, for example in deciding circumstances in which it might be more important that the public be informed than protecting an individual's right to privacy or vice versa. Such issues are addressed in Chapter 2.2, particularly in relation to the balancing of privacy rights with the right to freedom of expression. According to Feintuck, regulation of the media in the public interest ensures equality of citizenship and

⁷⁸ Supra fn 71, p.184

⁷⁹ Supra fn 71, p.182

⁸⁰ Supra fn 71, p.217

protection of democratic values, i.e. a “democratic rationale for regulation” as opposed to regulation based purely on a technical, legal or scientific basis.⁸¹

Inquiries into press standards as mechanisms for achieving media accountability

During the second World War, inquiries into press standards began to be established. For example the Commission on Freedom of the Press was set up in the United States in 1942 by Robert Hutchins. The Commission has to date written a number of reports on the freedom of the press and accountability to the public. The Commission recommended a non-governmental agency to oversee the performance of the press in the hope of improving press standards.⁸²

The Royal Commission on the Press was set up in Britain in the 1940s. Its establishment was initiated by the National Union of Journalists. In 1949, the Royal Commission on the Press published its first report.⁸³ The report supports social responsibility theories on freedom of the press. The inquiry was set up due to public concern “...at the growth of monopolistic tendencies in the control of the Press and with the object of furthering free expression of opinion through the Press and the greatest practicable accuracy in the presentation of news...[and to examine] the finance, control, management and ownership of the Press.”⁸⁴ The First Royal Commission on the Press recommended the setting up of ‘A General Council of the Press’.⁸⁵ This Council was to operate as a self-regulatory mechanism which would “...derive its authority from the press itself and not from statute.”⁸⁶ The Commission gave reasons why the Council was to operate on a self regulatory basis as opposed to a statutory one stating that:

⁸¹ Feintuck, Mike, Varney, Mike, *Media Regulation, Public Interest and the Law*, (Edinburgh University Press, 2006, UK) at p. 124

⁸² This was recommended by the Commission’s report, *A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (Chicago: University of Chicago Press, 1947), chap. 6, cited supra fn.71, p.188

⁸³ Royal Commission on the Press, Cmnd. 7700 (1949)

⁸⁴ Ibid para 14.

⁸⁵ Ibid para 616

⁸⁶ Ibid para 656

[...] it is preferable to seek the means of maintaining the proper relationship between the press and society not in government action but in the press itself.⁸⁷

The Commission had faith that the press industry itself would provide a self regulatory mechanism which would rely on the industry's own sense of responsibility to the public. The first Commission was idealistic in some of its views:

[T]here is in almost all newspaper ownership some admixture of commercial motives, we believe that it is also true that most newspaper undertakings conceive themselves to be rendering a service to the public. The strength and clarity of this conception vary according to the character of the undertaking, and so do its consequences in the conduct of the paper; but its existence should always be allowed for in discussing either the present or the future of the Press. There is still widespread among Pressmen a sense of vocation; they feel a call, somewhat as sailors feel the call of the sea....It may yet have value as a foundation in any attempt to build higher standards within the profession.⁸⁸

The Commission recommended that the General Council's main objectives should be:

to safeguard the freedom of the Press; to encourage the growth and sense of public responsibility and public service amongst all engaged in the profession of journalism...and to further the efficiency of the profession and the well being of those who practice it.⁸⁹

As well as these main objectives, the Commission recommended that the Council should "[...] take such action as it sees fit [...]"⁹⁰ on a number of other issues including the consideration of public complaints. It recommended that the Council set up a code of conduct which would set out a list of basic principles "...in accordance with the highest professional standards."⁹¹ By way of this code, the Council would consider complaints from the public regarding breaches of the code.

These initial inquiries in particular contributed greatly to the social responsibility theory and to the firm establishment of the concept of media accountability.

⁸⁷ *ibid*

⁸⁸ *Ibid* p88

⁸⁹ *Ibid* para 684

⁹⁰ *ibid*

⁹¹ *Ibid* para 640

Inquiries into the standards of the press have found time and time again that self regulation of the press is a preferred option to statutory regulation. As the public became dissatisfied with press standards and governments threatened intervention, the press took note and took on a more responsible role. Codes of ethics were put in place in many newspapers and press councils began to be established.

The role of the present day print media is a complicated one. The press has a moral obligation to the public to provide it with political news on one hand and on the other hand the press as a business must be financially viable. This means that the press is faced with a constant dilemma, i.e. whether to print material that sells or material that will serve the public interest.

The social responsibility theory established the concept of media accountability to the public and with it a new relationship between the media and the public, i.e. that the press has a moral obligation to adequately inform the public and that the public has a right to be informed. According to this theory, the media must be responsible for their publications and answerable to the public. The twin concepts of ‘responsibility’ and ‘answerability’ or ‘accountability’ are key.

The print media is accountable for its actions and publications under the ordinary laws of each jurisdiction. As such, the print media is subject to the same legal constraints as all citizens.⁹² The media must adhere particularly to “proscriptive legal rules”⁹³ in their everyday work such as those contained in tort and criminal law, which include laws on contempt of court, defamation, trespass, professional secrecy and discrimination.⁹⁴ These laws protect individual rights and the public interest.

According to Hocking, under the social responsibility theory, legal remedies, as imposed on the media, may be extended if any new “abuses”⁹⁵ by the media

⁹² See the Editor’s Codebook of the Press Complaints Commission Code of Practice Committee UK

⁹³ Thorgeirsdottir, Herdis, Study No. 415/2008, European Commission for Democracy in the Handling of Complaints, Strasbourg, 07/04/2008, p.2

⁹⁴ Supra fn 93, p.2

⁹⁵ Supra fn 71, p.223

come under any of these categories.⁹⁶ Such restrictions on freedom of the press, which are deemed to be in the public interest, have been generally accepted as being compatible with libertarian and social responsibility principles.

Libertarian and social responsibility theory principles are reflected in the constitutions and common law jurisprudence of democratic countries, as well as international human rights instruments. For example, the Irish Constitution specifically mentions the media in Article 40.6.1, which provides for freedom of expression. This freedom is, however, subject to a number of restrictions.

Freedom of expression is also provided under the European Convention of Human Rights, Article 10 and the International Covenant on Civil and Political Rights, Article 19. These rights are also subject to restrictions (See Chapter 2 for details on domestic and international protection of freedom of expression).

It has been universally accepted in democratic countries that accountability in the context of the media should not be interpreted too restrictively as it must be compatible with freedom of expression.

Regulation of the broadcast media

As discussed above, a system of self-regulation has been largely acknowledged as the most appropriate form of regulation of the print media in democratic society. The same rationale for non-statutory regulation of the print media has not been applied to the broadcast media. In order to understand the difference in approach to regulation of the broadcast media, it is necessary to examine its historical origins. This section sets out the justifications for the differences in approach to regulation of the broadcast media compared to that of the print media and considers whether these reasons still hold up in an age of media convergence.

The origins of regulation of the broadcast media

⁹⁶ Supra fn 71, p.223

The social responsibility model (as discussed above) has had a major influence on the development of regulation of the broadcast media and the concept of public service broadcasting which is examined in Chapter two. The idea of media responsibility based on the public's right to know was an important new departure from libertarian principles and is the main hypothesis of the social responsibility theory. Social responsibility theorists also believed that the privileged role of the press conferred on it certain responsibilities. The broadcast media does not have the same privileges as the print media industry and has, since its inception, been subject to much stricter legal regulation.

Legal regulation or 'hierarchical control' of the broadcast media has been generally accepted as the most appropriate form of regulation since the 1920s. The rationale for restrictions on freedom of expression of the broadcast media in the form of state interference is essentially premised on a number of issues of concern which became apparent shortly after the establishment of broadcasting, most notably the problem of scarcity of spectrum and the sense that broadcasting, following on from the telegraph and telephone, was part of the State's communications' resources and apparatus. Keller offers another rationale, namely that states were anxious to ensure that broadcasting to the public did not interfere with military communications.⁹⁷ The other main justifications for statutory regulation in the early days included the need to regulate monopolization and market dominance and the need to protect the public against the powerful influence of the broadcast media. At the root of these justifications was political fear of the potential of the broadcast media to interfere with public authority objectives. Barendt (1995)⁹⁸ considers that justification for heavier regulation of the broadcast media is not based on clear principles but rather it is based on vague historical reasoning and circumstance. Discrepancies in these dated justifications along with major technological advancements in communications media since have questioned the validity of these rationalizations. This section will consider these historical justifications for

⁹⁷ Keller, Perry, *European Media Law: Liberal Democracy, Trade, and the New Media*, (Oxford University Press, New York, 2011) at p. 13

⁹⁸ See Barendt (1995). Cited in Feintuck, Mike; Varney, Mike, *Media Regulation, Public Interest and the Law*, 2nd edition, (Edinburgh University Press), Edinburgh, 2006, p.57

heavier regulation of the broadcast media and consider whether they remain valid in the 21st century.

Scarcity of spectrum

Regulation of the broadcast media is a contentious issue and has had a major influence on the affirmation of the social responsibility theory and the role of government in accordance with this theory.⁹⁹ It became apparent in the 1920s that some form of media regulation was needed to control the airwaves. Radio stations were operating on the same wavelengths and this led to the mixing of signals and poor reception.¹⁰⁰ In 1927, in the United States, the Federal Radio Commission was established by Congress to alleviate this problem by allocating frequencies to stations.¹⁰¹ Its role also included overseeing programme content.¹⁰² In 1934, the Federal Communications Commission (FCC) was established by the Communications Act. Its role was to issue broadcast licences and to supervise programme content.¹⁰³ Despite the strong constitutional protection of freedom of expression under the First Amendment to the United States Constitution, the F.C.C. has been validated in fulfilling a supervisory role in overseeing programme content and maintaining standards in the public interest.¹⁰⁴

The constitutionality of statutory regulation of the broadcast media was challenged in the US case of *Red Lion Broadcasting Co. v FCC*¹⁰⁵ where the US Supreme Court held that governmental regulation was constitutional with regard to the need to allocate spectrum in the interest of fairness and plurality and the promotion of freedom of expression:

In view of the scarcity of broadcast frequencies, the Government's role in allocating these frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for

⁹⁹ Siebert et al, p.84

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ *Red Lion Broadcasting v F.C.C.* [1969] USSC 141

expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.¹⁰⁶

The validity of the scarcity of spectrum rationale for regulation of the broadcast media is now called into question, however, by technological advancements in communications technology, most notably the digitization of television. The digitization of traditional analogue television means that there is now a much greater availability of frequency spectrum. ‘Digital compression techniques’¹⁰⁷ allow for several programmes to be transmitted in a single data stream¹⁰⁸ a process known as ‘multiplex’.¹⁰⁹

Market dominance

Scarcity of spectrum and the need to allocate frequencies meant that market access was restricted. This rationalized the need for public regulation of the broadcast media in order to prevent market dominance and monopolization from occurring. The broadcast media industry was very different from the print media industry at this time in that the print media operated in a free, unrestrained market; therefore consumers of newspapers and magazines had a wide variety of publications to choose from.¹¹⁰ Consumers of the broadcast media did not have much choice at all, particularly in the early days of broadcasting. Public regulation of broadcasting content was therefore accepted as necessary to ensure plurality and diversity of programming. This can be seen as the original rationalization for the establishment of public service broadcasting, which is examined in detail in Chapter two.

¹⁰⁶ Supra fn.104 para. 49.

¹⁰⁷ Berger, Kathrin; Schoenthal, Max, *Tomorrow’s Delivery of Audiovisual Services- Legal Questions Raised by Digital Broadcasting and Mobile Reception*, (European Audiovisual Services), Strasbourg 2005, p.14

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

¹¹⁰ Humphreys, Peter, J, *Mass media and media policy in Western Europe*, (Manchester University Press), UK 1996, p.113

In the 1930s and the post-war period, content regulation reflected the taste and values of the authorities.¹¹¹ Broadcasters were given more independence with regard to content in the 1960s but had to adhere to standards and rules concerning, for example, the promotion of diversity and culturally specific programmes, as set out in legislation.

Major technological advancements in the broadcast media, such as the development of cable, satellite and digital broadcasting have meant an increase in availability of spectrum thereby facilitating a dramatic increase in the number of channels available without cross-channel interference.¹¹² However, a large number of channels does not of itself guarantee diversity in programming and thus content regulation has persisted at least with regard to public service broadcasting.

Justifications for differential treatment of the print and broadcast media in relation to monopolization and market dominance are weakened in light of such technological advances. Lee C. Bollinger,¹¹³ writing in 1976, argued that rationalizations for the difference in regulation of the broadcast and print media with regard to issues of monopoly and market dominance were inherently flawed because of the fact that such issues were also prominent in the newspaper industry.¹¹⁴ The broadcast media of the 21st century is very different from the broadcast media on which these historical justifications for heavy regulation are based. Consumers of the broadcast media can now choose between a wide variety of channels and on-demand services. Technical advancements in the broadcast media mean that consumers can pick and choose what to watch and when to watch it. The justifications for more stringent regulation of the broadcast media with regard to market forces therefore need to be re-addressed in this respect. (See further below)

¹¹¹ *ibid*

¹¹² *Supra* fn. 107 at 13.

¹¹³ Bollinger, Lee, C, *Freedom of the Press and Public Access: Towards a Theory of Partial Regulation* (1976) 75 Michigan Law Review 1, at 10-11, 13-16 cited in Barendt, Eric; Hitchens, Lesley, *Media Law- Cases and Materials*, (Pearson Education Limited 2000, p. 9 See also his views on this issue in his later work: Bollinger, Lee C, *Uninhibited, Robust and Wide-Open- A free press for a new century*, (Oxford University Press, New York, 2010) pp. 54-67.

¹¹⁴ *Supra* fn. 113 at 10.

The broadcast media as “uniquely pervasive”

The “uniquely pervasive” or “immediate impact” argument is based on the premise that the broadcast media is more powerful and influential than the print media because of the heightening effect of the combination of sound and image and the immediacy of its transmission directly into people’s homes. This rationalization for stricter regulation of the broadcast media was considered in the U.S Supreme Court case in 1978 of *F.C.C v Pacifica Foundation*¹¹⁵. This case considered a complaint made to the F.C.C. The complaint in question referred to a satirical monologue entitled “Filthy Words” which was broadcast by a radio station in an afternoon slot. In his judgment, Mr. Justice Stevens justified stricter regulation of the broadcast media, stating:

Of all the forms of communication, broadcasting has the most limited First Amendment protection. Among the reasons for specifically treating indecent broadcasting is the uniquely pervasive presence that medium of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home, and it is impossible to completely avoid those that are patently offensive. Broadcasting, moreover, is uniquely accessible to children.¹¹⁶

The view that broadcasting is “uniquely pervasive” is considerably undermined since then by major technological advancements in the broadcast media, in particular the introduction of interactive technologies in this area. The view of the broadcast media as an intruder into the privacy of the home is intrinsically flawed. Firstly, people are not forced to buy radio and television sets. The choice to have a broadcasting device in one’s home is completely optional. Secondly, there is now an immense set of channels to choose from, so that no one is confronted with a stark choice of whether to watch an indecent programme or turn off the television and do without. Thirdly, the development and widespread use of the “watershed”, whereby programming aimed at children or regarded as family viewing is broadcast during the day and more adult material is carried only progressively after a late evening cut –off such as nine o’clock, precludes the showing of indecent material during the day and operates as a protection for children and younger viewers. Fourthly, avoidance of material that is “patently offensive” is now possible with the development of interactive technologies such

¹¹⁵ *F.C.C. V Pacifica Foundation* [1978] 438 U.S. 726

¹¹⁶ *Supra* fn 115 at para. 4

as electronic programme guides that give the viewer an overview of channels with the daily schedule of programmes. Such devices give details of programme content under each channel so the viewer can tell, for example, whether the programme is suitable for a younger audience or not. As well as this, on demand audiovisual services allow the viewer to choose what to watch and when to watch it. (See broadcasting policy in Europe section below.)

Despite the obvious discrepancies of this rationale, the idea that the broadcast media is “uniquely pervasive”, or that it has an immediate impact on viewers, remains cited in constitutional and international human rights instruments as a reason for heavier restrictions on the freedom of expression of the broadcast media than any other type of media.

Article 10 of the ECHR (See chapter two for an examination of Article 10 case law) provides for freedom of expression. Article 10(1) provides that States shall not be prevented “from requiring the licensing of broadcasting, television or cinema enterprises.” The ECHR clarified its intention in including this sentence in Article 10(1) in the case of *Lentia and Others v Austria*¹¹⁷ declaring that:

States are permitted to regulate by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects [...] Technical aspects are undeniably important, but the grant or refusal of a license may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience and the obligations deriving from international legal instruments.¹¹⁸

Article 10(1) therefore gives member states the power to license the broadcasting media with regard to technical issues, such as spectrum allocation, and also gives the State discretion to grant or refuse licenses based on more ambiguous reasons with regard to compliance of the potential licensee with certain standards including the station’s “nature and objectives”, its potential audience”, whether the potential audience is “regional or local”, “the rights and needs of the specific audience” and compatibility with “international legal instruments.” These later reasons for possible licensing restrictions are nebulous and give the state a lot of

¹¹⁷ *Lentia and Others v Austria* [1993] 17 EHRR 93, at para. 32. See also Nicol, Andrew QC; Millar, Gavin QC, Sharland, Andrew, *Media Law and Human Rights*, 2nd edition, (Oxford University Press) Oxford, New York, 2009, p.24.

¹¹⁸ *Lentia & Others v Austria* [1993] 17 EHRR 93, at para.32

discretion in the granting and refusal of licenses. It also allows for state interference with content.

Restrictions of licences must be compatible with Article 10(2) ECHR, which sets out the limitations of freedom of expression. Article 10(2) states that any restrictions on freedom of expression must be “prescribed by law and...necessary in a democratic society...” There are some safeguards in place to ensure that the granting or refusal of licences is done fairly. For example the decision making process must be transparent and non-discriminatory.¹¹⁹ In the European Court of Justice (ECJ) case of *Centro Europa 7 Srl v Ministero delle Comunicazioni e Antorita per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*¹²⁰ the ECJ stated that national legislation must ensure that the allocation of frequencies is granted on the basis of “objective, transparent, non-discriminatory and proportionate criteria.”¹²¹ Following on from the ECJ case, *Centro Europa 7 Srl* also took a case to the European Court of Human Rights¹²² alleging that their right to freedom of expression under Article 10 had been infringed upon due to the Italian Government’s failure to allocate necessary broadcasting frequencies for television broadcasting¹²³ The Court found that the “failure by the State to comply with its positive obligations to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism” and its subsequent failure to allocate necessary frequencies for television broadcasting had amounted to a violation of Article 10.¹²⁴

Justifications for greater restrictions on the freedom of expression of the broadcast media, based on the “uniquely pervasive” argument, were addressed

¹¹⁹ Nicol, Andrew QC; Millar, Gavin QC, Sharland, Andrew, *Media Law and Human Rights*, 2nd edition, (Oxford University Press) Oxford, New York, 2009, p. 196.

¹²⁰ Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Antorita per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*.

¹²¹ *Ibid* at para. 128

¹²² *Centro Europa 7 S.R.L & DI Stefano v Italy* 38433/09 Grand Chamber 07/06/2012

¹²³ *ibid* at para.3.

¹²⁴ *ibid* at para. 110.

also in the ECHR case of *Jersild v Denmark*¹²⁵. In this case the court condemned state interference with freedom of the press stating that it is not for the courts:

to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.¹²⁶

In the same judgment, the court rationalized the need for heavier regulation of the broadcast media stating:

It is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media...The audiovisual media have a means of conveying through images meanings which the print media are not able to impart.¹²⁷

An earlier example of ECHR rationalization of stricter regulation of the broadcast media with regard to the “uniquely pervasive” argument can be seen in the case of *Purcell and Others v Ireland*¹²⁸. In this case the Commission stated:

In contemporary society radio and television are media of considerable power and influence. Their impact is more immediate than that of the print media, and the possibilities for the broadcaster to correct, qualify, interpret or comment on any statement made on radio or television are limited in comparison with those available to journalists in the press.¹²⁹

Justifications for more stringent regulation of the broadcast media as set out in ECHR jurisprudence are outdated and are becoming increasingly obsolete, particularly in light of the development of digital technologies which have significantly increased the level of control of the viewer. Also, justifications for sector specific regulation of the media have been questioned in light of convergence of the media in the twenty-first century, an issue which will be examined in depth throughout the course of this thesis. (ECHR jurisprudence on the rights and duties of the media under Article 10 is examined in Chapter 2.2 of this thesis.)

¹²⁵ *Jersild v Denmark* [1994] 19 EHRR 1

¹²⁶ *Supra* fn. 125, para. 31

¹²⁷ *ibid*

¹²⁸ *Betty Purcell & Ors v Ireland* [1991] ECHR 77

¹²⁹ *Supra* fn. 128, (no paras given)

Political reasons

Humphreys¹³⁰ also cites ‘the political rationale’ as another justification for heavier regulation of the broadcast media. The power and fear of the unknown new medium of communication allowed governments to step in and regulate heavily. These fears and anxieties are reflected in President Eamon De Valera’s first televised speech to the Irish nation in which he stated:

I admit that sometimes when I think of television or radio and their immense power, I feel somewhat afraid. Like atomic energy it can be used for incalculable harm. Never before was there in the hands of men an instrument so powerful to influence the thoughts and actions of the multitude.¹³¹

Perhaps what governments mostly feared was the broadcast media’s potential to interfere with their authority.¹³² When the print media was first developed governments also feared its potential threat to their public authority. With the emergence of libertarianism and democratization, legal regulation of the print media was seen by the authorities as damaging to society. (See above) Barendt makes the point that justification for heavier regulation of the broadcast media is not based on clear principles but rather it is based on vague historical reasoning and circumstance and attributes part of the rationale for heavy regulation to the newness of the broadcast media.¹³³

The potential of the broadcast media to be used by the authorities to effectively brainwash nations was seen during World War II in Germany. Hitler used propaganda to incite hatred and fulfill his political objectives. This abuse of the power of the media was not a new phenomenon at that stage. The print media was used by governments for the purposes of achieving public policy objectives up until the introduction of libertarian principles in the eighteenth century.

From examining the historical justifications for stricter regulation of the broadcast media, it is clear that the traditional rationalisations for strict regulation of the media, particularly the spectrum scarcity justification and immediate

¹³⁰ Supra fn. 110, p. 114

¹³¹ Eamon De Valera was the first person to address the nation on Irish television on New Year’s Eve, 1961. The transcript of this broadcast can be found at: www.rte.ie/laweb/brc_1960s.html

¹³² Supra fn. 110, p.114.

¹³³ Cited Supra fn. 97, p. 57

impact of the broadcast media on the public are becoming increasingly redundant in light of their application to regulation of the new media. Just as technological developments in communications media in the early twentieth century led to the questioning of the appropriateness of the application of libertarian principles to the new mass media, major developments in communications technology in the late twentieth and early twenty-first century have questioned the legitimacy of the application of traditional paternalistic social responsibility principles to the media of the twenty-first century.

The introduction of neo-liberalist principles as a means of providing media accountability to the public

As seen above, regulatory policy with regard to the broadcast media has historically been based on issues such as technical limitations and the protection of the public in accordance with social responsibility principles (see above).¹³⁴ In recent years, the emphasis has shifted towards the application of neo-liberalist principles which favour a more flexible market based approach, which protects competition in the EU¹³⁵ as well as consumer protection. Examples of the application of such principles can be seen from an examination of EU broadcasting policy which will be addressed in detail in Chapter 5.

EU broadcasting policy comprises of a two dimensional objective; i.e. 1) regulation of commercial and economic activities and 2) regulation of cultural, educational and political matters.¹³⁶ Broadcasting policy in the EU has had a major impact on broadcasting regulation in Member States over the past few decades, with Directives governing European harmonization of national legislation in the audiovisual media services sector.¹³⁷

The Treaty on the Functioning of the European Union (the TFEU, formerly the EC Treaty and EEC Treaty respectively) established a common market for

¹³⁴ Supra fn 110 at 159

¹³⁵ *ibid* See also supra fn. 97 at p. 19

¹³⁶ Supra fn 110 at 88. See also Harcourt, Alison, *The European Union and the regulation of media markets*, (Manchester University Press, UK, 2007), at 18

¹³⁷ See http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm See also Carolan, Eoin, O'Neill, Ailbhe, *Media Law in Ireland*, (Bloomsbury Professional, Dublin, 2010), at 486

member states which is founded on the four freedoms, i.e. the free movement of persons, services, goods and capital. ECJ case law has established that broadcasting is a service within the meaning of the free movement of services under the Treaty.¹³⁸

TVwF Directive 1989 and broadcasting as an economic undertaking

The establishment of broadcasting as an economic undertaking meant that broadcasting was subject to EU regulation in order to ensure free movement of services within Member States.¹³⁹ Broadcasting is also subject to anti-competitive agreements under Articles 81 and 82 which prohibit the “abuse... of a dominant position within the common market...”(Article 82 EC).¹⁴⁰ Competition is an important plank of EU law in that it prevents abuse of a dominant position in the media.¹⁴¹ As such, it ensures pluralism and diversity in the media, so that the public will have a range of choices of media sources and a diversity of content.¹⁴² Major technological developments in broadcasting, such as the unprecedented growth of satellite and cable broadcasting in the early 1980s, the consequent increase in commercial broadcasters, as well as differing laws governing the audiovisual sector in member states, led to the publication of two green papers, one in 1984 on the establishment of a common market in broadcasting¹⁴³ and the other in 1987 on the development of the common market

¹³⁸ Case 155/73 *Giuseppe Sacchi* [1974] ECR 409

¹³⁹ See Harrison, J and Woods, L, *European Broadcasting Law and Policy*, (Cambridge University Press; Cambridge; 2007)

¹⁴⁰ *ibid*, at 64

¹⁴¹ Media mergers and acquisitions often merit special provisions, for example, the special provisions in s. 23 of the Irish Competition Act 2002. New legislation is due in the autumn to update the 2002 provisions.

¹⁴² Irish competition law is governed by the Competition Act 2002. At the time of writing, a new Competition Bill is in preparation. Minister for Communications, Pat Rabbitte, has stated that the public interest will be a key factor with regard to media ownership in the new Bill. (See Collins, Stephen, ‘Media ownership law to focus on public interest’ *The Irish Times*, Wed, August 22, 2012). Although Competition law is an important factor in ensuring pluralism and diversity, detailed discussion of it is outside the scope of this thesis. For more on competition law see Prosser, Tony, *The Limits of Competition Law Markets and Public Services*, (Oxford University Press, New York, 2005)

¹⁴³ See http://ec.europa/avpolicy/reg/historytvwf/index_en.htm For the full text of the 1984 green paper see http://ec.europa.eu/avpolicy/docs/reg/tvwf/com_984_300_en.pdf

for Telecommunications Services and Equipment.¹⁴⁴ These green papers proposed regulation of the broadcast media in Europe and the establishment of a common market in broadcasting in accordance with the four freedoms under the EC Treaty.¹⁴⁵ The 1984 Green Paper advocated the need for “legal harmonization” of European broadcasting laws in areas such as “advertising, protection of minors and the right to reply.”¹⁴⁶ These green papers were influential in the establishment of the Television Without Frontiers Directive (hereafter TVwF Directive)¹⁴⁷ in 1989 which was designed to facilitate the free movement of broadcasting services within the EU and sets out the minimum requirements for broadcasting regulation in Member States under a two-tier objective, i.e. the regulation of both commercial and cultural matters.¹⁴⁸ (See chapter 2 for further details on the TVwF Directive.)

AVMSD and deregulatory trends

The successor to TVwF, the Audiovisual Media Services Directive (AVMSD) distinguishes on-demand media services from television broadcasting based on the level of control of the user and uses this distinction to justify lighter regulation of non-linear services than that of ordinary linear services, stating that:

[o]n demand services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services which should comply only with the basic rules provided for in this Directive.¹⁴⁹

The AVMS Directive reflects the current trend towards de-regulation of the media which is indicative of a move away from social responsibility principles towards neo-liberalist principles that allow for a more flexible market based approach which protects competition in the EU¹⁵⁰ as well as consumer

¹⁴⁴ For full text of 1987 green paper see http://ec.europa.eu/policy/docs/reg/tvwf/com_1987_290_en.pdf

¹⁴⁵ Supra fn. 143

¹⁴⁶ ibid

¹⁴⁷ Directive 89/552/EEC (TVwF)

¹⁴⁸ Supra fn. 140 at 88

¹⁴⁹ Directive 2010/13/EU (AVMSD) at para. 58

¹⁵⁰ Supra fn 110 at 159

protection. (See Chapter 5 for an examination of de-regulatory trends in broadcasting policy)

Overall Conclusion

In determining the underlying rationale for media accountability to the public as it exists in the twenty-first century, this chapter has examined the effect of different social systems on the role and function of the media and its relationship with society, beginning with the authoritarian theory of the press which emphasized control and censorship of the media in the interest of the authorities and the libertarian theory which saw the emergence of the notion of media accountability to the public for the first time.

The development of the broadcast media in the early twentieth century changed the relationship between the media and society once more. As a consequence of this new relationship, libertarian principles were seen as inadequate in their application to the broadcast media. The social responsibility theory addressed the perceived failings of the libertarian theory. Hocking, in his report, considered the relationship between the ‘issuer’ (the media) and the ‘audience’ (the public)¹⁵¹ and how this relationship had changed due to concentration of media ownership and market forces and other criticisms of the press. Hocking advised that this change in relationship meant that the audience/public needed to be adequately protected from the power of the media.

Just as technological developments in communications media in the early twentieth century led to questioning of the appropriateness of the application of libertarian principles to the new mass media, major developments in communications technology in the late twentieth and early twenty-first century have questioned the legitimacy of the application of traditional paternalistic social responsibility principles to the media of the twenty-first century.

¹⁵¹ See supra fn 71

Developments in communications technology as well as market developments and changing norms and values¹⁵² have all contributed to the change in relationship between the media and society, particularly in relation to the audiovisual media. This shift in relationship has called into question the application of paternalistic social responsibility principles in providing for media accountability in the twenty-first century. The emphasis is now on the application of neo-liberalist principles, which stress the importance of economic regulation and consumer sovereignty, in an attempt to fulfill public interest objectives.

¹⁵² Helberger, Natali, "From Eyeball to creator- toying with audience empowerment in the Audiovisual Media Service Directive", *Entertainment Law Review*, 2008-6 p. 128-137 at 129

CHAPTER TWO

THE ROLE OF LAW IN PROVIDING FOR MEDIA ACCOUNTABILITY TO THE PUBLIC

This chapter is divided into two parts. Part one considers the role of national laws in providing for media accountability. Part two examines the importance of protecting freedom of expression and the concept of ‘duties and responsibilities’ in the jurisprudence of the European Court of Human Rights as a mechanism for ensuring accountability. The role of EU law, in particular the Audiovisual Media Services Directive (AVMSD), as examined in Chapter 1, is also reflected in national laws considered in part one of this chapter.

PART ONE- NATIONAL LAWS

As previously examined in Chapter 1, the social responsibility theory of the press established the concept of media accountability to the public and with it a new relationship between the media and the public, i.e. that the press has a moral obligation to adequately inform the public and that the public has a right to be informed. According to this theory, the media must be responsible for its publications and answerable to the public. The media must also be accountable for any harmful effects of its publications.¹ The twin concepts of ‘responsibility’ and ‘accountability’ are key in this respect. McQuail has contended that the development of the mass media has added new “potential claimants”² on the media who request or require accountability.³ Such claimants, according to McQuail, include “governments acting on behalf of the public interest.”⁴

As seen in Chapter 1, Hocking considered the role of government under the social responsibility theory as that of “residual legatee of responsibility for an adequate press performance.”⁵ The media is accountable for its actions under the

¹ McQuail, Denis; *Media Accountability and Freedom of Publication*; (Oxford University Press, New York, 2003) p.40

² *ibid*

³ *ibid*

⁴ *ibid*

⁵ Hocking, W.E., *Freedom of the Press- A Framework of Principle* (A Report from the Commission on Freedom of the Press), (The University of Chicago Press, Illinois, 1947), p.182

ordinary laws of each jurisdiction. As such, the media is subject to the same legal constraints as all citizens.⁶ The media must adhere particularly to “proscriptive legal rules”⁷ in their everyday work such as those contained in tort and criminal law, which include laws on contempt of court, defamation, trespass, professional secrecy and discrimination.⁸ These laws protect individual rights and the public interest.

According to Hockings’ social responsibility theory, legal obligations, as imposed on the media, may be extended if any “new abuses”⁹ by the media come under any of these categories.¹⁰ Such restrictions on media freedom, that are deemed to be in the public interest, have been generally accepted as being compatible with libertarian and social responsibility principles. The State, therefore, has a legitimate role in regulating the media, although it is important that this regulation is not disproportionate and does not unduly restrict freedom of expression.

Libertarian and social responsibility theory principles are reflected in the constitutions and common law jurisprudence of democratic countries, as well as international human rights instruments (see introduction), which protect freedom of expression subject to restrictions in the interest of the public (See Chapter 2.2).

As examined in Chapter 1, non-legal regulation in the form of self or independent regulation, has been established as the most appropriate form of regulation of the print media. As such, it is not subject to the same legal constraints as the broadcast media. The law has, however, played a significant role in ensuring media accountability to the public through, for example, government led inquiries into press standards¹¹ and in certain instances providing

⁶ The Editor’s Codebook of the Code of Practice Committee-available at www.pcc.co.uk, p.10

⁷ Thorgeirsdottir, Herdis., Study no. 415/2008,European Commission for Democracy in the Handling of Complaints, Strasbourg, 7 April 2008, p.2.

⁸ *ibid*

⁹ *Supra* fn. 5 p.223

¹⁰ *ibid*

¹¹ Most recently the Leveson inquiry into the conduct of the British press as well as British police and politicians in the UK phone hacking scandal which began in October 2011. See Chapter 3 for an examination of inquiries into press standards.

for the terms and conditions of a press council to be set out in statute (see Chapter 3).

The traditional form of regulating the media is by statute or common law and is the standard form of regulation in the broadcasting industry (see Chapter 1). Statute law sets out the powers and functions of regulatory bodies in the broadcast media¹² in relation to a wide variety of issues, including economic matters such as licensing and funding, public interest concerns such as the protection of minors, plurality and diversity, and general technological standards¹³.

This chapter will focus on how these policy objectives are implemented in order to ensure media accountability to the public in the broadcast/audiovisual sector. In doing so, it will examine key legal developments in broadcasting/audiovisual regulation policy, which strengthened media accountability to the public at both domestic and European level in areas such as public service broadcasting, complaints bodies, right of reply mechanisms and codes of standards.

This section will also consider the changing relationship between the audiovisual media and the public and whether the role of law, as well as the role of sector specific law, as in the broadcast sector, remains appropriate in providing for media accountability to the public in light of major technological advancements which have resulted, most notably, in media convergence.

Public service broadcasting

Public service broadcasting obligations, as a form of regulation of broadcasting content, are a method of providing for media accountability to the public through law. Public service broadcasting obligations can be seen as a further manifestation of the social responsibility theory (see Chapter 1), as they have the status of law without being in conflict with human rights provisions or

¹² McGonagle, Marie, *Media Law*, 2nd Edition, (Thompson Roundhall, Dublin, 2003) p.14

¹³ Carolan, Eoin; O'Neill, Ailbhe., *Media Law in Ireland*, (Bloomsbury Professional) Dublin, 2010, p. 432

constitutional principles¹⁴. The model of public service broadcasting has been implemented throughout the world and is reflected in the broadcasting structures of almost all Western European countries, from where the concept originates¹⁵.

The importance of public service broadcasting is reflected in international instruments, both legally binding and non-legally binding as well as European and domestic broadcasting policy. Legally binding instruments include the Amsterdam Treaty, which contains a Protocol on the system of public broadcasting in the Member States; the EU Charter of Fundamental Rights (particularly Article 11.2 regarding freedom and pluralism of the media); the European Convention on Transfrontier Television¹⁶ and national legislation. Non-legally binding instruments, such as Council of Europe recommendations, are nonetheless important as they provide expert recommendations, in this instance with regard to the role of public service broadcasting in democratic society. Recommendations and Declarations of the Council of Europe are also referred to and used for guidance by the European Court of Human Rights. The Council of Europe has addressed broadcasting regulation, with particular emphasis on public service broadcasting issues, in its recommendations since its first Parliamentary Assembly (PACE) recommendation on public service broadcasting in 1975 on the role and management of national broadcasting.¹⁷ The 1975 Recommendation is of particular interest in the context of this thesis, as it specifically identifies the need for producers to be publically accountable in its Draft minimum requirements.¹⁸ The Draft requirements also include the need for

¹⁴ Supra fn 1, p. 55

¹⁵ Humphreys, Peter, J, Mass media and media policy in Western Europe, (Manchester University Press), UK, 1996, p.111

¹⁶ The European Convention on Transfrontier Television is binding on Member States who have ratified the Lisbon Treaty. It is not binding on Ireland which has not ratified it.

¹⁷ PACE Recommendation 748(1975) on the role and management of national broadcasting. Available at http://www.coe.int/t/dghl/standardsetting/media/Doc/PACE_en.asp ; and <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta75/erec748.htm> See Nikoltchev, Susanne., "European Backing for Public Service Broadcasting Council of Europe Rules and Standards", *The Public Service Broadcasting Culture*, (European Audiovisual Observatory) Strasbourg, 2007, p.7

¹⁸ Supra fn. 17 The Draft minimum requirements of PACE Recommendation 748(1975) provides for b) "Freedom of expression, with no governmental or institutional preliminary censorship, but subject to the following qualifications" which include *inter alia* "ii. public accountability of producers for their productions before some organization, in the first instance predominantly parliamentary, democratically representative of society;" and "iii. Accountability of producers, rather than institutions, before the laws in force in any particular state".

a right of reply (see below) as well the promotion of media literacy initiatives (see Chapter 5).

There have been a plethora of definitions as to what constitutes public service broadcasting throughout the years, many reflecting the different societal norms and values of a specific time, as well as the stage of technological development. The remit of public service broadcasters differs from country to country depending on factors specific to each country such as cultural, economic, social and political issues.

McQuail identifies the main principles of public broadcasting theory, in general terms, as incorporating: “universality and diversity of provision; democratic accountability to the public, a commitment to quality; not determined by profit or the market; and often some subordination to ‘national’ needs or priorities in cultural, economic, and political matters.”¹⁹ Eric Barendt identifies six key characteristics of public service broadcasting as:

- 1) General geographical availability
- 2) Concern for national identity and culture
- 3) Independence from both State and commercial interests
- 4) Impartiality of programmes
- 5) Range and variety of programmes
- 6) Substantial financing by a general charge on users.²⁰

This section will address the key characteristics of public service broadcasting as set out by McQuail and Barendt and consider their importance in providing for accountability to the public. In doing so, it will use examples to illustrate how such public service objectives are achieved through national laws.

Universality of access

According to Article 2 (2) of the International Covenant on Civil and Political Rights (ICCPR), States must “...adopt such laws or other measures as may be necessary to give effect to the rights recognized in the...Covenant.”²¹ Mendel asserts that this section, as applied to freedom of expression (Article 19 ICCPR),

¹⁹ Supra fn. 1, p. 56

²⁰ Eric Barendt, *Broadcasting Law: A Comparative Survey* (Clarendon Press, Oxford, 1993), p.52

²¹ See Article 2(2) ICCPR. See also Mendel, Toby, *Public Service Broadcasting: A Comparative Legal Survey*- Kuala Lumpur: UNESCO, Asia Pacific Institute for Broadcasting Development, 2000-p.8 Report available at http://www.amarc.org/documents/articles/PSB_legal_survey_Toby_Mendel_Barticle.pdf

means that States have a positive obligation to “create an environment in which a diverse, independent media can flourish thereby satisfying the public’s right to know.”²² Mendel argues that an essential aspect of this positive obligation with regard to the protection of the right to freedom of expression and the public’s right to know is the promotion of universality of access.²³ The provision of universality of access, i.e. that national public service broadcast channels are accessible to all geographically, is of particular importance with regard to the future of public service broadcasting, due to the important democratic role it plays in ensuring media pluralism as well as the social and cultural needs of society.²⁴ This vital democratic role of the media in contributing to public knowledge, informing public opinion and stimulating public debate is repeatedly articulated in ECHR case law which is examined in detail in Part 2 of this Chapter. As such, it is essential that the broadcast media and media generally are accessible to all members of society regardless of location. The importance of equal accessibility to all was articulated by the British Broadcasting Corporation (BBC) Director General, Mark Thompson, who stated that: “one of the founding elements of public service broadcasting is an idea of universal service.”²⁵ The 2009 Broadcasting Act in Ireland sets out the objectives of public service broadcasters, one of which is the accessibility of such services to the entire Irish population. The Act states that public service broadcasting must be:

[...] free to air [...] and be made available, in so far as practicable, to the whole community on the island of Ireland.²⁶

Radio Telefis Eireann (RTE), the main public service broadcaster in Ireland, is accessible to over 99% of the persons living in Ireland.²⁷

Plurality of content

²² Supra fn. 21, p.9

²³ *ibid*

²⁴ Protocol on the system of public broadcasting in the Member States, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts. Official Journal C 340, 10 November, 1997.

²⁵ House of Lords Communication Committee- Second Report on Public service broadcasting: short-term crisis, long term future? Available at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcomuni/61/6103.htm> Chapter 1, para. 12

²⁶ See Broadcasting Act 2009, section 114(1)(a) in relation to Radio Telefis Eireann and section 118(1)(a) in relation to Telefis na Gaeilge, the Irish-language television station.

²⁷ See <http://www.rte.ie/about/literature/history.pdf>

Public service broadcasting also serves a valuable public function in democratic society in that it promotes and ensures plurality of programmes and diversity of content. Public service broadcasters must ensure that their programmes provide for an informed and educated citizenry as well as catering for the diverse interests of the entire country. The 2009 Broadcasting Act for example, provides that RTE shall ensure that its programme schedules:

provide a comprehensive range of programmes in the Irish and English languages that reflect the cultural diversity of the whole island and include programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests and which, in every case, respect human dignity.²⁸

In addition, the Act provides for the continuation of the Broadcasting Fund (i.e. the BAI's Sound and Vision scheme), whereby 7% of the revenues collected from the licence fee paid by the public is used to support public service-type programming. The funding can be sought by independent producers provided a broadcaster in the State, whether a public service broadcaster or not, agrees to broadcast the programme if successful in securing the funding. This is an important consideration also for the future of PSB programming.

Cultural diversity

Traditionally, the mandate of a public service broadcaster has included the promotion of the cultural identity of the nation. While this remains an important role for public service broadcasters, the emphasis has now shifted towards the endorsement of cultural diversity and social inclusion which is reflective of the multi-cultural environment of the twenty-first century.²⁹ The role of public service broadcasting in promoting cultural diversity was advocated in the 2005 UNESCO 'Convention on the Protection and Promotion of the Diversity of Cultural Expressions'³⁰. The Convention stipulates under Article 6 that: "...each party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory" and that such measures may include

²⁸ Broadcasting Act 2009, section 114(3)(a)

²⁹ Mendel, Toby, *Public Service Broadcasting: A Comparative Legal Survey*, 2nd edition, (UNESCO, France, 2011) p.87 available at <http://unesdoc.unesco.org/images/0019/001924/192459e.pdf>

³⁰ See Communication on State aid rules to public service broadcasting (2009) para. 13 available at [http://eur-lex/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1115\(01\):EN:NOT](http://eur-lex/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1115(01):EN:NOT)

“measures aimed at enhancing diversity of the media, including through public service broadcasting.”³¹ The Treaty of Amsterdam (1997), pursuant to Protocol 27, refers to the system of public broadcasting in the Member States, stating that:

[...] the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism.³²

Since then, PACE and the Committee of Ministers of the Council of Europe have made regular updates in their recommendations on the subject, with emphasis on the promotion of cultural diversity and the operational independence of public service broadcasters (see below).³³ The 2009 Broadcasting Act provides that RTE shall ensure:

that the programmes reflect the various elements which make up the culture of the people of the whole island of Ireland, and have special regard for the elements which distinguish that culture and in particular for the Irish language.³⁴

Public service broadcasters are obligated to provide programmes for minority groups and alternative interests, which are not provided for by commercial broadcasting. For example, public service broadcasters in certain countries are obligated to provide programmes in minority languages.³⁵ The Irish Broadcasting Act 2001 provided for the establishment of Telefís na Gaeilge as a second public service broadcaster in Ireland, which like RTE, was to be a free to air service available to the whole country³⁶ but would provide a public service function primarily in the Irish language.³⁷

³¹ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) full text available at www.unesco.org

³² The Treaty of Amsterdam (1997), Protocol on the system of public broadcasting in the Member States, full text of the Treaty is available at <http://www.eurotreaties.com/amsterdamtreaty.pdf>

³³ Nicolitchev, Suzanne, “European Backing for Public Service Broadcasting- Council of Europe Rules and Standards”, *The Public Service Broadcasting Culture*, (European Audiovisual Observatory) Strasbourg, 2007, p.7.

³⁴ Broadcasting Act 2009, section 114(2)(a)

³⁵ *Supra* fn.29, p.87 Countries include, Poland, South Africa and France. See also, T McGonagle et al., *Minority-Language Related Broadcasting and Legislation in the OSCE*, OSCE 2003.

³⁶ Broadcasting Act 2001, section 45

³⁷ *ibid*

The 2009 Act stipulates that TG4, as the Irish language television channel has been renamed, must have particular regard for the culture of the “Gaeltachtaí”, i.e. the Irish speaking areas in Ireland.³⁸

The Independence of Public Service Broadcasters

The independence of public service broadcasters is of immense importance in a democratic society. The 2003 Joint Declaration by the Special Mandates International Mechanisms for Promoting Freedom of Expression³⁹ highlighted the need for any public authority that exercises regulatory powers in the broadcast media to be protected against interference from political or economic factors:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁴⁰

While this may apply primarily to regulatory authorities such as the Broadcasting Authority of Ireland or Ofcom in the U.K., it is also important for the internal regulators of public service broadcast stations, such as the RTE Authority. Section 98 of the 2009 Broadcasting Act provides that a Public Service Broadcasting Corporation “shall be independent in the pursuance of its objectives.”⁴¹

Tarlach McGonagle acknowledges the positive role of public service broadcasting, but concludes that this is dependent upon the editorial independence of the public service broadcaster.⁴² This viewpoint has been repeatedly expressed by the Council of Europe, which considers the editorial and

³⁸ Broadcasting Act 2009, section 118 (2)(a)

³⁹ Joint Declaration by the UN Special Rapporteur on Freedom of Opinions and Expressions, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression- Adopted on 18 December 2003- available at <http://www.osce.org/fom/28235>

⁴⁰ These sentiments are reiterated in the Special Mandates Joint Declaration 2007 on freedom of expression which is available at <http://www.article19.org/data/files/pdfs/igo-documents/mandates-broadcasting.pdf> See also supra fn.28 at 13-17

⁴¹ Section 98 Broadcasting Act 2009

⁴² McGonagle, Tarlach, “Does the Existing Regulatory Framework for Television Apply to the New Media?” *Key Legal Questions for the Audiovisual Sector*, (European Audiovisual Observatory) Strasbourg 2003, p.33

operational independence of public service broadcasters as vital to an effective public service broadcasting system. For example, Recommendation No. R(96) 10 on the guarantee of the independence of public service broadcasting emphasizes editorial independence and institutional autonomy and has provisions *inter alia* regarding Boards of management, supervisory bodies and funding mechanisms of PSBs.

Government influence

Recommendation No. R (96)10⁴³ on the guarantee of the independence of public service broadcasting, stresses the importance of an independent media in democratic society. Here, the Council of Europe recommends that member states “include in their domestic law or in instruments governing public service broadcasting organisations provisions guaranteeing their independence.”⁴⁴ In the Recitals there is specific reference to “respect for media independence, especially by governments” and Guideline 5 specifically refers to methods of appointment and the position of members appointed by government. Since the 1996 recommendation, the Council of Europe has noted the failure of a number of member states to sufficiently implement its recommendations on the independence of public service broadcasters particularly in newly democratic countries.⁴⁵ The Council of Europe recommendations, however, recognize that member states are ultimately responsible for “the legal framework governing public service broadcasting.”⁴⁶

Given the history of broadcasting regulation and the power that has been exercised by the state over the broadcast media throughout, it is not surprising that the independence of public service broadcasting remains questionable. Independence of public service broadcasting has improved considerably throughout the years but in many cases public service broadcasters are not sufficiently independent from the state. An example of this can be seen through an examination of the history of Irish public service broadcasting.

⁴³ Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting

⁴⁴ *ibid*

⁴⁵ Recommendation 1641 (2004) on public service broadcasting; available at <http://www.coe.int/t/dghl/standardsetting/media>

⁴⁶ *Supra* fn. 43

In Ireland, the Wireless Telegraphy Act 1926 provided the Minister for Post and Telegraphs with power over the content of broadcast material. The Minister retained control over broadcasting content until the enactment of the Broadcasting Authority Act in 1960, which granted a semi-state body, Radio Eireann, which became Radio Telefis Eireann (RTE) under the Broadcasting Authority (Amendment) Act 1966, the sole power to operate broadcasting services in Ireland.⁴⁷ RTE was referred to in statute as ‘the Authority’ and was subject to onerous public service broadcasting obligations.⁴⁸ Thus control of broadcasting services in Ireland was transferred from the Minister to a statutory body. The Government and Minister, however, maintained a significant amount of control over the Authority in that they had the power to both appoint and dismiss its members.⁴⁹ The Government and Minister retained these powers until the enactment of the Broadcasting Authority (Amendment) Act 1976, under which the powers of the Government and Minister were further limited.⁵⁰ In accordance with the 1976 Amendment Act, members of the RTE Authority could only be removed by Government if resolutions were passed by both Houses of the Oireachtas (Parliament), which was an important safeguard.⁵¹

The 1976 Amendment Act introduced the concept of public demand to Irish broadcasting policy and saw a move away from a paternalistic policy-making approach, i.e. based on social responsibility principles, towards a more market based, consumer driven approach, i.e. based on neo-liberalist principles. This change in approach was articulated in the Dail (Irish House of Representatives) by the then Minister for Posts and Telegraphs, Dr. Conor Cruise O’Brien, who stated:

In matters of broadcasting the state of public demand has to be kept in mind when public policy is formulated or applied.⁵²

Dr. O’Brien further stated that one of the main purposes of the Amendment Act was to provide

⁴⁷ Supra fn. 12, at 55

⁴⁸ Supra fn. 12, at 56 See also Carolan and O’Neill; 2009

⁴⁹ Supra fn.12, at 57

⁵⁰ Supra fn. 12, at 55

⁵¹ Broadcasting Authority (Amendment) Act, 1976, Section 2.

⁵² Dr. Conor Cruise O’Brien, Dail Eireann 28/October/1975 Broadcasting Authority (Amendment) Bill, 1975 (Seanad): Second Stage. Dail Eireann Debate Vol 285 No. 30, Col [391]

[...] greater autonomy and freedom for the broadcasting service within clearly defined statutory restraints and obligations, while at the same time improving public control in certain areas.⁵³

The independence of public service broadcasters was for the first time expressly provided for in the Broadcasting Act 2009 which states:

Subject to the requirements of this Act, a (public service broadcasting) corporation shall be independent in the pursuance of its objectives.⁵⁴

The true independence of a public service broadcaster can, however, only be seen through an examination of its funding and appointments process.

Funding

Public service broadcasters have traditionally been reliant on public funding either through the collection of revenue from the public by means of a radio or television licence fee or from government resources.⁵⁵ European legislation, under the 1997 Amsterdam Protocol, provides that Member States may provide for the funding of public service broadcasting services:

[...] insofar as such funding is granted to broadcasting organisations for the fulfillment of the public service remit...and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest [...]⁵⁶

EU law on state aid requires that public undertakings are financially transparent. The financial transparency requirements of Member States with regard to public undertakings are regulated by the Transparency directive⁵⁷, which requires that recipients of public funds, including public service broadcasters, provide detailed

⁵³ Supra fn. 52, Cols. 381-383

⁵⁴ Broadcasting Act 2009, Section 98

⁵⁵ Supra fn. 29 at 17

⁵⁶ Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and Related Acts, Official Journal C540, 10 November 1997-Protocol on the system of public broadcasting in Member States.

⁵⁷ Commission Directive 2006/111/EC of the 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings- available at <http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:2006:318:0017:01:EN:HTML> See Communication from the Commission on the application of State aid rules to public service broadcasting- available at http://ec.europa.eu/competition/State_aid/legislation/broadcasting_communication_en.pdf at para. 18

accounts of the “internal and financial organizational structure of such undertakings...”.⁵⁸ According to the Directive such accounts should:

[...] show the distinction between different activities, the costs and revenues associated with each activity and the methods of cost and revenue assignments and allocation.⁵⁹

The Broadcasting Act 2009 ensures the transparency and accountability of public funding of public service broadcast corporations under section 109, which provides that:

[...] a corporation (public service broadcasting corporation, i.e. RTE and TG4) shall as soon as may be after the end of each financial year, send to the Minister-

(a) a statement of the use it has made, of the monies paid to it [...] in that financial year, in pursuance of its public service objects, and

(b) a statement in respect of the total revenue and costs derived by the corporation in that financial year distinguishing between the monies received or expended on-

(i) activities in pursuance of its public service objects, and

(ii) activities in pursuance of its exploitation of commercial opportunities object.⁶⁰

The Broadcasting Act thus fulfils the obligations of financial transparency of public funds in accordance with EC law.

It is also important that such funding is independent from Government so that it is not used by Government to exert influence over the public service broadcaster.

Recommendation 1996(10) on the Guarantee of Independence of Public Service Broadcasters states that “[...] funding should not be used to exert, directly or indirectly, any influence over the editorial independence or institutional autonomy of the organization.”⁶¹

In certain countries, public funding alone is not sufficient to fulfill demanding public service obligations. In such cases, public service broadcasters have to rely on commercial activities, such as commercial advertising, as an extra means of

⁵⁸ Directive 2006/111/EC at para 14

⁵⁹ *ibid* at para. 15. See also Article 4

⁶⁰ Broadcasting Act 2009 Section 109(9)(a)(b)(i)(ii)

⁶¹ Rec No. R 96(10) on the Guarantee of Independence of Public Service Broadcasters

income. Recommendation 1878 (2009)⁶² on the funding of public service broadcasting sets out methods by which funding may be ensured:

The funding of public service media may be ensured, through a flat broadcasting licence fee, a tax, state subsidiaries, subscription fees, advertising and sponsoring revenue, specialized pay-per-view or on-demand services, the sale of related products such as books, videos or films and the exploitation of their audiovisual activities. In this regard, public service media may have a mixed funding, similar to other public cultural institutions...each of these forms of funding must enable public service broadcasters to meet the public service requirement of accessibility and affordability for the public at large.⁶³

A comparative study of public service broadcasting by Toby Mendel has shown that in a number of countries including the UK, Japan and Thailand, as much as 97% of public service broadcasting funding comes from the public. The other countries studied⁶⁴ rely on mixed funding from a public licence fee, government subsidies and commercial activities. In Ireland, public service broadcasting funding is part funded by a licence fee⁶⁵ and part funded by commercial activities such as advertising. Government subsidies may also be allocated to public service broadcasters in accordance with the Broadcasting Act 2009.⁶⁶ It is important that government grants are limited and should not be used to exert pressure over the public service broadcasters. This could be guaranteed through specific provisions in legislation which limit government grants.

Mendel, in his report, highlights the pros and cons of the reliance of public service broadcasters on commercial activities as a means of funding. A major concern is that commercial incentives may undermine the importance of public service programming and lead public service broadcasters to choose programmes

⁶² Recommendation 1878 (2009) on the funding of public service broadcasting

⁶³ *ibid* at para. 13

⁶⁴ For example; Public service broadcasters in Ireland, South Africa, Poland, Japan, France, Canada and Australia are reliant in part on commercial activities to supplement public funding. See *supra* fn. 29

⁶⁵ The Wireless Telegraphy Act 1926 established a licensing system in Ireland whereby both radio broadcasters and receivers of radio broadcasts had to have a licence. This Act, as amended by the Broadcasting Act 2009, forms the basis for the present day licensing system for television broadcasting in Ireland, which remains the main source of funding of public service broadcasting. For more information see *Supra* fn. 12, p. 387

⁶⁶ Broadcasting Act 2009, Section 123(3) “The Minister, with the consent of the Minister for Finance, may from time to time, pay to RTE such an amount as he or she determines to be reasonable for the purposes of defraying the expenses incurred by RTE in the pursuance of its public service objectives. Section 123(4) provides for the same ministerial power with regard to TG4.

based on popularity rather than quality.⁶⁷ On the other hand, as noted by Mendel, funding from means other than public revenue may increase the independence of public service broadcasters. Mendel recommends that funding from commercial activities should be limited with the majority of funding coming from the public.⁶⁸

Appointments process

In order to determine whether a public service broadcaster is truly independent from government, one must examine the autonomy of its appointments process.

The 2009 Broadcasting Act provides for the independence of public service broadcaster(s) in the “pursuance of its objectives”.⁶⁹ The independence of public service broadcasters in Ireland, is, however called into question in that the Government retains significant powers with regard to the appointments’ process of public service broadcaster board members. Section 81 provides that six out of twelve board members are to be appointed by Government as nominated by the Minister. There is a small element of protection in s. 82 in that appointees have to have relevant experience. Also, pursuant to s. 86(1) members of parliament cannot be board members. As well as this, s. 87 provides that it is the duty of board members to inter alia:

- (a) represent the interest of viewers and listeners,
- (d) safeguard the independence of the corporation, as regards the conception, content and production of programmes, the editing and presentation of news and current affairs programmes and the definition of programme schedules from State, political and commercial influences.⁷⁰

In the UK, the independence of the BBC is guaranteed by Royal Charter which states: “The BBC shall be independent in all matters concerning the content of its output, the times and manner in which this is supplied, and in the management of its affairs.”⁷¹ The BBC is governed by the BBC Trust comprising of twelve trustees who operate on behalf of the licence-fee paying public, who provide the

⁶⁷ Supra fn. 29 at 92

⁶⁸ *ibid*

⁶⁹ Broadcasting Act 2009, Section 98.

⁷⁰ *Ibid* at s. 87 (a) and (b)

⁷¹ Royal Charter for the continuance of the British Broadcasting Corporation, Section 6(1)

BBC's total funding, and guard the independence of the BBC from Government.⁷² BBC trustees are, however, appointed by the Queen as advised by the Government⁷³ and cannot therefore be said to be entirely independent from Government.

As can be seen from this examination, Government still plays a significant role in public service broadcasting, particularly with regard to the appointments process. It is important that safeguards, such as those considered above, are put in place to ensure that the appointments processes of such bodies are operationally independent of government and thereby free from any possible undue influence from government. It is also vital that government or commercial funding is not used to exert pressure over the public service broadcaster with regard to its programming choices.

Accountability to the public

As considered above, the independence of public service broadcasters from government interference is of vital importance. It is equally important, however, that such broadcasters are accountable to the public and fulfill their public service mandate in the public interest.⁷⁴ Public service broadcasters must be accountable for the use of public funds. Mechanisms that have been put in place to ensure the accountability and transparency of public service broadcasters to the public include statutory obligations to provide annual reports, audience councils, complaints' processes and codes of practice.

Annual reports

In most countries, public service broadcasters are accountable to the public through the legislature⁷⁵ for example through an obligation to provide an annual report. Such reports must provide details of how the public service broadcaster has fulfilled its mandate over the course of the year as well as provide an account

⁷² See generally website of the BBC Trust at www.bbc.co.uk/bbctrust/about/who_we_are/index.shtml

⁷³ See http://www.bbc.co.uk/bbctrust/about/who_we_are/trustees/appointment.shtml

⁷⁴ Supra fn. 29 at 90

⁷⁵ *ibid*

of how its funding was allocated. In accordance with the Broadcasting Act 2009, public service broadcasters in Ireland must submit an annual report to the Minister detailing “the performance of its functions and activities during the preceding year.”⁷⁶ These annual reports are to be laid before the houses of the Oireachtas (Parliament) via the Minister and are thereby open to public scrutiny. RTE’s annual reports can also be found on the RTE website.⁷⁷

Audience councils

Mendel notes that increasingly, public service broadcasters are required to put in place mechanisms such as advisory and audience councils.⁷⁸ Such councils can be an effective means of ensuring accountability to the public as they are designed to reflect the diverse views of the public. The Broadcasting Act 2009 provides for the establishment of an ‘audience council’ and states that its principal function is “...to represent to the board of its corporation the views and interests of the general public with regard to public service broadcasting by the corporation”.⁷⁹ The 2009 Act further stipulates that members of the audience council must be representative: “...of the viewing and listening public, in particular, of Gaeltacht communities and persons with sight or hearing disability.”⁸⁰

In certain countries audience councils are established on a regional basis in order to ensure equal representation of all regions, thus tying in with the universality of access principle. The Royal Charter for the continuance of the BBC provides for the establishment of four ‘audience councils’ which correspond “in geographical remit to the four nations for which Trust members are designated under Article 14”, i.e. England, Scotland, Wales and Northern Ireland.⁸¹

Audience councils can be a valuable means of providing for accountability to the public if obligations are put in place to ensure that the diverse views and

⁷⁶ Broadcasting Act 2009, Section 110(1)

⁷⁷ RTE’s annual reports starting from 2000, are available at <http://www.rte.ie/about/annualreport.html>

⁷⁸ Supra fn.29 at 91

⁷⁹ Broadcasting Act 2009 Section 96(10)

⁸⁰ *ibid* s. 96(4)

⁸¹ The Royal Charter for the continuance of the British Broadcasting Corporation, 2006, Section 39(3)

concerns of the entire population are represented. It is important that such audience councils consist of members who are independent from both the government and the public service broadcaster in question. This could be achieved through an independent appointments committee, the independence of which is set out in statute.

Codes of practice and complaints' mechanisms

An obligation to establish complaints' mechanisms for dealing with complaints from the public is another means by which the law can ensure effective accountability of public service broadcasters to the public. The establishment of such a mechanism ensures that the public can complain directly to the public service broadcaster with regard to any of its programmes or advertising. The Broadcasting Act 2009, for example, stipulates that all broadcasters, including public service broadcasters, must establish complaints handling mechanisms.⁸² Section 47(1) states that:

A broadcaster shall give due and adequate consideration to a complaint [...] (if the complaint is deemed to be)...made in good faith and not of a frivolous or vexatious nature.

RTE must comply with the Broadcasting Codes of the Broadcasting Authority of Ireland (BAI) with regard to programming and advertising. RTE has also prepared its own Internal Standards Guidelines⁸³. If members of the public are not satisfied with RTE's response to a complaint, a complaint can be made to the BAI (see below for details on the complaints' system of the BAI).

The continuation of public service broadcasting organizations is dependent on the support and funding of the public.⁸⁴ As such, it is essential that public service broadcasters are accountable to the public, to whom they serve. Without public support and audiences, public service broadcasters will be forced to rely on commercial activities as their primary funders and will inevitably offer less and less diversity in programming.

⁸² Broadcasting Act 2009, Section 47(1)

⁸³ RTE's Internal Standards and Guidelines are available at <http://www.rte.ie/about/complaints.html>

⁸⁴ Supra fn. 29 at 91

The future of public service broadcasting

The future of public service broadcasting has been called into question in light of an ever expanding and competitive commercial sector, strengthening new media and questions of independence and continued relevance.⁸⁵ State and government financial support of public service broadcasters has given rise to criticism from commercial broadcasters⁸⁶, the print media⁸⁷ and new media services, accusing public service broadcasters of using state and government funding for reasons beyond that of fulfilling their public service remit. As a result, public service broadcasters such as RTE, have to provide *inter alia* a Charter, and separate accounts for public service broadcasting programming.⁸⁸ In Ireland, commercial broadcasting is also subject to public service broadcasting obligations under broadcasting legislation beginning with the Radio and Television Act 1988 which provided for the establishment of the commercial sector. Despite being subject to such obligations, commercial stations in Ireland, unlike the public service broadcasters, i.e. RTE and TG4, do not receive a licence fee but can compete for a portion of 7% of the licence fee fund.⁸⁹

As stated above, the EU has recognized the importance of public service broadcasting and the discretion of Member States to provide for the funding of such services in accordance with the Treaty of Amsterdam. The Treaty, however, also provides that funding of public service broadcasters must not affect “trading conditions and competition in the Union to an extent which would be contrary to the common interest.”⁹⁰

⁸⁵ See Supra fn. 12 Chapter 11

⁸⁶ In 1999, TV3 made a complaint to the European Commission alleging that RTE was receiving incompatible state funding due to a lack of transparency on its use of such funds. See European Commission State aid E/4/2005 (Ex NN99/1999)- Ireland Re: State financing of Radio Telefis Eireann (RTE) and Teilifis na Gaeilge (TG4), Brussels, 27. II. 2008 C(2008) 723 final. Available at http://ec.europa.eu_law/State_aids/comp-2005/e004-05.pdf

⁸⁷ See submission by National Newspapers of Ireland (NNI) on Public Service Broadcasting and the Press, ‘*Ensuring Fair Competition in the Digital Age*’ submission to the Minister for Communication, Energy and Natural Resources, 2010 available at http://www.nni.ie/v2/_images/pdf/PSBandthePress.pdf

⁸⁸ “[T]he Charter is a statement of principles that clarifies what is expected of RTE as the national public service broadcaster including RTE’s accountability to its audience. RTE’s Public Service Broadcasting Charter is available at <http://www.rte.ie/about/organisation/psb.pdf>

⁸⁹ See Broadcasting Act 2009, part 10.

⁹⁰ Supra fn. 56

The EU approach to public service broadcasting policy is significantly different to the approach taken by the Council of Europe, which does not have the same legally binding powers as the EU. While the EU's primary focus has been on the negative impact of public service broadcasting on competition, the Council of Europe has focused on the importance of public service broadcasting in upholding democratic principles and human rights.⁹¹ It can be argued, therefore, that the main concern of the EU is with the consumer viewer while the Council of Europe is concerned with the citizen viewer.

A number of Council of Europe recommendations have advocated the important future role of public service broadcasting and have stressed that public service broadcasting must adapt to new technologies in order for it to remain relevant in an increasingly commercial and consumer driven environment. Council of Europe Recommendation 9(2003) on measures to promote democratic and social contribution of digital broadcasting recommends that public service broadcasters should be an integral part of the digital switchover process and provide services equal to their competitors on the digital platform. It also recommends that Member States:

[...] guarantee that public service broadcasting, as an essential factor for the cohesion of democratic societies, is maintained in the new digital environment by ensuring universal access by individuals to the programmes of public service broadcasters and giving it *inter alia* a central role in the transition to terrestrial digital broadcasting.

The Committee of Ministers Recommendation CM/Rec(2007)3⁹² on the remit of public service media in the information society recommended that Member States:

(i) guarantee the fundamental role of the public service media in the new digital environment, setting a clear remit for public service media, and enabling them to use new technical means to better fulfill this remit and adapt to rapid changes in the current media and technological landscape, and to changes in the viewing and listening patterns and expectations of the audience.⁹³

⁹¹ Jakubowicz, Karol, (with a forward by Andrew Gwynne MP) *Public service broadcasting: a new beginning, or the beginning of the end?* (Knowledge politics) 2007, p. 21 report available at: <http://www.coe.int>

⁹² Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

⁹³ *ibid*

Recommendation 1878 (2009)⁹⁴ on the funding of public service broadcasting reiterates these sentiments recommending that public service broadcasting adapt to technological advancements and accordingly:

[...] diversify their services through thematic channels, on-demand media, recorded media and internet based media services in order to offer a comprehensive and competitive range of media services to the public at large in accordance with their public service mission. Technological progress in the field of audiovisual media and electronic communications means that public service broadcasters should also make use of new technologies.⁹⁵

Council of Europe recommendation 1878 considers the vital role of public service broadcasting in facilitating “minority viewers and people with special needs who would not be served in a purely commercial market.”⁹⁶ This is an important point to bear in mind when considering the relevance and future role of public service broadcasting. In a Council of Europe commissioned report, Christian S. Nissen considers that public service broadcasting serves an important role as a solution to the deficit created by market forces to adequately provide for national and cultural diversity.⁹⁷ A similar line of reasoning was articulated by Lee C. Bollinger⁹⁸, who justified heavier regulation of the broadcast media as a remedy for the deficiencies caused by lighter regulation of other media, namely the print media.

According to Dr Karol Jakubowicz, there are three schools of thought as to the ‘legitimate’ role of public service broadcasting: firstly, the neo-liberalist view, i.e. that there is no future role for public service broadcasting and that the market will serve the needs of the public with regard to plurality and diversity; secondly, the view that public service broadcasting can fulfill the deficit created by the market place; and thirdly, “that everything is legitimate if it serves the execution and remit in ways that are effective and relevant to the public.”⁹⁹ Jakubowitz considers the merit of this third approach in his article. This approach stems from

⁹⁴ Recommendation 1878 (2009) on the funding of public service broadcasting

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ Closs, Wolfgang; Nikoltchev Susanne, *The Public Service Broadcasting Culture*, (European Audiovisual Observatory) Strasbourg, 2007, p.1

⁹⁸ Bollinger, Lee, C, ‘*Freedom of the Press and Public Access: Towards a Theory of Partial Regulation*’ (1976) 75 *Michigan Law Review* 1, at pp 10,11 See also Barendt, E.M, and Hitchens, Lesley, *Media law cases and materials*, (Pearson Education Ltd, UK 2000)p.14

⁹⁹ *Supra* fn. 91, p. 8

the view that the community has a duty to provide the public with audiovisual media services which are free from market forces through “offering the individual both a “basic supply” of what he/she needs as a member of a particular society and culture, and of a particular polity and democratic system and provision of content adjusted to special needs and interests.”¹⁰⁰ This approach advocates the important role of public service broadcasting in democratic society in the 21st century.

Promoters of this approach also acknowledge the need to modernize public service broadcasting in order for it to remain relevant in light of key technological advancements in communications media, most notably that of media convergence. As such, supporters of this approach have come up with a new name for public service broadcasting to reflect media convergence, i.e. public service (electronic) media (PSM).¹⁰¹ Supporters of this approach also recognize the need for public service broadcasting to reflect changing norms and values in society.¹⁰² One of the most significant changes brought about by major technological advancements in communications media is the relationship between the media and the public, particularly interactive new media. Jakubowitz refers to the fact that the relationship between public service broadcasters and their audience has remained the same and considers the possibility of changing that relationship to one of co-operation whereby the public play a hands-on role in the provision of public service broadcasting.

Jakubowitz refers to recommendations made by John Keane back in the early nineties which recommended a revision of public service broadcasting which would “aim to facilitate a genuine commonwealth of forms of life, tastes and opinions, to empower the plurality of citizens who are governed neither by despotic states nor by market forces. It would circulate to them a wide variety of opinions”¹⁰³. In Keane’s view this would require public intervention and co-operation with the media in order to ensure plurality and diversity of non-state media.¹⁰⁴ Jakubowitz considers that this approach could be achieved with regard

¹⁰⁰ Supra fn. 91, p.9

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ Keane, 1993:6 cited supra fn. 78, p.19

¹⁰⁴ Supra fn. 91, p.19

to the media of the 21st century “by opening up PSM media to the world of semiotic democracy and encouraging them to keep abreast of trends in societal communication.”¹⁰⁵

Major technological advancements in communications media, particularly the development of interactive media technologies means that the public of the twenty-first century can no longer be seen as passive viewers. In order to make public service broadcasting/media truly public, the public must play a significant role in public service media policy.¹⁰⁶ Jakubowitz acknowledges that this idea, although requiring serious consideration in its practical application, would: “fundamentally democratize public service media and bring it into line with trends in society and social communication.”¹⁰⁷

A co-operative relationship between media and the public in public service broadcasting policy, as advocated by Jakubowitz is in keeping with current de-regulatory trends in media policy, which are largely based on the concept of governance which advocates the involvement of a number of different actors in the regulatory process. As well as this, de-regulatory trends in media regulatory policy (which are examined in detail in Chapter 5) have resulted in a greater emphasis on self-regulation and self-accountability of media consumers. There has been a marked move away from the traditional, protectionist view of media consumers as passive to the “empowerment”¹⁰⁸ of consumers as active, participatory citizens.

As will be examined in Chapter 5, it has been widely acknowledged that soft law regulatory approaches such as self and co-regulation could prove to be more suitable than traditional regulation by statute broadcasting with regard to twenty-first century media. Accordingly, a co-regulatory approach with an emphasis on co-operation with audience councils, may prove to be a more appropriate regulatory method for the future of public service media than current statutory

¹⁰⁵ Supra fn. 91, p.20 The term “semiotic democracy” was coined by John Fiske in 1987 which he described as “Television’s....delegation of production of meanings and pleasures to its viewers.” See Fiske, John, *Television Culture*, 1987, Methuen & Co, USA at pp. 236-7

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

¹⁰⁸ Buckingham, David, “The future of media literacy in the digital age: some challenges for policy and practice” in *Media Literacy in Europe: Controversies, Challenges and Perspectives* (EuroMeduc, 2009) at 16

models. The Hans Bredow study on co-regulation, which is examined in Chapter 5, showed that in most instances, the co-regulatory bodies studied were able to effectively safeguard policy objectives, subject to certain factors.¹⁰⁹ As such, the important democratic objectives of public service media would remain protected.

With regard to the co-operation between the co-regulatory body and the public, regional audience councils, membership of which should represent the diverse views and interests of the general public from different parts of each country, as well as the views of minority groups and people with special needs, should be established to operate in conjunction with the co-regulatory mechanism. In order to ensure the active involvement of audience councils, their remit should be set out in statute. It is important that audience council members are appointed by an independent appointments committee to ensure autonomy from both the state and the industry.

A co-regulatory approach to public service media based on co-operation between the state, the industry and the public is dependent upon all three actors fulfilling their functions. According to such a system, the role of the state would be to ensure that the important democratic principles of the public service media are upheld through setting out the objectives in statute and ensuring the continuance of public funding as well as providing effective sanctions. Industry members would alleviate some of the problems faced by statutory regulation such as lack of expertise and inability to adapt quickly to ongoing technological advancements. And lastly the audience councils would provide a vital insight into changes in viewing and listening patterns (see 2007 CM Recommendation on the remit of public service media in the information society, above) which is essential to a steady audience.

The future relevance of public service media is dependent on its ability to compete with other media. It can do so by providing a solution to the deficit created by market forces to adequately provide for national and cultural diversity and by ensuring universal active and participatory citizenship. In doing so, public service media may prove to be an essential element to upholding fundamental

¹⁰⁹ Schulz, W. et al. (2006): Final Report: Study on Co-Regulation Measures in the Media Sector, commissioned by the European Commission at pp 119-121

democratic principles in a commercially saturated and market driven media environment.

Statutory complaints bodies as a means of providing accountability to the public

Statutory complaints bodies can provide an effective means of ensuring media accountability to the public in the broadcast sector and have been established in many member states to handle complaints with regard to alleged breaches of statutory duties of the broadcast media. In the UK, for example, the Broadcasting Complaints Commission was established in 1980, followed by the Broadcasting Standards Council in 1988¹¹⁰ which then became the Broadcasting Standards Commission under the Broadcasting Act 1990.¹¹¹ The functions of the Broadcasting Standards Commission were transferred to the Office of Communications (Ofcom) Compliance Committee in accordance with the Communications Act 2003. In Ireland, the pattern was somewhat similar. Accountability of the broadcast media to the public was improved through the establishment of a statutory Broadcasting Complaints Commission in 1976, whose remit was extended to commercial stations under the Radio and Television Act 1988. The Commission's remit was revised again under the Broadcasting Act 2001 and was finally transferred to the Compliance Committee of the Broadcasting Authority of Ireland under the Broadcasting Act 2009. (see below)

The Irish Broadcasting Complaints Commission

¹¹⁰ Robertson, Geoffrey, Q.C. and Nicol, Andrew, Q.C., *Robertson and Nicol on Media Law*, 5th edition, (Thomson Sweet and Maxwell) London, 2007, p. 868

¹¹¹ *ibid*

The Irish Broadcasting Complaints Commission (hereafter the BCC) was established in accordance with the Broadcasting Authority (Amendment) Act, 1976. The functions of the Commission, as set out in the 1976 Act, were to investigate and adjudicate upon complaints based on non-compliance with section 18 of the Broadcasting Authority Act 1960 (as amended by section 3 of the Amendment Act 1976) regarding the duties of the RTE Authority relating to programme content (see above), section 31 of the 1960 Act as amended, which granted ministerial power to prohibit the RTE Authority from broadcasting “any matter of a particular class (that) would be likely to promote, or incite to crime or would tend to undermine the authority of the state”; and RTE’s own code of standards on advertising. Section 9 of the Radio and Television Act (see above) extended the duties as provided under the previous acts to include the prohibition of material “which may reasonably be regarded as offending against good taste and decency...”¹¹² The Broadcasting Act 2009 establishes the Broadcasting Authority of Ireland (hereafter the BAI), which has two sub-committees, the Contract Awards Committee and Compliance Committee. The BAI replaces the Broadcasting Commission of Ireland (hereafter the BCI) and the Compliance Committee of the BAI replaces the BCC.

The independence of complaints’ bodies

It is important that such statutory complaints mechanisms are “independent of broadcasters and regulators alike”.¹¹³ This point was articulated by Dr. Conor Cruise O’Brien¹¹⁴ in Dail (parliamentary) debates on the Irish Broadcasting Authority (Amendment) Bill in 1975. Dr. Cruise O’Brien stated that it was inappropriate for a member of Government to deal with complaints with regard to RTE’s statutory duty of impartiality which may concern comments on party politics or individual politicians. The Minister further stated that it was equally

¹¹² Broadcasting Authority (Amendment) Act 1979, Section 9(i)

¹¹³ Supra fn. 12 at 392

¹¹⁴ Dr. Cruise O’Brien was the Minister for Posts and Telegraphs in 1975

inappropriate for the RTE Authority to receive complaints with regard to its own alleged non-compliance with its statutory obligations.¹¹⁵

In accordance with the Broadcasting Act 2009, members of the Compliance Committee must have had “experience” or “shown capacity” in one of a diverse number of areas, such as media affairs, public service broadcasting, digital media technologies, commercial affairs, the development of the Irish language, and cultural affairs.¹¹⁶

The Act further stipulates that members are to be chosen “[...] with a view to representing the public interest in respect of broadcasting matters.”¹¹⁷

The appointments’ process of the Compliance Committee as set out under Section 8(6) of the 2009 Act provides that the Committee will consist of eight members, four of whom are to be appointed by the Government, as nominated by the Minister and four are to be appointed by the Broadcasting Authority itself, “being two of the members, and two of the members of staff, of the Authority. As such, the membership of the Compliance Committee includes regulators, which is not appropriate for a complaints’ handling body.

Furthermore, the independence of the Compliance Committee has been called into question due to the fact that it operates alongside the Contracts Awards Committee under the seal of the BAI in accordance with Section 7(6) of the 2009 Act and that the two bodies are housed in the same building with the BAI providing the administrative staff, etc. Ofcom in the UK operate under the same structure.

In its report on the 2006 Broadcasting Bill entitled ‘Considerations, recommendations and conclusions on the Joint Committee’s consultation on the

¹¹⁵ “I was concerned about the risk of erosion of the Authority’s freedom under the system whereby the Minister was the recipient of complaints that the Authority’s freedom under the system had been in breach of their statutory duty of impartiality, and had unlimited power to judge and act on such complaints. Since the Minister is a political figure it is clearly undesirable that he should be the sole judge of impartiality in cases, which may involve comment on party politics and politicians and even on his own Department. Nor could the Authority be left as the sole judge as to whether or not they were properly discharging this responsibility [385-387]” Dr Cruise O’Brien, Broadcasting Authority (Amendment) Bill, 1975 (Seanad): Second Stage, Dail Eireann Debate, Volume. 285 No. 3 [385-387].

¹¹⁶ Broadcasting Act 2009, section 9(1)

¹¹⁷ Broadcasting Act 2009, section 8(9)

draft General Scheme of the Broadcasting Bill', the Joint Committee on Communications, Marine and Natural Resources highlighted its concerns with regard to the perceived independence of the proposed Compliance Committee by the public. It is important that a complaints committee is not only independent of government and regulators but that it is perceived to be independent. The Joint Committee, in its report, made reference to the views of the National Union of Journalists (NUJ) who also expressed concerns about the independence of the proposed new Compliance Committee.

It is vital that statutory complaints bodies are not only operationally independent but that they are seen to be independent by the public. The appropriateness of two such committees with competing interests, i.e. one of which awards contracts while the other handles complaints based on breaches of those contracts, operating under the same seal (the BAI) as well as in close physical proximity to each other with administrative staff being appointed by the BAI must be called into question. Such a set-up does not induce public trust in the impartiality of complaints handling which is essential to an effective complaints handling system.

Statutory complaints' bodies and sanctions

The Irish Broadcasting Complaints Commission was not empowered to impose any punitive sanctions in respect of breaches under the 1976 Amendment Act. The only power the Commission had was the ability to publish its decisions or oblige the Authority to publish decisions in a manner agreed between the two.

It was agreed by the BCC and the RTE Authority that adjudications of complaints would be published in the RTE Guide, an RTE television and radio listings magazine, published by RTE. This system was inherently flawed in that if a complaint was upheld and a decision made, that decision would appear in a printed form, a different medium, whereas the broadcast complained of had been originally broadcast on radio or television. In accordance with best practice in respect of self-regulatory systems in the print media industry, a decision by any complaints handling mechanism in the media sector should be published in

an appropriate and proportionate manner. With regard to complaints decided about broadcast material therefore, a decision should be aired at an equivalent time to that at which the offending broadcast was aired. This problem was addressed in the Broadcasting Act 1990, which specified that BCC decisions and corrections of inaccurate facts or information arising from a complaint must be broadcast by the broadcaster “at a time and in a manner corresponding to that in which the offending broadcast took place.”¹¹⁸ The Broadcasting Act 2001 provided for the same requirement with regard to the broadcasting of the outcome of complaints.¹¹⁹ The Broadcasting Act 2009 also stipulates that decisions made by the Compliance Committee must be broadcast “at a time and in a manner corresponding to that in which the broadcast to which the complaint relates took place” but adds that the decision must be published by the broadcaster within twenty-one days of the decision.¹²⁰

Financial sanctions were introduced for the first time in the Broadcasting Act 2009 under which the High Court, upon application by the Broadcasting Authority, following an investigation as set out in the Act, may impose fines not exceeding €250,000¹²¹ to be paid by a broadcaster found to be in breach of the Act. There is a safeguard in the Act however, in that only the Court can by order authorize the Authority to impose a fine, as well as decide on the amount of the fine¹²² unless the broadcaster asks the Authority to do so itself.¹²³

As will be examined in Chapter 3, the idea of a statutory complaints body, particularly one which imposes punitive fines, which may have a ‘chilling effect’ on investigative journalism, is widely considered as inappropriate in the print media industry due to the serious implications it could have on freedom of expression. As examined in Chapter 1, the traditional rationalisations for stricter regulation of the broadcast media than the print media based on issues such as technical limitations and the immediate impact argument, i.e. that the broadcast media is more powerful and influential than the print media because of the heightening effect of the combination of sound and image and the immediacy of

¹¹⁸ Broadcasting Act 1990 Section 8(2)

¹¹⁹ Broadcasting Act 2001, Section 24(11)

¹²⁰ Broadcasting Act 2009, Section 48(11)

¹²¹ Broadcasting Act 2009, Section 54(7)

¹²² Broadcasting Act 2009, Section 55(1)

¹²³ Broadcasting Act 2009, Section 54(4) and 55(2)

its transmission directly into people's homes, are no longer tenable in light of media convergence and new media technologies (see Chapter 1). As such, statutory complaints bodies, as well as the imposition of monetary sanctions on the broadcast media could also be seen as offending against the principles of freedom of expression. However, statutory regulation based on social-responsibility principles remain an appropriate form of regulation in the broadcast sector based on the important role played by law in safeguarding the fundamental rights of the public. In recent years, however, the emphasis has shifted towards a more flexible, market based approach which has resulted in de-regulatory trends in media law policy which are reflected in the AVMS Directive. As will be examined in Chapter 5, with regard to the implementation of co-regulatory bodies as alternative regulatory instruments to state regulation, the broadcast media, which has been traditionally subject to command and control regulation can be seen as the most appropriate media sector in which to establish such bodies in comparison with the print and new media. It has been widely acknowledged in recent years that the introduction of co-regulatory measures in this sector would transfer some of the power from the state to the broadcast industry and alleviate some of the problems faced by statutory regulation such, as lack of expertise and inability to adapt quickly to ongoing technological advances, while at the same time ensuring important public policy objectives through such factors as objectives set out in statute and effective legal sanctions. A complaints body operating under a co-regulatory system may therefore provide a more appropriate form of accountability to the public.

Right of reply as a legal remedy in ensuring media accountability to the public

The right of reply as a mechanism for achieving media accountability has been acknowledged as a justifiable restriction on freedom of expression in that it allows for plurality of opinions and gives the public an alternative remedy to the

courts.¹²⁴ The right of reply has also been viewed, however, in some jurisdictions as an unjustifiable restriction on editorial freedom.¹²⁵

Council of Europe Resolution (74)26¹²⁶ considers a right of reply mechanism to be an appropriate form of redress in accordance with Article 10 (2), which states that the freedom of expression of the media is subject to duties and responsibilities. This Resolution states that the right of reply mechanism should apply to all media but considered that the means of redress available to the public may differ depending on the type of media involved.

Recommendation (2004)16¹²⁷ on the right of reply in the new media states that a right of reply mechanism is a “particularly appropriate remedy in the online environment due to the possibility of instant correction of contested information and the technical ease with which replies from concerned persons can be attached to it”¹²⁸. The 2004 Recommendation also acknowledges that the right of reply can be guaranteed through self or co-regulatory measures as well as through legislation.

The appropriateness of a statutory right of reply as applied to the print media was contested in the US Supreme Court case of *Miami Herald Publishing Co. v Tornillo* [1974]¹²⁹. According to the Supreme Court, the central issue in this case was “...whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.”¹³⁰ The Supreme Court laid great emphasis on the role of the print media as watch-dog of the government and the subsequent importance of its freedom to comment on political affairs.¹³¹ The Supreme Court, in its judgment, considered that the main purpose of the First Amendment was: “...to protect the free discussion of governmental affairs. This of course includes

¹²⁴ See Article 19 website. Information on the right of reply is available at: <http://www.article19.org/pages/en/right-of-reply.html>

¹²⁵ *ibid*

¹²⁶ Council of Europe Resolution (74)26 on the Position of the Individual in Relation to the Press

¹²⁷ Recommendation (2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment

¹²⁸ *ibid*

¹²⁹ *Miami Herald Publishing Co. v Tornillo* [1974] USSC 147; 418 U.S. 241; 94 S. Ct. 2831; 41 L. Ed. 2d 730; No. 73-797 (25 June 1974)

¹³⁰ *Supra* fn. 129, para. 1 (Chief Justice Burger)

¹³¹ *Supra* fn. 129, para. 43

discussion of candidates....”¹³². The Supreme Court emphasised the importance of editorial freedom in the print media, as it stated:

A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials whether fair or unfair-constitute the exercise of editorial control and judgment¹³³.

The Supreme Court held that governmental regulation of a right of reply mechanism was not consistent with freedom of expression in the First Amendment.

A different approach to the same issue has, however, been taken with regard to publicly owned media in a number of national courts,¹³⁴ which have considered the need for a right of reply mechanism to ensure plurality of political opinions¹³⁵. As publicly owned media are funded by the public, they should, in theory and in practice be independent of government and free from government influence. In practice, however, the government may influence publicly owned media even in well-established democracies.¹³⁶

In accordance with the EC Television without Frontiers Directive 1989 (See Chapter 1), television broadcasters of Member States were obliged to make provision for a right of reply or equivalent remedies.¹³⁷ The right of reply is also provided for under the European Convention on Transfrontier Television¹³⁸ under Article 8. The explanatory memorandum of the Convention defines a right of reply as:

[...] a right exercised by natural or legal persons, for example, in order to correct inaccurate facts or information or to make known his/her views on such facts or information, for instance, in cases where such facts or information concern him/her or constitute an attack on his/her dignity,

¹³² Supra fn. 129, para. 36

¹³³ *ibid*

¹³⁴ Supra fn. 124

¹³⁵ *ibid*

¹³⁶ *ibid*

¹³⁷ Television Without Frontiers (TVwF) Directive 89/552/EEC

¹³⁸ The European Convention on Transfrontier Television (ECTT) 1989 as amended according to Protocol (ETS No. 171) which came into force in May 2002 (see chapter 1)

honour or reputation or- in the case of a natural person - an intrusion in his/her private life [...]¹³⁹

The Convention's explanatory memorandum also emphasised the importance of proportionality in the exercise of this right of reply as a means of redress, for example that corrections of inaccurate facts etc must be broadcast at an equivalent time to that at which the offending matter was broadcast.¹⁴⁰ The importance of proportionality in right of reply mechanisms has been emphasized in both the 1974 Resolution and 2004 Recommendation of the Council of Europe.

As seen above, the BCC in Ireland up to this point published corrections and retractions in the RTE Guide,¹⁴¹ which was unquestionably a highly insufficient remedy for complainants. This issue was discussed in the Dail in June 1990¹⁴² where the then Minister for Communications, Mr. Ray Burke, stressed the importance of proportionality in providing for an effective means of redress.

A right of reply system was subsequently provided for in the Broadcasting Act 1990 under section 8 in response to the TvWF Directive.¹⁴³ Section 8 empowered the BCC to compel the RTE Authority to broadcast its decisions in a proportionate manner to that in which the offending broadcast was made. Section (11 A) stated that:

the Authority shall, unless the Commission considers it inappropriate, broadcast the Commission's decision on every complaint considered by the Commission in which the Commission found in favour, in whole or in part, of the complainant, including any correction of inaccurate facts or information relating to an individual arising from a complaint...at a time in which the offending broadcast took place.

Thus the right of reply available to the public under the 1990 Act was in the form of a broadcast of the successful outcome of a complaint to the BCC. It was not an

¹³⁹ See European Convention on Transfrontier Television- Explanatory Report CM (89) 72addE 17 March 1989 – available on the Council of Europe website at www.coe.int/

¹⁴⁰ Supra fn. 138, para. 133 states "...the context in which a right of reply is exercised should be comparable to that in which the incriminated statement was made."

¹⁴¹ Broadcasting Bill, 1990, Second Stage. Thursday, 7 June 1990- Dail Eireann Debate Vol. 399, No. 8, Col. 1581 (Ray Burke)

¹⁴² Supra fn. 141, Cols 1579-1583

¹⁴³ Note the European Convention on Transfrontier Television states that it is not necessary that provision for a right of reply remedy be provided for in legislation. Para. 132 states that the right of reply mechanism "need not necessarily be in the form of legislation; it could be established in the broadcasters contract or franchise."

opportunity for the complainant to reply giving his/her side of the story. The same form of right of reply was provided for in the 2001 Act. The Broadcasting Act 2009 makes specific provision for a right of reply to:

[...] any person whose honour or reputation has been impugned by an assertion of incorrect facts or information in a broadcast shall have a right of reply.¹⁴⁴

The introduction of a statutory right of reply mechanism was undoubtedly a key development in ensuring media accountability to the public through law in Ireland as it provided complainants with a more effective and satisfactory form of redress. However, it can be argued that the right of reply mechanism, as provided in the Broadcasting Act 2009, is not a right of reply in the full sense of the term since it is confined to ‘incorrect facts and information’, i.e. that it is really only a right of correction. The Act also limits the right of reply remedy to persons whose honour or reputation has been impugned in a broadcast. The BAI was required under s. 49(3) of the Broadcasting Act to draft a Right of Reply Scheme within six months. The BAI scheme reiterates the fact that the remit of the right of reply is limited to the correction of incorrect facts and “does not provide for the broadcast of an alternative or contrary opinion.”¹⁴⁵ The scheme further emphasizes the limitations of the scope of the mechanism stating that:

A decision to broadcast a Right of Reply will hinge on two key factors: firstly, was there an assertion of incorrect facts or information and, secondly, has a person’s reputation or honour been impugned because of this being broadcast?¹⁴⁶

The following section will consider whether the right of reply mechanism, as provided for in Irish legislation, fulfills the requirements of the AVMSD.

Does the right of reply mechanism fulfill our obligations under the AVMSD?

The Audiovisual Media Services Directive, which was transposed into Irish law by the Broadcasting Act 2009, emphasizes the importance of a right of reply

¹⁴⁴ Broadcasting Act 2009, Section 49(2). This provision was required to be transposed into Irish law under the AVMSD.

¹⁴⁵ Broadcasting Authority of Ireland- Right of Reply Scheme, May 2011, available at <http://www.bai.ie/wordpress/wp-content/uploads/BAI-right-of-reply-scheme.pdf> at para 1.1

¹⁴⁶ *ibid* at para 1.3

mechanism as a legal remedy with regard to television broadcasting and considers it to be an appropriate remedy to be extended to the on-line environment.¹⁴⁷ Article 28(1) of the Directive provides that:

[...] any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.

The AVMSD, like the Broadcasting Act, limits the right of reply remedy to the correction of incorrect facts. In this regard, therefore, the Irish obligations under the AVMSD appear to have been met.

However, despite the fact that the AVMSD provides that a right of reply shall be exercised by person's whose legitimate interests, which include reputation and good name, have been damaged, the Irish Broadcasting Act and BAI Right of Reply Scheme limits the use of the right of reply mechanism solely to persons whose reputation and good name have been damaged by a broadcast. As such, it could be argued that the right of reply scheme, as provided for under Irish legislation, is not as broad as that in AVMSD and therefore does not sufficiently fulfill its obligations under the AVMSD with regard to this issue. However, AVMSD refers to a right of reply or 'equivalent remedies'. The term 'equivalent remedies' is not defined so it is unclear whether the right to make a complaint to the Compliance Committee of the BAI would suffice as redress for 'other legitimate interests' that have been damaged by incorrect facts or information in a television programme.

Interestingly, the AVMSD refers to the 2006 Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and

¹⁴⁷ Audiovisual Media Services Directive (AVMSD) Directive 2010/13/EU, para. 103

on the right of reply in relation to the competitiveness of the European on-line information services industry¹⁴⁸ and states that this Recommendation includes:

appropriate guidelines for the implementation of measures in national law or practice so as to ensure sufficiently the right of reply or equivalent remedies [...].¹⁴⁹

According to those guidelines:

[...] any natural or legal person, regardless of nationality, whose legitimate interests, in particular, but not limited to, reputation and good name, have been affected by an assertion of facts in a publication or transmission should have the right of reply or equivalent remedies [...].¹⁵⁰

According to the guidelines, a right of reply remedy can be invoked if a person has been affected by an ‘assertion of facts’ as opposed to an ‘assertion of incorrect facts’ as provided in the AVMSD. The AVMSD therefore limits the right of reply remedy to the correction of facts, despite its explicit endorsement of the European Parliament guidelines which do not provide for such a restriction.

The 2006 guidelines also explicitly state that a person’s legitimate interests should not be limited to reputation and good name. The AVMSD does not limit the scope of the right of reply mechanism to the ‘legitimate interests’ of reputation or good name but it could make clearer the fact that such a remedy should not just cater for reputation of good name as is the case with the Irish right of reply scheme.

The 2006 guidelines also refer to the fact that a right of reply mechanism does not have to be statutory but can also be ensured through co-regulatory or self-regulatory measures.¹⁵¹ The fact that a right of reply mechanism can operate through any regulatory body, i.e. whether statutory, co-regulatory or self-regulatory, is an important point to bear in mind when considering the current de-regulatory trends in media regulation (see Chapter 5). A right of reply mechanism can therefore be seen as a flexible form of redress and method of

¹⁴⁸ [Official Journal L 378 of 27.12.2006] Protection of minors and human dignity in audiovisual and information services- available at http://europa.eu/legislation_summaries/audiovisual_and_media/124030a_en.htm

¹⁴⁹ Supra 145 at para. 103

¹⁵⁰ Supra fn. 145 at Annex 1, p.1

¹⁵¹ *ibid*

providing accountability to the public in the twenty-first century. A right of reply mechanism can operate on its own or in conjunction with other forms of redress in order to provide more effective accountability to the public.

Codes of standards in providing for media accountability to the public

Codes of standards in the broadcast media are of immense importance in ensuring accountability to the public, as they provide the public with knowledge as to what constitutes good broadcasting standards and whether there has been a breach of such standards. This is particularly so when they are accompanied by Guidance Notes, as they are in the case of the BAI Children's Commercial Code for example.¹⁵² The absence of a code can lead to frustration on the part of the public who may be confused as to whether or not there has been a breach of standards. Such codes add structure and clarify acceptable standards within the broadcast media, which is also of benefit to broadcasters. A code of standards is also of great benefit to the effective working of any complaints handling mechanism (See Chapter 3). Pursuant to section 19 of the Broadcasting Act 2001, the Broadcasting Commission of Ireland were required to draw up 'codes and rules with respect to programme material' incorporating standards on 'taste and decency' (s.19(1)(a)); advertising and commercial activities generally (s.19(1)(b)) and specifically relating to children (s.19(1)(c)); and standards regarding provision for the deaf or hearing impaired (s.19(11)(a)) and blind or partially sighted (s.19(11)(b)); as well as a separate children's code (s.19(7)). The Broadcasting Act 2009 also provides for the drafting of codes governing standards and practice of broadcasters under section 42.

'Taste and Decency'

In 2007, the BCI published a Code of Programme Standards which set out inter alia standards on taste and decency issues. In the absence of a code, the lack of certainty with regard to the scope of the term, which had been included in broadcasting legislation (see above), was a source of frustration for both complainants and broadcasters alike. A review of national and international

¹⁵² www.bai.ie

practice on taste and decency standards within the broadcast sector was published by the BCI in January 2005.¹⁵³

The report described the approach taken by the Irish broadcasters RTE, TG4 and TV3 with regard to matters of taste and decency, and complaints made regarding taste and decency issues up until the introduction of a code, as “idiosyncratic rather than systematic”.¹⁵⁴

The report focused on the issues of language, violence and sex in relation to taste and decency, which reflected the issues emphasized in s.19 of the 2001 Act as well as those emphasized by complainants.¹⁵⁵ These three taste and decency issues, i.e. language, violence and sex, were among the most complained of to the Broadcasting Complaints Commission.¹⁵⁶ At European level, issues of taste and decency were included in the Television Without Frontiers Directive¹⁵⁷ but are not in the new Audiovisual Media Services Directive. This is indicative of a move away from European regulation of matters of taste and decency to an emphasis on the protection of minors and human dignity¹⁵⁸ matters which are reflected in the AVMSD.

The regulation of matters of taste and decency is a contentious issue especially at European level due to the intrinsically subjective and culturally specific nature of the concepts. The terms “taste” and “decency” are both dependent on the culture of a society and that society’s norms and values which are transient in nature. Broadcasting codes on taste and decency issues must therefore be set out in general terms and flexible enough to adapt to changing norms and values. The 2005 report recommended that the term ‘taste and decency’ be replaced by a more tangible and appropriate term such as “offence and harm” or “matter of

¹⁵³ Report entitled Taste and Decency- a review of national and international practice, BCI, January 2005 is available at: http://www.bci.ie/gaeilge/documents/taste_and_decency.pdf

¹⁵⁴ Supra fn. 153 para 14.2, p.111

¹⁵⁵ Supra fn. 153 p. xiv

¹⁵⁶ *ibid*

¹⁵⁷ See article 22 TVwF (as amended in 1997))

¹⁵⁸ Supra fn.153, p.6 See also Commission of the European Communities (2004), Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, COM (2004) 341

offence”¹⁵⁹, an approach which was adopted in the Broadcasting Act 2009. Section 42(3)(a) requires that the BAI shall have regard, inter alia, to:

the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description.¹⁶⁰

Similarly, section 2.1 of the 2011 Ofcom Broadcasting Code in the U.K. states that:

Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.¹⁶¹

With regard to broadcasting legislation it is imperative that the correct balance is struck between protecting the public against harmful material while at the same time ensuring that the right to freedom of expression is upheld. The struggle to achieve this balance is reflected in international instruments and national legislation which deal with the media. (See Chapter 1) The report shows that codes on taste and decency issues are often used in conjunction with classification systems and watersheds, thus allowing viewers to make an informed decision as to what material to watch. The AVMSD promotes such forms of co- and self-regulation and also reflects the universal de-regulatory trend in media regulation policy. As will be seen in Chapter 5, there has been a marked move away from traditional statutory regulation of the media towards less restrictive regulatory approaches which emphasize market forces and consumer sovereignty, such as co- and self-regulation.

Codes of practice, therefore, can provide for a meaningful system of accountability to the public, particularly when operating in conjunction with an effective complaints mechanism. It is important that codes of practice as provided for in statute are set out in general terms so that they are flexible enough to adapt to society’s changing norms and values, and also that they are

¹⁵⁹ Supra fn. 153, para 1.3, p.7

¹⁶⁰ Broadcasting Act 2009 Section 42(3)(a) on the provision of codes of broadcasting standards

¹⁶¹ Supra fn. 153, para. 1.3, p.7 See the Ofcom Broadcasting Code 2011 Section 2 on ‘harm and offence’ available at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

made subject to periodic review. Codes of practice are useful also as they can be adopted by every type of regulatory body. As such, they will remain an important means of providing for media accountability in the future. Codes of practice of non-legal bodies are examined in Chapter 3.

Part One: Conclusions

The benefits of law in providing for media accountability to the public are evident from this examination, most notably with regard to the guaranteeing of plurality and diversity of content in the media and the protection of individual rights. This chapter has examined key legal developments in broadcasting/audiovisual regulation policy which have strengthened media accountability to the public at both domestic and European level, i.e. public service media, complaints bodies, right of reply mechanisms and codes of standards. In doing so, this chapter has considered the strengths and weaknesses of such mechanisms and whether they remain an effective means of ensuring accountability in the twenty-first century or whether such mechanisms need to be updated or adapted in light of major advances in communications media technologies.

The main focus of this chapter has been on the role of public service media and its future relevance in providing media accountability. An examination of public service media has shown that it can play an important role in ensuring universal, active and participatory citizenship and thus make a significant contribution to upholding important democratic principles. In order for public service media to remain relevant in providing accountability to the public in the twenty-first century, it must reflect the changing norms and values in society and adapt to technological advances. It is recommended that a co-regulatory system with a strong emphasis on the involvement of regional audience councils would be best suited to ensuring that these objectives are achieved. According to such a system, the inclusion of industry members would ensure expertise and ability to adapt to technological advancements in the area, while audience councils would provide a vital insight into the ongoing changes in viewing and listening patterns, which is essential for the continued support of licence payers.

This study has shown that the state plays a legitimate and important role in ensuring media accountability to the public particularly with regard to ensuring the protection of important public interest objectives such as plurality and diversity of content. This study has also shown that the statutory accountability mechanisms examined in this chapter, i.e. public service media, complaints' bodies, right of reply mechanisms and codes of conduct, may provide greater accountability to the public under a co-regulatory system. A study of co-regulatory measures (see chapter 5) will show that the introduction of co-regulation in place of statutory regulation may alleviate some of the problems faced by traditional statutory regulation in the twenty-first century such as lack of expertise and inability to adapt quickly to ongoing technological changes while at the same time ensuring that important public policy objectives are upheld.

PART TWO: FREEDOM OF EXPRESSION OF THE MEDIA UNDER ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This section will focus on the freedom of expression of the media under Article 10 of the European Convention on Human Rights (hereafter ECHR). In this regard, the role of the European Court of Human Rights (hereafter ECtHR), is to consider whether a State's reasons for interfering with Article 10 are relevant and sufficient. Article 10, paragraph 2, gives Member States a margin of appreciation "both to the domestic legislator and to the bodies...that are called upon to interpret and apply the laws in force."¹ Member States, however, do not have an unlimited power of appreciation. The ECtHR "is responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10."² The ECtHR therefore, exercises a supervisory function in considering restrictions on Article 10 as imposed by Member States.

The European Court of Human Rights (hereafter ECtHR), in its Article 10 jurisprudence, has paid particular attention to the interpretation of the 'duties and responsibilities' of journalists under Article 10(2). These 'duties and responsibilities' in the context of the media are duties and responsibilities to the public in light of the public's right to be informed and are therefore a form of ensuring media accountability to the public. An examination of ECHR cases, setting out principles on what constitutes such 'duties and responsibilities' in this context, however, shows a number of inconsistencies which will be examined in this section. In doing so, this section will consider a number of cases which reflect a restrictive interpretation of the duties and responsibilities of the press under Article 10 and the consequent dangers that such restrictions pose to freedom of the press.

¹ *Handyside v United Kingdom* (Application no. 5493/72) 7 December 1976 at para. 48

² *ibid* at para. 49

The consideration of journalistic ethics by the ECtHR has become an important ‘contextual factor’³ in Article 10 cases concerning the press. Recent case law has shown an increase in references to journalistic ethics and criticism of journalistic practice. This section will consider the possible implications of the continuation of this trend.

Also, in determining whether a journalist has upheld his/her duties and responsibilities in accordance with Article 10(2), ECtHR judgments have made reference to a number of journalistic codes of practice and decisions and opinions of press councils and complaints commissions. Accordingly, this section will also consider the appropriateness of the Court’s reference to the codes and decisions of self/independently regulated institutions.

Article 10 ECHR

Article 10 of the ECHR provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to uphold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³ For information on ‘contextual issues’ see T. McGonagle, *Minority Rights, Freedom of Expression and the Media: Dynamics and Dilemmas*, 2011, Insertia. See also Voorhoof, Dirk, *Freedom of Expression, journalists’ rights and duties and the impact of ethics and self-regulation in the light of Article 10 ECHR*, Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends, Strasbourg, 10 October 2008. Report available at www.ircm.u-strasbg/fr/...report_by_Dirk_Voorhoof_session_11.pdf.

Freedom of expression, as a positive right, is set out in Article 10(1). Restrictions on this freedom are set out in Article 10(2). In the 1979 case of *Sunday Times v UK*⁴, the ECtHR elaborated on the application of Article 10(2), emphasizing the importance of a narrow interpretation⁵ of any restrictions on freedom of expression. The Court added that:

It is not sufficient that the interference involved belongs to that class of exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.⁶

Thus, even in cases where an interference with freedom of expression falls within the areas that are justified under Article 10(2), for example for the protection of health or morals, it is left up to the ECtHR, in exercising its supervisory role, to determine whether there has been an infringement on the applicant's freedom of expression on a case by case basis. The flexibility given to the ECtHR in such cases is an acknowledgment of the vital role of freedom of expression and the need for restrictions on freedom of expression to be scrutinized on the facts of each individual case.

The list of criteria set out in Article 10(2) which are to be considered in cases where there has been a restriction on freedom of expression, in order to determine whether such a restriction is justified were discussed in the *Sunday Times v UK* case:

(A) Is the interference with freedom of expression “prescribed by law”?⁷

An interference that is “prescribed by law” must “be in accordance with the law”⁸ whether statute or common law. If the interference relates to the common law, the common law principles being relied on to justify an interference with Article 10 must be sufficiently certain. The *Sunday Times* judgment stipulated

⁴ *Sunday Times v The United Kingdom* (Application no. 6538/74), 26 April, 1979.

⁵ *ibid* para.65

⁶ *ibid*. See also commentary in Nicol, A, Millar, G, Sharland, A, *Media Law and Human Rights*, 2nd edition, (Oxford University Press; Oxford, 2009), at p.14

⁷ *Supra* fn. 4, para. 47

⁸ *ibid*

two requirements for the law to fulfill; i.e. that the law must be “...adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case”⁹ and “Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequence which a given action may entail.”¹⁰

(B) Does the interference “have aims that are legitimate under Article 10 para.2?”¹¹

In order for a restriction on freedom of expression to fulfill the requirement of having a “legitimate aim”, it must come within one of the aims cited in Article 10(2).¹² The ECtHR will also consider whether a restriction on freedom of expression was proportionate to the legitimate aim pursued.¹³

(C) Is the interference “necessary in a democratic society”?¹⁴

In determining whether an interference with Article 10 is “necessary in a democratic society”, the ECtHR will consider whether the interference constitutes a “pressing social need”.¹⁵ The national courts have a margin of appreciation in determining what constitutes a “pressing social need” as it relates to their respective jurisdictions. The ECtHR, however, plays a supervisory role and can overrule the national courts if it finds that there has been an unjustified restriction of freedom of expression.¹⁶ The ECtHR in this regard looks to see if the national court’s reasons are “relevant” and “sufficient”¹⁷ under Article 10(2).

⁹ Supra fn.4, para. 49

¹⁰ ibid

¹¹ Supra fn. 4, para. 54

¹² Nicol, A, Millar, G, Sharland, A, *Media Law and Human Rights*, 2nd edition, (Oxford University Press; Oxford, 2009), p.27

¹³ Supra fn. 4, para. 62

¹⁴ Supra fn. 4, para.58

¹⁵ *Sunday Times v UK*, (cited supra fn.4), para. 62, referring to *Handyside v United Kingdom* (Application no. 5493/72) 7 December 1976, paras 48-50

¹⁶ ibid, para. 62, *Handyside*, paras 48-49

¹⁷ ibid, para. 62, *Handyside*, para. 50

There is an abundance of case-law to illustrate the Court's approach to and application of these criteria. The case law relating to the media will be discussed below.

The protection of freedom of the press under Article 10

ECHR jurisprudence has consistently acknowledged the importance of freedom of expression. The *Handyside* judgment of 1976 emphasized its crucial role in a democratic society, stating that:

Freedom of Expression constitutes one of the essential foundations of [...] a (democratic) society, one of the basis conditions for its progress and for the development of every man.¹⁸

The judgment stressed the importance of protecting “not only...”information” and “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that “offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. The ECtHR, in its case law has referred to the particular importance of such principles as they relate to the media:

These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, *inter alia*, in the “interests of national security” or for “maintaining the authority of the judiciary”, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.¹⁹

The ECtHR has referred to the “pre-eminent”²⁰ role of the press as society's watchdog. As such, Article 10 offers added protection to the press in certain circumstances so that the media can fulfill its role. A number of principles on the special protection afforded to the press under Article 10 have been established by ECtHR case law. Examples of such principles include the protection of

¹⁸ *Handyside v United Kingdom* (Application no. 5493/72) 7 December 1976, para.49

¹⁹ *Case of Observer and Guardian v. the United Kingdom* (Application number 15585/88) 26 November 1991, para. 59, See also *Sunday Times v UK* (1979) supra fn.4, para.65, *Case of Bergens Tidende & Others v Norway* (Application number 26152/95) 2 May 2000 and *Case of Goodwin v. The United Kingdom* (Application number 17488/90) 27 March 1996, para 39

²⁰ *Case of Thorgeir Thorgeirson v Iceland* (Application number 13778/88) 25 June 1992, para.63

journalistic sources and the protection of journalistic reporting on political speech. The Article 10 protection of journalistic sources was firmly established in the case of *Goodwin v UK* which considered the “potentially chilling effect an order of source disclosure has on the exercise of...freedom (of expression)”.²¹ Accordingly, an order to disclose a journalistic source will be considered to be an infringement of Article 10 unless justified in the public interest. The special protection afforded to the press with regard to political speech was articulated in the case of *Lingens v Austria*:

Freedom of the press [...] affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.²²

The ECtHR has also advised that:

[t]he most careful scrutiny on the part of the Court is called for when...the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.²³

In the case of *Barthold v Germany*²⁴, it was noted that restrictions on freedom of expression of the press must be proportionate to the legitimate aim pursued so as not to “hamper the press in the performance of its task as purveyor of information and public watchdog.”²⁵ The Court has recognized the possibility that “heavy sanctions” on the press could have a “chilling effect” on journalistic freedom.²⁶ In the case of *Fatullayev v Azerbaijan*²⁷ the Court stated that the:

[...] nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of the interference with the

²¹ Case of *Goodwin v. the United Kingdom* (Application number 17488/90) 27 March 1996, para. 39

²² Case of *Lingens v Austria* (Application no. 9815/82) 8 July 1986, para.42

²³ Case of *Stoll v. Switzerland* (Application no. 69698/01) 10 December 2007 at para.106, See also *Bladet Tromso and Stensaas v Norway* (Application no. 21980/93) 20 May 1999 at para. 64 and *Jersild v Denmark* (Application no. 15890/89) 23 September 1994, para. 35.

²⁴ *Barthold v Germany* (Application no. 8734/79) 25 March 1985

²⁵ *ibid*, para. 58

²⁶ *Armoniene v Lithuania* (App no. 36/9/02) (25 November 2008), para. 47

²⁷ *Fatullayev v Azerbaijan* (Application no. 40984/07) 22 April 2010

freedom of expression guaranteed by Article 10. The Court must also exercise the utmost caution where the measures taken or sanction imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of public concern.²⁸

In the case of *Nikasaari and Others v Finland*²⁹, the ECtHR held that the sentence on conviction of two journalists for defamation to forty day-fines along with costs and damages amounting to approximately €20,000 was disproportionate to the legitimate aim pursued and was in violation of Article 10.³⁰

In *Fatullyyev*, the applicant journalist was sentenced to two years and six months in prison. This severe penalty was held by the Court to be incompatible with the journalist's freedom of expression under Article 10. The Court stated that:

[...] the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been impaired, as, for example, in cases of hate speech or incitement to violence.³¹

The Council of Europe in Resolution 1577(2007) Towards decriminalization of Defamation, calls on Member States to "abolish prison sentences for defamation without further delay" due to the chilling effect such sanctions may have on journalism.

Duties and Responsibilities under Article 10

The special protection afforded to the press by Article 10 is subject to certain 'duties and responsibilities' in accordance with Article 10(2).

Article 10(2) states that the right to freedom of expression carries with it 'duties and responsibilities'. Article 10(2) does not, however, elaborate on what constitutes 'duties and responsibilities' for the purposes of Article 10 protection. This task has been left to the interpretation of the ECtHR. The case of *Handyside*

²⁸ *ibid* at para. 102

²⁹ *Nikasaari and Others v Finland* (Application no. 37520/07) 6/10/2010),

³⁰ *ibid* at para 78

³¹ *ibid* at para. 103 See also *Internet: case-law of the European Court of Human Rights*, published by Council of Europe/European Court of Human Rights, 2011 at p.13 Report available at www.echr.coe.int

v U.K., which was the first Article 10 case to be dealt with by the ECtHR, affirmed that the ‘duties and responsibilities’ attached to Article 10, were dependent on the applicant’s “situation and the technical means he uses.”³² Hence, pursuant to Article 10 applications, the Court will take into account the status and circumstances of the applicant and the method of communication used in the dissemination of the information.

Occupation of applicant

In accordance with this principle, the ECtHR will take into account the occupation of the applicant, e.g. whether the applicant is a member of the armed forces³³ or a judge³⁴. The ECtHR has developed varying degrees of ‘duties and responsibilities’ depending on the applicant’s status. For example, it has considered journalists “acting in their professional capacity”³⁵ to have a higher level of requirement of ‘duties and responsibilities’ than an ordinary citizen. This may also have relevance for bloggers and other citizen journalists who could also possibly be distinguished from ordinary citizens in future cases. In the case of *De Haes and Gijssels v Belgium*³⁶ the Court stated that the press has a duty:

[...] to impart in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest [...]³⁷

The Court has emphasised, however, that all individuals are entitled to protection under Article 10 regardless of their status. For example, in the case of *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria*,³⁸ the Court stated that: “Article 10... applies to them (servicemen) just as it does to other persons within the jurisdiction of Contracting States.”³⁹

In *Bladet Tromso*, the Court stated:

³² *Handyside*, (supra fn.18) para. 49

³³ *Engel and Others v The Netherlands* (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) 8 June 1976

³⁴ *Wille v Liechtenstein* (Application no. 28396/95) 28 October 1999 See also commentary supra fn. 12 at p. 33

³⁵ Supra fn. 10, p.33

³⁶ *De Haes and Gijssels v Belgium* (Application no. 19983/92) 24 February 1997

³⁷ *ibid* at para 37

³⁸ *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria*³⁸ (Application no. 15153/89) 19 December 1994

³⁹ *ibid* at para. 36

By reason of the “duties and responsibilities” inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.⁴⁰

In the case of *Pedersen and Baadsgaard v Denmark* (2006)⁴¹ the Court further asserted that the media is not exempt from the ‘duties and responsibilities’ attached to Article 10(2) even in cases concerning the publication of matters of “serious public concern”⁴² and especially in cases which involve the rights of others.

Method of communication

The ECtHR will also take into account the method of communication used in the dissemination of information as well of the potential impact of the medium in question.⁴³ As discussed in Chapter 1, the broadcast media is regarded as more intrusive than other mediums, such as the print media, in the distribution of information. The immediacy of its impact on the public, as compared with other media, has been one of the main justifications for stricter regulation of the broadcast media than that of other media (see Chapter 1 for an examination of these justifications). Such rationales for stricter regulation of the broadcast media are also reflected in ECtHR jurisprudence⁴⁴. In the case of *Stoll v Switzerland*, the Court referred to the impact of the internet⁴⁵ on the rights and duties of journalists with regard to Article 10 protection stating:

[...] In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.⁴⁶

⁴⁰ *Bladet Tromsø and Stensaas Norway* (Application no. 21980/93) 20 May 1999

⁴¹ *Pedersen & Baadsgaard v Denmark* (Application no. 49017/99) 17 December 2004

⁴² *ibid* at para. 78

⁴³ See history of broadcast regulation section for information on the difference in regulation of the broadcast media and the print media. Article 10 ECHR provides greater protection to the print media than the broadcast media. This issue is discussed in Chapter 1. See *Jersild v Denmark* (1994) (supra fn 23) para. 31

⁴⁴ *Jersild v Denmark*, supra fn.23 at para. 31

⁴⁵ See *Internet: case-law of the European Court of Human Rights*, published by Council of Europe/European Court of Human Rights, 2011 at p.13 Report available at www.echr.coe.int

⁴⁶ *Stoll v Switzerland*, supra fn.23 at para. 104

However, the general principles of press freedom as applied by the ECtHR also apply to online publications. In the case of *Times Newspapers Ltd*⁴⁷, the European Court referred to the important role played by the internet in the dissemination of information to the public. The Court referred to:

[...] the substantial contribution made by Internet archives to preserving and making available news and information.⁴⁸

The Court further stated that:

Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free.⁴⁹

The ECtHR acknowledged the vital function played by the internet in twenty-first century democratic society as an *addition* to the traditional ‘public watchdog’ role of the press, stating:

[W]hile the primary function of the press in a democratic society is to act as a “public watchdog”, it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported.⁵⁰

The Court further stipulated that the press has a higher duty to provide accurate information to the public with regard to historical information as opposed to perishable information (see below).

Journalistic ethics

In considering whether a journalist has fulfilled his or her ‘duties and responsibilities’ for the purposes of Article 10 protection, the ECtHR, in its jurisprudence, has considered whether the applicant adhered to journalistic ethics.

In *Pedersen and Baadsgaard v Denmark*, the Court observed that in order to comply with journalistic ethics, journalists “should act in good faith and on an

⁴⁷ *Times Newspapers Ltd (Nos 1 & 2) v. The United Kingdom* (Applications 3002/03 & 23676/03); 10 March 2009)

⁴⁸ *ibid* at para. 45

⁴⁹ *ibid*

⁵⁰ *ibid*

accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism.”⁵¹ However, in the case of *Jersild v Denmark*, the Court conceded that it was not its role to dictate journalistic practice stating: “It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what techniques of reporting should be adopted by journalists.”⁵²

In recent years, the ECtHR has considered adherence to journalistic ethics as a “contextual factor”⁵³ when determining whether there has been an interference with Article 10. Adherence to professional journalistic ethics has been invoked in the European Court either as a defence for applicant journalists who have adhered to journalistic ethics⁵⁴ or to justify an interference with freedom of expression in cases where the applicant journalist has failed to adhere to

⁵¹ *Pedersen & Baadsgaard v. Denmark* supra fn.41, para. 78. See also *Fressoz and Roire v France*, (Application number 29183/95) para.54, *Bladet Tromso and Stensaas v Norway* (supra.fn 23) para.58 and *Prager and Oberschlick v Austria* (Application number 15974/90) 26 April 1995 at para. 37.

⁵² *Jersild v Denmark* (1994) (supra fn.23) para.31. Despite the sentiments expressed in *Jersild*, the ECtHR has repeatedly referred to matters concerning journalistic techniques which goes beyond the parameters it set itself. See section on *Stoll v Switzerland* below.

⁵³ In Article 10 cases, the ECtHR considers interferences with Article 10 on a case by case basis. “To this end the Court will take into account *who* is invoking the right to freedom of expression, *what* was published, broadcast or imparted, *who* was eventually criticized or insulted, *how* the opinions or statements were formulated or what medium was used, to *whom* the message was directed or who could receive the information, *when* something was published, broadcasted or imparted, *where* and under *which circumstances* something was made public, with *what intention* information was made public or allegations or opinions were formulated, and what the possible *effect* or impact of the message was. The Court finally will also take into account the character of the interference or the severity or *proportionality* of the sanctions, before finally deciding whether or not an interference with the right to freedom of expression amounted to a violation of Article 10 of the Convention.” Voorhoof, Dirk, *Freedom of Expression under the European Human Rights System. From Sunday Times(no.1) v U.K. (1979) to Hachette Filipacchi Associes (“Ici Paris”) France (2009)*, in Haeck, Hector Olasolo, John Vervaele en Leo Zwaak (eds.) *Inter-American and European Human Rights Journal/Revista Interamericana y Europa de Derechos Humanos*, Intersentia Cambridge- Antwerp, Issue 2009/1-2.pp.3-49, Published September 2009, p.19. See also T. McGonagle, *Minority rights and freedom of expression: a dynamic interface*, Amsterdam, Institute for Information Law, Ph.D Thesis, October 2008) cited in Voorhoof, Dirk, *Freedom of Expression, journalists’ rights and duties and the impact of ethics and self-regulation in the light of Article 10 ECHR*, Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends, Strasbourg, 10 October 2008. Report available at www.ircm.u-strasbg.fr/...report_by_Dirk_Voorhoof_session_11.pdf.

⁵⁴ See for example; *De Haes and Gijssels v Belgium* (Application number 19983/92) 24 February 1997; *Freesoz and Roire v France* (Application no. 29183/95) 21/1/1999; *Thoma v Luxembourg* (Application number 38432/97) 29 March 2001; and *Selisto v Finland* (Application number 56767/00) 16 November 2004. See Voorhoof, Dirk, *Freedom of Expression, journalists’ rights and duties and the impact of ethics and self-regulation in the light of Article 10 ECHR*, Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends, Strasbourg, 10 October 2008. Report available at www.ircm.u-strasbg.fr/...report_by_Dirk_Voorhoof_session_11.pdf.

journalistic ethics.⁵⁵ Despite repeatedly referring to ‘journalistic ethics’ in its judgments, the ECtHR has not defined what it means by ‘journalistic ethics’. Instead the Court has interpreted journalistic ethics on a case by case basis, generally taking into account the journalistic ethics of each Member State, as set out, for example, in codes of ethics of self-regulatory bodies such as press councils⁵⁶ thereby leaving it to the press in each country to set out its own journalistic standards (see below). The Court’s approach here is in line with the principle set out in *Jersild*, i.e. that it is not the role of the courts to dictate techniques of reporting or, indeed, to impose its view as to what journalistic standards should be.⁵⁷

As will be discussed in Chapter three, although there are substantial similarities, no two codes of practice of press councils, commissions or journalistic ethical bodies provide the same set of principles. It is imperative that codes take into account cultural differences and the norms and values of the society in which they operate. However, fundamentally, such codes set out common ethical journalistic standards, which include: accuracy in reporting and the protection of human rights such as freedom of expression, the right to privacy, the right not to be discriminated against and the right to a fair trial. Other common principles deal with harassment; intrusion into grief and shock; the protection of the vulnerable; protection of sources; fairness and honesty in reporting and publication of adjudications.

In deciding whether a journalist applicant has adhered to journalistic ethics, the ECtHR will take into account a number of factors, including whether the publication in question contained fact or value judgments, whether the rights of others have been infringed upon and whether the research undertaken by the journalist was adequate. In examining these factors, this section will consider whether recent ECtHR judgments indicate a shift away from the Court’s traditional strong “pro-press”⁵⁸ stance, which was a predominant feature of its

⁵⁵ See for example the cases of *Prager and Oberschlick v Austria* (Application no. 15974/90) 25 April 1995 and *Stoll v Switzerland* (2008) (supra fn. 23)

⁵⁶ See *MGN Ltd v the United Kingdom* (Application no. 39401/04) 18 January 2011

⁵⁷ *Jersild v Denmark*, supra fn.23 at para. 31

⁵⁸ McGonagle, Marie, “Defamation law in Europe: A rapprochement between *Reynolds* and the ECHR”, *Media and Arts Law Review*, Vol. 14, No. 2, June 2009, Melbourne, at p.178

earlier jurisprudence, towards a more restrictive interpretation of press freedom which demands higher journalistic standards.

Facts and value judgment

The ECtHR has stressed the importance of distinguishing between facts and value judgments in media reporting. In the case of *Lingens v Austria*⁵⁹ the Court stated that:

a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated. Whereas the truth of value-judgments is not susceptible of proof.⁶⁰

The Court has articulated that an obligation to prove the truth of a value judgment is in violation of freedom of opinion, a core element of freedom of expression:

The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.”⁶¹ Thus, in general, journalists must be more careful when stating facts as opposed to value judgments.⁶²

The Court has stated however that an interference with an applicant’s right to freedom of expression may be held to be proportionate with regard to an “excessive” value judgment if it has no factual basis.⁶³

The ECtHR will, therefore, determine whether a statement is a fact or a value judgment on a case by case basis. In the case of *Sokolowski v. Poland*⁶⁴, for example, the Court considered whether an article included a statement of facts or a value judgment. In this case, the Court took into account the “gist”⁶⁵ of the applicant’s criticism, which it considered to be:

⁵⁹ *Lingens v Austria* (Application no. 9815/82) 8 July 1986 at para. 46

⁶⁰ *ibid* See also *Kasabova v Bulgaria*, (Application no. 22385/03, at 58), 19 April 2011

⁶¹ *Busuioc v Moldova* (Application no. 61513/00) 21 December 2004, para.6

⁶² Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaks (eds) *Theory and Practice of the European Court of Human Rights*, 4th Edition, (Insertia, UK, 2006) p. 796

⁶³ *Busuioc*, supra fn.61 at para. 61

⁶⁴ *Sokolowski v. Poland* (Application no. 75955/01) 29 March 2005

⁶⁵ *ibid* at para. 46

couched in ironical language...was meant to stress that the functions in the election committees should have been assigned to those inhabitants of the municipality who were financially worse off than the councillors themselves.⁶⁶

The Court concluded that:

A serious accusation of theft cannot...be justifiably read into such a statement particularly when the satirical character of the text and the irony underlying it are taken into account.⁶⁷

Accordingly, the Court held that the impugned article in question contained a value judgment as opposed to a statement of facts. It is clear from *Sokolowski* that the ECtHR will take into account the article as a whole, including the tone, in this case the satirical and ironic character of the text, as well as the general essence or “gist” of the article. The issue of considering articles as a whole, rather than isolating phrases, which may have a different meaning out of context, is an important one which has been stressed by the Court many times in its jurisprudence.⁶⁸

The more recent case of *Pfeifer v Austria* is indicative of the inconsistencies in the court’s reasoning when deciding whether statements are to be treated as fact or as value judgments and represents a restrictive interpretation of freedom of the press under Article 10.

In the case of *Pfeifer v Austria*⁶⁹, the Court found that an allegation in a magazine that the applicant caused the suicide of another was found to be a statement of fact and not a value judgment and was therefore susceptible of greater proof.⁷⁰ Judge Loucaides, in his dissenting opinion, pointed out that the majority’s reasoning here was inherently flawed. According to Loucaides, J, the statement did not accuse the applicant of writing the article with the intent of causing the person to commit suicide, instead it was a value judgment based the journalist’s opinion which was based on a sequence of events.⁷¹ In any event, as

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ See for example, *Jersild v Denmark* 1994 (Application no. 15890/89) 23 September 1994 and *Lindon, Ofchakovsky-Laurens & July v France* (Applications nos. 21279/02 & 36448/02) 22 October 2007

⁶⁹ *Pfeifer v Austria* (Application no. 12556/03) 15 November 2007

⁷⁰ *ibid* at para. 46

⁷¹ *Supra* fn. 69 See dissenting opinion of Loucaides, J

pointed out by Eoin Carolan, "...any accusation that an individual "caused" another to commit suicide cannot but be speculative."⁷² It cannot be proven that a person caused another person to commit suicide, therefore the allegation that the applicant caused the suicide of another, can only be regarded as a value judgment and thereby not susceptible of greater proof.

These cases are indicative of the difficulty in distinguishing between fact and value judgments. As emphasised in *Busuioc*, the Court must be careful not to place restrictions on the right to freedom of opinion which is a fundamental part of Article 10 and as such a vital component of press freedom.

The rights of others

The duties and responsibilities of journalists with regard to Article 10 protection are particularly significant in circumstances where the rights of others have been infringed upon.⁷³ In cases where the European Court has had to determine whether an applicant journalist's right to freedom of expression has been unduly restricted, the Court has often had to balance the right to freedom of expression under Article 10 with the right to privacy under Article 8. In such cases, "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole."⁷⁴ This is an example of how the state can protect the public interest in terms of both the rights of individuals and the public at large. See Chapter 1.

The judgments of *Pfeifer*⁷⁵ and *Von Hannover*⁷⁶ are indicative of the ECtHR's restrictive tendencies in recent years in their approach towards freedom of the press under Article 10 where privacy is the right to be balanced with it. The Court, in these cases, adopted an "expansive interpretation"⁷⁷ of the concept of private life under Article 8 to the detriment of the Article 10 right to freedom of expression.

⁷² Carolan, Eoin, "The Changing Face of Media Freedom under the ECHR" (2008), *Bar Review*, April 2008 at p. 4

⁷³ See case of *Eerikainen and Others v Finland* (Application no. 3514/02) 10 February 2009, at para 60

⁷⁴ *Von Hannover v Germany* (Application no. 59320/00) 24 June 2004 at para.57

⁷⁵ *Supra* fn. 69

⁷⁶ *Supra* fn. 74

⁷⁷ *Supra* fn. 72 at p. 3

In the case of *Pfeifer*, the Court found that there had been a violation of Article 8 due to the State's failure to protect the applicant's reputation. In its judgment, the Court considered that a person's reputation "even if that person is criticized in the context of public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life".⁷⁸ In *Karako v Hungary*⁷⁹, the Court clarified that this right to reputation under Article 8 will only be applied in exceptional cases:

"In the Court's case-law, reputation as only been deemed to be an independent right sporadically and mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's privacy."⁸⁰

The recent case of *Axel Springer v Germany*⁸¹ also emphasized the limitations to the right to reputation under Article 8. In its judgment, the Court stated:

"In order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. The Court...held...that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, a criminal offence."⁸²

The restrictive interpretation of freedom of expression under Article 10 in the interest of the protection of an individual's privacy in *Pfeifer* has therefore been corrected in the judgments of *Karako* and *Axel Springer*.

In the case of *Von Hannover* in 2004, the Court held that there had been a breach of the applicant, Princess Caroline of Monaco's Article 8 right to privacy with regard to the publication of photographs of the princess and her family. The

⁷⁸ Supra fn. 69 at para. 35

⁷⁹ *Karako v Hungary* Application no. 39311/05 (28 April 2009)

⁸⁰ *ibid* at para. 23

⁸¹ *Axel Springer AG v Germany* (Application no. 39954/08) 7 February 2012

⁸² *ibid* at para. 83

Court stated that in cases which involve balancing the protection of private life against freedom of expression:

the decisive factor....should lie in the contribution that the published photographs and articles make to a debate of general interest.⁸³

The Court stated that despite the fact that the Princess and her family are very well known to the public and despite the fact that the photographs were taken in a public place, the public did not have a legitimate interest in knowing how the Princess behaves in her private life. The Court considered, in this instance, that the photographs in question were published for the sole purpose of satisfying “the curiosity of a particular readership regarding the details of the applicant’s private life and did not therefore contribute to a debate of general interest.”⁸⁴ This reasoning reflects a very limited view of freedom of the press. Most worryingly with regard to the Court’s judgment in this case, was the Court’s explicit call for a narrower interpretation of freedom of expression in such cases concerning the privacy of public figures.⁸⁵

Also, as noted by McGonagle, the Court, in distinguishing between facts contributing to a debate of general interest relating to politicians in the exercise of their official functions and facts detailing the private life of public persons, when not exercising their official functions, has the effect of relegating “the Princess Caroline’s of this world to the status of ordinary private citizen.”⁸⁶ McGonagle further considers that this distinction ignores the relationship that many public figures have with the media, i.e. the “manipulation of the media for their own public relations purposes”.⁸⁷ It must be borne in mind, however, that this case was the first of its kind in considering the specific media activity of pursuing public persons in public places in order to obtain photographs and the tide has since shifted slightly towards a wider interpretation of freedom of the press in such circumstances.⁸⁸

⁸³ Supra fn 74 at para. 60

⁸⁴ Supra fn. 74 at para. 65

⁸⁵ Supra fn. 74 at para. 66

⁸⁶ McGonagle, Marie, “Privacy-Confusing Fundamental Values and Social Traditions”, *Irish Human Rights Law Review*, 1 IHRLR 2010, Dublin p. 164 See also supra fn. 72 at para. 63

⁸⁷ *ibid*

⁸⁸ Supra fn. 86 at p. 151

In contrast with the original *Von Hannover* case in 2004, (which will be referred to from this point as *Von Hannover (No. 1)* in the interest of clarity), in the recent case of *Von Hannover v Germany (No.2)*⁸⁹, the Court held that there had been no violation of Princess Caroline's right to privacy under Article 8 with regard to the publication of photographs of the Princess and her family which accompanied an article about her father's illness, the late Prince Rainier III of Monaco. The judgment sets out useful guidance with regard to the balancing of the competing Article 8 and Article 10 rights.⁹⁰ With regard to this balancing exercise, the Court considered a number of factors based on its previous relevant case law which consisted of a number of elements including⁹¹:

(a) the article's "contribution to a debate of general interest"⁹²

The ECtHR has distinguished between the protection offered to journalists under Article 10 with regard to "the reporting of facts even if controversial capable of contributing to a debate in a democratic society" and "making tawdry allegations about an individual's private life."⁹³ In the 2011 case of *Mosley v U.K.*⁹⁴, in which the ECtHR considered the balancing of Article 10 with the Article 8 right to privacy, the Court stated that although a narrow interpretation of any restriction on freedom of expression is necessary for the press to fulfill its role as 'public watchdog':

different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life. While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the Court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it.⁹⁵

⁸⁹ *Von Hannover v Germany (No. 2)* (Application nos. 40660/08 and 60641/08) 7 February 2012

⁹⁰ *ibid* at para. 100

⁹¹ A similar set of criteria was set out in the case of *Axel Springer* which are incorporated into the list here. *Axel Springer AG v Germany* (Application no. 39954/08) 7 February 2012

⁹² *Von Hannover (No.2)*, *supra* fn. 89 at para. 109

⁹³ See *Axel Springer AG v Germany* (Application no. 39954/08) 7 February 2012 at para 89 (iv)(a).

⁹⁴ *Mosley v The United Kingdom* (App no. 48009/08) 10/05/2011

⁹⁵ *ibid* at para. 114

In *Von Hannover (No. 1)*, the Court held that there was no public interest element in publishing the photographs and accompanying material. In *Von Hannover (No. 2)* however, the Court accepted that the photos in question in light of the accompanying articles relating to the illness of the late Prince of Monaco, did contribute to a debate of general interest.

(b) “How well known is the person concerned and what is the subject of the report?”⁹⁶

Another important criterion for the Court in considering the balance between Article 10 and Article 8 protection is the role and function of the person concerned. In such cases, the Court will distinguish between ordinary private persons and persons acting in the public sphere, such as politicians and public figures. According to the ECtHR:

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.⁹⁷

The subject matter of the article in question is also of importance in such cases. The special public interest protection afforded to the press with regard to the reporting of the activities of a public person do not extend to photographs and commentary which refers exclusively to the person’s private life and is not in the public interest (see above). In the case of *Von Hannover*⁹⁸, the Court stated that:

[...] anyone, even if they are known to the general public, must be able to enjoy a “legitimate expectation” of protection of and respect for their private life.⁹⁹

In *Von Hannover (No.2)*, the ECtHR reiterated these sentiments but held that the photographs of Princess Caroline of Monaco and her family were in the public interest due to the fact that the photographs were accompanied by articles concerning the illness of the late Prince of Monaco.

⁹⁶ *Von Hannover v Germany (No. 2)*, supra fn. 89 at para. 110

⁹⁷ *ibid* See also *Lingens v Austria* (Application no. 9815/82) 8 July 1986

⁹⁸ *Von Hannover (No.1)*, supra fn. 74

⁹⁹ *ibid* at para. 69

It can be deduced from the Court's reasoning in the Von Hannover cases that journalists must be careful, when reporting on public figures, that there is a public interest element to the published material.

(c) "Content, form and consequences of the publication"¹⁰⁰

The ECtHR will consider the publication as a whole, taking into account the manner in which the person was portrayed, whether in text or photographic form. In examining such issues, the Court is second-guessing the editor to some extent in deciding whether a photograph was a proper technique of reporting in the circumstances but perhaps only because two separate rights, freedom of expression and privacy, protected by the ECHR are at issue. The extent to which the material was disseminated is also a factor that will be taken into account, e.g. whether the material in question was published in regional or national newspapers or periodicals.

(d) "Circumstances in which photos were taken"¹⁰¹ or "method of obtaining the information and its veracity."¹⁰²

In Article 10 v Article 8 cases, the Court will take into account the way in which the information in question was obtained, as well as the truth and accuracy of the information. The special protection afforded to the press in the reporting of issues of genuine public concern is subject to the proviso that journalists act in good faith in accordance with the ethics of journalism (see *Fressoz above*).

As can be seen from this examination, the Court will take a restrictive approach to the freedom of the press when the activities of the press infringe on the rights of others, such as the right to privacy as discussed above. The Court's call for a narrower interpretation of freedom of the press in cases involving the publication of photos of a public person in a public place is a cause for concern. Since the *Von Hannover* case in 2004, the Court has rowed back somewhat on the

¹⁰⁰ *Von Hannover (No.2)*, supra fn. 89 at para. 112

¹⁰¹ *Von Hannover (No.2)*, supra fn. 89 at para. 113

¹⁰² *Axel Springer* supra fn.93 at para. 93

restrictiveness of this principle, as can be seen in *Mosley v UK* (above) in 2011. The judgment in 2010 in the case of *Fatullayev*¹⁰³ also indicates that the ECtHR may be rowing back from its previous inconsistent case law. In this case the Court stated that:

Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals, they must not do so in a manner that unduly deters the media from fulfilling their role in informing the public on matters of general public interest.¹⁰⁴

The Court in this judgment also reiterated the important role played by investigative journalism in democratic society.

‘Research’

In the case of *Prager & Oberschlick v Austria*¹⁰⁵, the ECtHR held that due to his inadequate research, the applicant journalist, Mr Prager, could not “[...] invoke his good faith or compliance with the ethics of journalism.”¹⁰⁶ This case considered a publication by Mr. Prager in which he severely criticized members of the judiciary. In finding that the applicant’s research was inadequate, the Court considered Mr. Prager’s failure to establish whether his allegations were “true” or whether his “value judgments” were fair comment.¹⁰⁷ In balancing the right to a good name with that of freedom of expression, the Court considered “[t]he research that (the journalist) had undertaken does not appear adequate to substantiate such serious allegations. In this connection, it suffices to note that, on his own admission, the applicant had not attended a single criminal trial before Judge J (the defamed judge). Furthermore he had not given the judge any opportunity to comment on the accusations leveled at him.”¹⁰⁸

¹⁰³ *Fatullayev*, supra fn.27

¹⁰⁴ *ibid* at para. 88

¹⁰⁵ *Prager and Oberschlick v Austria* (Application no. 15974/90) 26 April 1995

¹⁰⁶ *ibid*, para. 37

¹⁰⁷ *ibid*

¹⁰⁸ *Supra* fn. 105, para.37

In the case of *Rumyana Ivanova v. Bulgaria*, the Court held that the applicant journalist had “failed to comply with the rules of investigative journalism”¹⁰⁹ in that she “failed to consult trustworthy sources, preferring to rely on sources which could not, according to best journalistic practice, be deemed dependable.”¹¹⁰

The Court’s explicit reference to “investigative journalism” here may be indicative of higher standards attached to cases involving investigative journalism as a separate category of journalism. Also, the ECtHR will generally expect a higher level of research with regard to cases involving serious allegations. In the case of *Koprivica v Montenegro*¹¹¹, the Court considered that information containing serious allegations required “particular diligence” prior to publication.¹¹²

Journalistic reporting techniques

The consideration of journalistic ethics by the ECtHR has become, as previously stated, an important ‘contextual factor’ in Article 10 cases involving the press. . The ECtHR has a legitimate role in considering journalists’ duties and responsibilities to inquire into, for example, the extent or appropriateness of the research carried out in the circumstances, usually by reference to journalists’ own proclaimed codes of conduct or standards but not to impose its own standards or substitute itself as editor or usurp editorial independence. The ECtHR must be careful not to consider issues that are, as it has acknowledged, beyond its remit such as journalistic technique. It must do so in the interest of press freedom and preventing a ‘chilling effect’ on journalism. In the case of *Stoll v Switzerland*, for example, the ECtHR made extensive reference to journalistic technique. This case represents a contentious departure from ECHR jurisprudence on the freedom of the press under Article 10.

The case of Stoll v Switzerland and reference to journalistic ethics

¹⁰⁹ *Rumyana Ivanova v Bulgaria* (Application no. 36207/03) 14 February 2008 at paras 64-65

¹¹⁰ *ibid*

¹¹¹ *Koprivica v Montenegro* (Application no. 41158/09) 22 November 2011

¹¹² *ibid* at para. 67

It has been stated in a dissenting opinion that the Grand Chamber judgment in the case of *Stoll v Switzerland* represents a “dangerous and unjustified departure”¹¹³ from well-established principles as set out by its own case law on freedom of expression as it relates to the press.¹¹⁴ In this case, journalist Martin Stoll was convicted under Article 293 of the Swiss Criminal Code for publishing “secret official deliberations”. The initial judgment by the European Court¹¹⁵ held that the journalist’s conviction amounted to an infringement of his Article 10 right to freedom of expression. This decision was, however, overturned by the Grand Chamber which held that the journalist’s conviction was proportionate and ‘necessary in a democratic society’. In its judgment, the Grand Chamber considered the competing public interests in the case,¹¹⁶ namely “[t]he public interest in publication of the articles” and “[t]he interests the domestic authorities sought to protect.” The Court rejected the Swiss Government’s argument that the interference with Article 10 was to protect “national security” and “public safety”¹¹⁷ and instead found the protection of confidential information to be the only legitimate aim of the interference. The majority, despite stating that although “the confidentiality of diplomatic reports is justified in principle, it cannot be protected at any price”¹¹⁸ and finding that the Swiss Government failed to demonstrate that “the articles...actually prevented the Swiss Government and Swiss banks from finding a solution to the problem of unclaimed assets”, found that publication of the articles in question was capable of having “negative repercussions on the negotiations...[which was] liable to cause considerable damage..”¹¹⁹ The dissenting opinion criticized the Court’s reasoning in this instance as “merely a hypothesis” and not sufficient to properly justify an interference with the right to freedom of expression:

¹¹³ *Stoll v Switzerland*, supra fn.23. Dissenting opinion of judge Zagrebelsky joined by judges Lorenzen, Fura-Sandstrom, Jaeger and Popovic.

¹¹⁴ See for example; *Jersild v Denmark* (1994) supra fn.21 and *Bladet Tromso and Stensaas v Norway* (1999) supra fn.23

¹¹⁵ *Stoll v Switzerland*, supra fn 23

¹¹⁶ Supra fn. 12, p. 238

¹¹⁷ *Stoll v Switzerland*, supra fn. 23 para.54

¹¹⁸ *Stoll v Switzerland*, supra fn 23 See also Dissenting opinion

¹¹⁹ *Stoll v Switzerland*, supra fn.23, para. 130. See also dissenting opinion of judge Zagrebelsky joined by judges Lorenzen, Fura-Sandstrom, Jaeger and Popovic.

In sum, this reasoning renders meaningless the principle whereby any interference with the right to freedom of expression must be properly justified.¹²⁰

This case can be compared, in that respect, with the case of *Fressoz and Roire v France*¹²¹, which concerned the publication of confidential information regarding tax assessments. The ECtHR considered the applicant journalist, Mr. Roire, to have acted according to journalistic ethics in that he “verified the authenticity of the tax assessments.”¹²² The Court, in its judgment, stated that “journalists had to be given reasonable latitude in the manner in which (confidential information in the public interest)...was conveyed to the public or (the journalist’s) Article 10 right to freedom of expression would be unnecessarily inhibited.”¹²³ The Court concluded that “[i]n essence, (Article 10) leaves it for journalists to decide whether or not it is necessary to produce such documents to ensure credibility.”¹²⁴ The Court’s reasoning in this case is consistent with its endorsement of the watchdog role of the press.

It is, however, the Grand Chamber’s scrutiny of the applicant journalist’s reporting technique that is of most concern. The Grand Chamber considered the powerful influence of the media of the 21st century on public opinion and the consequent growing need to monitor compliance with journalistic standards as a reason for its departure from previous case law on the area stating:

not only do (the media of the twenty-first century) inform, they can also suggest by the way in which they present information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and

¹²⁰ *Bergens Tidende v Norway* (Application number 26152/95) 2 May 2000, para. 48.

“The need for any restrictions (on Article 10) must be established convincingly.” The Grand Chamber itself, in the *Stoll* judgment, referred to the greater importance attached to press freedom “in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as “public watchdog” and the ability of the press to provide accurate and reliable information may be adversely affected.” *Stoll v Switzerland*, supra fn. 23, para. 110. See also *Bladet Tromsø and Stensaas v Norway*, supra fn. 23, para. 64 and *Jersild v Denmark*, supra fn 23, para. 35.

¹²¹ *Fressoz and Roire v France* (Application no. 29183/95) 21/01/1999

¹²² *ibid* para.55

¹²³ *ibid*

¹²⁴ *ibid*

involving an ever-growing number of players, *monitoring* compliance with journalistic ethics takes on added importance.¹²⁵

The Court went on to state that it is a well - established principle that the Convention “must be interpreted in light of present day conditions”¹²⁶. It is true that in a world saturated with information from all types of media, the public need to be able to access accurate information of a high journalistic standard from reliable sources. It is not, however, the role of the Court or law to dictate or implement such standards but rather the role of the media itself which can ensure that the public has access to accurate and reliable information through a variety of editorial controls and independent or self-regulatory bodies.

In advocating the monitoring of journalistic ethics, the ECtHR is essentially contradicting itself in *Jersild* and condoning a system of censorship of the press. If journalistic ethics and reporting techniques, as well as the way in which journalists present information, are essentially monitored by the Courts it will inevitably have a chilling effect on journalism and inhibit the fulfillment of the essential role played by the press as society’s watchdog.

Despite the well established principles as set out in ECHR jurisprudence on journalistic freedom, particularly the principle set out in *Jersild*, i.e. that it not the role of the courts to dictate journalistic reporting techniques, the Grand Chamber, in *Stoll* examined the journalist’s reporting techniques under two headings; i.e. the ‘manner’ in which the information was obtained by the journalist and the ‘form’ of the articles.

The “manner” in which the information was obtained

In this case the Grand Chamber examined the ‘manner’ in which the report in question was obtained by the applicant. Despite finding that the applicant was not responsible for leaking the report, the Court considered that the applicant, as a journalist, must have been aware that publication of the report was punishable

¹²⁵ *Stoll v Switzerland*, supra. Fn.23,para.104 (emphasis added)

¹²⁶ *ibid* at para. 104. The Court cited previous case law which set out this principle including inter alia, *Tyver v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26 at para 31; *Airey v Ireland*, judgment of 9 October 1979, Series A no. 32, at para. 26 and *Mamatkulov and Askarov v Turkey* [GC], nos. 46827/99 and 46951/99, at para. 121 ECHR 2005-I.

under the Swiss Criminal Code. In accordance with Article 293 of the Swiss Criminal Code, which is entitled “Publication of secret official deliberations”¹²⁷:

Anyone who, without being entitled to do so, makes public all or part of the documents, investigations or deliberations of any authority which are secret by law or by virtue of a decision taken by such an authority acting within its powers shall be punished with imprisonment or a fine...¹²⁸

The Grand Chamber, in its deliberations, reiterated that ‘duties and responsibilities’ are attached to Article 10 protection, from which journalists are not exempt. The Court went on to state that:

[...] notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection.¹²⁹

The Grand Chamber found that the applicant was not responsible for the leaking of the documents in question but subsequently found that the criminal conviction against him was proportionate to the legitimate aim pursued due to the fact that the applicant published the information in the documents. This finding can be seen as a departure from previous ECHR principles on the issue of proportionality.¹³⁰ Essentially, in this judgment, the Grand Chamber placed a higher emphasis on the journalists’ compliance with ordinary legal principles than its duty to fulfill its vital watchdog in society by providing information in the public interest. The Grand Chamber’s reasoning here departs from its own well established principles on the special protection of the press with regard to the reporting of issues in the public interest (see above). As illustrated above, the Grand Chamber’s reasoning can be contrasted with an earlier ECtHR ruling in the case of *Fressoz and Roire v France*¹³¹ which also involved the publication of allegedly unlawfully obtained documents. The Court in *Fressoz* stated that:

[...] Article (10) leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis

¹²⁷ *ibid* at para 35

¹²⁸ *ibid* (unofficial translation)

¹²⁹ *Ibid* para. 161

¹³⁰ See *Barthold v Germany* (Application no. 8734/79) 25 March 1985

¹³¹ *Fressoz & Roire v France*, *supra* fn. 121

and provide “reliable and precise” information in accordance with the ethics of journalism.¹³²

Interestingly, the *Stoll* judgment referred to the publication of the same document by two other newspapers and considered both papers to have acted ethically in that they printed the documents in their near-entirety, thereby leaving the reader to make up his/her own mind on the issues in the document.¹³³ By this reasoning, the applicant in *Stoll* would have succeeded in showing that his Article 10 right had been infringed if he had printed the document in full regardless of whether he acted according to journalistic ethics in obtaining the document in question. This reinforces the point that the Grand Chamber was in fact more concerned with the actual ‘form’ of the article rather than the ‘manner’ in which the document was obtained.

The ‘form’ of the articles

The Grand Chamber’s thorough scrutiny of the ‘form’ of the articles shows a worrying departure from well established ECHR principles on the subject of freedom of journalistic reporting technique under Article 10, which has been considered by the Court to be necessary to prevent a ‘chilling effect’ on the press. The Grand Chamber reiterates the importance of this freedom and states that Article 10 protects “not only the substance of the ideas and information expressed but also the form in which they are conveyed”¹³⁴. The Court then goes on to directly contradict itself in the very next paragraph in which it criticizes the ‘form’ of the articles and in so doing adds an “[...] element of censure regarding the form chosen by the journalist [...]”¹³⁵.

In examining whether the ‘form’ of the articles was in accordance with journalistic ethics, the Grand Chamber considered the way in which the documents were edited, the vocabulary used, the style of the headings and sub-headings as well as the likelihood of the articles to mislead. Issues such as these should be considered by a self/independently regulated press council or complaints commission and are beyond the remit of the ECHR, or any court for

¹³² *ibid* at para. 54

¹³³ *Stoll v Switzerland*, *supra* fn. 23, para. 147

¹³⁴ *ibid*, para. 146

¹³⁵ *ibid*

that matter in the interest of press freedom. The dissenting judgment considered the majority's criticism of the "form" of the articles as "irrelevant"¹³⁶. Despite this, the 'form' of the article seems to have been one of the main factors in the Grand Chamber's finding of no-violation of Article 10.

A year after the *Stoll* judgment, the European Court again considered, inter alia, the manner and form of a publication in the case of *Flux v Moldova (No. 6)*¹³⁷. The Court held that the applicant journalist's Article 10 right had not been infringed as the result of an award of damages against him. The dissenting judges articulated their fears for the future of freedom of the press as a result of the Court's focus on the way in which the report was written as opposed to whether or not it was written in the public interest. The judges stated:

The serious inference of this judgment is that freedom of expression also ceases to exist when it is punished for pushing forward for public debate allegations of public criminality made by witnesses certified as credible but in a manner considered unprofessional. When subservience to professional good practice becomes more overriding than the search for truth itself it is a sad day for freedom of expression.¹³⁸

The *Stoll* and *Moldova* judgments represent a perturbing departure from the ECtHR's own well established principles on press freedom and the safeguarding of investigative journalism. With regard to the judgment's implications for Article 10 protection of press freedom, it essentially means that restrictions on freedom of the press can now apply to both the subject matter of the publication in question as well as the way in which the publication was researched, edited and presented, i.e. the manner and form.¹³⁹ As such, these judgments add further restrictions to freedom of the press under Article 10.

It is apparent however, from this examination that there are a number of significant dissenting opinions which warn against such a restrictive interpretation of freedom of the press under Article 10, as can be seen in the dissenting opinions of the judges in the *Stoll* case (see above).¹⁴⁰ Dissenting opinions of judges in recent ECHR cases such as *Mouvement Raelien Suisse v*

¹³⁶ *ibid*

¹³⁷ *Flux v Moldova (No. 6)* (Application no. 22824/04) 29 July 2008.

¹³⁸ *Ibid*. Dissenting opinion of Judge Bonello, joined by Judges David Thor Bjorgvinsson and Sikuta

¹³⁹ *Supra* fn. 72 at p. 8

¹⁴⁰ *Stoll v Switzerland*, *supra* fn.23, dissenting opinions.

*Switzerland*¹⁴¹, also emphasize the importance of a broad interpretation of press freedom under Article 10. The dissenting judges in *Mouvement*, for example stated that Article 10 protection must include protection of “the form in which...ideas and opinions are conveyed”.¹⁴²

Press Council codes and the courts

The Grand Chamber, in *Stoll*, makes continuous reference to the opinion of the Swiss Press Council. The dissenting judges criticized the majority for endorsing “the wholly different position of a private body concerned with journalistic ethics.”¹⁴³ Reference to press councils, complaints commissions and journalistic ethical codes by the courts, whether domestic or international, is a contentious issue and one that may have serious consequences for the effectiveness of press councils and consequently freedom of the press.

Journalistic codes of ethics/practice and the decisions and opinions of press councils, and press complaints bodies have been recognized and referred to by the courts in such areas as the protection of Human Rights. ECtHR judgments, in recent years, have made reference to a number of journalistic codes of practice, such as those of the British Press Complaints Commission, the Danish Press Council, the Press Council of the Netherlands and the Swiss Press Council. An example of this can be seen in the case of *Stoll v Switzerland*, in which the ECtHR judgment relied on the findings of the Swiss Press Council, i.e. that the articles in question were in breach of the Press Council’s Declaration on the rights and responsibilities of journalists.

In the judgment of *Jersild v Denmark*,¹⁴⁴ it was noted that it is outside the ambit of the court to over-ride the professional principles of journalistic behaviour such as, for example, those set out in codes of practice of press councils.¹⁴⁵ These

¹⁴¹ *Mouvement Raelien Suisse v Switzerland* (Application no. 16354/06) 13 January 2011

¹⁴² *ibid*, dissenting opinions of Judges Rozakis and Vajic.

¹⁴³ *ibid*

¹⁴⁴ *Jersild v Denmark*, *supra* fn.23

¹⁴⁵ *ibid*, para.31

sentiments were reiterated in the case of *Bladet Tromso v Stensaas Norway*¹⁴⁶ as discussed above.

In the UK case of *Jameel v Others v Wall Street Journal* (2006)¹⁴⁷, the House of Lords referred to the significance of the Code of Practice of the Press Complaints Commission stating that “...the standards of responsible journalism are made more specific by the Code of Practice...[and such codes]...while not binding on the courts, can provide valuable guidance.”¹⁴⁸ Also, in the case of *Mosley v News Group* (2008),¹⁴⁹ the Court considered the principles set out in the PCC Code as “reflecting acceptable practice” in journalism in the UK.

It is apparent from such judgments, both at national and European level, that press council codes of ethics and decisions made by press councils, are increasingly having an impact on decision making by the courts with regard to cases involving the print media. It is important, however, that press council decisions and codes of practice are seen as separate and distinct from the law. Self-regulatory or independent press council decisions are made in order to establish and maintain standards but on the supposition that no legal sanctions will be incurred that may jeopardize freedom of expression. The value of such ethical guidelines is based on the self-regulatory nature of those guidelines.¹⁵⁰ Press council decisions are made by a committee composed of, for the most part, both industry and lay members. As such they operate very differently from a court of law.

There is a risk that a court’s reliance on the decisions of self-regulatory press councils may undermine the role of such press councils and damage the delicate relationship between the press council and the industry. If press councils lose the support of the industry then they will cease to be effective. Reliance by the courts on press council decisions may also have a chilling effect on journalists who may

¹⁴⁶ *Bladet Tromso v Stensaas Norway* (1999)

¹⁴⁷ *Jameel & Ors v Wall Street Journal Europe Sprl* [2006] UKHL 44

¹⁴⁸ *ibid*, para. 55 The UK Courts have to take account of codes of practice, including that of the PCC under s.12 of the Human Rights Act.

¹⁴⁹ *Mosley v News Group* [2008] EWHC 1777 (QB)

¹⁵⁰ Anna Louise Schelin, Seminar on Journalists’ Rights and Responsibilities and the Impact of Ethics and Self-Regulation-Session II *The sensitive relationship between Press Councils and the Courts* 07/10/08- available at http://www.ircm-ustrasbg.fr/seminaire_oct2008/docs/Rapport_Schelin_Session_II.pdf

be worried that a possible breach of a press council code may result in a legal sanction.

Another reason why press council decisions should not be used as definitive evidence in a court of law is that all press councils differ. As stated above, no two press councils in Europe have the same principles within their codes of practice. Each code has a set of principles based on its own country's culture, norms and values. A judgment based on one country's code of practice may jeopardize the freedom of expression of another country.¹⁵¹

For these reasons, it is imperative that codes of practice of press councils do not become blurred with legal principles. It is vital for the continued trust and support of the industry that press councils remain separate and distinct from the law.

Part two: Conclusions

Part two of this chapter has involved an examination of the ECtHR's interpretation of the duties and responsibilities of journalists under Article 10(2). This examination has shown a number of inconsistencies in the principles as set out by the Court in this regard.

In previous case law, such as *Jersild*, *Thorgeirson* and the *Observer and Guardian* (above), the Court took a strong "pro-press" stance which favoured a broad interpretation of freedom of the press. A number of principles on the special protection afforded to the press under Article 10 have been firmly established by ECtHR jurisprudence, such as the protection of journalistic sources and the protection of reporting on political speech.

The Court, in its jurisprudence, has set out a number of principles on the duties and responsibilities of the press under Article 10(2), which the Court will take into account when deciding whether journalists have fulfilled such duties and responsibilities. These principles include:

¹⁵¹ *ibid*

- 1) journalists will meet the requirements of duties and responsibilities under Article 10(2) if they are acting in good faith in order to provide accurate and reliable information (Bladet);
- 2) duties and responsibilities apply in all circumstances to all kinds of reporting;
- 3) the centrality of journalistic ethics in fulfilling the requirements of duties and responsibilities;
- 4) whether the journalist has conducted adequate research;
- 5) whether the rights of others have been infringed upon;
- 6) journalists must take greater care with facts as opposed to value judgments;
- 7) the ECtHR will generally expect a higher level of research with regard to cases involving serious allegations.

The essence of these points is that journalists must act in “good faith”, which can be gauged from the accepted standards of journalism, i.e. journalistic ethics, which would include the level and appropriateness of the research s/he conducted; attention to accuracy of facts; and the seriousness of the allegations and potential or likely harm to others.

Worryingly, the Court’s recent case law in particular, indicates an increasingly restrictive approach being taken by the Court with regard to the interpretation of freedom of expression and opinion of the press. In *Stoll*, the Grand Chamber cited the powerful influence of the media of the twenty-first century on public opinion as a reason for an increased need to “monitor” compliance with journalistic standards and as justification for a more limited interpretation of freedom of the press. This appears to be in stark contrast with the Court’s reasoning in the subsequent case of *Times Newspaper Ltd v UK* in which the ECtHR acknowledges the vital role played by the new media, particularly the internet, in making news and information available to the public. In this case the ECtHR referred to the vital function of the internet in twenty-first century democratic society as an *addition* to the traditional ‘public watchdog’ role of the press. This could indicate that the Court has seen the error of its ways in *Stoll* and is now returning to normal course.

In its interpretation of the duties and responsibilities of the press under Article 10, the ECtHR in certain cases such as *Stoll v Switzerland* and *Flux v Moldova*, have placed a significant emphasis on the scrutiny of journalistic ethics, including the subject matter of publications and the way in which publications are researched, edited and presented, instead of focusing on more important issues such as the public importance of the subject matter and the protection of investigative journalism in democratic society.¹⁵²

It is submitted that the Court needs to re-focus its energies on upholding the well established principles as set out in cases such as *Jersild v Denmark*, *Goodwin v UK*, *Lingens v Austria*, *Barthold v Germany* and *Fatullayey v Azerbaijan*, whose judgments focus on upholding and safeguarding the vital role played by the press in democratic society.

¹⁵² *ibid* at p. 3

CHAPTER 3

NON-LEGAL REGULATION OF THE MEDIA

As examined in Chapter one, inquiries into press freedom contributed greatly to the development of the social responsibility theory and the firm establishment of the concept of media accountability to the public in the early twentieth century. In the US, the Commission on Freedom of the Press was set up by Robert Hutchins in 1942. The Commission has to date published a number of reports featuring recommendations concerning freedom of the press and accountability to the public. Similar inquiries into press freedom, i.e. the Royal Commission of the Press reports have been set up in the UK. Such inquiries were prompted by public dissatisfaction with press standards. As governments threatened intervention, the print media took note and took on a more responsible and responsive role. Codes of ethics were put in place in many newspaper and journalist organisations in order to improve journalistic standards. At the beginning and particularly in the middle of the twentieth century, press councils were also set up to improve standards in journalism through the setting and overseeing of standards in the print media. In the US, in particular, a number of the larger newspapers introduced an internal appointee to handle readers' complaints, e.g. a readers' representative or newspaper ombudsman, as a means of strengthening accountability to the public. This chapter will examine the origins and development of press councils and press ombudsmen, as well as newspaper ombudsmen and readers' representatives. It will also the ways in which the remit of press councils and ombudsmen is changing or likely to change in response to developments in technology, for example the handling of online material, user generated material and information gathered from social network sites. The need for accountability of search engines as the main 'gatekeepers' of news and information in the twenty-first century will also be considered.

SECTION 1

Press Councils

Press councils have been established by the print media industry as a means of providing greater accountability to the public through the setting and overseeing of journalistic standards.

Upon examination of the development process of a number of press councils, certain similarities have become apparent.¹ Firstly, political and public dissatisfaction with the print media, for example intrusion into privacy and poor journalistic standards, has resulted in government inquiries into press standards and subsequent calls for regulation of the press. This has motivated the print media to improve its standards through adopting self-regulatory mechanisms, such as press councils which provide greater accountability to the public.² Secondly, in cases where self-regulation of the print media is deemed to be ineffective, whether by a government inquiry or dissatisfaction from the public, the print media has been pressured into improving its self-regulatory system in an effort to stave off stricter regulation based in statute.

The British Press Council, for example, was set up in 1953 in response to the report of the Royal Commission of the Press, which was published in 1949.³ The inquiry was set up due to public concern:

[...] at the growth of monopolistic tendencies in the control of the Press and with the object of furthering free expression of opinion through the Press and the greatest practicable accuracy in the presentation of news...[and to examine] the finance, control, management and ownership of the Press.⁴

While Competition Law later developed to address the issue of monopolies and ownership generally, during the period 1953-1991, the Press Council strengthened its accountability to the public as a result of the recommendations

¹ Danilo A. Leonardi, "Self-regulation and the print media: codes and analysis of codes in use by press councils of the EU ", 2004, p. 4 available at <http://pcmlp.socleg.ox.ac.uk/selfregulation//iapcoda/0405-press-report-dl.html>- accessed 28/01/08)

² ibid

³ Royal Commission on the Press, Cmnd, 7700 (1949)

⁴ ibid at para. 14

of a number of subsequent Royal Commission reports. For example, the Third Royal Commission of the Press report, published in 1977, criticized the fact that the Press Council was made up of an industry member majority and as such was perceived by the public as prioritizing the protection of the press as opposed to the protection of the public.⁵

What are press councils?⁶

The majority of press councils are non-legal mechanisms which are used in the print media industry as a means of 1) making the print media more accountable to the public, 2) safeguarding freedom of the press and 3) ensuring high standards in the print media by providing guidelines for journalists in the form of codes of practice. Press councils offer a non-legal alternative to individuals who wish to complain about a publication which personally affects them.

Claude Jean Bertrand wrote of press councils:

A press council is multi-functional... As an alternative to a court of justice, it is competent, flexible and fast, as it provides simple and inexpensive services. As a protector of press freedom, because of its independence and of the respect it can get from the public, it could enjoy an influence both strong and totally harmless.⁷

While it is true that press councils can provide an excellent means of accountability to the public which does not unduly inhibit freedom of expression, the effectiveness of such bodies is dependent on a number of sensitive factors which will be examined throughout this section. The ability of press councils in ensuring effective accountability has been the subject of hot debate since the establishment of the first press council in Sweden in 1916.

⁵ The Third Royal Commission on the Press Final Report, Cmnd 6810 para. 20.15

⁶ The press councils in this study include the press councils of Ireland, the UK, Australia, New Zealand, Sweden, Denmark, Germany, the Netherlands, Estonia, Flanders, Bosnia Herzegovina and Finland.

⁷ Claude-Jean, Bertrand, *An Arsenal for Democracy- Media Accountability Systems*, Hampton Press, USA, 2003, p.129

As well as this, the nature and role of press councils and similar bodies⁸ are changing and expanding in light of major technological developments in media communications and calls from government to provide greater accountability to the public in response to these changes.

This section will focus on the changing structure and the possible future role and operation of press councils in light of these issues as called for by such reports as the UK Culture Media and Sport Committee on Press Standards, Privacy and Libel⁹ (hereafter the CMS report), which was prompted by the treatment of the McCann¹⁰ family by the British press and the failure of the Press Complaints Commission (PCC) to launch its own investigations into the matter¹¹ and more recently the Leveson Inquiry¹² into Culture, Practice and Ethics of the Press which was set up in 2011 in response to the phone hacking scandals in the UK press. At the time of writing, it has just been announced that the PCC will move into a “transitional phase” pending the establishment of a new authority based on the findings of the Leveson Inquiry which are due to be published in October 2012.

Also, the merging of the traditional print media with the new media has meant that many press councils have extended their remit to include online versions of

⁸ Similar bodies include press complaints commissions, press complaints bodies and press ombudsmen.

⁹ Culture, Media and Sport Committee- second report, *press standards, privacy and libel*, (Second report, session 2009-10)

¹⁰ In May 2007, three year old Madeleine McCann went missing from a holiday apartment in Portugal where she had been staying with her family. The case attracted an enormous amount of media attention, which resulted in the publication of numerous libellous articles about the child’s parents and included unfounded accusations with regard to their alleged involvement in their daughter’s kidnapping. See Supra fn.9. paras 333 to 374

¹¹ Supra. fn.9 para. 374 and para.552. See also <http://www.pcc.org.uk/news/index.html?article=NjMyNA==> for PCC’s response to these criticisms. The PCC’s response to CMS report is discussed below under ‘Role’ of press councils section.

¹² The Leveson Inquiry is a government inquiry into media ethics which was initiated in 2011 in response to the phone hacking scandals in the UK, particularly the *News of the World*, which called into question the credibility and effectiveness of self-regulation of the UK print media. Lord Justice Leveson was appointed as Chairman of the Inquiry. Police investigations into allegations of phone hacking by the UK tabloid press found *News of the World* journalists to be guilty of intercepting voicemail messages. The *News of the World* has admitted the allegations and consequently ceased publication. See <https://www.levesoninquiry.org.uk>

member publications. Issues such as user-generated comments which appear on the websites of member publications have given rise to questions of editorial responsibility and how best to handle complaints arising from such content.

In order to ascertain the best practice of press councils and establish where changes and improvements could be made in response to all of these types of issues, this section examines a number of press councils with a view to determining their common strengths and weaknesses in terms of their independence, role, standards and resolution of complaints.¹³

(i) Independence

The issue of the independence of press councils from both government and industry is an important one which has been raised many times in the past.¹⁴ More recently and more specifically the issue has been raised in Ireland in the context of the statutory recognition given to the Press Council of Ireland (hereafter the PCI) in the 2009 Defamation Act. The longer established press councils such as the press councils of Sweden, Australia, New Zealand, the UK, the Netherlands and Germany tend to be wholly industry established and not provided for in statute.

As an operationally independent but statutorily recognised press council, the PCI is therefore unique among the press councils examined for the purpose of this thesis. Schedule 2 of the Defamation Act 2009 sets out the minimum requirements including the general duties of the press council, its composition, its independence, funding, the role of the Press Ombudsman and the requirement

¹³ See Brody, Annabel, "Pressing times ahead: the evolution of press councils in an age of media convergence", *Communications Law*, Volume 16, No.3, 2011, 106-113

¹⁴ In the UK, the first Royal Commission on the Press recommended that the General Council of the Press (the Press Council) was to operate as a self-regulatory mechanism which would "derive its authority from the press itself and not from statute." (Royal Commission on the Press, Cmnd, 7700 (1949) para. 656) The Commission recommended that the Council should be self-regulatory as opposed to regulated by statute as it was "...preferable to seek the means of maintaining the proper relationship between the press and society not in government action but in the press itself. (ibid) The Commission had faith that the press industry itself would provide a self-regulatory mechanisms which would rely on the industry's own sense of responsibility to the public.

of a code of standards. The PCI was established voluntarily on an independent basis by the print media in Ireland in 2007 and began to operate in January 2008. Its establishment was prompted by a *quid pro quo* arrangement with government in order to get much needed defamation law reform and to stave off the introduction of privacy legislation. Ultimately, the government chose to provide in the Defamation Act 2009 a scheme for recognition of a press council that would meet certain criteria set out or referred to in the Act.¹⁵ The criteria reflected those of the existing press council established by the print media, which applied for and duly received recognition as the Press Council provided for in the Act in July 2010.

The Irish Press Council, therefore is something of a hybrid: it is recognised in statute but is not a statutory body in the usual sense of the term, as will be seen below. It might in fact be seen as a co-regulatory body, that is, a body which is independent in operation but in respect of which the state plays a significant role at arm's length. Most other press councils are non-statutory and vary from the self regulatory, which are the norm, to the statutorily regulated¹⁶, which are the exception.

The PCI also differs from its counterparts in that it refers to itself as an independent regulator of the press as opposed to a self-regulatory body. Historically, press councils have been created as self-regulatory mechanisms.

¹⁵ Defamation Act, 2009, §44. Section 44 of the Act makes provision for a Ministerial Order to be made granting recognition to the Press Council of Ireland. This order is subject to the approval of both Houses of the Oireachtas (National Parliament). The relevant Minister must be satisfied that the Press Council is in compliance with the conditions set out in Schedule II. Failure to comply may result in revocation of the Order.

¹⁶ The issue as to whether press councils should be self-regulatory or regulated by statute has been ardently debated worldwide over the past number of decades. Press Councils set up by statute are not the norm in the print media industry. According to the Review of the New Zealand Press Council (Barker, Ian and Evans, Lewis, Review of the New Zealand Press Council (2007) available at www.presscouncil.org.nz/articles/press_council_review.pdf) only 14% of press councils are established by statute. Statutory press councils have been set up in the past in certain authoritarian regimes with the sole intent of controlling the press (Law Reform Commission of Hong Kong Report on Privacy and Media Intrusion, December 2004, p.156- <http://www.hkreform.gov.hk>) However, a number of press councils have been established by statute in an attempt to provide greater accountability to the public and protection from the power of the press. Examples of such councils include the press councils of Denmark, Belgium, India and Portugal. (ibid p.157)

Over the years, however, many press councils have included lay members, due to government pressure to increase their accountability to the public. This can be contrasted with the regulation of other professional bodies, such as the Law Society of Ireland, whose council is made up exclusively of solicitors, and is clearly therefore self-regulatory. A large number of press councils now have a majority of lay members and, in some cases, a lay chairman.¹⁷ Independent regulation, therefore, is perhaps a more accurate term to describe such councils and it certainly seems to be the way forward as more and more councils are opting for a lay majority membership in an effort to improve public accountability.

Although statutory recognition of a press council is far from ideal, it can offer a number of advantages to the print media industry. For example, the Defamation Act 2009 confers on the Press Council and Ombudsman¹⁸ certain protections including the defence of qualified privilege in relation to defamation law (Sch.1, Part 1). Additionally, in cases where member publications plead the defence of fair and reasonable publication on a matter of public interest, the court “shall” take into account the publication’s membership of and co-operation with the adjudication process of the Press Council/Ombudsman system as well as its adherence to the code of practice (s.26(e)). The Act does offer the same protection to non-Press Council members that adhere to an equivalent set of standards (s.26(f)) The offer of this security alone acts as a good incentive for responsible journalism and membership of the Press Council.

In order to determine the true extent of a press council’s independence, however, it is necessary to examine its relationship with the state under three important headings: 1) the composition of the press council; 2) the appointments process; and 3) the funding.

Composition

¹⁷ Examples of press councils which have a lay majority membership are the PCI (which also has a lay chairman), the PCC and the Australian Press Council.

¹⁸ The PCI operates under a dual system whereby complaints are firstly made to the Office of the Press Ombudsman and can be referred to the Press Council by the Press Ombudsman or appealed by a complainant. The role of Press Ombudsmen will be dealt with in section 2 of this chapter.

The 2009 CMS report has recommended an increase in lay members of the PCC to a two thirds majority.¹⁹ It also recommends the inclusion of lay members on the PCC's Editors' Code of Practice Committee, along with a lay person as chairman. It is important that the PCC is not seen to be overly influenced by the press, as is the public's perception, according to the report. This is a valid argument as the success of any press council is contingent upon its perceived independence from the print media. However, the danger of further decreasing the percentage of industry members is that the PCC could lose the support of the industry and thereby fail to be effective. Industry members are a vital element of an effective press council as they provide expert knowledge of the operation of the media in the adjudication process. Industry members are essential to the credibility of a press council in the eyes of the press itself, as their membership means that the decisions of the press council will be taken more seriously within the press industry.²⁰

Although support from the print media industry is a vital component to the success of a self regulated council, a press council should not be dominated by industry members.²¹ Lay members are also a crucial element of an effective press council as they lend credibility to the council in the eyes of the public. A council run entirely by industry members will not be seen by the public as putting the public first, as the decisions of such a council would be perceived as being biased. In 1969, the industry members of the Swedish Press Council lost their dominant position²² in an attempt by the Press Council to provide greater accountability to the public.²³ It is imperative that the public are shown to be

¹⁹ Supra fn 9, para. 542

²⁰ All of the press councils under this study include industry members.

²¹ The German press council is composed of industry members only. See generally, the website of the German Press Council, available at www.presserat.info.

²² See Weibull, Lennart and Borjesson, Britt, *The Swedish Media Accountability System: A Research Perspective*, (1992) 7(1) *European Journal of Communication*, 121-139

²³ In 1969, the Swedish Press Council was totally revamped after the introduction of a parliamentary bill which threatened statutory intervention of the media. The main changes included the introduction of an Office of the Press Ombudsman, the abolition of the complaints fee, and the restructuring of the Press Council's composition to include three lay members which would make up fifty per cent of the Council's members. Supra fn. 22

represented on the council so that they can trust that the complaints are being adjudicated upon objectively.²⁴

Another concern raised by the CMS Committee was that of the involvement of PCC members in the adjudication of complaints in which they had a direct interest. The report cited the grievances of Gerry McCann and Max Mosley who criticised the fact that the editors of certain newspapers “with which they had been in dispute”²⁵ were PCC members. The report does not specify whether these members were involved in the adjudication process. If so, this is certainly an issue which needs to be addressed in the interest of public accountability.

Members of the Australian Press Council must declare any interest in complaints which are to be adjudicated upon. Any member with a direct or indirect interest in the complaint cannot take part in the adjudication process, nor can they vote.²⁶

A similar such common sense approach should be adopted by the PCC and other press councils to ensure greater public support and accountability.

Appointments process

The appointment process of press council members is a decisive factor in determining whether a press council is in fact independent or whether there is scope for state interference.

The majority of self-regulatory press council members under this study are appointed by an Independent Appointments Committee and include the press councils of the UK, Australia, New Zealand, Sweden and the Netherlands. PCC members are appointed by an Appointments Commission which is entirely independent of the PCC. Lay member positions are publicly advertised and then selected by the Appointments Commission.

At the other end of the spectrum, certain statutory press councils contain safeguards within the legislation to ensure operational independence from

²⁴ With the exception of Germany, all of the press councils under this study include lay/public members.

²⁵ Supra fn. 9, para.540, report available at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomeds/362/36209.htm>

²⁶ <http://www.press.council.org.au/psite/about/members.html>

government. The appointments process of the Danish Press Council is set out in considerable detail in section 41 of the Media Liability Act.²⁷ Section 41 provides that the Press Council shall comprise of a chairman, vice chairman and six members. It states that the chairman and vice chairman must be members of the legal profession to be recommended by the President of the Danish Supreme Court, and the “editorial managements of the printed press and radio and television”²⁸ are to be represented by two members as recommended by the media. Two members should also be appointed as public representatives upon recommendation by the Danish Council for Adult Education.²⁹

Although the members are recommended by the individual bodies, who are themselves independent of government, the Minister for Justice actually appoints the members. In that regard, it cannot be said that the appointments process of the Danish Press Council is independent of government. If however, the Minister’s only role is to officially sanction the appointments, this may not affect independence.

Similarly in Ireland, according to Schedule 2 of the Defamation Act 2009, non industry affiliated press council members are to be appointed by an Independent Appointments Committee.³⁰ The independence of this process from government is however called into question in that Schedule 2 specifies that the appointment of public interest directors must be made by an independent panel as approved by the Minister and that the selection process is also subject to ministerial approval.³¹

It is vital that a self-regulatory press council is not only seen to be but is, in practice, free from any potential state interference. Industry support is fragile and is dependent on an independent and transparent self-regulatory system. State

²⁷ Consolidating Act 1998-02-09 no.85 The Media Liability Act. Information on this Act in English is available on the website of the Danish Press Council at: <http://pressenaevnet.dk/Information-in-English/The-Media-Liability-Act.aspx>.

²⁸ Supra fn.27. Part 7, s. 41.

²⁹ Ibid

³⁰ Irish Defamation Act, 2009, Schedule 2, s.6(1)

³¹ Supra fn.30. According to Schedule 2, s.6(1)(c)(i) and (ii), the appointment of the public interest members shall be made (i) by a panel of persons who are, in the opinion of the Minister, independent of...(the industry) and (ii) in accordance with a selection process that is advertised to members of the public in a manner that the Minister considers to be sufficient.

interference with a self-regulated council could potentially create a chilling effect on journalists and cause member publications to withdraw their support and funding from the self-regulatory system.

Funding and Influence

The financial support of a press council is highly indicative of its independence from industry and government. The majority of the press councils in this study, whether statutory or self-regulated, are financed fully by the print media industry.³² The press councils of Germany and Flanders are part-financed by the government.³³

Government funding and influence

The German Press Council is funded by the German government and by the print media industry. The government provide almost half of the press council's financial aid, which is intended specifically for the efficient running of the complaints handling process. In order to ensure the independence of the press council from government, the parties have agreed that government funding will not surpass 49% of the total financial support of the press council, thereby allowing the print media industry to provide the majority of the funding. The obvious danger of a press council receiving a substantial amount of government funding is that the funding will be used to exert influence or leverage over it.

Although the Irish Government does not provide the PCI with funding, the relevant Minister does have the power to dissolve the PCI if it fails to adhere to

³² The annual budget of industry only funded press councils in this study fluctuates quite considerably with the UK PCC in receipt of approximately €2,480,000 compared with the Danish Press Council, which receives approximately €260,000, and the Press Council of the Netherlands which receives only €144,000. Figures taken from report by Koene, Daphne, *Press Councils in Western Europe*, (2009), p.6, available at www.rvdj.nl/?katern=15

³³ The German Press Council's annual budget of approximately €570,000 is co-funded by government and industry. The Press Council of Flanders is also co-funded by government and industry and receives approximately €175,000 per annum. Figures taken from report by Koene report, *Supra*, fn. 32

the minimum requirements as set out in the 2009 Act³⁴ but only if a resolution to do so has been passed by each House of the Oireachtas, which is an important safeguard.³⁵

Industry funding and influence

The effectiveness of a self-regulatory press council is dependent on the extent of its membership and the financial support and co-operation of the print media industry. In the case of the UK PCC, the withdrawal of the Northern and Shell Group's subscription to PressBof and the PCC's subsequent retraction of membership of newspapers and magazines owned by the Group, which include the Daily Express, Daily Star, Star on Sunday and OK! Magazine³⁶, has served a considerable blow to the credibility of the PCC. The Group's rejection of the PCC system means that the public can no longer lodge complaints to the PCC against any newspaper or magazine owned by the Northern and Shell Group. More seriously, the withdrawal of financial support and consequent retraction of PCC membership has placed the future of UK self-regulation in jeopardy.

Despite the importance of financial support from the industry, it is also essential that the print media industry does not use its funding as a means of exerting power over *press* councils. This issue was raised in the 2007 Review of the New Zealand Press Council.³⁷ The constitution of the New Zealand Press Council (hereafter NZPC) states that the NZPC is to be funded by the Newspaper Publishers' Association (hereafter NPA),³⁸ the Engineering, Printing and Manufacturing Union (media division) (hereafter EMPU)³⁹ and other organisations.⁴⁰ The annual budget of the Press Council is subject to the

³⁴ Defamation Act 2009, s. 44(5) states: If the Minister is of the opinion that a body for the time being standing recognised by order under this section no longer complies with the provisions of Schedule 2, he or she may revoke that order.

³⁵ Defamation Act 2009, s. 44(7) states: Whenever an order is proposed to be made under this section a draft of the order shall be laid before each House of the Oireachtas and the order shall not be made unless a resolution approving of the draft has been passed by each such House.

³⁶ See <http://www.pcc.org.uk/news/index.html?article=Njg3NA==>

³⁷ Barker, Ian and Evans, Lewis, Review of the New Zealand Press Council, 2007, available at the website of the New Zealand Press Council, www.presscouncil.nz.org

³⁸ The NPA represent the Newspaper Publishers' Association. www.nabs.co.nz

³⁹ The EMPU is the Engineering, Printing and Manufacturing Union (media division) www.empu.org.nz

⁴⁰ Supra fn.37. p.75.

approval or the NPA and EMPU. Clause 14 of the constitution extends the power of the NPA and EMPU to amend the structure of the Press Council and also to dissolve it. Surveys conducted in the Review of the NZPC found that the public perception of the Press Council was that it was not independent of industry due to its funding from, and close affiliation with the NPA.⁴¹

The review recommends that Clause 14 of the constitution be modified to curtail the NPA and EMPU's power. It reasons that the Press Council will not be seen to be independent so long as its funders have such power over it.⁴²

Press councils need financial support from the industry in order to operate. Funding should be sufficient for a press council to work independently without having to cut corners or having to constantly worry about extra financial support in order to perform properly or effectively. The funding also needs to be guaranteed for a reasonable period and subject to a periodic review. This support, however, should not be subject to conditions and funders should not have any influence over the operation of the press council in question. It is important that press councils operate independently from industry in the interest of public accountability. It is also important that press councils are entirely independent of government. Ideally, press councils should not be funded by government. Such a connection with government would be in conflict with the print media's vital role as society's watchdog.

(ii) Role

Recent government reports, for example, the CMS and NZ reports, have recommended that the press councils reviewed should take on a more proactive role. The reports suggest increasing the role of the respective press councils from the traditional roles of complaints handling and promoting press freedom to a role of monitor of the print media industry.

⁴¹ Ibid at 76.

⁴² Ibid at 76.

The traditional role of press councils can essentially be categorised into two main objectives,⁴³ i.e. receiving and handling complaints from the public and safeguarding the freedom of the press.

Complaints handling mechanism

Traditionally, press councils have been set up and improved in response to government pressure on the print media industry to provide greater public accountability.⁴⁴ Press councils act as an alternative avenue of redress for complainants who wish to complain about a member publication without resorting to legal means. Providing the public with an accessible and effective complaints handling service should be the main priority of press councils.⁴⁵ The PCC was originally only set up as a complaints handling body and not as a regulator in the formal sense of the word. In his submission to the Leveson Inquiry, Lord Hunt, former chairman of the PCC, highlighted this fact and stated that due to the fact that the PCC had no powers of “enforcement, compliance or monitoring”⁴⁶, the PCC could not be classified as a regulator. The primary role of the PCC has been to act as a mediator between the public and the industry with no power to initiate complaints or power of investigation. The limited role of the

⁴³ According to the website of the Alliance of Independent Press Councils of Europe (AIPCE), press councils generally have two main functions: 1) “the administration of an agreed Code of Practice and the investigation of complaints from members of the public about editorial content in the media” and 2) “the defence of press freedom”. See the website of the AIPCE, What is a Press Council? available at: <http://www.aipce.net/whatIsAPressCouncil/>

⁴⁴Leonardi, Danilo. A., *Self-regulation and the print media: codes and analysis of codes in use by press councils in countries in the EU*, (Oxford University: Programme in Comparative Law and Policy, 2004) at 4, available at <http://pcmlp.socleg.ox.ac.uk/selfregulation//iapcoda/0405-press-report-dl.html> accessed 28/01/08

⁴⁵ See <http://www.po.se/english/how-self-regulation-works>

⁴⁶ Leveson Inquiry into the Culture, Practices and Ethics of the Press- Witness Statement- David James Fletcher, Lord Hunt of Wirral at para.7

PCC can be seen as the main reason for the PCC's poor response to the phone-hacking scandal in the UK.⁴⁷

An effective complaints handling service can however, provide greater accountability to the public. A dual system of press ombudsman and press council which was adopted by the Swedish Press Council in 1969 and by the PCI in 2007, provides the public with a more thorough and efficient complaints system whereby complaints, which are firstly dealt with by the press ombudsman, may be appealed to the press council. Historically, press councils which have failed to provide a complaints handling mechanism, have lost public support and have either introduced such a system⁴⁸ or have been replaced by another regulatory body.⁴⁹

Safeguarding freedom of the press

Press councils safeguard the freedom of the press in numerous ways; the most common examples include promoting public awareness and visibility, education of the public and education of the media itself.

Visibility

It is imperative that press councils promote public awareness. Press councils do so by providing information leaflets, advertisements and through their websites. Visibility is of vital importance to an effective press council. It is particularly important to promote public awareness when a press council is first established. The PCI, for example, which was established in 2008, is involved in an 'outreach programme' which has included an information stand at a national event which

⁴⁷ Frost, Chris, "Newspapers on the naughty step: An analysis of the ethical performance of UK publications", *Journal of the Association for Journalism Education*, Vol. 1, No. 1, April 2012 at p. 22

⁴⁸ The Swedish Press Council was established in 1916. In 1923, as a result of the threat of statutory regulation of the print media, the Press Council introduced a code of ethics. This code was envisaged as a set of guidelines which would set out journalistic standards for the print media to adhere to. Gradually, the Press Council began to deal with complaints from the public with regard to breaches of this code. See *Supra* fn.22, p.128.

⁴⁹ The British Press Council was replaced by the PCC in 1990- one of the reasons for the failure of the Press Council which was cited in the report of the Third Royal Commission of the Press in 1977 (See Third Royal Commission of the Press Final Report Cmnd 6810 para 20.60) was its failure to produce a written code of conduct based on its previous adjudications.

was attended by 50,000 people and a large number of speaking engagements by the Press Ombudsman at conferences both nationally and internationally. The Press Complaints Commission launched an advertisement campaign in 2010. In doing so, the PCC encouraged member newspapers and periodicals to publish its advertisements in both online and print editions. Such advertisement campaigns are an excellent means of promoting visibility but are expensive and, therefore, not feasible for press councils with very limited budgets.⁵⁰

Media education

Media education is also of vital importance. Media education should include education of the public and education of the media itself. Children should be targeted to ensure that future generations are aware of how the media operate and the importance of press freedom and non- government control of the print media from an early age. Media education for children and young people is of particular importance in light of the increasing number of complaints made to press councils which refer to information taken or obtained from social networking sites being published in newspapers and periodicals. Press councils have a role to play here in educating children and young people about the potential danger of posting personal information and photographs on such sites. Press councils also need to set out standards for journalists to follow with regard to accessing and using information on the internet. Guidelines need to be set out, for example, on the procuring of information from social networking sites.

Media education has been repeatedly called for by the Council of Europe. A recommendation of the Council of Europe on professional education and training of journalists (Rec 1789 (2007)) recommends that journalists should be professionally trained and educated with the aim of improving journalistic standards and achieving a more socially accountable press.⁵¹ It suggests that

⁵⁰ The annual budget of the PCC is approximately GBP 1,900,000 and is financed completely by the print media industry. The PCC's budget is considerably larger than its European counterparts. For example the annual budget of the Swedish Press Council is approximately €575,000 and the annual budget of the Netherlands' Press Council is approximately €144,000. See report by Koene, Daphne, *Press Councils in Western Europe*, (2009) available at www.rvdj.nl/?katern=15

⁵¹ Recommendation 1789 (2007) Professional education and training of journalists at para. 11.1.

media companies invest in such training and education as a means of providing the public with a greater quality of content “...in an increasingly competitive media environment.”⁵² This is a very common sense approach to providing the public with a well informed and ethically sound print media industry. However, the introduction of such initiatives may not be financially viable for smaller media companies.

Possible future objectives

Often press councils tend to respond to complaints only, to be reactive rather than proactive. The CMS report recommended a more proactive PCC, citing the McCann and Bridgend cases as examples of where the PCC should have taken action and not just waited for a complaint to be made.⁵³ In the PCC’s response to this criticism, it states that it regularly contacts potential complainants and seeks to make sure that those at the centre of news stories are aware of their services. It also cites the breakdown of its predecessor, the British Press Council, which was “fatally undermined by its willingness to comment on issues without information from those concerned.”⁵⁴ The British Press Council, which was in operation from 1953-1990, was heavily criticised for prioritising the promotion of freedom of the press over its role as a forum for receiving and dealing with complaints from the public. The PCC, which replaced the Press Council, was intended to operate exclusively as a complaints handling body. This role has been expanded over the years to include the promotion of press freedom through the endorsement of public awareness, media education and such like.

The CMS report, by recommending that the PCC take on a more proactive role, is essentially advocating a type of supervisory role for the print media whereby the PCC will have the power to initiate complaints or intervene in the absence of, or in advance of, complaints.

There are a number of reasons why a press council should not be involved in monitoring/policing the print media: 1) It is in conflict with freedom of the

⁵² *ibid* at para.8.

⁵³ *Supra* fn. 9 at para.552.

⁵⁴ See the PCC’s submission to the CMS report available at <http://www.pcc.org.uk/news/index.html?article=NjMyNA==>

press; 2) press councils may lose the support of the industry and thereby fail to operate effectively; and 3) the addition of such a role is simply not feasible with regard to the vast amount of publications both printed and online and the limited financial support of press councils.⁵⁵ It is imperative that press councils concentrate on fulfilling their primary public role as a complaints handling mechanism and alternative route of redress to the courts. After the primary role is operating effectively, a press council is then ready to promote freedom of the press. The focus, it is submitted, should be on updating, adapting and improving the existing roles of press councils and not on adding unnecessary and impractical duties.

(iii) Standards

Codes of ethics have been employed in the print media industry as instruments of self-regulation since the early twentieth century. Codes have been established, for example, by professional journalists' associations⁵⁶, individual newspapers and press councils. Codes of ethics promote professional standards in journalism and set out ethical guidelines for editors and journalists to follow. The public can refer to such codes when deciding whether or not to make a complaint about a publication.⁵⁷ In this way, codes seek to protect the rights of the individual without resorting to unnecessary restrictions on freedom of expression.

The vast majority of press councils operate on the basis of a code of practice⁵⁸ which sets out general principles of good journalistic standards. Codes are of fundamental importance to press councils as complaints are made by the public based on the principles set out in such codes. A breach of the principles could result in a number of sanctions ranging from an embarrassing apology to an obligation to print a full publication of the press council's adjudication by the offending newspaper in question (sanctions are examined below). The media

⁵⁵ *ibid*

⁵⁶ For example, the National Union of Journalists in the UK first established a code of practice in 1936. See <http://www.nuj.org.uk/InnerPagenuj.html?docid=2226>

⁵⁷ See statement by Lord Wakeman 'Can self-regulation achieve more than law? 15 May 1998- available at www.pcc.org.uk

⁵⁸ Also known as code of ethics (Swedish press council), Statement of principles (Australian press council), Guidelines (Netherlands press council)

industry has traditionally established codes of practice to improve journalistic standards in an attempt to ward off statutory regulation and improve its accountability to the public.

The print media is liable for its actions and publications under the ordinary laws of each jurisdiction. As such, it is subject to the same legal constraints as all citizens.⁵⁹ Journalists must adhere particularly to “proscriptive legal rules”⁶⁰ in their everyday work, such as those contained in tort and criminal law which include laws on contempt of court, defamation, trespass, professional secrecy and discrimination.⁶¹ Many of these ‘proscriptive legal rules’ which are directly related to the media, are included in press council codes but do not have the same “binding effect” as the law.⁶²

As well as incorporating ‘proscriptive legal rules’, codes of practice of press councils promote the ethical conduct of journalists, such as respect for personal space in times of grief or shock and protection of the vulnerable. Such codes also endorse fairness and honesty in reporting as well as discouraging professional offences in reporting such as malicious misrepresentations, or unfounded accusations.⁶³ The inclusion of a ‘conscience clause’ in the PCC code of conduct, which has been recommended on several occasions by the National Union of Journalists (NUJ), could help to further discourage such professional offences in reporting and help to raise standards in journalism. A ‘conscience clause’ offers support and protection to journalists who refuse an assignment which may be in breach of the code of practice.

No two codes of practice examined in this study provide the same set of principles as each press council code must take into account the cultural differences and norms and values of the society in which they operate. However,

⁵⁹ The Editor’s Codebook of the Code of Practice Committee- available at www.pcc.co.uk, p.10

⁶⁰ European Commission for Democracy in the Handling of Complaints report by Herdis Thorgeirsdattir (Substitute Member, Iceland) Strasbourg, 7 April 2008; Study no. 415/2008 p.2

⁶¹ *ibid*

⁶² *ibid*, p.6

⁶³ International Federation of Journalists- Declaration of Principles on the Conduct of Journalists- Adopted by the 1954 World Congress of the IFJ, amended by the 1986 World Congress available at www.ifj.org

fundamentally, the codes examined set out common ethical journalistic standards. All of the codes endorse accuracy in reporting and the protection of human rights such as freedom of expression, the right to privacy, the right not to be discriminated against and the right to a fair trial. Other common principles deal with harassment, intrusion into grief and shock, the protection of the vulnerable, protection of sources and fairness and honesty in reporting.

An example of the importance of codes of practice to the effectiveness of press councils can be seen through an examination of the establishment of the Press Council of Sweden.

The oldest press council, the Press Council of Sweden, began its work without the guidance of a code of practice. The Swedish Press Council was originally known as a n Honorary Court of Justice and was set up to protect “the requirements of honour and standing of the press.”⁶⁴ In 1923, as a result of public dissatisfaction with the print media and the subsequent call for statutory regulation⁶⁵, the Press Council introduced a Code of Ethics as a means of increasing its accountability to the public with the hope of avoiding statutory regulation. The Code of Ethics was envisaged as a set of guidelines which would provide a list of good journalistic standards for the print media to comply with. Gradually, the Press Council began to deal with complaints from the public regarding breaches of its code of ethics.

One of the primary reasons for the failure of the British Press Council (1956-1991) was its failure to provide a code of standards despite repeated calls for such a code from the Royal Commission on the Press. The absence of a code of standards meant that the public and press council members were unclear as to what constituted good journalistic standards and were therefore unsure when there had been a breach of those standards.

Flexibility of codes

Whether set out in statute or articles of association of self-regulatory press councils, it is important that code principles are flexible. Codes of practice offer

⁶⁴ Weibull, Lennert, Britt, Borjesson, “The Swedish Media Accountability System: A Research Perspective” *European Journal of Communication*, Volume 7, 1992, at 129

⁶⁵ *ibid*

principles to follow and as such should not be rigidly defined. Code principles need a certain degree of generality so that they can be adapted to each individual case. It is also vital that such codes are adaptable to technological developments and major issues of public concern which may arise. The Code of Practice of the PCC, for example, has been amended thirteen times since it was first drafted in 1991 in response to such issues.⁶⁶ It is important that press council codes of practice take into account cultural differences and the norms and values of the society in which they operate. It is important also that they are periodically reviewed and adapted to take account of changes in those norms and values. However, fundamentally, the majority of press council codes set out common ethical journalistic standards such as accuracy in reporting and the protection of human rights, i.e. freedom of expression, the right to privacy, the right not to be discriminated against and the right to a fair trial (see above). The CMS report recommended that the PCC code incorporate matters of taste and decency. This recommendation was rebutted by the PCC in its response to the report which stated that “It would be unacceptable for the Commission unduly to restrict freedom of expression by imposing its opinions on the overall suitability of material.”⁶⁷ The *raison d’être* of a press council is to protect the freedom of the press. To uphold standards relating to taste and decency would be in conflict with this freedom, not least because it is a very subjective consideration.

This issue arose in Ireland when the Legal Advisory Group on Defamation, which was set up by the Government in 2002, recommended the introduction of a statutory press council. It also proposed that certain principles of the proposed Press Council’s code should include matters concerning taste and decency.⁶⁸ It is not for a press council or government to dictate standards of the press in terms of taste and decency. Definitions of taste and decency are ever changing as society’s norms and values change. People’s views on what is offensive to taste and decency are interpreted differently depending on the sensibilities of the

⁶⁶ For example, after the death of Princess Diana, the public called for the principles on privacy and harassment to be reviewed and strengthened.

⁶⁷ PCC’s response to the report of the CMS committee on Press standards, privacy and libel, p.3 available at <http://publications.parliament.uk/pa/cm200910/cmselect/cmcmums/532/53202.htm>

⁶⁸ Report of the Irish Legal Advisory Group on Defamation, 2003, at para.28. Available at www.justice.ie

individual.⁶⁹ It is extremely difficult to define and therefore to regulate issues of taste and decency. The danger of trying to regulate such nebulous concepts is that it could create a chilling effect in journalism, i.e. legal regulation of the print media may cause journalists and editors to refrain from publishing certain information which may be in breach of such regulations. If the journalist has no clear guidelines on what is meant by taste and decency, how can they know whether or not they are in breach of such standards.

Extended remit

The majority of press councils have extended their remit, both officially⁷⁰ and unofficially, to include online versions of member publications. It is clear that editorial responsibility extends to online versions of publications but does this responsibility also extend to reader generated comments which are posted on member sites?

The subject of editorial responsibility of the print media online was discussed at length at the annual meeting of the AIPCE in Amsterdam in November 2010. Questions included: Should editorial responsibility extend to all online material that is available under the brand of a member newspaper? Should editors take responsibility for all material that appears on their websites even if it is user generated?

These questions were addressed in the Scottish case of *Robertson v Sunday Herald*⁷¹. This case involved allegedly libellous user generated comments being posted on an online edition of the Sunday Herald newspaper by anonymous contributors. Lord Robertson, British Labour party politician and former secretary general of NATO, issued legal proceedings against the *Sunday Herald* following the defamatory comments posted on its site. The Herald apologised and removed the offending comments from its website as soon as the complaint

⁶⁹ See Miklos Haraszti, *The Media Self Regulation Guidebook*, OSCE, Vienna 2008, p.25, (See generally chapter two; ‘Setting up a journalistic code of ethics, the core of media self-regulation.’)

⁷⁰ See PCC, Swedish PC and Catalan PC codes of practice. The PCC code was amended to extend its ambit to online publications. The preamble of the code now states: “It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications.”

⁷¹ *Robertson v Newquest (Sunday Herald) Ltd & Ors* [2006] Scot CS CSOH_97

was received. The *Herald* also decided to settle the matter out of court for £25,000. The case, therefore, has not shed much light on the legal implications and responsibilities of newspapers for publishing libellous user generated material.⁷²

The issue was made a little clearer in the UK case of *Kaschke v Gray Hilton*⁷³ where the High Court ruled that the defendant, Mr Hilton, who was the owner and operator of a website called Labourhome.org, was not entitled to immunity from liability as provided under Regulation 19⁷⁴ of the E-commerce Directive for material which was posted on his website by another party. It appears from this case that owners of online sites are responsible for user generated material on their sites if their involvement in the site goes beyond that of a mere storage provider, i.e. if they have or have had any editorial control over the information displayed on their websites.⁷⁵ In accordance with this judgment, online publications can be held responsible for any user-generated comments appearing on their websites. As such, it is important that online publications make a clear distinction between their own content and user generated contributions in order to avoid any confusion.⁷⁶ Online publications or online versions of publications

⁷² Thurman Neil, Forums for citizen journalists? *Adoption of user generated content initiatives by online news media; New Media and Society*, 10(1), Sage Publications 2008, p.22 available at <http://dx.doi.org/10.1177/1461444807085325>- accessed 29/11/2010

⁷³ *Kaschke v Gray Hilton* [2010]EWHC 690 (QB)

⁷⁴ Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002, which provides for the hosting of user generated material on sites stipulates that: “where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where- (a) The service provider (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information, and (b) the recipient of the service was not acting under the authority or the control of the service provider”.

⁷⁵ *ibid*

⁷⁶ Such a distinction is advocated in the newly revised code of practice of the Flemish Press Council, under the guidelines annexed to the code under Article 14. AIPCE, Annual Country Report (Flemish Press Council), 12th Annual Meeting 4th and 5th November 2010, p.20. Flanders Press Council Code of Practice available at: http://www.rvdj.be/sites/default/files/pdf/code_of_practice.pdf

must be proactive and take precautionary measures to prevent complaints or possible legal proceedings.

To prevent such actions, a practice which has been adopted by a number of online newspapers, is the moderation or filtering of user generated comments. This is essentially a type of screening process for information which is posted on the websites of member newspapers. This system can be divided into three separate categories with differing degrees of editorial control: 1) pre-moderated screening; 2) post moderated screening; and 3) reactively moderated screening.⁷⁷ Pre-moderated screening is the most rigorous of the three categories. It means that user generated comments are editorially screened before they are posted on the site. Post moderated material is material that has been screened after it has been automatically posted onto the site. Reactive moderation is where user-generated comments are taken down subject to complaints. This screening process has been implemented into broadcasting standards by a number of broadcasters including the BBC whose guidelines set out three different types of screening methods used to deal with user generated material appearing on their websites.⁷⁸

It is essential that press councils adapt to such online issues and cater for them in their codes of practice in order to remain relevant and effective. A minority of press councils have already incorporated guidelines concerning the handling of user-generated comments by the press into their codes. For example, the Flemish

⁷⁷ See for example the BBC Editorial Guidelines. Section 17: Interacting with our audiences, Phone-in Programmes, User Generated Content Online, Mobile Content, Games and Interactive TV, sets out methods used by the BBC to moderate user generated material.(s.17.4.41) RTE's guidelines came under scrutiny in 2012 following the use of a tweet during the final televised debate in the Presidential election. The tweet in question was from a Twitter account which was "erroneously described by the programme presenter as that of the official Martin McGuinness for President Campaign" and showed a lack of impartiality, fairness and objectivity towards the presidential candidate, Sean Gallagher on the part of the presenter of the RTE programme (see http://www.rte.ie/news/2012/0307/bai_gallagher_ruling.pdf.) As a result of the serious mistakes made by RTE in relation to such programmes as the Frontline Presidential Debate programme, RTE is in the process of reviewing its guidelines on current affairs and new journalism as well as its editorial standards and training of staff (see <http://www.rte.ie/about/docs/key%20Actions%20and%20Changes%20RTE%20Current%20Affairs%20April%203%202012.pdf>) An interim edition of RTE's Journalism Guidelines are available at <http://cdn.thejournal.ie/media/2012/04/RTE-Journalism-Guidelines-April-3-2012.pdf>. See Chapter 4 for further details.

⁷⁸ *ibid*

Press Council's code of practice was updated to include journalistic guidelines on user generated material in 2010. Article 14 of the code of practice states that "[...] Editors must moderate their web forums with complete independence and are responsible for said moderation."⁷⁹ Article 14 is supplemented by a comprehensive set of principles which are appended to the code and include a recommendation that digital discussion forums be responsibly monitored through either pre-monitoring, reactive monitoring or post-monitoring methods.

Press Councils should adopt similar guidelines as a means of promoting higher journalistic standards in the area and guaranteeing a greater level of editorial control over user-generated comments.

Another key concern which has arisen from the inclusion of online publications within the remit of press councils, is the protection of individual privacy in the digital environment. Technological advancements in this area have highlighted the need for the remit of press councils to be extended to include provisions in their codes of practice on the gathering of personal information which is posted on the internet, particularly on social networking sites. Clause 10 of the PCC Code of Practice has been amended to prohibit the "unauthorized removal of documents or photographs; or [the] accessing [of] digitally held private information without consent." The type of information gathered, the content and portrayal of the content are among the matters that should be taken into account. The Danish Press Council, in its annual report to the AIPCE, has specified that when dealing with complaints relating to the acquiring of information from social networking sites, a distinction will be made between public and private profiles, with greater protection being offered to those profiles with higher privacy settings.⁸⁰ There has been an exponential growth in users of social networking sites; in particular facebook which has recently recorded its 500 millionth user. Research has found that 78 per cent of people surveyed would be more likely to trust websites governed by a code of practice as opposed to

⁷⁹ Flanders Press Council Code of Practice available at: http://www.rvdj.be/sites/default/files/pdf/code_of_practice.pdf

⁸⁰ AIPCE, Annual Country Report (Danish Press Council), 12th Annual Meeting 4th and 5th November 2010, p.40

ungoverned sites.⁸¹ There is also a need for education of journalists and children regarding the use of social networking sites, including the implications of publishing information online and how to use privacy settings.

In order to adapt to such issues of convergence, it is imperative that press council codes are organic. Guidelines on online issues such as these will develop as press councils receive more cases. At present, press councils are dealing with complaints on a case by case basis and are setting their own standards for future cases relating to online issues.

(iv) Resolution of complaints and press council remedies

The lack of power of press councils to impose punitive sanctions on member publications has been hotly debated since the establishment of the first press council in the early twentieth century. Statutory intervention has historically been threatened due to the lack of so called “teeth” or effective sanctions.⁸² The 2009 report by the CMS committee recommended the introduction of fines for member publications of the PCC found to be in breach of the Code of Practice. More worryingly, the Select Committee also recommends that in the event of “most serious cases” the PCC should have the power to order the suspension of printing of the offending publication for one issue, stating that:

this would not only represent a major financial penalty, but would be a visible demonstration of the severity of the transgression.⁸³

It is not acceptable for a non-legal, self-regulatory body, such as a press council, which is not a court, to impose what are in essence criminal sanctions. A free press is an essential part of every democratic society. Punitive sanctions such as

⁸¹ Presentation delivered by David Racadio, Research Director The Reputation Centre, Ipsos MORI at ‘*Social networking, privacy and the press- Protecting individual privacy in the digital age*’, 5th June, 2008, London (Westminster Media Forum Keynote Seminar, London)

⁸² The subject of PCC sanctions will be considered again by the CMS Committee in its new inquiry into media ethics, which has just begun its initial investigations. It is important to note that the print media is accountable for its actions under the ordinary laws of each jurisdiction. Issues such as phone hacking fall under the remit of statutory acts such as the Computer Misuse Act and Regulation of Investigatory Powers Act: (<http://www.pcc.org.uk/news/index.html?article=NzlyOQ==>)

⁸³ *ibid*

those proposed by the CMS Committee may create a chilling effect on journalists and editors which would seriously compromise freedom of expression. The Hungarian government, which took over the presidency of the EU in January of this year, was heavily criticised for failing to adhere to European and International standards of freedom of expression in its controversial new media law.⁸⁴ The new media legislation, as it stands at the time of writing, regulates all forms of media in Hungary under the same principles, which is in direct conflict with OSCE (Organization of Security and Co-operation in Europe) standards on media freedom.⁸⁵ Under the new Hungarian media law, two bodies have been set up to oversee media regulation, the National Media and Telecommunications Authority and the Media Council.⁸⁶ These bodies are made up of members nominated exclusively by the Hungarian Parliament and have the power to levy large fines on all media, including the print media, who offend against standards of taste and decency and unbalanced publications and reporting. The bodies will also have the power to force journalists to reveal their sources if it is deemed to be in the public interest.⁸⁷

In order to ensure that the print media fulfil its vital role as society's watch-dog and scrutinizers of government, mechanisms for achieving media accountability of the press must not unduly restrict freedom of the press. However, it is important that sanctions implemented are effective enough to deter future breaches of standards (see below).

Sanctions

⁸⁴ For example, OSCE '*OSCE media freedom representative calls on Hungarian Government to halt media legislation package, start public consultations*' - Press Release, June,24, 2010 available at <http://www.osce.org/fom/69491>

⁸⁵ OSCE, '*Hungarian media law further endangers media freedom*', says OSCE media freedom representative, Press Release, Vienna, July, 29,2010 available at <http://www.osce.org/fom/74687>

⁸⁶ *ibid*

⁸⁷ McLaughlin, Daniel, 'Much criticised Hungary set to begin EU presidency', The Irish Times, Dec 31, 2010 available at <http://www.irishtimes.com/newspapers/wold/2010/1231/1224286544365.html>

The main sanction imposed by self-regulatory/independent press councils is that member publications which are found to be in breach of the respective code of practice are obligated to print the press council's decision.⁸⁸

The effectiveness of this sanction depends on full co-operation from the print media and essentially operates on the basis of peer pressure. Other remedies include the publication of a retraction, apology or clarification by the offending publication. These remedies are utilised as a conciliatory measure by member publications in order to avoid formal adjudication by the press ombudsman or press council. Another sanction which has been adopted by press councils in light of media convergence is the removal of articles from online editions of member publications. One of the biggest problems with this sanction is that, if an apology or clarification has been made, for instance, then there will be no online record of this. It also deprives future researchers, historians, academics and such of the future of a source. A better alternative would be to leave the article on-line with a clearly visible apology or clarification attached. Press councils need to develop a comprehensive set of guidelines on the "unpublishing"⁸⁹ of online articles due to confusion on the part of complainants who are unsure of their position under data protection laws and because of the potential for abuse with regard to the deleting of online articles by publications in an attempt to avoid press council regulation.⁹⁰

Statutory press councils impose sanctions on a legal basis and, therefore have much more serious implications for the freedom of the press than the ethical sanctions of self-regulatory or independent press councils. For example, Section 53 of the Danish Media Liability Act provides for the imposition of fines or imprisonment for up to four months if the terms of the Act are violated.⁹¹ The Swedish Press Council is unusual in that it is the only self-regulatory press

⁸⁸ All of the self-regulatory/independent press councils considered in this study request member publications found to be in breach of the code to print their decisions.

⁸⁹ *Supra* fn. 80, (Press Council of Estonia, p.45)

⁹⁰ *ibid*

⁹¹ Information in English on the Danish Media Council is available at: <http://www.pressnaevnet.dk/Information-in-English/The-Media-Liability-Act.aspx>. For more information on the Danish Media Council see: Law Reform Commission of Hong Kong, Report on Privacy and Media Intrusion, December 2004, p.156. This report can be found at <http://www.hkreform.gov.hk>

council that imposes a small monetary fine on newspapers which are found to be in breach of its code. This fine is intended more as an administrative fee to co-finance the work of the press council rather than a deterrent to breaching the code.⁹² However, it is not ideal in principle to tie in even a slap on the wrist type of sanction with funding.

The issue of sanctions has also been raised in light of the PCI and the power conferred on it by the Defamation Act 2009. Section 44 of the Defamation Act sets out “the procedures for investigating, hearing and determining a complaint to the Press Ombudsman.”⁹³ This includes provision of remedial action by the offending member publication found to be in breach of the Code of Practice. This remedial action may consist of a number of remedies as set out under section 44, including the publication of the Press Ombudsman’s decision in the offending publication⁹⁴, the publication of a correction in due prominence⁹⁵, the publication of a retraction⁹⁶ or “such other action as the Ombudsman may, in the circumstances deem appropriate.”⁹⁷

This quite vague final section gives discretion to the Press Ombudsman to impose other sanctions he/she may consider appropriate based on the facts of an individual case. It will be interesting to see what other sanctions, if any, may be imposed in future cases. For example, does this give the Press Ombudsman the power to impose punitive sanctions in instances of a serious breach of the Code of Practice similar to the recommendation of the CMS Committee in its report? One argument against the introduction of fines in the PCC is that it would require statutory backing. The PCI is independent in practice but statutorily recognised so it would, theoretically, be in a better position to implement fines than the PCC if the Act specified punitive sanctions.

The recommendation of the CMS report to empower the PCC to fine publications which are found to be in serious breach of the code and, more worryingly, to suspend printing of a publication which has been found to be in

⁹² Ibid at p.176.

⁹³ Defamation Act 2009, s.44(9)(1)

⁹⁴ Defamation Act 2009, s.44(9)(1)(c)(i)

⁹⁵ Defamation Act 2009, s.44(9)(1)(c)(ii)

⁹⁶ Defamation Act 2009, s.44(9)(1)(c)(iii)

⁹⁷ ibid

breach of the Code for one issue, can only be seen as a serious breach of press freedom. In the PCC's submission to the inquiry, it stated that "[t]he PCC remains opposed to a system of fines for breaches of the press Code. The Commission already provides a range of meaningful remedies for intrusions into privacy and in any case, the public does not seem particularly supportive of fines as a remedy."⁹⁸ The 2007 Independent Review of the NZPC recommended against the introduction of any power to impose monetary sanctions, but it did recommend a new power to censor in serious cases.⁹⁹ The 2009 New Zealand Law Reform Commission (LRC) review agrees with this.¹⁰⁰

If punitive sanctions are implemented in press councils, the advantages of self-regulation, most notably the support and co-operation of the print media, would be called into question and the effectiveness of press councils could fall into disarray thereby placing freedom of the press in jeopardy.

CONCLUSIONS

Section One

A system of self or independent regulation has been largely acknowledged at least up until now as the most appropriate form of regulation of the print media. A number of submissions to the Leveson inquiry, however, which have made recommendations as to the regulatory structure of a new body to take over from the PCC, have recommended a co-regulatory system for the press. For example, Lord Hunt of Wirral, former Chairperson of the PCC, in his submission to the inquiry, recommended the strengthening of the self-regulatory system through "proper legal underpinning" and "compliance procedures" in the event of serious breaches of the Editor's Code of Practice.¹⁰¹

⁹⁸ PCC's response to the 2009 CMS report available at: www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news/press-standards-privacy-and-libel-responses/

⁹⁹ Supra fn 37, p.69

¹⁰⁰ NZLC R113 Invasion of Privacy: Penalties & Remedies: Review of the Law of Privacy: Stage 3, 2010, 6.13

¹⁰¹ Leveson Inquiry into the Culture, Practices and Ethics of the Press, Witness Statement-David James Fletcher, Lord Hunt of Wirral, at p. 18

In another submission to the Leveson Inquiry, Ofcom recommended a strengthened system of self-regulation of the press, which could possibly be statutorily recognized in an effort to provide incentives for membership, similar to the PCI system in Ireland.¹⁰² As examined in this chapter, statutory recognition of press councils can offer a number of advantages to the print media industry and therefore incentives for membership. The Defamation Act 2009 confers on the Press Council and Ombudsman certain protections including the defence of qualified privilege in relation to defamation law (Sch.1, Part 1). Additionally, in cases where member publications plead the defence of fair and reasonable publication on a matter of public interest, the court “shall” take into account the publication’s membership of and co-operation with the adjudication process of the Press Council/Ombudsman system as well as its adherence to the code of practice (s.26(e)). The Act does offer the same protection to non-Press Council members that adhere to an equivalent set of standards (s.26(f)) The offer of this security alone acts as a good incentive for responsible journalism and membership of the Press Council.

As highlighted in this thesis, any direct form of statutory regulation of the print media is not ideal as it risks government interference or control of the sector. Legislation once in place can be amended to provide for greater statutory controls to the detriment of press freedom. However, as recommended in Ofcom’s submission, this risk could be reduced somewhat: “by ensuring that there is no provision in primary legislation to enact secondary legislation.”¹⁰³ It is recommended therefore that such safeguards are put in place in instances where press councils are recognized in statute. It is also recommended, however, that the introduction of any sort of statutory recognition of press councils should be a matter of last resort only after all other options have been exhausted. The focus should be on strengthening self or independent regulatory systems through, for example, the introduction of a press ombudsman to work in conjunction with a press council as in the Swedish and Irish models which can improve

¹⁰² See Ofcom Submission to the Leveson Inquiry on the future of press regulation. A response to Lord Justice Leveson’s request. Available at <http://media.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf> at p.16

¹⁰³ *ibid*

accountability to the public through providing a more visible and transparent complaints system. The dual system and appeals process may also promote greater public confidence that complaints are being handled thoroughly and objectively.

As can be seen from this examination of press councils, a self/independently regulated press council is a fragile institution whose effectiveness is dependent on full co-operation from the industry and the support of the public. At the time of writing, the self-regulatory system in the UK, the PCC, has been shut down. The 2011 phone hacking scandal called into question the credibility and thereby the effectiveness of the UK self-regulatory system. The new government inquiry into media ethics in the UK was welcomed by the PCC which accepted the need for serious reform of the current self-regulatory system.¹⁰⁴ However, calls for the introduction of draconian measures such as punitive fines and suspensions are not the answer.

A central theme which can be seen throughout this study is the evolution of press councils. Press councils need to keep up with the exponential growth of media communications technology in order to fulfill their duties as effective and relevant complaints handling mechanisms and safeguarders of press freedom. As such, it is imperative that press councils remain as flexible as possible and that their codes of practice are as organic as possible. This examination has included a study of the four crucial elements of press councils, i.e., independence, role, standards and remedies. Since the first press council was set up in Sweden in 1916, these elements have been altered and updated quite dramatically in some instances but always with the view to providing greater accountability to the public. The most important development has perhaps been the inclusion of lay members in press councils. The number of lay members has increased so much that now many press councils have a lay majority membership with a lay chairperson. It is important that a press council is not only operationally independent but that it is perceived by the public to be independent.

¹⁰⁴ See <http://www.pcc.org.uk/news/index.html?article=Nz10Mg==> The PCC has launched its own review of its constitution, funding, sanctions and independence.

It is imperative that press councils focus on fulfilling their primary roles as mechanisms for achieving public accountability and promoters of press freedom. Government reports, such as the CMS report and Leveson Inquiry, should focus on recommendations on updating and improving the existing role of press councils in light of media convergence, as discussed above, instead of making unworkable and tentative recommendations which will only serve to inhibit freedom of the press.¹⁰⁵

As will be discussed in Chapter 5, justifications for sector specific regulation of the media are becoming increasingly outmoded in light of major technological developments in communications media. Convergence of the media has also meant that the media cannot be easily categorized into specific media types as the boundaries between the different types of media are becoming increasingly blurred.

As such, convergence of media regulation policy, as recommended in recent inquiries into media regulation in Australia¹⁰⁶, which were set up in response to the Leveson Inquiry in the UK, may be premature. One of the Australian reports entitled the *Report of the Independent Inquiry into the Media and Media Regulation* which was written by Finkelstein QC, recommended the introduction of a statutory single regulatory body called the ‘News Media Council’ to enforce standards of the news media across all media sectors in Australia.¹⁰⁷ The report recommended that this body be entirely government funded. The proposed

¹⁰⁵ As observed by Tessa Jowell, former Secretary of State for Culture who was also a victim of phone hacking and participant in the Leveson Inquiry (Jowell, Tessa, Redress For All- Not Only the Rich and Powerful, *British Journalism Review*, Vol. 22, No. 4, December 2011:

“[T]here is a risk that Leveson will end up solving yesterday’s problems without addressing the pace of change of the media.” at p.33

¹⁰⁶ *Report of the Independent Inquiry into the Media and Media Regulation* by the Hon R. Finkelstein QC, Assisted by Professor M. Ricketson, Report to the Minister for Broadband, Communications and Digital Economy, 28 February, 2012 Available at http://www.dbcde.gov.au/digital_economy/independent_media_inquiry and *Convergence Review: Final Report*, March 2012 (Department of Broadband, Communications and Digital Economy, Australia) available at http://www.dbcde.gov.au/data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf

¹⁰⁷ *Report of the Independent Inquiry into the Media and Media Regulation* by the Hon R. Finkelstein QC, Assisted by Professor M. Ricketson, Report to the Minister for Broadband, Communications and Digital Economy, 28 February, 2012 at p. 290 Available at http://www.dbcde.gov.au/digital_economy/independent_media_inquiry

‘News Media Council’ was heavily criticised by the Australian media as well as by leading media law academics and critics as a severe infringement on freedom of expression of the media. Another recent report established by the Australian Government on convergence of the media, which was published a month later, recommends the introduction of a non-statutory ‘independent news standards body’ which would operate across all media platforms. The new body would be independent of government but providers of news and commentary would be required by statute to become members.¹⁰⁸ As such, the proposed news standards body would be classified for the purposes of this thesis as a co-regulatory body (see Chapter 5). Furthermore, the Review stated that if the new body proved to be ineffective, the government would have the option of introducing “direct statutory measures.”¹⁰⁹ A similar co-regulatory body has been recommended in a preliminary proposal by the New Zealand Law Reform Commission to regulate the news media across all media sectors in New Zealand.¹¹⁰ These recommendations advocate the inclusion of the state as a regulatory actor in the regulation of the important “news function” of the print media and internet in countries in which print media and internet have traditionally been self regulated. As such, these recommendations can be seen as advocating de-regulation of the broadcast media (which is governed by statute) while at the same time advocating stricter regulation of the print media. It is submitted that imposing stricter regulation of the print media and news media on the internet, for the sake of providing sector-neutral regulation of the media, is inappropriate and poorly thought out.

In its submission to the Leveson Inquiry, Ofcom described the possible establishment of a “single cross media regulator” as “undesirable”, but highlighted the importance of different media regulatory bodies working together “to ensure that there are common and consistent principles applied across digital

¹⁰⁸ Convergence Review: Final Report, March 2012 (Department of Broadband, Communications and Digital Economy, Australia) available at http://www.dbcde.gov.au/_data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf at p.51

¹⁰⁹ *ibid*

¹¹⁰ The News Media meets ‘New Media’ Rights and Responsibilities in the Digital Age, December 2011, Wellington, New Zealand, Issues Paper 27. Available at <http://www.lawcom.govt.nz/sites/default/files/publications/2011/12/ip27-all-web-v2.pdf> at p.9

media.”¹¹¹ For example, it is submitted that press councils could provide for “opt in” membership of authors of “press like” material that can be accessed online, such as information posted online by citizen journalists and bloggers. The main incentive for joining the press council and adhering to its standards would be that the material would gain credibility and be seen by the public as having a higher standard than other online material and therefore may ensure more hits. Another option to establish higher standards for “press like” material online is the creation of an alliance of bloggers and citizen journalists whereby members adhere to an agreed set of standards. Such accountability mechanisms would allow the public to distinguish between bloggers and citizen journalists who adhere to standards and those that do not.

¹¹¹ *ibid*

SECTION 2

National Press Ombudsmen and Newspaper Ombudsmen

This section is divided into three parts; part (a) will consider the role played by national press ombudsmen who work in conjunction with press councils while part (b) examines the role played by individual newspapers' ombudsmen or readers' representatives, i.e. an internal appointee who handles readers' complaints in order to provide responsiveness and accountability to the public. Part (c) considers the need for accountability of search engines as the main 'gatekeepers' of news and information in the twenty-first century.

(A) Press Ombudsmen working in conjunction with press councils

The concept of a national press ombudsman working in conjunction with a press council was first established in Sweden in 1969 as a means of strengthening media accountability to the public. Under this model, the press ombudsman and press council operate under a dual complaints handling system. This model has been adopted in other countries including South Africa and most recently in Ireland.

The development of the position of Press Ombudsman

The first national Press Ombudsman was appointed in Sweden in 1969 in response to heavy criticism from the Government and public with regard to the inaccessibility and ineffectiveness of the Press Council which had been

established in 1916 (see press councils section above).¹¹² One of the main reasons for the Press Council's ineffectiveness was that the unpaid, voluntary members of the Press Council could not cope with the growing workload. By 1960 it was clear that drastic changes were needed to improve the effectiveness of the Press Council and gain credibility in the eyes of the public and government.¹¹³ In 1969, after the threat of statutory intervention, the Press Council system was totally revamped. As part of this overhaul, a Press Ombudsman (PO) was introduced to work in union with the Press Council to help manage the workload and to strengthen accountability to the public.

The Role of Press Ombudsman

As seen above, the role of the press ombudsman is to work in conjunction with a press council. Generally, under this dual system, complaints are firstly made to the Office of the Press Ombudsman and can be referred to the Press Council by the Press Ombudsman or appealed by a complainant in certain instances.

Under the Irish system, for example, the Press Council appoints the Press Ombudsman whose role is detailed in Schedule 2 of the Defamation Act 2009.¹¹⁴ In this two-tiered system, complaints are firstly made to the Office of the Press Ombudsman who will try to resolve the complaint through an informal conciliation process between the complainant and the newspaper or periodical involved. If the conciliation process is unsuccessful following all reasonable efforts (Sch 2, s 9(1)(b)), the Press Ombudsman will adjudicate. 'Significant or complex cases' can be referred to the Press Council by the Press Ombudsman. In certain instances, the complainant can appeal the Press Ombudsman's decision to the Press Council if it can be shown that there is 'reasonable cause' for such an appeal. The availability of such an appeal process provides extra accountability to the public.

¹¹² Weibull, Lennart, Borjesson, Britt, "The Swedish Media Accountability System: A Research Perspective", *European Journal of Communication*, Volume 7, March 1992, 121-139 at 129)

¹¹³ *ibid*

¹¹⁴ See McGonagle, Marie, Brody, Annabel, "The Irish Defamation Act 2009- too little, too late?" *Communications Law*, Volume 15, Number 2, 2010 pp 43-50.

The role of the Swedish Press Ombudsman is similar in that complaints are firstly made to the Press Ombudsman. Upon receipt of a complaint, the PO must decide whether or not the issue can be resolved by a correction or published reply from the complainant in the newspaper in question.¹¹⁵ In such cases, the PO contacts the newspaper and essentially acts as mediator between the newspaper and complainant. If the issue cannot be resolved through mediation or conciliation, the PO may investigate the complaint further if s/he considers that there has been a breach of journalistic ethics. Upon completion of relevant inquiries, the PO has two options 1) the PO may decide that the complaint in question does not "warrant formal criticism of the newspaper"¹¹⁶ or 2) that there is sufficient evidence to warrant a formal decision by the Press Council.¹¹⁷ If the PO decides not to continue with the complaint, (option 1), the complainant can appeal the decision to the Press Council¹¹⁸ provided that the complainant is directly affected in the publication complained of.¹¹⁹ In contrast to the remit of the Irish PO, the Swedish PO has the power to initiate cases if s/he feels that there has been a breach of the code of journalistic ethics (see press councils section above). The Instruction for the Office of Press Ombudsman states:

The Press Ombudsman (PO) shall...investigate deviations from good journalistic practice, either on his own initiative or following an application, and whenever appropriate refer such cases for decision by the Press Council and, by participating in public debate further the cause of good journalistic practice.¹²⁰

The Charter of the Press Council expressly states that the Press Council does not have similar investigatory powers.¹²¹ Although the PO has the power to initiate investigations into breaches of the code of ethics, this power is, in practice, rarely

¹¹⁵ See <http://www.po.se/english/how-self-regulation-works>

¹¹⁶ *ibid*

¹¹⁷ In referring a complaint to the Press Council, the PO shall consider whether a number of requirements have been met: "(a) There must be reasonable ground for the application, b) Review of a case by the Council must be of significance in view both of ethical principles and the damage which the article might have caused, c) The application must refer to a relatively recent article." If these requirements are not met, the case may be dismissed by the PO. See *supra* fn. 106

¹¹⁸ *Supra* fn. 106.

¹¹⁹ Instruction of the Press Ombudsman- (Section 7) available at <http://www.po.se/english/instruction>

¹²⁰ *ibid* Section 1

¹²¹ The Charter of the Press Council (Sweden) (Section 3) available at <http://www.po.se/english/charter-of-the-press-council>

utilized. The PO will launch such an investigation only in cases where there has been a clear and obvious breach of journalistic ethics or when the complainant is not in a position to make a complaint. The PO must gain the consent of those affected by the breach in such instances.¹²²

The Swedish ‘Instruction for the Office of Press Ombudsman’¹²³ also sets out a list of additional duties of the Office of the Press Ombudsman. They are as follows:

In addition to the duties of the Office of the Press Ombudsman...the Ombudsman shall, as far as possible provide the general public with information and advice concerning the professional ethics of the press....PO shall as far as possible contribute to the general knowledge of matters concerning the professional ethics of journalists. This should include talks and lectures, the writing of articles, etc., for publication in journals of both a specialized and general kind, and, if desired, also lecture at educational institutions for journalists.¹²⁴

According to a study of press councils in Western Europe¹²⁵, approximately 40% of the Swedish PO’s work consists of these additional duties.¹²⁶ The Irish Office of Press Ombudsman also spends a significant amount of time on similar duties, for example, by creating public awareness of press regulation and related issues through organizing seminars and giving lectures to media law and journalism students around the country. These duties are important as they provide media education to the public and increase public understanding of the importance of press freedom. It also provides media education to future journalists.

The Position of Press Ombudsman (PO)

The Press Ombudsman is the public face of press regulation. As such, the position of PO should go to a well respected member of society. It is essential that the person appointed is independent of both the industry and government so

¹²² Koene, C, Daphne, “Press Councils in Western Europe”, Netherlands Press Council Foundation, 2009, available at <http://www.rvdj-archive//docs/Research%20report.pdf> at p. 45

¹²³ Supra fn. 121

¹²⁴ Supra fn. 121 (Section 9)

¹²⁵ Supra fn. 122

¹²⁶ ibid at 51

that the public will trust that complaints will be handled objectively by an impartial person. The person appointed should also be able to demonstrate expert knowledge in journalistic ethics and freedom of expression. The Instruction for the Office of the Press Ombudsman in Sweden, section 10 specifies that:

The person appointed Press Ombudsman should have a thorough knowledge of press ethics and related issues. Journalistic experience should also be taken into account.¹²⁷

The first two Press Ombudsmen to be appointed in Sweden were well respected and accomplished judges. As pointed out by John Williams, “the selection of men of high caliber and public reputation to serve as ombudsman has been the hallmark of the Swedish system.”¹²⁸ The Irish Press Ombudsman, Professor John Horgan, is a well respected and prominent academic with a background in politics and journalism. Professor Horgan also held the position of Professor of Journalism at Dublin City University, Ireland from 1999 to 2006 and as such has a vast amount of expertise in the area of journalism ethics.

The addition of a press ombudsman to a press council system can provide an excellent means of improving accountability to the public through providing a more visible and transparent complaints process. The dual complaints system and appeal process may promote greater public confidence that complaints are being handled thoroughly and objectively.

As the recognizable face of the PO and Press Council system, it is important that the position of PO is held by a well respected member of the community. The appointment of such a person will strengthen the public’s trust in the system. It is also beneficial if the person is well known in the community as this increases visibility of the service, which is of vital importance to the effectiveness of such a system.

The role of a PO as media educator for the public is an important one which should be promoted as it increases the public’s awareness of the availability of the services such as those provided by Press Ombudsmen and Press Councils and can create a greater public understanding of the importance of press freedom.

¹²⁷ Supra fn. 121 Section 10

¹²⁸ Williams, John, “The Swedish Press Ombudsman- A Model for the United States”, *N.Y.J Int’l and Comp. L.* Vol.3, 1981-2, p.144

Overall, the addition of a Press Ombudsman to a Press Council system is a positive one which can do a lot to strengthen the relationship between the public and the press through creating a more thorough and transparent complaints system as well as providing an additional means of promoting press freedom.

(B) Newspaper Ombudsmen/Readers' Representatives/ Readers' Editors

As Hudgens points out, in the US “the term ombudsman refers primarily to a newspaper staff member who acts as readers’ representative for complainants and as an in-house critic of the papers’ performance.”¹²⁹ The newspaper ombudsman is therefore a staff member and he or she acts on behalf of the readers. This role originated in the US but has been adopted in other countries around the world such as Canada, the UK and Ireland. Different terminology has been used to describe the role, for example, a person employed in such a position at a newspaper or media organisation may be known as a readers’ representative, readers’ editor or readers’ advocate.

As seen in Chapter 1, the 1947 report of the Hutchins Commission on Freedom of the Press recommended self-regulation of the press as the best means of preserving press freedom. However, the report also recommended government intervention should the press fail to regulate itself effectively. The report criticized the press for its lack of self-regulation stating:

[b]y a kind of unwritten law the press ignores the errors and misrepresentations, the lies and scandals, of which its members are guilty.¹³⁰

The establishment of newspaper ombudsmen as a mechanism for ensuring effective self-regulation of the print media from within was first proposed in the US in an article written by Ben Bagdikian, a US journalist and well known media critic. The article in question appeared in *Esquire Magazine* in March 1967. Bagdikian, who feared for the future of American newspapers, called for the

¹²⁹ Hudgens, Kay, “The Ombudsman and the News Media”, *Freedom of Information Center*, Report No. 479, School of Journalism, University of Missouri at Columbia, August 1983, p.1

¹³⁰ Commission on Freedom of the Press, *A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (Chicago: University of Chicago Press, 1947), p.65

establishment of community ombudsmen who it was envisaged would provide for greater accountability to the public.¹³¹ In June of the same year, *New York Times* magazine columnist, A. H. Raskin, wrote a probing article in which he supported the recommendation for self-regulation as cited in the Hutchins' Commission Report. In his article, Raskin heavily criticized the print media, stating:

Of all the institutions in our inordinately complacent society, none is so addicted as the press to self-righteousness, self-satisfaction and self-congratulation.¹³²

Raskin's article drew attention to the fact that the press was always eager to hold other institutions to account, whether government or other, but that it never seemed to focus its criticism internally. Raskin agreed with the Hutchin's report which warned of the increasing influence of the print media in society and the need for statutory regulation should the print media fail to be accountable to the public.¹³³ Raskin proposed that a 'Department of Internal Criticism' be established in every newspaper in the US as a means of making the print media more accountable:

[T]here is a need in every paper for a Department of Internal Criticism to put all its standards under re-examination and to serve as a public protector in its day to day operations.¹³⁴

Raskin further stipulated that such a department:

ought to be given enough independence in the paper to serve as an ombudsman for the readers armed with authority to get something done about valid complaints and to propose methods for more effective performance of all the paper's services to the community, particularly the patrol it keeps on the frontiers of thought and action.¹³⁵

Raskin's proposal promoted the strengthening of the relationship between newspapers and their readers by providing an independent, internal appointee to handle readers' complaints and grievances. As such, it would ensure an increase in accountability to the public. Raskin's proposal became the model for the role

¹³¹ Supra fn 130 at 178

¹³² A.H. Raskin, What's Wrong With American Newspapers? A newsman's critique of the press, *New York Times*, June 11, 1967

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ *ibid*

of newspaper ombudsman in the US. In the same year as Raskin's article was published, the *Louisville Courier Journal* appointed John Herchenroeder as its newspaper ombudsman making him the first official newspaper ombudsman in the US.¹³⁶ Herchenroeder's role was to receive and handle complaints from the readers of the newspaper. He also wrote a daily report detailing the complaints he received and distributed them among the newsroom.

The Role of newspaper ombudsman

The role of a newspaper ombudsman varies from newspaper to newspaper.¹³⁷ Thus far, the role of newspaper ombudsman has entailed a number of different responsibilities. The mission statement of the organization of newspaper ombudsmen, which is indicative of the varied role of news ombudsmen, is as follows:

- 1) The news ombudsman is dedicated to protecting and enhancing the quality of journalism by encouraging respectful and truthful discourse about journalism's practices and purposes.
- 2) The news ombudsman's primary objective is to promote transparency within his or her news organisation.
- 3) The ombudsman works to protect press freedom and promote responsible, high quality journalism.
- 4) Part of the ombudsman's role is to receive and investigate complaints about news reporting on behalf of members of the public.
- 5) The ombudsman recommends the most suitable course of action to resolve issues raised in complaints.
- 6) The ombudsman is an independent officer acting in the best interests of news consumers.
- 7) The ombudsman strives to remain completely neutral and fair.

¹³⁶ Supra fn. 130 at 179

¹³⁷ The Organisation of News Ombudsmen (ONO) submission to the Independent Media Inquiry (Inquiry on the work done by journalists worldwide to promote self-regulation of the news media) available at http://www.dbcde.gov.au/data/assets/pdf-file/0007/142956/Organisation_of_News_Ombudsmen.pdf at p.2

- 8) The ombudsman refrains from engaging in any activity that could create a conflict of interest.
- 9) The ombudsman explains the roles and obligations of journalists to the public.
- 10) The ombudsman acts as a mediator between the expectations of the public and the responsibility of journalists.¹³⁸

The most common and significant and of these roles are:

- a) Establishing ethical principles for journalists to adhere to,
- b) Dealing with complaints from the readers of the newspaper regarding breaches of journalistic standards,
- c) Writing reports with regard to complaints received from the public or public issues of concern to be distributed around the newsroom or in some cases publishing a weekly or monthly column in the newspaper in question.¹³⁹

a) ethical principles

The ombudsman role often includes setting out journalistic standards and distributing that information around the newsroom. While acting independently of the newspaper and its editors, the ombudsman can act as a media educator for the newsroom by providing information on journalistic ethics and issues which may be of concern to the public regarding journalistic standards. The education of journalists can vary dramatically from newspaper to newspaper and some journalists may have received little or no guidance on journalistic ethics and standards. As such, there is a need for greater media education and regular upskilling in the newsroom and updates on journalistic reporting ethics, for example in light of a converging media and journalists obtaining information from social networking sites, Internet sources and blogs.

¹³⁸ ONO mission statement available at <http://newsombudsmen.org/about/mission>

¹³⁹ See Hudgens, Kay, "The Ombudsman and the News Media", *Freedom of Information Center Report*, No. 479, School of Journalism, University of Missouri, Columbia, August 1983, p.1, Donald, T. Mogavero, "The American Press Ombudsman", *Journalism Quarterly*, 1982, p. 548,

b) Dealing with complaints

The newspaper ombudsman essentially works as a mediator between the newspaper and its readership. The public can contact the ombudsman directly if they feel there has been a breach of journalistic standards. The ombudsman will then deal with any complaints or grievances and publish his or her findings in a weekly, monthly or bi-monthly report. The ombudsman service should be visible to the public, easily accessible and user-friendly. Of the newspaper ombudsmen studied¹⁴⁰, the ombudsman service was not displayed in a prominent place on the newspaper's website. It is recommended that the newspaper ombudsman service should be made more visible on both the website and printed versions of the newspaper in order to make it more accessible to the public.

c) Reports

The publication of reports, including details of complaints which have been dealt with by the ombudsman as well as information on current ethical issues of concern which may have been highlighted by complainants, is an important role of a newspaper ombudsman. It is important that the public feel that their complaints are being taken seriously and thoroughly examined by an impartial person. The newspaper ombudsman differs from press councils in that the public can deal with the newspaper directly and can voice all manner of concerns. Many press councils will only consider complaints if the complainant has been personally affected by a breach of journalistic standards as set out in the code of practice of the press council (see above). As such, it could be considered that the ombudsman role offers a more comprehensive mechanism of accountability with regard to this issue.

¹⁴⁰ For the purposes of this study, I examined the websites of a number of member newspapers of ONO which included, the *Observer*, the *Guardian*, the *New York Times*, the *Washington Post*, the *Los Angeles Times*, *USA Today* and the *Brisbane Times*.

Independence

One of the most essential elements of the newspaper ombudsman role is that the ombudsman is completely independent from the rest of the newsroom.¹⁴¹ Total independence can be difficult to demonstrate to the public as the ombudsman is an employee of the newspaper. There has been much confusion as to whether a newspaper ombudsman, as a newspaper employee, is an agent of the newspaper acting in defence of the newspaper or whether he or she is an independent critic acting on behalf of the readers of the newspaper which employs him or her. It is vital, therefore, that the ombudsman is not only independent from the newsroom and editors but that he or she is perceived to be independent by the public. A weekly or monthly column setting out the details of complaints, which have been dealt with by the ombudsman, shows that the ombudsman is working on behalf of the public. It also shows a commitment on the part of the newspaper to improve journalistic standards. It also conveys to the public that the newspaper is dedicated to making its readers happy by listening to their concerns, thereby promoting a loyal readership.¹⁴² The newspaper ombudsman is essentially working on behalf of the newspaper to the benefit of the public. As such, the role of newspaper ombudsman can benefit both the public and the newspaper. It advantages the public in that it provides a complaints handling service and ensures higher journalistic standards of the paper, while the newspaper may benefit from an improved relationship with the public through an increase in newspaper sales and/or website subscriptions.

The rise and fall of the newspaper ombudsman

As discussed above, the concept of newspaper ombudsman was first adopted in the US and then in Canada¹⁴³ by a minute percentage of newspapers but was

¹⁴¹ Pritchard, Stephen, "Holding ourselves Accountable", *British Journalism Review*, December 2008 Volume 19, No.4 19: 63-67 p. 65

¹⁴² *ibid*

¹⁴³ The first Canadian newspaper to appoint a press ombudsman was the *Toronto Star* in 1972- information available at www.newsombudsmen.org

even slower to develop elsewhere.¹⁴⁴ In the UK, the *Guardian* and *Observer* are the only newspapers who currently employ a permanent readers' editor.¹⁴⁵ In Ireland, prior to the establishment of the Press Council of Ireland (see above), a Readers' Representative service had been in operation in a number of national newspapers that were members of the National Newspapers of Ireland association. The service was introduced by the Irish National Newspapers in 1989. Similar to the newspaper ombudsman position, the role of readers' representative in Ireland was originally envisaged as a mechanism for achieving an improved relationship between newspapers and their readers. The readers' representative was to represent the public and handle calls and complaints from the public based on the articles in the newspaper in question. A report prepared by Professor Kevin Boyle and Mrs. Marie McGonagle, which was published in 1995, analyses five years' experience of readers' representatives in Irish newspapers. The study concluded that the service or readers' representatives in national newspapers was:

[...] a valuable service to both reader and newspaper. It gives the reader easy and direct access to the paper to voice all manner of views and complaints with the prospect of a personal, prompt and effective remedy. For the paper, there is an advantage of being able to channel readers' communications through one office, the opportunity of knowing about and being able to put right inaccuracies and mistakes.¹⁴⁶

The concept of readers' representatives for individual newspapers was, at this time, considered to be "...the most appropriate self-regulatory system for prevailing publishing conditions in Ireland."¹⁴⁷ The setting up of a national press ombudsman and press council in Ireland was deemed unnecessary at the time. Reasons for this were the size of the industry- only twelve national newspapers were in publication in Ireland at the time. Also the "traditionally conservative and cautious nature"¹⁴⁸ of the industry were factors which were taken into account. Given these reasons, the study concluded that there would not be a sufficient amount of complaints to warrant the setting up of a press council on a

¹⁴⁴ See C. David Rambo, "Ombudsmen serve less than 2 per cent of dailies" *Presstime*, July 1983, pp. 44-45

¹⁴⁵ *Supra* fn. 141 at 63

¹⁴⁶ Boyle, Kevin, McGonagle, Marie, *Media Accountability: the Readers' Representative in Irish Newspapers*, National Newspapers of Ireland, 1995, p. 37

¹⁴⁷ *ibid* at p.8

¹⁴⁸ *ibid*

national scale.¹⁴⁹ The study did not however rule out the possible future influence of the British tabloids on the standards of Irish newspapers which may result in the need for the setting up of a national press council.¹⁵⁰

Newspapers have been slow to adopt the position of newspaper ombudsman.¹⁵¹ At present there are approximately 56 news ombudsmen members of ONO, which is largely indicative of the number of news ombudsmen worldwide.¹⁵² According to Executive Director of ONO Jeffrey Dvorkin, of these 56 ombudsmen members, approximately 43 are considered to be news ombudsmen in the traditional sense of the term, i.e. ombudsmen employed by a newspaper or media organization but who act independently of the organisation. The other members include large TV networks who have senior management positions responsible for standards and audience relations, who are not independent with regard to the audience. Of the estimated 43 independent news ombudsmen, approximately 25 are employed by newspapers in the US and only 12-18 are employed by other newspapers around the world. Despite the small percentage of ombudsmen worldwide, it should be noted that many of the current ONO members work within some of the world's leading and most reputable news media, including, the British Broadcasting Corporation, The New York Times, The Guardian, Le Monde, ESPN, The Washington Post, the Los Angeles Times and the Australian Broadcasting Corporation.¹⁵³ Employing an ombudsman conveys to the public that the media organization is concerned with providing its readers/viewers with good journalistic standards and a means of accountability.

The present financial climate along with a decrease in newspaper readerships has unfortunately resulted in a number of newspaper ombudsmen redundancies.¹⁵⁴ Although getting rid of the ombudsman position at a paper which is in financial difficulty may make sense in the short term, it does not make sense in the long

¹⁴⁹ *ibid*

¹⁵⁰ *ibid* at p.35

¹⁵¹ Starck, Kenneth, Eisele, Julie, "Newspaper ombudsmanship as viewed by ombudsmen and their editors." *Newspaper Research Journal*; Fall 1999, Volume 20, Issue 4, p.37,

¹⁵² See <http://newsombudsmen.org/membership/join-ono>

¹⁵³ *ibid*

¹⁵⁴ *Supra* fn. 141 at p.63

term.¹⁵⁵ According to Stephen Pritchard, readers' editor for *the Observer*, newspapers who have not yet appointed a readers' editor or newspaper ombudsman "need to ask themselves if they can afford to be without one."¹⁵⁶ In an age where communication technologies are developing at an expeditious rate and consumers have so much choice as to which newspaper, broadcast station, radio station or website they get their news and information from, the focus should be on gaining the trust of the public through providing greater accountability. The vast amount of information available through all of the various media outlets also means that the public may not be sure when the information they receive is reliable. According to sociologist William H. Dutton, the fourth estate as examined in Chapter one,¹⁵⁷ has been replaced by a new 'fifth estate' which he asserts is:

[...] being built on the growing use of the internet and related information and communication technologies (ICTs) in ways that are enabling 'networked individuals' to reconfigure access to alternative sources of information, people and other resources. Such 'network of networks' enable the networked individuals to move across, undermine and go beyond the existing institutions, thereby opening new ways of increasing the accountability of politicians, press, experts and other loci of power and influence.¹⁵⁸

These so called 'networked individuals' operate through various platforms such as social networking sites and other ICTs. The trouble with obtaining information from such sources is that it is difficult to determine whether the information is accurate or reliable.¹⁵⁹ In its submission to the Independent Media

¹⁵⁵ Supra fn. 141 at p.64

¹⁵⁶ *ibid*

¹⁵⁷ The concept of the press as the 'fourth estate' was first articulated in 1841 by Thomas Carlyle in reference to media presence in the British House of Commons. In describing the press as the 'fourth estate', Carlyle was equating the importance of the press with the other three estates already established as being essential to the workings of an effective democracy, i.e. the executive, the legislature and the judiciary. According to 'fourth estate' theory, the role of the press was to "...act as an indispensable link between public opinion and the governing institutes..." Boyce, George; Curran, James; Wingate, Pauline; eds, *Newspaper History from the Seventeenth Century to the Present Day*, (Constable, London, Sage Publishers, California, 1978) p. 21

¹⁵⁸ Dutton, William, H, "The Fifth Estate Emerging through the Network of Networks", *Prometheus*, Vol. 27, No. 1, pp 1-15, 2009 at p. 3

¹⁵⁹ Begbie, S. "Defining A News Ombudsman in a Digital World: Differentiating the news from the rumour mill and learning to sing about it", Organisation of News Ombudsmen Conference, Oxford, May 13, 2010 available at

Inquiry, ONO warned that the speed at which such unregulated and unchecked networks can spread information “...means equally that disinformation could be spread quickly.”¹⁶⁰ Sally Begbie, Ombudsman for the Special Broadcasting Service in New South Wales, Australia, notes that the capacity of the self-regulated news media to sort the reliable and accurate information from the “rumour and rubbish”¹⁶¹ of the vast amount of information supplied by the fifth estate is what distinguishes the self-regulated news media from the fifth estate. Therefore, in order to continue to serve a vital function in democratic society, the news media must distinguish itself as providing a credible source of information in the twenty-first century. It can do this by showing its commitment to high journalistic standards and gaining the trust of the public through putting in place media accountability mechanisms. Pritchard makes the excellent point that gaining the trust of the public is all about transparency. If the newspaper can show its readers that it is concerned with providing them with fair and accurate reports and high journalistic standards then the newspaper will gain the trust of the reader and enjoy a reputation as a reliable source of information.¹⁶²

The role of news ombudsman must be adapted to take into account the newsroom of the twenty-first century. According to Begbie, news ombudsmen of the digital age should take on a more significant role in the newsroom. Begbie suggests that such ombudsmen could help to set out specific procedures for verifying sources, checking the accuracy of material prior to publication as well as establishing procedures on the publication of sensitive material.¹⁶³

However the role of news ombudsman is defined, it is of the utmost importance that the ombudsman operates independently of the newspaper. A news ombudsman should not be involved in the editorial process of any particular story.¹⁶⁴ An ombudsman’s primary role should be to review post publication

http://www.newsombudsmen.org/wp-content/themes/sink_ono/documents/begbieoxfordenglish.pdf)

¹⁶⁰ *ibid* at p.3

¹⁶¹ *ibid* at p.1

¹⁶² *Supra* fn. 141 at p.64

¹⁶³ *Supra* fn. 159 at p.12

¹⁶⁴ *ibid*

material and adjudicate on complaints from the public. News ombudsmen can however also play an important role in the newsroom as a media educator. Establishing procedures for journalists to adhere to, as well as general standards of journalistic ethics, such as those recommended by Begbie, would help to improve standards and guide journalists who may not have had any specific or adequate training or who may simply be in need of refreshing or updating. As a media educator for the newsroom, the news ombudsman could hold regular seminars to be attended by newspaper employees on specific ethical issues of public concern at any given time such as, for example, the publication of disturbing images in newspapers. As such, newspaper employees would remain informed and updated as to the concerns of the public thereby improving the relationship between the newspaper and its readership.

Overall, the role of newspaper ombudsman or readers' representative must be seen as a positive one as it lessens the gap between newspapers and their readership. As Perrotta has pointed out:

[n]o matter how each newspaper defines the role of its ombudsman, he serves an important purpose in giving the reader limited access to the newspaper and showing him that editors care what he thinks.¹⁶⁵

Tessa Jowell, former Secretary of State for Culture in the UK, has recommended that all national newspapers in the UK establish readers' editors (newspaper ombudsmen) as a "step in the right direction"¹⁶⁶ towards improving journalistic standards. As noted by Jowell, the appointment of such a position would improve standards and accountability to the public, while at the same time not unduly restricting freedom of expression.

(C) The accountability of search engines as the main 'gatekeepers' of news and information

Issues such as globalisation, the establishment of the internet and media convergence have meant that newspapers and broadcasters no longer dominate as

¹⁶⁵ Perrotta, John, "The Unpopularity of Ombudsmen", *The Press*- December, 1982, p. 5

¹⁶⁶ Jowell, Tessa, "Redress for All- Not Only the Rich and Powerful, *British Journalism Review*, Vol. 22, No. 4, December 2011

“gatekeepers of public knowledge”¹⁶⁷ but now share that role with search engines and other new online services. Thus, there are new gatekeepers/controllers of public knowledge who determine what information can be accessed and in what order through “selective filtering of content” prior to delivery of that content to users.¹⁶⁸ Keller (2011) has commented that “[t]he selection or exclusion of socially and politically important information and analysis has....shifted from content production towards content filtering.”¹⁶⁹ The main problem with this new delivery process is that there is limited control over the quality of information being supplied to the public apart from the minimal content restrictions on services that come under the AVMSD¹⁷⁰. With newspapers and broadcasters, as well as being subject to the proscriptive legal rules, as is the case with search engines also, the information supplied is subject to editorial control whereas there is no such accountable actor with regard to information supplied by search engines for example.¹⁷¹ As the internet is increasingly becoming the main source of information for many people, search engines such as google and bing, can be seen as the main “gatekeepers” of public information. The lack of accountability of search engines is a contentious issue in the media sector at present which has caused major public policy concerns with regard to access to information as well as the quality of information being made available through search engines.¹⁷²

There are serious public policy concerns with regard to a number of issues such as universality of access, the quality of the material being accessed, diversity of content and plurality of sources. The potential negative effects of Internet search engines are plentiful and include “ -access to harmful and/or illegal content; discrimination of content; misleading consumers; and influence on opinion makers”.¹⁷³ The development of search engines such as google and yahoo, have

¹⁶⁷ Keller, Perry, *European and International Media Law- Liberal Democracy, Trade and the New Media* (UK: Oxford University Press, 2011) at 23

¹⁶⁸ *ibid* at 24

¹⁶⁹ *ibid* at 23

¹⁷⁰ AVMSD 2010/13/EU, Article 12

¹⁷¹ *Supra* fn 167 at 24

¹⁷² See also website of SuMa-ev- the Association for Free Access to Knowledge-www.suma-ev.do

¹⁷³ Jakubowitz, Karol, *A new notion of media? –Media and media-like content and activities on new communication services*, (Council of Europe, 2009), p.33 (Background text for the 1st Council of Europe Conference of Ministers Responsible for Media and

provided the public with an information overload. It is important however that the information provided is easily accessible and most importantly comes from accurate and reliable sources.¹⁷⁴

Search engines can significantly influence the freedom to receive and impart information. Search engines sort vast amounts of information and select what information is provided through their facility on the basis of a non-transparent, selective process based on issues such as popularity of search hits and commercial incentives. Due to a lack of transparency and accountability, there is serious scope for manipulation of search engine results.¹⁷⁵ Critics of search engines such as the German non-profit organisation, the ‘ SuMa-eV -Association for Free Access to Knowledge’ which promotes universal access to knowledge’, particularly with regard to access to information via search engines, call for search engines to be “free, versatile and non-monopolistic”.¹⁷⁶ Information providers can also manipulate search results by either paying the service provider for a higher ranking or by cleverly adapting their profiles so that they are placed higher in the list of results through, for example, adding attractive search words such as ‘pornography’ or ‘football’ which may have nothing to do with their actual service.¹⁷⁷

The public are largely dependent on an oligopoly¹⁷⁸ of search engine providers for information. In a study of search engines, google has consistently dominated, holding the top position of most used search engine since 2006¹⁷⁹ and in 2010 had an average of 70% of total searches made to search engines.¹⁸⁰ Other top ranked search engines include Yahoo, Bing, Ask and AOL Search.¹⁸¹ As a multi-

New Communication Services, A New Notion of Media? 28-29 May 2009, Reykjavik, Iceland)

¹⁷⁴ Supra fn. 173, at 23

¹⁷⁵ Van Eijk, Nico, “ Search Engines, the New Bottleneck for Content Access”, in Preissl, Brigitte, Haucap, Justus, Curwen, Peter (eds), *Telecommunication Markets Drivers and Impediments*, Physica-Verlag, Heidelberg, 2009 at p. 146

¹⁷⁶ Cited in Van Eijk, Nico, “Regulating Old Values in the Digital Age”, in Moller, Christian, Amouroux Arnaud (Edts) *The Media Freedom Internet Cookbook* (Vienna: OSCE, 2004) at 34

¹⁷⁷ *ibid*, at p. 147

¹⁷⁸ *ibid*

¹⁷⁹ Information available at <http://www.seoconsultants.com/search-engines/>

¹⁸⁰ *ibid*

¹⁸¹ *ibid*

billion euro company, google's main commercial activity is "selling the attention of end-users to advertisers" which it does "by showing advertising that matches the searches of its users."¹⁸²

The selection process of search engines is non transparent. The source code which effectively selects the information is not publicly accessible and so the public have to rely on selected information from the search engine providers.¹⁸³ A major problem with regard to the operation of search engines is the room for manipulation of the selection process by search engine providers for commercial or political reasons. In China, for example, search engines remove content which is disapproved of by the government.¹⁸⁴ The ranking of results is an important factor in the selection process also, as generally the public will rate the importance of the results by their ranking. Also, the first page of results is often the only page that will be looked at. As such, the ranking system of search results. is of vital importance. There is also serious scope for outside manipulation of this system by companies for commercial purposes.

The Council of Europe has emphasised the importance of the public service value of the Internet. In Recommendation CM/Rec (2007)16 on measures to promote the public service value of the Internet, the Council stresses the importance of pursuing "...public policy goals which protect human rights, democracy and the rule of law on the Internet..." In its recommendation, the Council considers that the public's increasing reliance on the internet "as an essential tool for their everyday activities (communication, information, knowledge, commercial transaction)"¹⁸⁵ has resulted in a "legitimate expectation that Internet services be accessible and affordable, secure, reliable and ongoing." The Council therefore encourages that the private sector develop, where appropriate, self and co-regulatory systems to ensure greater accountability to the public.¹⁸⁶ In Germany, a number of search engine providers established a self-monitoring instrument under the umbrella of the Freiwillige Selbstkontrolle

¹⁸² Supra fn. 176, at 34

¹⁸³ Supra fn 175, at. 35

¹⁸⁴ Supra fn 173, at 34

¹⁸⁵ Recommendation CM/REC (2007)16 on measures to promote the public service value of the Internet.

¹⁸⁶ *ibid*

Multimedienanbieter (voluntary self-monitoring body for multimedia service providers FSM).¹⁸⁷ As examined above, self-monitoring is distinguishable from ‘pure’ self regulation in that it is “limited to monitoring compliance with a given set of regulations laid down by another party, e.g. a public authority”.¹⁸⁸ In the case of FSM, the State sets out the legal framework which is implemented by the voluntary industry members. According to the objectives of the FSM: “[t]he purpose of the Association is to provide both protection and education of minors and general consumer protection in the multimedia sector.”¹⁸⁹ These objectives are achieved through a voluntary self-monitoring system which implements principles set out in the FSM’s Code of Conduct which sets out standards for Multimedia Service Providers to adhere to. In 2004, a specific sub-code for Search Engine Providers was established.¹⁹⁰ The aim of this Code of Conduct is to improve consumer protection and the protection of children and young people when using search engines in Germany.¹⁹¹ The Code provides that signatories shall implement precautionary measures which will improve the protection of children and young people from harmful material.¹⁹² As well as this, the Code sets out standards aimed at increasing the transparency of search engines based on their selection of information methods. According to Section 2:

(1)The Code signatories agree to clarify to the user the functioning method of the search engine. In the same way, the signatories shall describe the circumstances that will cause an exclusion from the search results. This information should be easily accessible to the user.

(2) Within the framework of its possibilities, the Code signatories agree to transparently structure their search results pages. Search engines results which owe their position on the search page to a commercial agreement with the respective search engine provider shall be reasonably designated. This can occur, in particular, by the use of the terms “Advertisement”, “Sponsor Link”, “Sponsored Link” or “Sponsored Website”.¹⁹³

¹⁸⁷ Palzer, Carmen, “*Voluntary Self-Monitoring Body for Search Engine Providers*” IRIS 2005 5:12/91- European Audiovisual Observatory, Germany.

¹⁸⁸ Palzer, Carmen, *Self-Monitoring v. Self-Regulation v. Co-Regulation, Co-Regulation of the Media in Europe*, European Audiovisual Observatory, (Strasbourg, 2003) at 29

¹⁸⁹ See Article 2(1) at <http://www.fsm.de/en/Articles>

¹⁹⁰ See http://www.fsm.de/en/SubCoC_Search_Engines

¹⁹¹ *ibid*

¹⁹² *ibid* at Section 2(3)

¹⁹³ *ibid* Section 2(1) and (2)

According to this Code therefore, signatories must increase their level of transparency with regard to the way in which they exclude or select information. Search engines must justify reasons for the exclusion of certain information and indicate where information has been included in search results due to a commercial agreement between the information provider and the search engine. The Code thus promotes greater accountability of search engines to the public. However, Hajer points out that openness and transparency are not necessarily the same as accountability, e.g. because openness and transparency might be achieved by an overload of information or use of language/presentation of information in a way that people would find hard to understand or interpret.¹⁹⁴

Another positive development of the FSM has been the establishment of a search engine primarily for the use of children in Germany called fragFINN.de.¹⁹⁵ The search engine, which is supported by Google technology, provides access to pre-checked domains.

Recommendations proposing regulation of search engines to ensure diversity of information in the form of “forced ranking” or “inclusion” methods have been put forward by legal experts in the area.¹⁹⁶ Other recommendations to ensure that search engines are accountable to the public, include the modification of existing legislation such as regulation on consumer protection.¹⁹⁷ According to this recommendation, search engines would be obligated to be more transparent with regard to how they operate. Van Eijk also considers the possibility of creating the equivalent of an on-line public library based on public policy initiatives as an alternative to commercial search engines.¹⁹⁸ The Google books project has created a digital library in which “people...use a “webcrawler” to index the books’ content and analyse the connections between them, determining any given book’s relevance and usefulness by tracking the number and quality of

¹⁹⁴ Hajer. A. Maarten, *Authoritative Governance: Policy-making in the Age of Mediatization*, Oxford University Press, 2011 at pp. 32-3 Hajer also points out that “practices of openness and dialogue with stakeholders may even lead to a loss of trust when stakeholders feel they should be consulted but are not, or when they feel that the consultation process is unfair.” *ibid*

¹⁹⁵ See <http://www.fragFINN.de>

¹⁹⁶ *Supra* fn. 176, at 34

¹⁹⁷ *Supra* fn. 176, at 36

¹⁹⁸ *ibid*

citations from other books.”¹⁹⁹ The Google books service is however not a public service and creates even more control for Google over the provision of information. A similar public library service could however be initiated based on public service initiatives as suggested by Van Eijk. The appropriateness of government influence in the process of information selection with regard to such projects is highly questionable, although some may argue that democratically elected regulators may be in a better position to control or oversee search results than unaccountable search engine providers.

Van Eijk has referred to the unique situation of search engine providers in that, as content providers, they operate within “a legal vacuum”²⁰⁰. Search engines are generally considered to fall within the remit of telecommunications law. Van Eijk points out that due to this “dual telecom and information-related nature”²⁰¹, “it is difficult to place search engines squarely in the Article 10 framework” which does not specifically refer to a right to seek information.²⁰² The right to seek information could be particularly significant with regard to the accountability of search engines. The right to seek information is also provided under Article 19 of the UDHR and under Article 19 of the ICCPR.²⁰³ Van Eijk notes that the primary function of search engines is “making information accessible”, which he considers to be “so closely linked with the basic aspects of freedom of expression that it should be treated similarly.”²⁰⁴

From this analysis, it is evident that the selective processes of search engines, as main gatekeepers of information need to be clear, transparent, publicly accessible and reviewable by democratically legitimised institutions.²⁰⁵ The creation of a non-commercial on-line information index, (similar to that proposed by van Eijk - see above) would provide the public with an alternative means of seeking and receiving information in the online environment. The creation of self or co-regulatory mechanisms such as the FSM in Germany is also recommended to

¹⁹⁹ Information available at <http://books.google.com/intl/en/googlebooks/history.html>

²⁰⁰ Supra fn. 176, at 35

²⁰¹ *ibid*

²⁰² *ibid*

²⁰³ *ibid*

²⁰⁴ Supra fn. 175 at p.151

²⁰⁵ See suma-ev website for aims at <http://www.suma-ev.de/en/aims/index.html>

provide greater transparency in the information selection process and thereby greater accountability to the public.

CONCLUSIONS

Section Two

This chapter has involved an examination of non-legal methods which have been employed in the print media industry as a means of providing accountability to the public, i.e. press councils, press ombudsmen and newspaper ombudsmen, as well as an examination of the need for accountability of search engines as the main ‘gatekeepers’ of news and information. This study has shown how accountability mechanisms, such as press councils, press ombudsmen and newspaper ombudsmen have been updated and adapted in light of calls for greater accountability from governments, as well as technological developments and changing norms and values in society. The flexibility of non-legal methods such as these is of great importance in an age of continuing development of communications technology and convergence of the media. In contrast, statutory or legal regulation of the media is not as flexible as self or co-regulatory bodies, which is reflected in the current trend towards de-regulation of the media as will be examined in Chapter 5.

The role of the present day media is a complicated one. The press has a moral obligation to the public to provide it with political news and news of significant world-wide events on one hand and on the other hand the press as a business must be financially viable. Competition from citizen journalism, bloggers and a sea of other online sources of information has led to increased pressure on journalists and newspapers to keep up. Jowell poses the important question: “[i]f people can consume news free of charge, what is the incentive to pay for it?”²⁰⁶ As examined in Chapter 1, the emergence of a new role of newspaper publishers and editors that developed with the ‘fourth estate’ concept, i.e. that of being responsible for the selection of information for public dissemination is an important function to bear in mind for the future relevance of newspapers and the

²⁰⁶ *ibid* at p.34

news media generally.²⁰⁷ The role of the press in providing accurate and reliable information is an important one which should be highlighted in light of the surplus sources of information available to the public through various communications technologies. The vital democratic role of the press to provide society with accurate political news and coverage of world-wide events, i.e. the “news function”²⁰⁸ gains even more significance with regard to the converged media of the twenty-first century. In its submission to the Leveson Inquiry, Ofcom described the possible establishment of a “single cross media regulator” as “undesirable”, but highlighted the importance of different media regulatory bodies working together “to ensure that there are common and consistent principles applied across digital media.”²⁰⁹ For example, press councils could provide for “opt in” membership of authors of “press like” material that can be accessed online, such as information posted online by citizen journalists and bloggers. The main incentive for joining the press council would be that the material would be seen by the public as having a higher standard than other online material and therefore may ensure more hits. Another option to establish higher standards for “press like” material online is the creation of an alliance of bloggers and citizen journalists whereby members adhere to an agreed set of standards. Such accountability mechanisms would allow the public to distinguish between bloggers and citizen journalists who adhere to standards and those that do not.

The plethora of sources of information available in the twenty-first century means that the relationship between the public and the news media requires more transparency than ever before.²¹⁰ The public are ever more reliant on the media to provide them with accurate and reliable information. In order to achieve a relationship of transparency and trust, newspapers and media organizations must ensure that effective media accountability mechanisms such as suitably structured press councils, press ombudsmen and newspaper ombudsmen are put

²⁰⁷ McQuail, Denis; *Media Accountability and Freedom of Publication*; (Oxford University Press, New York, 2003) at p.34

²⁰⁸ Hocking, W. E, *Freedom of the Press- A Framework of Principle* (A Report from the Commission on Freedom of the Press), (University of Chicago Press, Illinois, 1947) at p. 167

²⁰⁹ *ibid*

²¹⁰ *Supra* fn. 159 at p.3

in place and reviewed and revised as necessary in light of developments in technology and other societal forces.

As seen from this study, the lack of accountability of search engines as the main “gatekeepers” of public information is a serious concern for policy makers at present. This lack of accountability has caused major public policy concerns with regard to access to information and quality of information. The selection processes of search engines are non-transparent at present. Self and co-regulatory mechanisms have been recommended by the Council of Europe and other bodies to provide greater accountability to the public and to increase transparency in this area. The creation of a non-commercial online information index (similar to that proposed by Van Eijk above) is also recommended to provide the public with an alternative means of accessing information online. It is clear that search engines, as the main access points to information, need to be transparent, accessible and accountable to external bodies whether through self-or co-regulatory systems. It is however, also important that the public service, i.e. universality of access to information, of search engines is borne in mind.

CHAPTER 4

EMPIRICAL RESEARCH

Having examined some of the theoretical aspects of media accountability in Chapter One, this thesis proceeded to look at how media accountability is provided for through legal and non-legal mechanisms. In order to get a sense of how media accountability systems operate in practice, I decided to undertake some empirical research at the offices of the Press Council of Ireland (PCI). As outlined at the outset of this thesis, media accountability systems must be effective in practice. As such, this chapter considers the effectiveness of the PCI as a media accountability system. In doing so, it will consider whether the PCI system addresses the three main elements of accountability as it relates to the media, i.e. responsibility and responsiveness to the readership and transparency. In order to determine the responsibility, i.e. the “duties and responsibilities” as articulated in Article 10.2 ECHR of the media, this chapter examines the PCI’s standard setting and the adherence to those standards by the press, as well as the acceptance of the print media’s ‘responsibility’ or liability where they have failed to adhere to standards; it examines the responsiveness of the print media to the public, i.e. whether the complaints system in place works in practice and encourages or ensures responsiveness on the part of the media to the public, e.g. the willingness to engage with complainants, to offer appropriate remedies; and finally its level of transparency, i.e. whether the decision making process of the PCI is transparent and whether the public can see that complaints are being handled internally by the print media in an open and transparent manner.

The objective of the empirical research was also to determine the extent to which the public are using the PO and PCI system, which suggests the level of awareness of the system among the public and their confidence in it and willingness to use it.

This chapter presents an analysis of data resulting from empirical research undertaken at the Press Council of Ireland over a ten week period. The chapter is divided up into

four sections based on four main questions posed at the outset of the research of the PCI complaints system. The questions were as follows:

- 1) Who uses the PCI complaints system?
- 2) How is the system used?
- 3) What are the main types of complaints?
- 4) What are the current issues of concern?

I selected these four questions in order to determine an overall profile of people who use the PCI, how are they using it, what are they using it for and what they may use it for in the future. I chose to analyse questions 1 and 2, i.e. who uses the PCI system and how it is used, partly because they shed light *inter alia* on the PCI's visibility, reach and sphere of influence and partly because they are issues which are not dealt with in the annual reports of the PCI. Questions 3 and 4, i.e. what are the main complaints and issues of concern are dealt with in the PCI's annual reports. The annual reports provide statistics with regard to the principles complained of each year as well as a report from the Press Ombudsman and staff at the PCI regarding issues of concern that have been highlighted by complaints during the year. The annual reports, however, lack an in depth analysis of the two latter questions. This chapter also seeks to provide a more thorough and detailed analysis of these issues through a comparative study of the types of complaints made to press councils and current issues of concern to press councils around the world.

The Press Council of Ireland

In August and September 2010, and June 2011, I spent a number of weeks researching at the offices of the Press Council of Ireland.¹ The research involved a thorough examination of all of the complaints made to the PCI since it began processing complaints in January 2008.

¹ The research undertaken at the PCI was conducted with the formal agreement of the Press Ombudsman and PCI based on an undertaking of confidentiality that no complaints would be identified in any way and that the data would be used only in connection with this doctoral thesis.

The first aim of my research was to determine an overall profile of the people who use the PCI's complaint system. The profile was composed from the following factors: gender; address; the complainant's involvement with the complaint, i.e. whether the complaint was made on behalf of the complainant, a third party or on behalf of a deceased relative; the status of the complainant, i.e. whether the complainant was a public or private person; and the occupation of the complainant.²

In order to ascertain the second question posed, i.e. how is the PCI system used, I analysed the data based on the method of communication used by each complainant, i.e. whether by e-mail, website, telephone, letter, fax or in person.

With regard to answering the third question, i.e. what are the main types of complaints, I considered (a) the type of publication most complained of, i.e. whether national newspaper, regional newspaper or periodicals through an analysis of the data gathered from my research of the PCI complaints.

I then examined (b) the issues which were most cited in complaints by analysing the principles of the Code of Practice cited in complaints over the period, as well as statistics on principles complained of which I compiled from the PCI's annual reports from 2008-2011. I also compared these statistics with those of other press councils around the world³ in order to determine world-wide trends in the types of complaints made to press councils and whether the Irish system is in line with those trends.

The final aim of my research was to investigate key issues of concern being addressed by the PCI and other press councils around the world at present. I analysed the PCI complaints data under a number of areas which have been highlighted as issues of concern either at the present time in a number of other press councils⁴ including: online issues, defamation of the deceased, privacy protection (particularly with regard to online protection) and children in the media.

² Lack of information on the status and occupation of complainants in the PCI's data prevented me from completing a comprehensive analysis of these factors. As such, these factors are not included in this chapter.

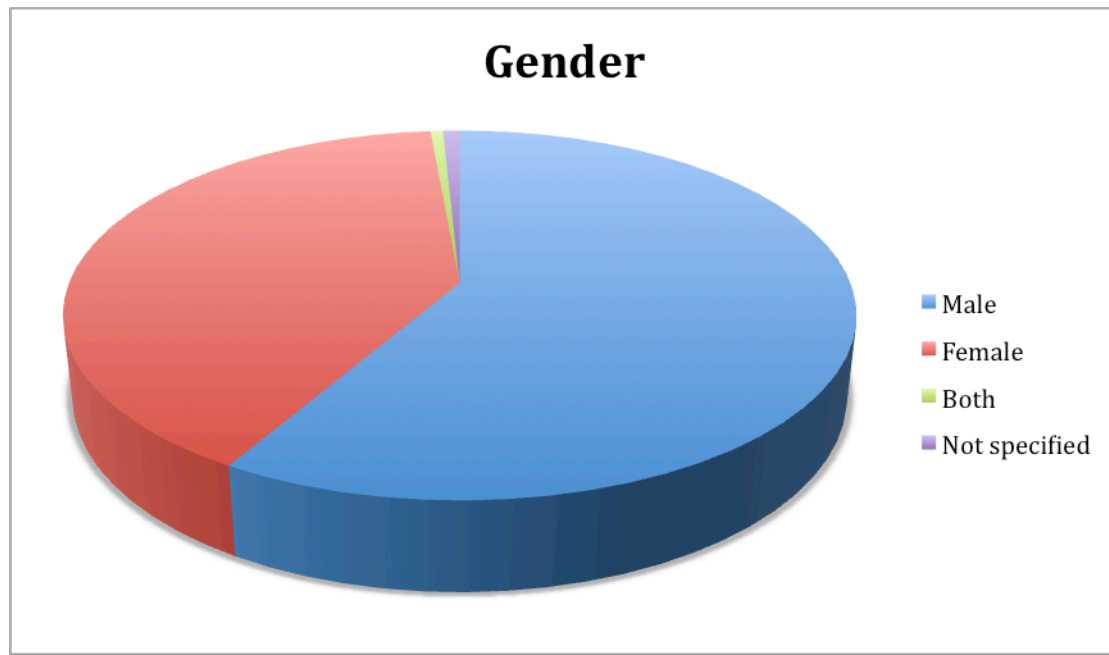
³ The press councils in this study include the press councils of Ireland, the UK, Australia, New Zealand, Sweden, Denmark, Germany, the Netherlands, Estonia, Flanders, Bosnia Herzegovina and Finland.

⁴ *Supra* fn. 2 Current issues of concern such as online matters and privacy protection were highlighted at the AIPCE annual conference in Amsterdam in November 2010

(1) Who uses the PCI system?

(i) Gender of complainants

Over the three year period, a total of 1018 complaints were made to the PCI. Of those 1018 complaints, 598 were made by male complainants, 411 by female complainants; seven complaints were made by both male and female complainants, and nine were unspecified. (See Figure 1. below) Figure 1.



Prior to the establishment of the PCI in 2008, all complaints were made directly to the editor, or previously to the Readers' Representative in national and some regional newspapers (see Chapter 3, part 2). If the complainant was not satisfied with the response from the editor, the only other option was to take legal action, if the complaint gave rise to a tort such as defamation or other head of action that could be litigated (see Chapter 3, part 1). A 1988 report on Press Freedom and Libel included a study of High Court records of defamation cases taken against the media from 1980-1985, which showed that 87% of men and only 7% of women sued national newspapers.⁵ In the 1995 report entitled *Media Accountability: The Readers'*

⁵ Boyle, Kevin, McGonagle, Marie, *A Report on Press Freedom and Libel*, (National Newspapers of Ireland, Dublin, 1988) pp.42-49

Representative in Irish Newspapers, a study of two sample newspaper groups over a five year period showed that, in contrast to the statistics on libel actions, a significant amount of complaints made to Readers' Representatives were made by female complainants, although the majority of complaints were made by male complainants. In relation to newspaper group A in the first sample period 26% of complaints were made by females compared with 70% of male complainants⁶. In the second sample period 30% of complaints were made by female complainants compared with 63.3% of male complainants⁷. Similar statistics were found in complaints made to the second newspaper group studied, where in the first sample period 38% of complainants were female compared with 58% male. In the second sample period 36% of complaints were made by women with 60% made by men⁸. These statistics, in comparison with the statistics on libel actions from the 1988 report, indicated to the authors that females were more likely to use a non-legal, informal complaints system as offered by media accountability systems such as Readers' Representatives and press councils than formal legal systems when making complaints about newspapers. The PCI complaints statistics show that female complainants make up 40% of all complainants, which in comparison with the previous statistics marks a very significant increase and appears to bear out the conclusion reached by the authors of the above-mentioned reports. It is also possible that a major contributory factor to the high percentage of female complainants is the more prominent position taken by women in the workforce and in public life nowadays compared to the 1980s and 1990s. Regardless, it is a positive development and important in terms of the reach and effectiveness of the Press Council that women and men alike are making significant use of its service in ensuring accountability and adherence to standards in the print media.

(ii) Geographical distribution of complainants

An analysis of the addresses of complainants over the three year period show that approximately 31% of complainants came from County Dublin while 30% of

⁶ Boyle, Kevin, McGonagle, Marie, *Media Accountability: The Readers' Representative in Irish Newspapers*, (National Newspapers of Ireland, Dublin 1995) p.18

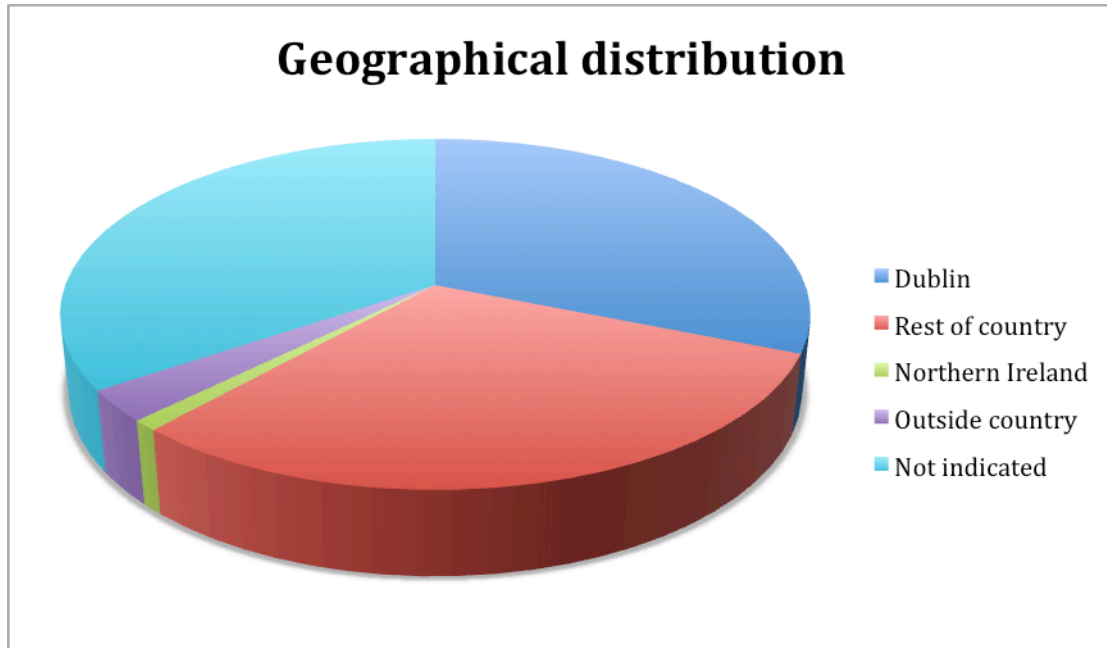
⁷ *ibid*

⁸ *ibid*

complainants came from the rest of the country. 0.9% of complaints were made from Northern Ireland and 2.9% of complaints were made from outside the country. The remaining 33.7% of complainants did not provide details of address (see figure 2.).

Figure 2.

9



In the 1995 report on Reader's Representatives, referred to above, a similar study of complaints made to the Reader's Representatives of two newspapers showed that the majority of complainants came from the Dublin area¹⁰. The current study indicates that complaints from the rest of the country have increased but that a substantial amount of complainants still come from the Dublin area. This may be due to a number of factors including a higher population percentage in the capital and a greater level of awareness of the facilities offered by the PCI in Dublin than in the rest of the country.

⁹ Of the 30% of complaints made from other parts of the country, the majority of complaints came from the Leinster area (46%) followed by Munster (29.6%), Connaught (13.5%) and Ulster (7.0%). Complaints made from Northern Ireland made up (0.9%) of the overall complaints. 2.9% of complaints were made from outside the country (see above) while 33.7% of complainants did not give an address.

¹⁰ Supra fn. 2

The 2.9% of complaints made from outside the country is indicative of the reach of the PCI. Of the 2.9% of complaints, the majority was made from the UK, which may be indicative of the large number of Irish citizens living in the UK. The 1995 report also shows that a small percentage of complaints were made from outside the country. For example, 1.5% of complaints with regard to Newspaper Group A were made from outside the country in the first sample period while 2% were made in the second sample period¹¹. The report does not indicate from which countries the complaints originated but it can be presumed that the majority of complaints were made from areas in the UK or the US in which there was a high percentage of Irish immigrants and therefore accessibility to Irish newspapers which were transported over as there was no online access to newspapers at the time.

With regard to the data compiled from the PCI complaints, while the majority of complaints made from outside the country came from the UK, other complaints were made from Scotland, the USA, France, Dubai, the Netherlands and Trinidad¹². The fact that the PCI system can be accessed in such an array of countries worldwide reflects the reality that Irish newspapers can now be read anywhere in the world via the Internet. The PCI complaints system can of course also be used online (see below).

(iii) Complainants

For the purposes of this study, complainants were categorized according to whether the complaint was made by the complainant on his/her own behalf or whether the complaint was made by a third party on behalf of a person who had been directly affected by a publication. If a complaint was made by a third party on behalf of a person who had been personally affected by a publication, the complainants were further categorized under four headings:

¹¹ Supra fn. 5 at 20

¹² Of the complaints made from outside the country to the PCI, 18 were made from the UK, 4 from Scotland, 3 from the USA, 1 from France, 1 from Dubai, 1 from the Netherlands and 1 from Trinidad.

- a) Unspecified authorized third party complainants, i.e. complainants who received permission from the subject of the complaint to lodge a complaint with the PCI.¹³
- b) Unauthorised third party complainants, i.e. one who does not have prior written permission from the person directly affected by a publication. As is the case with the majority of press councils, a person can only complain to the PCI if s/he has been personally affected by an article, photograph etc. A person can complain on behalf of another person only if s/he receives written permission from that person.¹⁴ Complaints made by an unauthorized third party are held to be outside the remit of the PCI.
- c) Relatives of a person directly affected by a complaint.
- d) Third party complaints made by a solicitor acting on behalf of a client who has been personally affected by a publication.

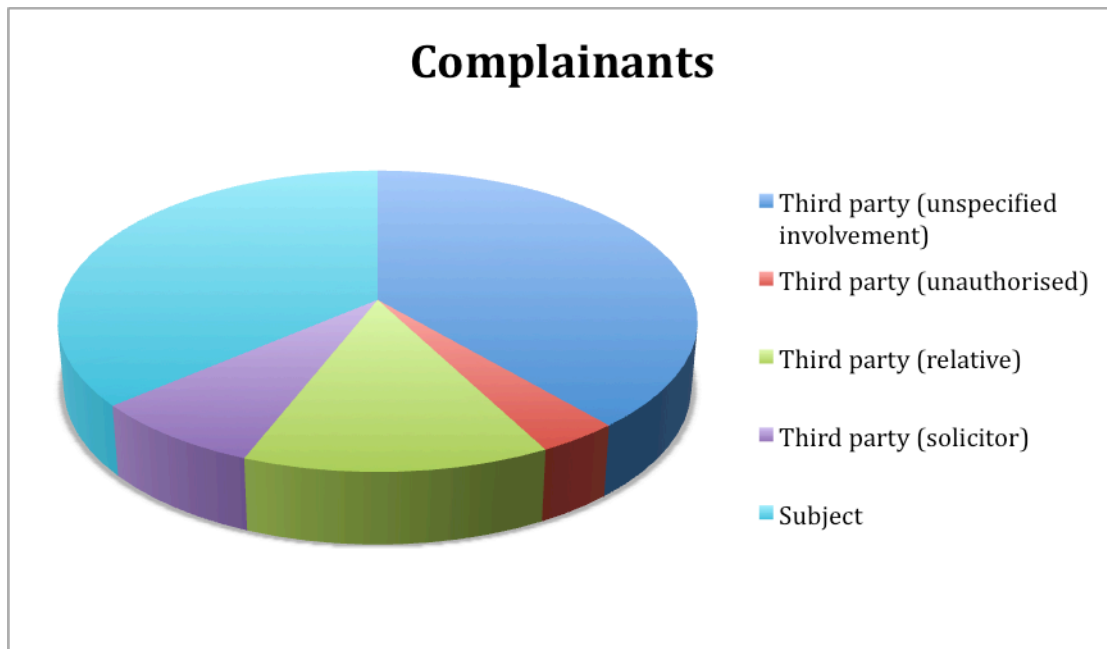
This study has shown that the majority of complaints made over the three year period were made by a third party (63%) while 36% of complaints were made by the subject of the complaint. Of the 63% of third party complaints the involvement of 38.5% with the subject of the complaint was unspecified, 21% were made by a relative of the person who was personally affected by the complaint, 11.9% were made by a solicitor of a person personally affected and 5.7% of the third party complaints were made by an unauthorized third party and were therefore outside the remit of the PCI.

Figure.

3

¹³ see <http://www.pressombudsman.ie/making-a-complaint.24.html>

¹⁴ See PCI website. For information on how to make a complaint to the PCI see <http://www.presscouncil.ie/making-a-complaint.24.html>



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As a person can only complain to the PCI if s/he has been personally affected by an article, photograph etc, one might have expected that the largest category of complainant would have been persons directly affected. However, this was not the case. The largest category was authorized complainants on behalf of a person who had been directly affected by a complaint. A high percentage of third party complaints were made by relatives of persons who had been directly affected by a publication. Complaints made by relatives included complaints made on behalf of minors or elderly relatives. A number of third party complaints were also made on behalf of deceased relatives. The question of whether complaints made can be made on behalf of the deceased is not specifically addressed on the PCI website but in practice complaints made on behalf of the deceased are generally made by relatives of the deceased person and have been permitted by the PCI (see section on defamation of the deceased below).

The relatively low percentage of unauthorized complaints (3.6%) indicates that the public is sufficiently familiar with the remit and procedures of the PCI. A public

¹⁵ Figure 3. shows that 38.4% of complaints were made by an authorized but unspecified third party, 3.6% were made by an unauthorized third party, 13.5% were made by a relative, 7.7% were made by a solicitor and 36% of complaints were made by the subject of the complaint /person who had been directly affected by a publication.

awareness, information or educational campaign to draw attention to the remit may be needed if the number of unauthorized third party complaints rises in the future.

2. How is the PCI system used?

Method of communication used by complainant

In this section, I categorized the method of communication used by the complainants over the three year period under six headings (see figure. 4 below):

- a) whether the complaint was received by e-mail,
- b) whether the complaint was received through the PCI website,
- c) whether the complaint was received by letter,
- d) whether the complaint was made by telephone,
- e) whether the complaint was made via fax, or
- f) whether the complaint was made in person.

The data showed that the majority of complaints were made online via e-mail (24%) or the PCI website (16%), followed by letters from both the public and solicitors on behalf of the public (31%) and telephone calls (27%). A small minority of complaints were made in person (1%) (see Figure. 4). In comparison with the 1995 study on Readers' Representatives, this study shows a major decrease in complaints initiated by phone¹⁶.

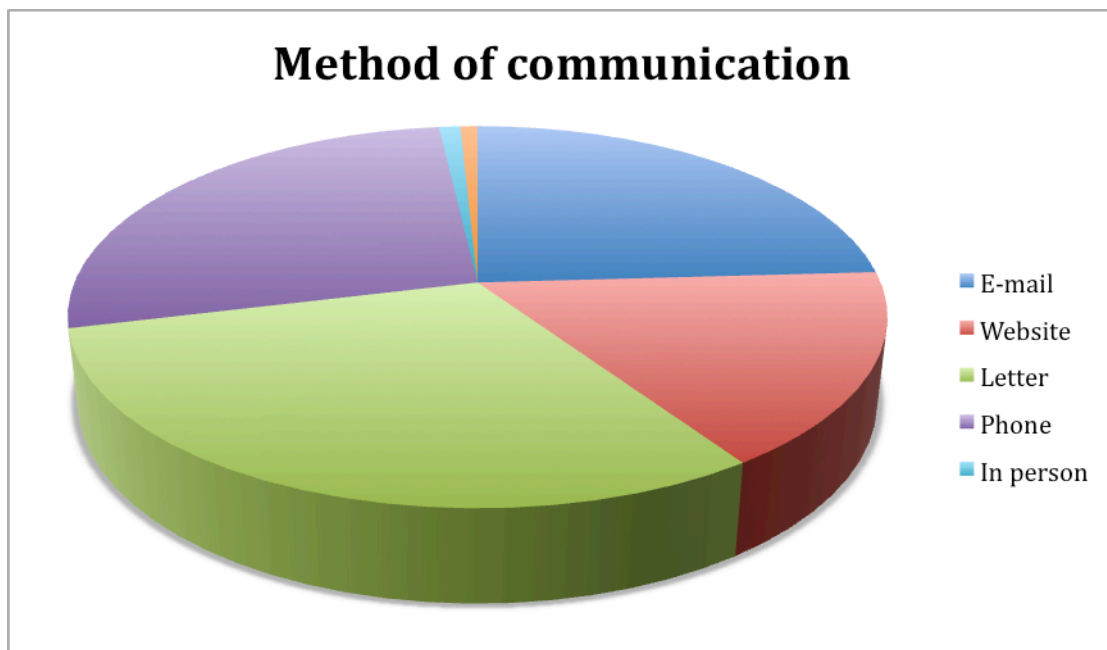
The PCI figures are indicative of the exponential increase in internet based communication with the majority of complainants opting to complain via the PCI website or by e-mail rather than by letter or phone call which were previously the most popular methods of making complaints with regard to newspaper articles¹⁷. Thus, the PCI's website is an important point of contact for the public, as well as the main source of information on how to complain. The website, therefore, needs to be user-friendly, clear, up-to-date and easy to navigate. The complaints procedure of the

¹⁶ Supra fn. 2, p.23

¹⁷ ibid

PCI is clearly set out on the PCI's website which also provides easy access to an online complaints form. It seems likely that complaints will increasingly be made to the PCI via the Internet, particularly through the PCI's website so it's important that the procedures and online form remain easily accessible and prominently featured.

Figure 4.



3. Types of complaints?

(i) Type of publication

Statistics of complaints over the three year period shows that the majority of complaints are made in relation to national newspapers. A small percentage of complaints have been made also in relation to regional newspapers. The percentage of such complaints has however risen slightly each year (see Figure 5.). Only a very

small number of complaints to date have been made about other periodicals. The number of complaints made to the PCI in relation to non-member publications was significant in the beginning but has decreased substantially each year since, which may be due to increased membership of the PCI as well as a greater level of information on the part of the public. British newspapers and periodicals are subject to the PCC¹⁸ rather than the PCI, except where they have separate Irish editions that are members of the PCI. Also, it is to be expected that the vast majority of complaints would be against national newspapers as they are the largest entities with the largest circulations.

FIGURE 5. TYPE OF PUBLICATION ¹⁹

Year	2008	2009	2010
National Newspaper	77%	81.8%	68.3%
Regional Newspaper	5.6%	8.4%	8.9%
Periodical	0.4%	1%	Not given
Non-Member Publication	17%	8.8%	6.3%
Not indicated	-	-	16.5%

(ii) Type of complaints- Principles complained of

¹⁸ The PCC has moved into a “transitional phase” ahead of the publication of the Leveson inquiry findings which are due to be published in October 2012. See Chapter 3.

¹⁹ Statistics taken from PCI statistics for 2008, 2009 and 2010 available at <http://www.presscouncil.ie/statistics.294.html>)

An examination of the principles of the PCI’s Code of Practice cited in complaints over the three year period show that issues such as ‘truth and accuracy’ in reporting and ‘privacy’ are the key concerns of the Irish public with regard to the print media. Truth and accuracy and privacy are among the two most complained of issues in all the press councils studied throughout my research. Truth and accuracy has always been the main concern historically with the public and, indeed in 2008 complaints regarding truth and accuracy were by far the largest category of complaints to the PCI, with privacy in a distant second place just marginally ahead of ‘distinguishing fact and comment’. While the number of complaints regarding truth and accuracy has remained fairly static since then, there has been a large increase in the number on privacy, thus closing the gap quite considerably, especially in 2010. Privacy, as a serious issue of concern is dealt with in more detail below under section 4 (iii). Figures from the annual reports of the PCC over the same period, i.e. 2008-2010, show that accuracy in reporting and privacy have consistently been the most complained of issues to the PCC over the three year period.

FIGURE 6. PRINCIPLES COMPLAINED OF²⁰

	2008	2009*	2010
Truth and Accuracy	128	138	116
Distinguishing Fact and Comment	38	46	40
Fairness and Honesty	37	57	44

²⁰ Statistics taken from PCI statistics for 2008, 2009 and 2010 available at <http://www.presscouncil.ie/statistics.294.html> * The 2009 statistics are estimates as the exact numbers were not available on the PCI website.

Respect for Rights	29	40	30
Privacy	39	68	90
Protection of Sources	1	2	1
Court Reporting	10	10	5
Incitement to Hatred ²¹	74	42	36
Children	6	20	11

4. What are the main issues of concern at present?

This section will consider key issues being addressed by press councils at present, which have become apparent from my study of the PCI and other press councils around the world. This section examines the role played by self-regulatory mechanisms as an alternative to legal measures in providing for media accountability to the public with regard to a number of common thematic issues such as: online matters, defamation of the deceased, privacy, the protection of children online. The aim of this section is to determine the best practice among press councils in dealing with these issues of concern.

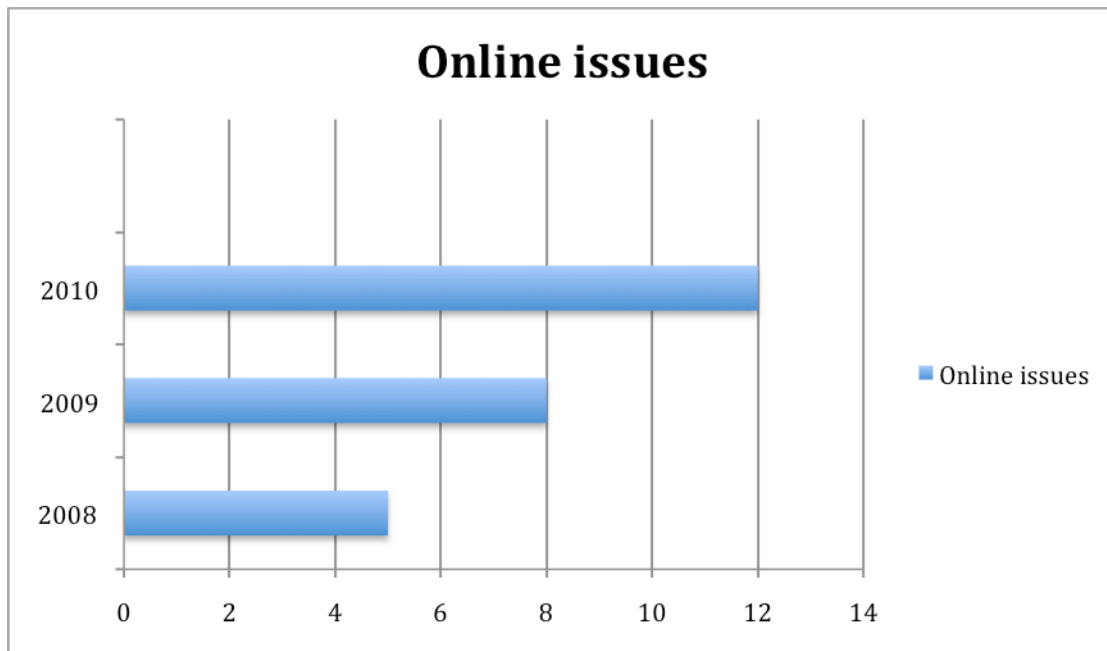
(i) Online issues

According to the PCI data studied, a total of 25 complaints were made with regard to online material generally.²² The study indicates a gradual increase in complaints

²¹ The principle (Principle 8 of the Code) on ‘incitement to hatred’ has been replaced/renamed in the revised code by a principle on ‘Prejudice’, which includes causing grave offence or stirring up hatred. The text of the code is available at <http://www.presscouncil.ie/code-of-practice.10.html>

relating to online material during the three year period, with the PCI receiving 5 complaints in 2008, 8 in 2009 and 12 in 2010 (see figure 7 below).

Figure 7. Increase in complaints re online issues over the three year period



Of the 25 complaints studied, 8 complaints were made in reference to information or photographs taken without permission by journalists from social networking sites and 2 complaints related to information taken without authorisation by journalists from personal blogs.

The PCI's 2010 annual report made reference to the impact of the Internet on PCI complaints. The report cited two instances where the unauthorized use of information from blogs was the subject of complaints²³. In the case of '*Bopp and the Irish Mail on Sunday*' the Press Ombudsman (PO) decided not to uphold the complaint due to the

²² The number of complaints made with regard to online material is likely to be much higher. The number reflects the limited information available in the PCI's data.

²³ See 2010 Annual Report of the PCI, p.11 available on PCI website at <http://www.presscouncil.ie/publications-and-press-releases/publications.1053.html>

fact that much of the information had been sourced by the newspaper from the complainant's facebook and twitter accounts that were publicly accessible to all. The PO stated that such complaints highlighted the need for the public to be careful about what material they choose to put into the public domain.²⁴

A key concern that has arisen from the inclusion of online publications within the remit of press councils²⁵ is the protection of individual privacy in the digital environment. Technological advances in this area have highlighted the need for the remit of press councils to be extended to include provisions in their codes of practice on the gathering of personal information that is posted on the Internet, particularly on social networking sites. Clause 10 of the PCC Code of Practice, for instance, has been amended to prohibit the “unauthorized removal of documents or photographs; or [the] accessing [of] digitally held private information without consent”. The type of information gathered, and the content and portrayal of the content are among the matters that should be taken into account when assessing whether there has been a breach of journalistic standards. The Danish Press Council in its annual report to the AIPCE has specified that when dealing with complaints relating to the acquiring of information from social networking sites, a distinction will be made between public and private profiles with greater protection being offered to those profiles with higher privacy settings.²⁶ There has been an exponential growth in users of social networking sites, particularly Facebook, which has recently recorded its 500 millionth user. Research has found that 78 per cent of people surveyed would be more likely to trust websites governed by a code of practice as opposed to ungoverned sites.²⁷ There is also a need for education of journalists. Children also need to be educated regarding the use of social networking sites, including the implications of publishing information online and how to use privacy settings.

²⁴ Supra fn. 21, p.12

²⁵ The Irish Defamation Act 2009 defines “periodicals” as including “any newspaper, magazine, journal or other publication that is printed, published or issues, or that circulates in the State at regular or substantially regular intervals and includes any version thereof published on the internet or by other electronic means”. (Part 1(2))

²⁶ AIPCE Annual Country Report (Danish Press Council) 12th Annual Meeting, November 4-5, 2010, p.40

²⁷ Presentation delivered by David Racadio, Research Director The Reputation Centre, Ipsos MORI at ‘*Social networking, privacy and the press- Protecting individual privacy in the digital age*’, June 5, 2008, London (Westminster Media Forum Keynote Seminar, London)

In order to adapt to such matters of convergence, it is imperative that press council codes are organic. Guidelines on online issues such as these will develop as press councils receive more cases. At present, press councils are dealing with complaints on a case by case basis and are setting their own standards for future cases relating to online issues. Cooperation and sharing of experiences with other press councils, such as through the AIPCE, can be very instructive in this regard and useful in developing policy and standards. As will be seen below, much can be learned also from the experiences and policies of broadcast regulators.

Online newspapers and editorial responsibility

The remainder of PCI complaints regarding online issues during the period studied related to online articles on the websites of newspapers/periodicals.

The majority of press councils have extended their remit, both officially²⁸ and unofficially, to include online versions of member publications. It is clear that editorial responsibility extends to online versions of publications, but does this responsibility also extend to user generated comments which are posted on member sites?

The subject of editorial responsibility of the print media online was discussed at length at the annual meeting of the AIPCE in Amsterdam in November 2010. Questions included: Should editorial responsibility extend to all online material that is available under the brand of a member newspaper? Should editors take responsibility for all material that appears on their websites even if it is user generated?

These questions arose in the Scottish case of *Robertson v Sunday Herald*.²⁹ This case involved allegedly libelous user generated comments being posted on an online edition of the *Sunday Herald* newspaper by anonymous contributors. Lord Robertson, British labour party politician and former secretary general of NATO, issued legal proceedings against the *Sunday Herald* following the defamatory comments posted on

²⁸ See PCC, Swedish Press Council and Catalan Press Council codes of practice. The PCC code was amended to extend its ambit to online publications. The preamble of the code now states: "It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications."

²⁹ *Robertson v Newsquest (Sunday Herald) Ltd & Ors* [2006] Scot CS CSOH_97

its site. The *Herald* apologized and removed the offending comments from its website as soon as the complaint was received. The case was settled out of court for £25,000. The case, therefore, has not shed much light on the legal implications and responsibilities of newspapers for publishing libelous user generated material.³⁰

The issue was made a little clearer in the UK case of *Kaschke v Gray Hilton*³¹, where the High Court ruled that the defendant, Mr. Hilton, who was the owner and operator of a website called Labourhome.org, was not entitled to immunity from liability, as provided under regulation 19 of the E-commerce Directive,³² for material that was posted on his website by another party due in part to the fact that Mr. Kaschke admitted to occasionally intervening in individual blogs on his website although on this occasion he had not intervened in the case of Mr. Gray's blog.³³ It appears from this case that owners of online sites are responsible for user-generated material on their sites if their involvement in the site goes beyond that of a mere storage provider, i.e. if they have or have had any editorial control over the information displayed on their websites³⁴. In accordance with this judgment, although it did not concern a newspaper website, it would appear that online publications can be held responsible for any user-generated comments appearing on their websites. As such, it is important that online publications make a clear distinction between their own content and user generated contributions in order to avoid any confusion. Such a distinction is advocated in the newly revised code of practice of the Flemish Press Council, under

³⁰ Thurman Neil, *Forums for citizen journalists? Adoption of user generated content initiatives by online news media*; New Media and Society, 10(1), Sage Publications 2008, p 22

See also Council of Europe, Recommendation CM/Rec (2011)7 of the Committee of Ministers to member states on a new notion of media on 21 September 2011.

³¹ *Kaschke v Gray Hilton* [2010] EWHC 690 (QB)

³² Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002, which provides for the hosting of user generated material on sites stipulates that: 'where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where- (a) The service provider (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information, and (b) the recipient of the service was not acting under the authority or the control of the service provider.'

³³ *Supra* fn 32 at para 110

³⁴ *Supra* fn. 18

the guidelines annexed to the code under art 14³⁵. It is submitted that online publications or online versions of publications should be proactive and take precautionary measures, such as screening, to prevent complaints or possible legal proceedings.

To prevent such actions, a practice which has been adopted by a number of online newspapers, is the moderation or filtering of user generated comments. This is essentially a type of screening process for information which is posted on the websites of member newspapers. This system can be divided into three separate categories with differing degrees of editorial control: (1) pre-moderated screening; (2) post moderated screening; and (3) reactive moderated screening³⁶. Pre-moderated screening is the most rigorous of the three categories. It means that user generated comments are editorially screened before they are posted on the site. Post moderated material is material that has been screened after it has been automatically posted onto the site. Reactive moderation is where user generated comments are taken down on the basis of complaints. This screening process has been implemented into broadcasting

³⁵ AIPCE, Annual Country Report (Flemish Press Council), 12th Annual Meeting, November 4-5, 2010, p 20. Flanders Press Council Code of Practice is available at: http://www.rvdj.be/sites/default/files/pdf/code_of_practice.pdf.

³⁶ (See for example the BBC Editorial Guidelines. Section 17: Interacting with our audiences, Phone-In Programmes, User Generated Content Online, Mobile Content, Games and Interactive TV, sets out methods used by the BBC to moderate user generated materials (s 17.4.41). RTE's guidelines came under scrutiny in 2012 following the use of a tweet during the final televised debate in the Presidential election. The tweet in question was from a Twitter account which was "erroneously described by the programme presenter as that of the official Martin McGuinness for President Campaign" and showed a lack of impartiality, fairness and objectivity towards the presidential candidate, Sean Gallagher on the part of the presenter of the RTE programme (see http://www.rte.ie/news/2012/0307/bai_gallagher_ruling.pdf.) As a result of the serious mistakes made by RTE in relation to such programmes as the Frontline Presidential Debate programme, RTE is in the process of reviewing its guidelines on current affairs and new journalism as well as its editorial standards and training of staff (see <http://www.rte.ie/about/docs/key%20Actions%20and%20Changes%20RTE%20Current%20Affairs%20April%203%202012.pdf>) An interim edition of RTE's Journalism Guidelines are available at <http://cdn.thejournal.ie/media/2012/04/RTE-Journalism-Guidelines-April-3-2012.pdf>. A number of obligations and referrals which are cited in the guidelines are mandatory. For example, the provision under Section 9 on 'Editorial Integrity and Independence' which states that: "Programme-makers must ensure that in their use of social media they avoid damaging perceptions of their own or RTE's impartiality." The Guidelines also include guidance on reporting from social media sites and the Internet including App 2.2 Hoaxes and Spoofs which provides: "Many websites and social media streams contain bogus information such as spoof news reports. Some campaign and activist sites mimic the domain name and design of an official source for reasons of satire or misinformation. You must take care to perform thorough provenance checks before using material from a website or a social media stream using for example, "about us" sections or "WHOIS".

standards also by a number of broadcasters, including the BBC, whose guidelines set out three different types of screening methods used to deal with user generated material appearing on their websites³⁷.

In a 2010 adjudication regarding a complaint about the re-publication by a newspaper of digitally held information about a deceased man,³⁸ the Irish Press Ombudsman, Professor Horgan, stated that “editorial judgment will always be considered” by the PO and Press Council when deliberating on whether or not there has been a breach of the Code of Practice. Accordingly, if editors act in good faith and can provide valid and well thought out reasons for publishing certain sensitive information, the PO and Press Council will take that factor into consideration in their adjudication.

In its 2011 recommendation on a notion of new media, the Council of Europe³⁹ set out a list of criteria for member states to be used to determine whether “particular activities, services or actors ought to be regarded as media”⁴⁰. One of the criteria is whether or not there is “editorial control”⁴¹. According to the criteria set out for determining whether there is editorial control, the editorial process can include moderating user generated material whether by means of reactive moderation, automated moderation or pre-moderation.⁴²

It is vital that press councils adapt to such online issues and cater for them in their codes of practice in order to remain relevant and effective. A minority of press councils have already incorporated guidelines concerning the handling of user generated comments by the press into their codes. For example, as mentioned above, the Flemish Press Council’s code of practice was updated to include journalistic guidelines on user generated material in 2010. Article 14 of the code of practice states that: “...Editors must moderate their web forums with complete independence and are responsible for said moderation.”⁴³ Article 14 is supplemented by a comprehensive

³⁷ *ibid*

³⁸ *Supra* fn. 21, p.11

³⁹ Recommendation CM/Rec (2011)7 of the Committee of Ministers to member states on a new notion of media (Adopted by the Council of Ministers on 21 September 2011 at the 1121st meeting of the Ministers’ Deputies)

⁴⁰ *Supra* fn. 36, para. 9

⁴¹ *Supra* fn. 36, para. 11

⁴² *Supra* fn. 36, para. 33

⁴³ Flanders Press Council Code of Practice available at: http://ww.rvdj.be/sites/default/files/pdf/code_of_practice.pdf.

set of principles which are appended to the code and include a recommendation that digital discussion forums be responsibly monitored through either pre-monitoring, reactive monitoring or post monitoring methods.

Press Councils should adopt similar guidelines as a means of promoting higher journalistic standards in the area and guaranteeing a greater level of editorial control over user generated comments.⁴⁴

(ii) Defamation of the deceased

Since its inception, the Press Council of Ireland has dealt with a significant number of complaints which were made on behalf of the deceased. During the three year period studied 86 complaints were made to the PCI on behalf of the deceased which accounted for 8.4% of the total complaints made during that period. Complaints made on behalf of the deceased related to defamatory material published about victims of suicide, murder victims and publications about inquests into the deceased's death.

Complaints can be made to the PCI on behalf of the deceased if it is considered that there has been a breach of any of the Principles of the PCI Code of Practice. The most commonly cited Principle with regard to complaints on behalf of the deceased is Principle 5 which protects privacy rights. In the PCI's 2010 annual report, Professor Horgan, in considering the scope of Principle 5 of the Code of Practice, affirmed that Principle 5 extends to publications about the deceased stating: "Although Principle 5 is concerned primarily with the privacy rights of living persons, sub-section 3 of that Principle enjoins "sympathy and discretion" on publications seeking or publishing information in situations of personal grief or shock. This has an obvious bearing on reports of death in tragic circumstances, or where the bereaved family may feel that publication of some details about the deceased is an unwarranted reflection on his or her character."⁴⁵ An example of a case in which the PCI dealt with a complaint made on the basis of a breach of Principle 5.3 which related to defamation of the deceased

⁴⁴ See Brody, Annabel, *Pressing times ahead: the evolution of press councils in an age of media convergence*, Comms Law, Vol 6, No.3, 2011 at 106-113

⁴⁵ *Supra* fn. 21, p.11

is the case of ‘A Woman and the Western People’⁴⁶. In this case, the complainant claimed that there had been a breach of Principle 5.3 of the Code of Practice in that an article published by the ‘*Western People*’ newspaper failed to take into account the feelings of the complainant’s grieving family when it published information on the day of her relative’s funeral which included the re-publication of information about the deceased’s previous murder conviction. The Press Ombudsman decided that the editor’s offer to meet the complainant in an attempt to resolve the matter, which was rejected by the complainant, amounted to “an offer of sufficient remedial action” on the part of the editor.”⁴⁷ In the 2010 Annual Report, Professor Horgan highlighted the continued importance of editorial judgment in such cases despite the fact that digital archives can so easily retrieve information that is “beyond the normal span of human memory.”⁴⁸

Defamation of the deceased and the role of law

This section considers the role played by media accountability mechanisms, in the print media industry, in providing effective remedies to those whose reputations have been defamed in a publication, particularly in relation to reputations of the deceased, as an alternative to law.

The appropriateness of creating a cause of action in defamation law with regard to defamatory statements made about the deceased is a contentious issue and one that has been ardently debated in recent years. In Ireland, a 1991 Law Reform Commission Report on the Civil Law of Defamation⁴⁹ recommended the introduction of a new cause of action in defamation law for personal representatives of the dead. The Commission stipulated that such actions should have a limitation period of three years and that remedies for such actions should be limited to a declaratory order or injunction where appropriate.⁵⁰ This recommendation was not included in the 2009

⁴⁶ Complaint entitled ‘A Woman and the Western People’ (22 June 2010) Details of this complaint are available at: <http://www.presscouncil.ie/decided-by-press-ombudsman/a-woman-and-the-western-people-.1977.html>

⁴⁷ *ibid*

⁴⁸ *Supra* fn. 21, p.11

⁴⁹ Report by the Law Reform Commission on the Civil Law of Defamation, (LRC 38-1991) December 1991, p.85

⁵⁰ *ibid*

Defamation Act; however, provision was made for existing defamation actions to continue after death with no award of damages (See section 39(2)(a) and (b) and section 39(3)(a) and (b)). A similar recommendation was put forward by the Australian Government in its 2004 report entitled '*Outline of Possible National Defamation Law*⁵¹ which endorsed a much earlier recommendation from the Australian Law Reform Commission report of 1979⁵². This proposal was opposed by media and legal representatives in Australia in a submission in response to the Government's proposal⁵³. The SCAG (Standing Committee of Attorneys General Working Group of State and Territory Officers) recommended that no cause of action should be created for representatives of the deceased and this was implemented in the Australian Defamation (Uniform) Act 2005, which specifically states under section 10 that no cause of action exists "for defamation of, or against, deceased persons."⁵⁴ This section is enforced by all of the Australian provinces with the exception of Tasmania where an existing action for defamation may be continued after the death of the person defamed. Section 10 of the Australian Defamation (Uniform) Act 2005 has been included in the Tasmanian Defamation Act in the interest of uniformity but has been left blank. No such cause of action has been introduced in Australia to date. The UK Defamation Act 1996 makes no specific provision for defamation of the deceased although in a general note after section 5 (Limitation of actions: England and Wales) it is written:

Actions for malicious falsehood are capable of surviving the death of a party, unlike defamation actions, and provision is made in ss. 5(4) and 6(4) for the court to take the actions of personal representatives into account.

⁵¹ Report by the Attorney General's Department '*Outline of Possible National Defamation Law*', Australian Government, March 2004 pages 12 and 13)

⁵² Report by the Australian Law Reform Commission: '*Unfair Publication: Defamation and Privacy*' (ALRC Report 11) 7 June 1979, pp. 54, 55

⁵³ See submission of the Media and Communications Committee of the Business Law Section of the Law Council of Australia to the Commonwealth Attorney General's Department, April 2004, p. 7- See Proposal for Uniform Defamation Laws- SCAG Working Group of State and Territory Offices- Published by the Legislation and Policy Division of the NSW Attorney General's Dept- p.16

⁵⁴ Section 10 Defamation Act 2005 states that "A person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to (a) the publication of defamatory matter about a deceased person (whether published before or after his or her death); or (b) the publication of defamatory matter by a person who has died since publishing the matter."

The Canadian Defamation Act 1996 (Uniform Act) is the only legislation in a common law country that forms part of this study which specifically provides for defamation of the deceased⁵⁵. The limitation period for such actions is five years after the death of the person defamed (Section 3(4)) and no award of damages can be made under Section 3 (Section 3(3)). It has, however, been widely acknowledged in common law that the deceased cannot be defamed.⁵⁶ A person's reputation is personal in nature and cannot be inherited by surviving relatives in the same way that property rights can be inherited.⁵⁷

As well as this, the right to sue in defamation on behalf of the deceased could potentially infringe on freedom of expression in that it may create a chilling effect on journalism or prevent historians from giving accurate accounts of historical figures whose relatives had the power to sue in the event of an unflattering report.⁵⁸ The development of the internet and new media has also questioned the effectiveness of a cause of action in defamation on behalf of the deceased in Scotland, due to the media's ability to publish information online. For reasons such as these, a legal right to sue in defamation on behalf of a deceased relative has generally been considered to be inappropriate and largely unworkable.

An Article 19 publication entitled, *'Defining Defamation- Principles of Freedom of Expression and the Protection of Reputation'*⁵⁹ sets out principles which reflect the "appropriate balance"⁶⁰ between the right to freedom of expression and the protection of individual reputation. The publication states: "the Principles are based on the premise that in a democratic society, freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations."⁶¹ Principle 2 states that defamation laws

⁵⁵ Section 3 Defamation Act 1996 (Uniform Act)

⁵⁶ *Death of a Good Name- Defamation of the Deceased: A Consultation Paper* (January 2011) (Scottish Government Publication) Chapter 3, p.1- available at <http://www.scotland.gov.uk/Publications/2011/01/11092246/3>

⁵⁷ Article 19 *Defining Defamation- Principles on Freedom of Expression and the Protection of Reputation-* Article 19 Report (London, 2000) (International Standards Series) available at <http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf>

⁵⁸ *ibid.* Also see *Supra* fn. 53, Chapter 3, p.4

⁵⁹ *Supra* fn. 54

⁶⁰ *ibid*

⁶¹ *ibid*

need to be justified and must reflect a “legitimate purpose”.⁶² Principle 2 specifies that defamation laws cannot be justified if, inter alia, their effect is to “enable individuals to sue on behalf of persons who are deceased.”⁶³

Non-legislative alternative

Due to the potential problems of providing for a legal cause of action on behalf of the deceased in defamation law, it is necessary to consider alternative non- legislative approaches to protecting reputations of the deceased, which can be used by their representatives. Media accountability mechanisms such as press councils can provide a non-legislative alternative for those who wish to defend the reputation of a deceased relative. In this respect the protection offered to the reputation of the deceased by press councils is more concerned with respect for the sensibilities of relatives of the deceased which indirectly protects the reputations of the deceased.

The Irish Legal Advisory Group on Defamation recommended against introducing a legal cause of action in defamation law on behalf of the deceased but instead recommended that the “essential aim- to provide some mechanism whereby the reputation of a deceased person can be vindicated - can largely be realized by way of an effective Press Council”.⁶⁴ It recommended that such a press council should be given “appropriate breadth”⁶⁵ to deal with such issues. The PCI has been providing an effective avenue for those who wish to make a complaint on behalf of the deceased in the three year period examined (see above).

The Scottish Consultation paper on Defamation of the Deceased⁶⁶ considered the non-legislative approach to the issue in the UK. The paper considers the role played by the Press Complaints Commission in offering protection to the reputations of the deceased under a number of clauses of the Editors’ Code of Practice which is overseen by the PCC. The PCC code does not specifically provide for defamation of the deceased; however, complaints dealt with in this area by the PCC are concerned

⁶² ibid

⁶³ ibid

⁶⁴ Report of the Legal Advisory Group on Defamation, March 2003, para. 29

⁶⁵ ibid

⁶⁶ Supra fn. 42

with the family of the deceased person and are dealt with under such clauses as Accuracy, Intrusion into Grief and Shock and Privacy.⁶⁷ In its response to the 2010 Consultation Paper by the Scottish Government on Defamation of the Deceased, the Editors' Code of Practice Committee condemned the proposal for a new Scottish law to provide redress for defamation of the deceased as "unwarranted, inappropriate, largely unworkable and...potentially damaging to freedom of expression and the public interest in Scotland and beyond."⁶⁸ The Committee stated that there was no need for a new law as redress for defamation of the dead is already provided by self-regulatory bodies in the media sector and by the courts. The Committee agreed with the consultation paper's finding, i.e. that an offer of damages in law would be inappropriate as a form of redress for actions on behalf of the deceased and considered that forms of redress would have to be limited to an apology, removal of the defamatory material or an agreement not to repeat the libel, which are already offered under the PCC self-regulatory system and other regulatory bodies in the media industry such as Ofcom.⁶⁹ The Editors' Committee also pointed out that while the media can be responsible for publishing information about the deceased of a defamatory or inaccurate nature, the media also provides a forum whereby rebuttals can be made on behalf of the deceased which is often a more powerful remedy than a court verdict⁷⁰ due to its immediacy whereas a court case can be a long and costly affair.

Although the Australian Press Council makes no specific provision for defamation of the deceased in its Statement of Principles, complaints can be made on behalf of the deceased under a number of principles including; Accurate, fair and balanced reporting; Respect for privacy and sensibilities, Honest and fair investigation; preservation of confidences, Discretion and causing offence⁷¹. Likewise, the Statement of Principles of the New Zealand Press Council does not specifically provide for defamation of the deceased in its statement of principles. The complaints dealt with in this area by the council are concerned with distress caused to relatives of

⁶⁷ See Editors' Code of Practice available at: <http://www.pcc.org.uk/cop/practice.html>

⁶⁸ Supra fn. 42, Editors' Code of Practice Committee response to consultation paper, p.1

⁶⁹ *ibid*, p.2 See also Supra fn. 42, Chapter 3, pp 32,33

⁷⁰ *ibid*, p.2

⁷¹ See the Statement of Principles of the Australian Press Council available at: <http://www.presscouncil.or.au/statements-of-principles/>)

the deceased and accuracy in reporting of deaths.⁷² Complaints can be made to press councils on behalf of the deceased under a number of principles including; Accuracy, Fairness and Balance, Privacy and Comment and Fact.⁷³

The Scottish Consultation Paper on Defamation of the Deceased recommended that media regulators such as the PCC publish guidance notes setting out best practice scenarios when dealing with material in relation to the deceased, particularly with regard to homicide victims. As well as this, the paper recommended that such regulators provide the public with information and guidelines with regard to dealing with media interest in the case of the death of a relative⁷⁴. This recommendation was endorsed by Victim Support Scotland in its submission in response to the Consultation Paper.⁷⁵ The PCC has subsequently implemented this recommendation and has recently published advice on ‘Media attention after a death’.⁷⁶ It is recommended that the PCI and other press councils provide similar advice on this issue whether on their websites or printed material.

Other complaints bodies in the media sector

Codes of practice and complaints bodies in the broadcast media which are based in statute can offer redress to representatives/relatives of the deceased where defamatory or inaccurate remarks have been made about the deceased. In the UK complaints can be made to the Office of Communications (Ofcom) on behalf of the deceased. According to Section 3 of the Communications Act 2003, which sets out the general duties of Ofcom, Ofcom must provide protection from *inter alia* “unfair treatment in programmes” (Section 3(2)(i)) and “unwarranted infringements of privacy”(Section

⁷² See New Zealand Press Council Statement of Principles available at http://www.presscouncil.org.nz/principles_2.php)

⁷³ *ibid*

⁷⁴ *Supra* fn. 53, p.37

⁷⁵ *Supra* fn. 53 Submission by Victim Support Scotland, p.6

⁷⁶ available at http://www.pcc.org.uk/assets/482/Media_attention_following_a_death_web_version.pdf

3(2)(i)), Ofcom have confirmed that complaints regarding fairness can be made on behalf of the deceased.⁷⁷

This study indicates that ‘defamation’ of the deceased is really an issue of ethics, rather than law. As such self-regulatory/independently-regulated complaints bodies such as press councils can offer effective protection to the reputations of the deceased which is arguably more effective than a legal remedy in that the complaint is dealt with quickly. Representatives/relatives of the deceased can complain to press councils on behalf of the dead. Self/independently regulated bodies such as the PCI and PCC can provide effective redress in cases where the deceased has been defamed. The protection afforded by press councils to the reputation of the deceased is arguably more about protecting the memory of the deceased and protecting the sensibilities of relatives of the deceased. These remedies include: an apology, clarification, publication of a rebuttal, removal of the defamatory material or an agreement not to repeat the libel. The only remedy that could be added by way of legislation is an award of damages which has been largely accepted as an inappropriate means of redress in such cases (see above).

(iii) Press Councils and Privacy

The protection of privacy offered by press councils is a contentious one and is of particular relevance with regard to the PCI. The 2006 Privacy Bill has been “parked” to see whether the PCI can offer a sufficient degree of privacy protection to individuals without recourse to privacy legislation. Changes in press attitudes to privacy and the influence of ECHR jurisprudence in both Ireland and the UK have resulted in an increase in claims for invasion of privacy. Privacy complaints made to the PCC have also increased. (See figure. 8)⁷⁸

⁷⁷ Supra fn. 53, Chapter 3, p.34

⁷⁸ See also the Executive Summary of the Press Complaints Commission submission to CMS select committee inquiry into press standards, privacy and libel, 2009, para. 2 “The PCC now helps more people with privacy concerns than ever before-but the profile of the courts’ activity in this area has increased along with media concern about the power of individual

Figure 8. Press Complaints Commission: Privacy complaints since 1996

<u>Year</u>	<u>Number of Complaints Received</u>	<u>Clause 3 Privacy</u>	<u>*Private Lives</u>
2010	Not given	Not given	23.7% ⁷⁹
2009	Not given	Not given	21.4%
2008	4,698	8.8%	23.8%
2007	4,340	9.2%	19.4%
2006	Number not given	10.8%	22.6%
2005	3,645	12.5%	25.4%
2004	3,618	11.4%	24.3%
2003	3,649	11.4%	36.1%
2002	2,630	10.5%	24.1%
2001	3,033	12.0%	27.8%
2000	2,225	14.1%	
1999	2,427	14.7%	
1998	2,505	13.8%	
1997	2,944	13.0%	
1996	3,023	14.9%	

judges to decide what can and cannot be published.” Available at http://www.pcc.org.uk/assets/111/PCC_Select_Committee_submission_2009.pdf

⁷⁹ % refers to the percentage of all complaints.

*‘Private lives’ includes all complaints which related to privacy which includes Clause 3 (privacy), Clause 4 (photos in private places), Clause 5 (Intrusion into grief), Clauses 6 & 7 (privacy of children), Clause 9 (privacy in hospitals), Clause 10 (privacy of innocent relatives) and Clause 12 (privacy of sexual assault victims). This heading was included in the PCC annual report statistics in 2001.

In its first three years, the PCI has received and dealt with a significant number of complaints relating to privacy issues. In 2008, 39 complaints citing a breach of privacy were recorded. The number increased to 68 in 2009 and 90 in 2010. The number reflects the total amount of complaints made which cited Principle 5 (Privacy). In most cases more than one principle was cited. In 2008 Principle 5 (Privacy) was the third most cited principle in complaints and was the second most cited principle in 2009 and 2010⁸⁰ (See figure. 9)

Figure. 9 Press Council of Ireland: Privacy complaints 2008-2010

Year	Principle 5 Privacy
2010	90
2009	68
2008	39

The PCI has dealt with a number of high profile complaints since its establishment and is setting its own standards and precedent for future cases relating to privacy (see Chapter 3). The decision to park of the 2006 Privacy Bill has not been re-considered to date although it is included in the current programme of government.⁸¹ In March 2012 Senator David Norris proposed a new Privacy Bill based on the original 2006 Bill. Senator David Norris, speaking in the Seanad requested: “That leave be granted to introduce a Bill entitled an Act to provide for a tort of violation of privacy; and to

⁸⁰ See PCI annual reports, 2008, 2009, 2010

⁸¹ See http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/SECTION_D1.html

provide for matters connected therewith.”⁸² Speaking in the Seanad the following week, Minister Alan Shatter opposed the new Bill which he described as “premature” in consideration of the fact that the 2006 Bill had be parked in order to give adequate time to assess the effectiveness of the Press Council in protecting privacy and also to assess the impact of the Defamation Act 2009. Minister Shatter spoke of his intentions to review the effectiveness “current architecture” in ensuring privacy protection in 2013.⁸³

Up until the establishment of the PCI, complaints of invasion to privacy which were made to media accountability mechanisms in existence at the time, i.e. readers’ representatives and the Broadcasting Complaints Commission (which has since been replaced by the BAI Compliance Committee- see Chapter 2) were very low (See figure. 10). The number of complaints on privacy in broadcasting has in some circumstances risen slightly in recent years (See figure. 10).

Figure. 10 Broadcasting Complaints Commission: Privacy complaints 1996- 2007

Year	Number of complaints relating to privacy issues
1996	0
1997	1
1998	0
1999	0
2000	0
2001	0
2002	1
2003	4

⁸² Seanad Eireann, 22 March 2012, Privacy Bill 2012: (First Stage) Speech by Senator David Norris, (Debate Vol. 214 No.8 Unrevised)

⁸³ Private Members Business, Seanad Eireann- 28 March 2012 (Second Stage) Speech by Mr. Alan Shatter, T.D., Minister for Justice, Equality and Defence.

2004	6
2005	6
2006	3
2007!Unexpected End of Formula	1
2008	7 ⁸⁴

The BAI Compliance Committee came into operation in October 2009. As such, its 2009 Annual Report provides for statistics on complaints received by the Compliance Committee from November 2009 to December 2009. During this short time period a total of 159 complaints were made to the Committee, 2 of which related to privacy.⁸⁵ The 2010 Annual Report showed that out of a total of 547 complaints made to the Committee, only 6 complaints related to privacy.⁸⁶ Judging from these complaints statistics, it doesn't appear that there has been any significant increase in complaints of privacy against broadcasters; most of the complaints seem to have related to fairness and impartiality and taste and decency.

Press Councils as means of providing privacy protection

Specific provision for privacy protection is included in all of the codes of practice studied. It is statistically one of the most complained of code principles within press councils generally (see Chapter 3). This section will consider the extent of privacy protection offered by press councils focusing on the press councils of Ireland, Australia and the UK.

The Press Council of Ireland (PCI)

⁸⁴ Out of the 7 complaints on privacy made to the BCC, 4 related to the same programme.

⁸⁵ See BAI Annual Report and Accounts 2009 at p. 16 available at http://www.bai.ie/wordpress/wp-content/uploads/BAI_Annual-Report_2009_OnlineVersion_ENGLISH_PK.pdf

⁸⁶ See BAI Annual Report and Accounts 2012 at p. 33 available at http://www.bai.ie/wordpress/wp-content/uploads/BAI_AR_2010_English.pdf

As a quasi legal body which is statutorily recognised it can be argued that the PCI offers greater privacy protection than its self-regulated counterparts which are for the most part not statutorily recognised. The Defamation Act 2009 specifically stipulates that the principal objects of the Press Council shall be *inter alia* to “ensure that the privacy and dignity of the individual is protected.”⁸⁷ The Act further provides that the Press Council must provide standards on privacy in its Code of Practice⁸⁸. In the ECHR case of *Karako v Hungary* the European Court of Human Rights examined the extent to which privacy (Article 8 ECHR) should be protected at a domestic level. The court concluded that “as a minimum requirement...an effective legal system must be in place and operating for the protection of the rights falling within the notion of “private life””⁸⁹ As a statutorily recognised, effective body, it can be argued that the PCI fulfills this ECHR requirement in cases of press intrusion on privacy. In the case of *Sanoma v the Netherlands*, the Grand Chamber considered that the word “law” as it appears in the context of Articles 8-11 of the Convention, i.e. “prescribed by law” and in accordance with law” is to be interpreted substantively as opposed to formally.⁹⁰ According to the Grand Chamber the “law” in this context has included “...both “written law”, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. “Law” must be understood to include both statutory law and judge made “law”. In sum, the “law” is the provision of force as the competent courts have interpreted it.” As a body which is independent in operation but in respect of which the state plays a significant role at arm’s length, the PCI comes under the Grand Chamber’s definition of a legal body.

The PCC and privacy protection

The extent to which privacy is protected by the PCC has been an issue of hot debate for a number of years in the UK.

⁸⁷ Section 44(2) (d) Defamation Act 2009

⁸⁸ Section 44(10) (c) Defamation Act 2009

⁸⁹ *Karako v Hungary* 39311/05 [2009] ECHR 712 (28 April 2009) at para. 19

⁹⁰ *Sanoma v the Netherlands Sanoma Uitgevers B.V. v. The Netherlands*- 38224/03 [2010] ECHR 1284 (14 September 2010) at para.83

Following the death of Diana, Princess of Wales in 1997, calls were made to revise the Editor's Code of Practice in relation to the privacy and harassment clauses. The new Code was ratified in January 1998. The new privacy clause (clause 3) was based largely on the text of Article 8 on privacy of the European Convention on Human Rights which was about to come into force in the UK under the Human Rights Act 1998. The new clause expanded the definition of privacy so as to offer a greater degree of protection to individual privacy which had been criticised for being too narrow.⁹¹ Clause 3 was further amended in 2004 to include the protection of digital communications.⁹² In 2009, Clause 3 was amended again in order to clarify the PCC's position on previous disclosures made by complainants, i.e. "the PCC will take into account relevant previous disclosures made by the complainant."⁹³

Privacy protection has been significantly strengthened in the UK in response to both social and technological developments. The flexibility of self-regulatory or independent press councils codes to adapt to such developments is a major advantage over statutory codes of practice which would not be so easy to amend. For example in September 2007, the PCC received complaints about their privacy and harassment clauses and by January 2008 the Code had been significantly revised.

In 2009 an inquiry was conducted by the House of Commons' Culture, Media and Sports Committee into press standards, privacy and libel⁹⁴. The inquiry was prompted by the treatment of the McCann⁹⁵ family by the British press and the failure of the PCC to launch its own investigations into the matter.⁹⁶ The report considered the merits of introducing privacy legislation, which it decided against⁹⁷. The report

⁹¹ See PCC website. Information on the evolving Code of Practice is available at <http://www.pcc.org.uk/cop/evolving.html>

⁹² *ibid* (Clause 3 was amended to include the protection of digital communications: "everyone is entitled to respect for his or her private...correspondence, including digital communications.")

⁹³ *ibid*

⁹⁴ Culture, Media and Sport Committee, second report, *Press Standards, privacy and libel*, (Second report, session 2009-10)

⁹⁵ In May 2007, three year old Madeleine McCann went missing from a holiday apartment in Portugal where she had been staying with her family. The case attracted an enormous amount of media attention, which resulted in the publication of numerous libellous articles about the child's parents and included unfounded accusations with regard to their alleged involvement in their daughter's kidnapping. See *supra* fn.84 paras 333-74

⁹⁶ *Supra* fn. 84 paras 374 and 552

⁹⁷ *Supra* fn. 84, para. 67. See chapter 3 for further details on CMS report 2009-10

criticized the PCC as toothless and recommended that the PCC be given the power to impose monetary sanctions and in serious cases, to suspend printing of offending publications for one issue.⁹⁸ The PCC responded to these recommendations stating its opposition to the introduction of monetary fines and maintained that the PCC “already provides a range of meaningful remedies for intrusion into privacy...”⁹⁹

The recommendations regarding PCC sanctions have not been implemented to date.

In 2010, another government inquiry into media ethics (The Leveson Inquiry) was initiated in response to the *News of the World* phone hacking scandals in the UK which have called into question the credibility and effectiveness of self-regulation in the UK print media. Police investigations into allegations of phone hacking scandals by the UK tabloid press have found *News of the World* journalists to be guilty of intercepting voicemail messages. The *News of the World* has admitted the allegations and consequently ceased publication (see Chapter 3 for more on the Leveson inquiry). At the time of writing, it has just been announced that the PCC has been shut down and will move into a “transitional phase” ahead of the publication of the Leveson Inquiry findings which are due to be published in October 2012.

The Australian Press Council and Privacy Standards

In Australia, the Privacy (Private Sector) Amendment Act was introduced in December 2001. The legislation relates to data protection and includes a media exemption clause which means that any media organisation engaged in the course of journalism is exempt from legislation on the basis that such organisations make provision for a set of privacy standards.¹⁰⁰ The Australian Press Council responded to

⁹⁸ *Supra* fn. 83, para. 575

⁹⁹ See *Press standards, privacy and libel: Press Complaints Commission's Response to the Committee's Second Report of the Session 2009-10* 6th April 2010 para. 6 (See also chapter 3 for press council remedies)

¹⁰⁰ See Privacy (Private Sector) Amendment Act 2000, Schedule 1 7B (4) “Journalism (4) An act done, or practice engaged in, by a media organisation is exempt for the purposes of paragraph 7(1)(e) if the act is done, or the practice engaged in: (a) by the organisation in the course of journalism; and (b) at a time when the organisation is publicly committed to observe standards that: (i) deal with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters); and (ii) have been published in writing by the organisation or a person or body representing a class of media

the provision by introducing a detailed and comprehensive set of privacy standards for the Australian Press Council to adhere to. These privacy standards expand on the Press Council's Statement of Principles which also provide for privacy standards in journalism. The standards are made up of detailed guidelines on areas such as "collection of personal information", "use and disclosure of personal information", "quality of personal information", "security of personal information", "anonymity of sources", "correction, fairness and balance", "sensitive personal information", and "complaints."¹⁰¹

(iv) Children in the media

The reporting of stories in the media involving children is a complex and often contentious issue and one which must be dealt with sensitively by press councils and other media accountability systems¹⁰². This section will consider the protection offered to children by press councils.

The protection of children in the print media is a hugely important issue and specific provision for the protection of children should be included in all press council codes of practice. A study of a number of press councils around the world has shown that many press councils do not specifically mention the protection of children at all in their codes although it may be implied. The Australian, Swedish and South African codes of practice, for example, offer no specific provision for the protection of children. Other codes are too general in their provision for the protection of children - as is the case with regard to the New Zealand Press Council's Statement of Principles which simply states that "Editors should have particular care and consideration for reporting on and about children and young people."¹⁰³ A preliminary study of press councils has shown that the code of practice of the Press Council of Ireland and the

organisations. Similar exemptions for journalism are contained in data protection legislation in other countries including Ireland and the U.K.

¹⁰¹ See Australian Press Council Statement of Principles and Statement of Privacy Principles available at <http://www.presscouncil.org.au/statements-of-principles/>

¹⁰² The Irish Press Ombudsman, Professor Horgan has advised that editors act cautiously in their treatment of children for the purposes of news stories. See *Supra* fn. 21, p.12

¹⁰³ *Supra* fn. 69

Editor's Code of Practice of the Press Complaints Commission offer the greatest protection to children within their codes.

The code of practice of the Press Council of Ireland offers general protection to children in the media under 9.1 but it also goes a step further in detailing certain situations which journalists should pay particular attention to when dealing with children. This is of great benefit to the public and newspapers alike as it makes the guidelines more comprehensive. Journalists are given examples of the type of situation that could lead to a breach of the code when dealing with children and the public are given examples of the type of situations in which their children are protected.

Principle 9.1 confers a general protection on children stating that "newspapers and periodicals shall take particular care in seeking and presenting information or comment about a child under the age of 16."

Principle 9.2 emphasises certain situations for journalists to pay particular regard to:

1) The vulnerability and the age of the child should be taken into account whether or not consent was given.

For example, a consenting parent may not always have the best interest of the child in mind and the print media must be aware that in certain circumstances - for instance battles for custody, children may be used by their parents in order to obtain sympathy. The media must therefore acknowledge the rights of the child and consider whether there is sufficient public interest to justify the potentially harmful impact the publication may have on the child.

2) The sensitivity of the subject matter

The reporting of human tragedies for example deserves special attention with regards to any children affected directly by the death of a sibling or parent. A complaint made to the Press Complaints Commission regarding the naming of a 16 year old girl whose mother had committed suicide and whose brother had also committed suicide the previous year was upheld. The article in question which headlined " Mum hanged a year after son's suicide" named the woman's 16 year old daughter and identified her

school by name. The article also speculated as to her possible whereabouts. The Commission stated that “Clause 6(i) of the Code exists to protect young people from the publication of unnecessary intrusive material while they are at school. It was very clear to the Commission that the girl, who was just 16 and who had suffered the loss of her mother shortly after that of her brother, was the sort of vulnerable person who could expect the protection of the Code.”¹⁰⁴

Although the protection of children is not explicitly provided for its Statement of Principles, the Australian Press Council also places importance on the protection especially of children. The APC upheld a complaint against a newspaper for publishing a photograph of a grieving boy after the discovery of the murder of his mother and suicide of the woman’s de facto husband. The photograph showed the boy leaning against the wall with his face totally concealed. When the boy saw the photographer taking the pictures of him, he asked him to leave. The request, according to the Council, should have been a sufficient indication that the boy did not want exposure in the newspaper. The Press Council found that the newspaper should have shown a greater respect for the boy’s obvious grief.¹⁰⁵

3) Whether there’s a public interest.

While acknowledging the rights of the child, the media must weigh up whether the public interest element attached to a publication involving a child sufficiently outweighs the negative effects such a publication may have on the child.

The Irish code of practice gives no concrete definition as to what is meant by the “public interest” in such a case. It states that it is up to the Ombudsman and Press Council “to define the public interest in each case”. The code does however offer a very broad guideline as to what may constitute the public interest element. “...[T]he general principle is that the public interest is invoked in relation to a matter capable of affecting the people at large so that they may legitimately be interested in receiving and the press legitimately interested in providing information about it.”¹⁰⁶

¹⁰⁴ Details of cases available on PCC website at <http://www.pcc.org.uk/cases/index.html>

¹⁰⁵ Details of cases adjudicated by the Australian Press Council are available at <http://www.presscouncil.org.au/adjudications-other-outcomes/>

¹⁰⁶ Principle 9, PCI Code of Practice

An example of a complaint which involved the weighing up of the public interest element was considered by the Australian Press Council. In the case of a complaint brought by a famous business man, Rodney Adler, against a Sydney newspaper, the Council held that the publication of a photograph of him and his teenage son preparing to board a plane was justified by prevailing circumstances. At the time, Adler was on bail after being charged with serious offences and facing further scrutiny through the HIH Royal Commission. The photograph, taken at the check in counter, indicated he was taking his family on an overseas holiday. In response to Mr. Adler's concerns about the unwarranted publicity cast upon his son, the Press Council stated:

While public figures like Mr Adler sacrifice this right in some circumstances, the Council is especially concerned for the protection of their families, friends, and other members of the public caught up in newsworthy events.

Nevertheless, the public interest in the publication of the photograph outweighed the privacy rights of the son. It was legitimate for the public to be informed that Adler's family was joining him on an overseas holiday in despite his legal difficulties at the time.¹⁰⁷

4) School-Young people should be free to complete their time at school without unnecessary intrusion from the media.

This means that children should not be approached by the media or photographed while on school property and also that their important school years should not be unduly intruded upon. For example, the PCC upheld a complaint against a newspaper where the paper published video footage featuring students in a class room without their consent which had been taken by a fellow student during class.

5) Fame - the fame, notoriety or position of a parent or guardian must not be used as sole justification for publishing details of a child's private life.

¹⁰⁷ Supra fn. 94

In a complaint made to the PCC, JK Rowling, world renowned author of the Harry Potter books complained through her solicitors that photographs of her daughter which were published in *OK! Magazine* were in breach of Clause 6 (Children) of the code of practice and clause 3 (privacy). The photographs in question were taken on a private beach in Mauritius which was only accessible by the residents of a particular hotel. The photographs showed the child, JK Rowling and her partner in their swimwear and were taken using long lens photography.¹⁰⁸

The editor of *OK magazine* apologised to Ms Rowling but denied that there had been a breach of the code as all beaches in Mauritius were public by law. The editor referred to previous PCC decisions including *Donald v Hello!* which held that “the mere publication of a child’s image when taken in a public place could not be considered by the Commission to be a breach of the Code.”¹⁰⁹

Rowling’s solicitors detailed the cautious lengths that she had gone to to ensure the privacy of her daughter since she had become famous. Ms Rowling had never courted publicity for herself or her daughter. “She had chosen the resort because of its private nature and visited it in the low season”¹¹⁰.

The complaint was upheld by the PCC. The PCC distinguished the case from the *Donald* case stating that the *Donald* case involved a photograph which was “...not apparently taken with a long lens of a child of pre-school years sitting in a push-chair in a public street”¹¹¹, whereas the photograph in this instance was taken at a private beach. The PCC also took into account the great lengths that Ms Rowling had gone in order to avoid any publicity while on holiday with her family. The fact that “...the child was of school age and vulnerable to comments from her peers”¹¹² and that the pictures were taken without her consent and only because she was the daughter of a famous person were issues that were also taken into account by the Commission. The PCC stated that “this intrusion into a young child’s private family holiday was unnecessary and in finding a breach of the Code, the Commission wished to remind

¹⁰⁸ Supra fn. 94

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid*

¹¹² *ibid*

editors that publications should take particular care to seek full and proper consent when publishing pictures of children which might embarrass them, intrude into their privacy or damage their welfare in some other way.”¹¹³

It is important that non-legal media accountability systems, such as press councils, include specific provision in their codes of practice which set out guidelines on the proper handling of stories about children in the media for the benefit of both journalists and complainants. Provision should also be made for the reporting of children in sex cases similar to that of the PCC code of practice which dedicates a separate clause to the protection of children in sex cases¹¹⁴.

CHAPTER FOUR: CONCLUSIONS

This chapter involved an examination and analysis of four questions posed at the outset of my research of the PCI’s complaints system, i.e. 1) who uses the PCI’s complaints system?; 2) How is the system used?; 3) what are the main types of complaints?; and 4) What are the current issues of concern?

With regard to question one, i.e. who uses the PCI’s complaints system, the study supported the findings of a 1988 study of High Court records of defamation cases and a 1995 study on complaints made to Readers’ Representatives which indicated that females were more likely to complain via a non-legal and informal complaints mechanism, such as a readers’ representative or press council than through a formal legal system when making a complaint about a publication. The statistics from the PCI complaints data showed that 40% of complainants were female while 60% were male. This shows that a good percentage of males and females are making use of the service and that one gender is not overly dominant.

An analysis of the addresses of complainants showed that the majority of complaints (31%) came from the Dublin area with just 30% coming from the rest of the country collectively. These statistics were similar to those of the 1995 study on Readers’

¹¹³ *ibid*

¹¹⁴ Clause 7, Editors’ Code of Practice, PCC

Representatives. The concentration of complaints from the Dublin area may be due to a number of factors, i.e. the higher population percentage in the capital or a higher level of awareness of the PCI's facilities in the Dublin area. It also points to the possibility that there is not enough awareness in the rest of the country. It is recommended that the PCI develop an awareness campaign specifically targeting different parts of the country in order to ensure equal awareness of the PCI across the country. An analysis of complainants addresses also showed the reach of the PCI and the fact that the PCI system can be used anywhere in the world with complaints being made from various countries including Dubai and Trinidad.

In terms of who is physically making the complaints, i.e. whether complaints are being made by persons directly affected by a publication or by a third party on their behalf, the data showed that the majority of complaints (63%) are being made by a third party with only 36% being made by the person directly affected by a publication. A third party can only make a complaint to the PCI if given permission to do so by the person who has been personally affected. The data also demonstrated that only 5.7% of the third party complaints were made by an unauthorized third party which indicates that the public are sufficiently familiar with the procedures of the PCI. The data conveyed that a high percentage of third party complaints were made by relatives of a person who had been personally affected by a publication - in many cases on behalf of a minor, elderly, incapacitated or deceased relative. This data provided a good indication of who uses the PCI system, i.e. in many instances persons acting on behalf of more vulnerable members of society who are not in a position to make a complaint themselves. This is an important factor which should be highlighted by the PCI in its complaints procedures in order to encourage more people to complain on behalf of the vulnerable.

The second question posed was 'how is the PCI complaints system used?' The data highlighted the fact that the majority of complaints are now being made via the internet which is unsurprising in light of the unprecedented increase in internet based communication in the past decade. The PCI website is of vital importance therefore, as the main source of contact for the public which can be accessed from anywhere around the world. It is essential that the website is easy to navigate and user friendly. The PCI's website provides easy access to an online complaints form as well as

information on how to complain. It is important that such procedures are easily accessible and prominently placed on press council websites.

Section 3 considered the types of complaints looking firstly at the types of publications complained of. The data showed that the majority of complaints were made in relation to national newspapers. The percentage of complaints made in reference to regional newspapers has risen steadily each year indicating a greater awareness of the PCI around the country. The data also pointed out that the number of non-member publications had decreased substantially each year which may be due factors such as a rise in PCI membership and a greater level of awareness of the procedures of the PCI.

The second part of section 3 examined the statistics of the principles of the Code of Practice that the public complained of. The study showed that Truth and Accuracy and Privacy were the key concerns of the Irish public with regard to publications. The number of complaints regarding Truth and Accuracy remained fairly constant throughout the three year period while complaints on privacy have risen significantly in keeping with current trends among other press councils around the world.

Finally, this chapter considered the main issues of concern being addressed by press councils at present looking at the PCI as well as other press councils around the world. The study examined the role of self-regulatory mechanisms in providing effective media accountability to the public with regard to a number of common issues of concern, i.e. online matters, defamation of the deceased, privacy and protection of children.

With regard to online matters, the PCI data indicated a steady increase in complaints. The study demonstrated that press councils must be flexible in order to adapt to the new media and convergence of the traditional media with the new media. It is important that press councils keep up to date with new communications technologies in order to remain relevant and effective. Guidelines on dealing with online issues will develop as press councils receive more cases. The study has shown that press councils are dealing with complaints on a case by case basis and are setting their own standards for future cases regarding online matters. The study has also shown that it is important that press councils develop guidelines on for member publication on editorial control over user generated comments appearing on their websites.

This section also considered the role played by non-legal media accountability systems in providing effective remedies with regard to the reputations of the deceased. The study conveyed that ‘defamation’ of the deceased is really an issue of ethics, not law. As such, self-regulatory/independently regulated complaints bodies can offer effective protection to reputations of deceased persons, which can be more effective than a formal legal remedy in that it offers the same remedies but through a much faster process that is free of charge.

In relation to the contentious issue of privacy, the study showed that all of the press councils examined provide for specific privacy protection and that privacy is one of the most complained of principles. The PCI is unique among its counterparts as it is statutorily recognized. The Defamation Act 2009 specifically specifies that the protection of privacy is to be one of the principal objects of the press council. As such, it can be argued that the PCI offers greater privacy protection than its counterparts in that it is provided for in statute.

With regard to children in the media, the study showed that a number of press councils still do not make specific provision for the protection of children. It is recommended that all press council codes of practice include a specific principle on children in their codes. Additionally, press councils should provide guidelines on the reporting of children in the media as well as educational seminars to journalists and journalism students on such matters.

CHAPTER 5

ALTERNATIVE METHODS TO ACHIEVING MEDIA ACCOUNTABILITY IN THE TWENTY-FIRST CENTURY

Chapter one of this thesis considered the effect of different social systems on the role and function of the media and its relationship with society based on the work- '*The Four Theories of the Press*'¹, which considers four different social systems and analyses the role and function of the media under each system. The four theories are; the authoritarian theory, the soviet communist theory, the libertarian theory and the social responsibility theory (see Chapter 1). As indicated in Chapter one, the social responsibility theory addressed some of the shortcomings of the libertarian principle in light of its application to the mass media of the twentieth century. The unprecedented development of communications technology at the beginning of the twentieth century, i.e. the invention of broadcasting and the motion picture, meant that libertarian principles which had applied exclusively to the print media had to be reassessed. Libertarian principles were largely incompatible with statutory regulation of broadcasting and film. The establishment of this new type of media, as well as a questioning of the inadequacies of libertarian principles by a more educated society, led to major criticisms of the performance of the press, particularly in light of the monopolistic tendencies of the media at the time, the concentration of media owners and an apparent emphasis on the financial profit of the media at the expense of the public interest.

The development of the broadcast media in the early twentieth century thus changed the relationship between the media and society. As a consequence of this new relationship, libertarian principles were largely seen as insufficient in their application to the broadcast media (see Chapter 1). The theory of social responsibility addressed

¹ Siebert, S, Fred, Peterson, Theodore, Schramm, Wilbur; *Four Theories of the Press*, (University of Illinois Press, Urbana) 1956

the perceived failings of the libertarian theory. Hocking², in his report, considered the relationship between the 'issuer' (the media) and the 'audience' (the public) and how this relationship had changed due to concentration of media ownership and market forces and other negative developments of the press. Hocking advised that this change in relationship meant that the audience/public needed to be adequately protected from the power of the media.

Just as technological developments in communications media in the early twentieth century led to questioning of the appropriateness of the application of libertarian principles to the new mass media, major developments in communications technology in the late twentieth and early twenty-first century have questioned the legitimacy of the application of the traditional paternalistic social responsibility principles to the media of the twenty-first century (see Chapter 1).

Technological developments in communications technology as well as market developments and changing norms and values³ have all contributed to a further change in the relationship between the media and society, particularly in relation to the audiovisual media.⁴ Issues such as globalisation and media convergence have questioned the legitimacy of traditional regulatory approaches in providing for media accountability to the public in the twenty-first century. There has been a move away from the application of social responsibility principles in media regulation to neo-liberalist principles, which emphasise market forces and consumer sovereignty. Methods for achieving media accountability to the public must therefore be reconsidered in light of these developments.

This chapter will consider whether traditional regulatory approaches which have been used to ensure media accountability remain appropriate or whether alternative methods such as self and co-regulation, already employed in certain media sectors, should be further considered. It will do so by examining the different methods which are currently being used to ensure media accountability to the public and considering the merits of alternative methods.

² Hocking, W. E, *Freedom of the Press- A Framework of Principle* (A Report from the Commission on Freedom of the Press), (University of Chicago Press, Illinois, 1947)

³ Helberger, Natali, From eyeball to creator - toying with audience empowerment in the Audiovisual Media Service Directive, *Entertainment Law Review*, 2008-6, p. 128-137 at 129

⁴ *ibid*, See also Humphreys, Peter, J, *Mass media and media policy in Western Europe*, (Manchester University Press), UK 1996

Existing regulatory methods used to ensure media accountability to the public

As evidenced throughout this thesis, regulation of the media industry has taken many forms. In his article entitled, 'Code and Other Laws of Cyberspace', Lessig categorizes four separate systems of regulation, i.e legal regulation, market forces, norms and architectural regulation⁵. Murray and Scott recategorise these headings based on the type of control exerted over the media as follows: 1) "hierarchical control", i.e. law based control of the media or "command and control"⁶ regulation of the media; 2) "community based control", i.e. regulation based on the protection of society's norms and values; 3) "competition based control", i.e. regulation of the media based on market forces and 4) "design based control", i.e. technological control of the media, for example through the use of software to block channels or to restrict access to websites⁷.

All regulatory methods which have been used to achieve media accountability to date fall under one or more of these broad headings. For example, statutory regulation of the broadcast media can be categorised under 'hierarchical control'; co-regulation is a hybrid of 'hierarchical control' and 'community based control' while self regulation falls under the 'community based control' category. Technological methods of blocking or filtering content, for example in protecting minors from harmful content, falls under the 'design based control' category.

According to 'hierarchical control' methods used to ensure media accountability, the media must adhere to standards as set out in law. These standards, like the 'community based standards', are premised on societal norms and values but are set out in statute and reflect public policy aims. Sanctions for breach of standards are often punitive and legally enforceable⁸.

'Community based control' of the media is based on the societal norms and values of the particular community in question. It can therefore be more particularised than

⁵ Cited in Murray, Andrew and Scott, Colin, "Controlling the New Media: Hybrid Responses to New Form of Power", *The Modern Law Review* 2002, Vol. 65, No.4, at 500.

⁶ Schulz, W. et al. (2006): Final Report: Study on Co-Regulation Measures in the Media Sector, commissioned by the European Commission, at 12

⁷ *Supra* fn. 6 at 504.

⁸ *ibid*

universally applicable statutory control. As a method of ensuring media accountability to the public, standards are set by the industry to reflect the particular norms and cultural concerns of a given society. For example, the code of practice of the PCI (See Chapter 3) includes the protection of the travelling community under Principle 8, which protects against prejudice. Sanctions under this form of regulation are non-legal, and for the most part, non-punitive (see Chapter 3). ‘Community based control’ regulation is based on a system of professionalism and peer pressure, essentially a name and shame approach to deter breaches of standards⁹.

According to ‘competition based control’, standards are regulated by market forces, i.e. consumer demand as opposed to ‘community based control’ or ‘hierarchical control’. In relation to this form of regulation, “sanctions” are in the form of consumer dissatisfaction which may result in the consumer discontinuing to avail of a service and consequent poor sales figures¹⁰.

‘Design based control’ or technological control of the media is associated with the new media and has been used as an important tool in ensuring the protection of children, for example, in the audiovisual media environment through the use of ‘walled gardens’, i.e. restrictions on access to content. Facebook is an example of a ‘walled garden’ in that facebook users can access information which is inaccessible to general Internet users. ‘Design-based control’ has its origins in the commercial sector where it is used in banks and insurance companies¹¹.

Sector specific media accountability mechanisms and media convergence

As seen throughout this study, the media are subject to sector specific regulation. Accordingly, different types of media are subject to different levels of accountability based on the relationship between the type of media and society and difficulties in regulation due to, for example, globalisation.

⁹ *ibid*

¹⁰ *ibid*

¹¹ *ibid*

As examined in Chapter 3, the print media has traditionally been subject to the lowest degree of regulation, along with film and recorded music.¹² McQuail identifies this type of media as “consultation”¹³ media, in that the public, as an active user, is free to select published items and purchase at their discretion and according to their taste.¹⁴ Consequently, the public do not need as much protection from “unwanted influence”¹⁵ from this type of media as from other types. The same would apply to audiovisual on-demand services, where the viewer self-selects. The lower level of regulation applied under AVMSD to non-linear (on demand) media, as discussed below, reflects this theory.

Indeed, McQuail, writing in 2003 when these new services were at an early stage of development, identified two further types of media according to their level of influence or unwarranted impact on the public. The second type of media identified is that of “common carrier media” which McQuail described as “...forms of communication designed for individual point-to-point, often interactive, communication processes” which originated with mail and telephone facilities and now includes mobile phone and e-mail services¹⁶. The third model identified by McQuail is the broadcasting model, which has been subject to the strictest form of regulation due to historical reasons such as the allocation of spectrum and its immediate impact on audiences, reasons which have become increasingly archaic and outmoded in light of technological advances (see Chapter 1).

Justifications for differentiating between these three types of media based on their perceived level of influence have become increasingly obsolescent in light of technological advancements in communications technology such as initially the introduction of cable and satellite broadcasting (see Chapter 1)¹⁷ and more recently the establishment of the internet and new media which has resulted in convergence of the media.

¹² McQuail, Denis, *Media accountability and freedom of publication*, (New York: Oxford University Press, 2003) at 108

¹³ See McQuail, op. cit. at 108 citing Bordewijk and van Kaam (1986)

¹⁴ Supra fn 12

¹⁵ *ibid*

¹⁶ Supra fn 12, at 109

¹⁷ Supra fn 12, at 110

The internet consists of elements of all of the above mentioned media types and as such has caused serious confusion amongst policy makers and media law experts with regard to appropriate forms of regulation¹⁸. The three models identified by McQuail, in their traditional forms, are capable of being regulated at national level whereas the internet, which is universal in nature, is not.

Convergence of the media has also meant that the media cannot be easily categorised into specific media types. The boundaries between the different types of media are becoming increasingly blurred, as are the arguments for different regulatory treatment of the various types of media. This has led to deregulatory trends in approaches to media regulation throughout the world.

Deregulatory trends

Major technological developments in communications technology and the subsequent convergence of the media have led to a “paragadigm shift”¹⁹ in regulatory approaches to the broadcast media in particular. As previously examined in Chapter one, reasons for more stringent regulation of the broadcast media, in contrast with the relatively light regulation of the print media, are based on historical rationales that are quickly becoming obsolete in light of continuing technological advancements in the area. Regulation of the media must be proportionate in accordance with the principle of proportionality under Article 5 of the EU Treaty ECHR need for p

If the historical arguments for stricter regulation of the broadcast media are no longer valid, statutory regulation of the broadcast media may no longer be proportionate.²⁰ As such, more proportionate regulatory measures must be put in place. The 2011 recommendation of the Committee of Ministers to Member States of the Council of Europe on a new notion of media²¹ sets out criteria for identifying media and

¹⁸ Supra fn 12, at 111

¹⁹ See Hoffman-Riem (1986) Cited in Humphreys, Peter, J, *Mass media and media policy in Western Europe*, (UK: Manchester University Press, 1996) at 159.

²⁰ European Parliament, Inter-Institutional Agreement on better law making, (2003/C 321/01) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0001:EN:PDF>

²¹ Recommendation CM/Rec (2011)7 of the Committee of Ministers to Member States on a new notion of media.

guidance for a graduated and differentiated approach to regulation of the new media.

The criteria *inter alia* state that:

Policy making and, more particularly, regulatory processes should ensure that due attention is paid to the principle that, as a form of interference, any regulation should itself comply with the requirements set out in Article 10 of the European Convention on Human Rights and the standards that stem from the relevant case law of the European Court of Human Rights. Regulatory responses should therefore respond to a pressing social need and, having regard to their tangible impact, they should be proportionate to the aim pursued.²²

This issue has been addressed at European level by the AVMS Directive which provides for graduated regulation of the audiovisual media based on the level of control of the user but still retains stricter regulation for traditional television broadcasting. Paragraph 5 of the AVMSD justifies the continuation of the application of specific rules in the audiovisual media sector due to the sector's important democratic role in ensuring "freedom of information, diversity of opinion and media pluralism-media education and culture..."²³. The AVMSD distinguishes on-demand media services from television broadcasting based on the level of control of the user and uses this distinction to justify lighter regulation of non-linear (on demand) services than that of ordinary linear (traditional television) services. Paragraph 5 of the AVMSD highlights the importance of the application of specific rules to audiovisual services as opposed to other media stating that:

[o]n demand services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services which should comply only with the basic rules provided for in this Directive.²⁴

This definition, however, it is submitted, is based on the presupposition that all viewers of linear services are passive and that viewers of non-linear services are active, which is simply not the case. The Directive fails to take into consideration the fact that viewers of linear services nowadays with multiple channels and recording devices can be just as selective as viewers of non-linear services in that they can carefully select programmes to view at whatever time they decide; using recording technologies, for example, viewers can opt to record an entire series being shown on

²² *ibid*

²³ Audiovisual Media Services Directive (AVMSD) Directive 2010/13/EU, para. 5

²⁴ *ibid* at para. 58.

linear television and watch the series at any time they want, thereby becoming a non-linear viewer.²⁵ As Hajer puts it: “A passive audience is only passive until it switches on.”²⁶ The distinction made by the Directive between linear and non-linear appears to be overly-simplistic and poorly thought out in that it fails to consider the massive overlap between linear and non-linear services and the certainty that this overlap is going to increase with technological advances in the area already occurring at an exponential rate. The control of the viewer is not a sufficient basis for determining the extent to which media accountability to the public should be provided for in European legislation. Other rationales such as the function, i.e. the purpose for which the particular form of media is primarily used, whether for leisure, entertainment or for hard news, information or educational purposes, may be more appropriate in distinguishing between levels of regulation.

Historically, regulatory policy with regard to the broadcast media has been based on issues such as technical limitations and the protection of the public²⁷. In recent years, the emphasis has shifted towards a more flexible market based approach which protects competition in the EU²⁸ as well as consumer protection. The Bangemann Report (1994) recommended the introduction of a new regulatory system in the media sector which would not unduly restrict competition in the market place.²⁹ The report recommended the identification and establishment of the minimum regulation needed in the sector to ensure minimum interference with competition.³⁰ At the 1997

²⁵ See generally Breitschaft, Andrea, “Evaluating the linear/non-linear divide- are there any better factors for the future regulation of audiovisual media content?” *Entertainment Law Review*, Volume 20, Issue 8, 2009

²⁶ Maarten A. Hajer, *Authoritative Governance: Policy-making in the Age of Mediatization*, Oxford University Press, 2011 at p.180 where he also refers to audiences as “citizens on standby”.

²⁷ Humphreys, Peter, J, *Mass media and media policy in Western Europe*, (UK: Manchester University Press, 1996), at 159

²⁸ *ibid*

²⁹ High Level Group on the Information Society- Bangemann report recommendations to the European Council (1994) at 12. The 2005 European Commission report on ‘Better Regulation for Growth and Jobs in the European Union focused on the economic advantages of deregulating the media sector through alternative mechanisms such as self and co-regulation which would not unduly restrict competition in the EU. See Communication from the Commission to the Council and the European Parliament - on Better Regulation for Growth and Jobs in the European Union, Brussels, 2005 available at http://eur_lex.europa.eu/LexUriServ/Site/en/com/205/com2005_0097en01.pdf at p. 4

³⁰ *ibid*, at 13

Ministerial Conference on ‘Global Information Networks: Realising the Potential’, EU governments agreed that the development of global information networks should be left to market regulation.³¹ The Ministerial Declaration stressed the importance of the role of the private sector in protecting consumer interests and ensuring ethical standards through “properly functioning systems of self-regulation in compliance with and supported by the legal system”.³²

This has led to the consideration of alternative approaches to traditional command and control and to more de-centred media regulation such as self and co-regulatory mechanisms as well as audience empowerment mechanisms such as media literacy initiatives³³, which will be discussed in detail below. Humphreys notes that this process of deregulation has been a natural occurrence in light of developments in communications technology stating that “[t]he trend of public policies has been deregulatory even when this was not intentional”³⁴ due to difficulties in regulating the Internet and new media. McQuail notes that there has been a move away from ‘imperative’ (hierarchical) methods of media regulation towards soft law approaches such as self and co regulation, which has been achieved through a surrender to market forces “within a broadly controlled media system environment.”³⁵

A number of regulatory theories have contributed to this de-regulatory trend in media regulation policy. For example, the ‘responsive’ regulation model, as articulated by Ian Ayres and John Braithwaite provides that:

[...] governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed....In particular, law enforcers should be responsive to how efficiently citizens or

³¹ European Ministerial Conference, ‘Global Information Networks: Realising the Potential’, Ministerial Declaration, Bonn, 1997. Summary available at http://web.mclink.it/MC8216/netmark/attach/bonn_en.htm. See also Keller, at 51

³² *ibid*

³³ Lievens, Eva, Valcke, Peggy, Jan Valgaeran, Pieter, ‘State of the art on regulatory trends in media- Identifying whether, what, how and who to regulate in social media’, Interdisciplinary Centre for Law and ICT (ICRI) December 2011, EMSOC available at http://www.law.kuleven.be/icri/deliverables/238EMSOC_ICRI_D%201%202%201_2011.pdf at p. 6

³⁴ *Supra* fn. 27, at 159

³⁵ *Supra* fn. 12, at 114

corporations are regulating themselves before deciding whether to escalate intervention.³⁶

The emergence of the 'governance' model as a form of government has also made a significant contribution to trends towards de-regulation in the media sector. A UNESCO publication defined the concept of 'governance' as:

[...] a form of government that aims at re-founding the democratic basis for the exercise of power, by proceeding with directives and recommendations rather than laws and sanctions. It implies a multiplicity of actors, at all levels, local, national, regional and even international. It encourages participation and responsible behaviour from citizens in the face of today's complexity, to which the media environment contributes massively.³⁷

Regulatory theories such as these advocate the involvement of a number of different actors in the regulatory process and have thus contributed to the establishment of alternative regulatory instruments such as self and co-regulation as well as incentive and market based regulation and educational and information based regulation.³⁸

Alternative Regulatory Instruments (ARI's)

Alternative mechanisms such as self regulation and co-regulation have been considered in light of the perceived shortcomings of traditional 'command and control' or 'hierarchical' regulation as it applies to the new media of the twenty-first century. In the audiovisual media sector, which has traditionally been regulated by command and control regulation, self and co-regulatory measures have been advocated at European level, for example in AVMSD, as an alternative to or to operate in conjunction with methods of traditional statutory regulation.

The merits of introducing media literacy initiatives have also been brought to the fore in recent years, particularly in light of the change in relationship between the media and the public as a result of significant advancements in communications technology.

³⁶ Ayres, Ian, Braithwaite, John, *Responsive regulation: transcending the deregulation debate*, Oxford, Oxford University Press, 1995, p.205. Cited supra fn. 33 at p.20

³⁷ Media Education- A Kit for Teachers, Students, Parents and Professionals, Edited by Divina Frau-Meigs, UNESCO, 2006. Available at <http://unesdoc.unesco.org/images/0014/001492/149278e.pdf>

³⁸ Supra fn. 33 at p.20

Media literacy initiatives have been promoted for a number of years at European level; however, the inclusion of media literacy in the AVMSD can be seen as a key regulatory development and an indication of its growing importance in the future of democratic society.³⁹ However, media literacy is strictly speaking an educational tool which is being used somewhat as a surrogate for regulation, i.e. to educate the public either because it is difficult or impossible to regulate the new media in particular or as an alternative to regulation. Media literacy, as an alternative regulatory instrument will be examined in detail below.

This section will examine the strengths and weaknesses of self and co-regulatory methods as well as media literacy initiatives as alternatives to traditional command and control regulatory instruments and determine whether such methods offer a more appropriate means of ensuring media accountability in the twenty-first century.

Self and co-regulation

Self and co-regulation, as alternative instruments to traditional command and control regulation have been repeatedly referred to in policy documents at European level. EU media policy documents have referred to the use of self- and co-regulatory measures as an alternative or supplementary means of regulating the audiovisual media and new media from the mid 1990s onwards.⁴⁰

Most recently, the AVMSD has expressly encouraged the establishment of more self and co-regulatory regimes in the audiovisual environment in an attempt to achieve public interest objectives more effectively in the emerging audiovisual media services sector:

Member States shall encourage co-regulation and/ or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.⁴¹

³⁹ McGonagle, Tarlach, “Media Literacy: No Longer the Shrinking Violet of European Audiovisual Media Regulation?” extract from the publication IRIS plus 2011-3 Media Literacy, 2011, European Audiovisual Observatory, Strasbourg (France) at p.14

⁴⁰ Supra fn. 33

⁴¹ Audiovisual Media Services Directive (Directive 2010/13/EU) Article 4(7)

The AVMSD⁴² refers to the 2005 European Commission Communication on ‘Better Regulation for Growth and Jobs in the European Union’⁴³ which recommended a re-examination of regulatory approaches to determine their appropriateness in each sector. (see above) The Communication recommended the introduction of alternative regulatory mechanisms to legislation, such as co-regulation and self-regulation.⁴⁴ The AVMSD reiterates the importance of these ‘soft law’ approaches and acknowledges the important role that such measures can play in providing for “consumer protection”⁴⁵, stating that “[m]easures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves.”⁴⁶ The Inter-Institutional Agreement on better law-making also promotes the use of alternative regulatory mechanisms such as co and self-regulation “in suitable cases where the Treaty does not specifically require the use of a legal instrument”⁴⁷ in order to provide more flexible regulation in the interest of the protection of competition in the EU⁴⁸.

Despite the repeated reference to self and co-regulatory measures in European media policy documents over the past number of years, there has been much ambiguity as to what is meant by the terms self and co-regulation. While self and co-regulatory bodies are generally distinguishable by the extent of their autonomy from government, the degree of involvement of different actors in each regulatory process remains a contentious issue. The AVMSD however, sheds some light on the European Commission’s interpretation of the envisaged use of such measures in the European media sector. Para. 44 of the AVMSD states:

Member states should, in accordance with their different regulatory legal traditions, recognise the role which effective self regulation can play as a complement to the legislative and judicial and or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, whole self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a

⁴² *ibid*, at para. 44

⁴³ *Supra* fn. 20

⁴⁴ *Supra* fn.20 at para. 16

⁴⁵ *Supra* fn. 41 at para. 44

⁴⁶ *ibid*

⁴⁷ *Supra* fn. 20 at para. 16

⁴⁸ *Supra* fn. 20 at para. 17

substitute for the obligation of the national legislator. Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met [...]⁴⁹

The description of self-regulation in para. 44 is of particular interest. The Directive emphasises that self-regulation is to be used as a complementary regulatory measure and not as a “substitute for the obligations of the national legislator.” This description indicates that self-regulation is not considered by the Commission as a feasible “alternative” to legislation.⁵⁰ It can be deduced from the above description that a co-regulatory mechanism, which “allow(s) for the possibility of State intervention in the event of objectives not being met” is the only viable alternative to statutory regulation, while self-regulation can only be a complement to it.⁵¹

Self Regulation

Self-regulation has been used as a regulatory mechanism across a variety of different business sectors, for example, the Law Society of Ireland and the Irish Medical Association. As seen in chapter 3, self-regulatory mechanisms have been utilised as a means of providing media accountability in the media sector since the beginning of the twentieth century, primarily with regard to the print media. As discussed in Chapter 3, it has been widely accepted that statutory regulation of the print media is inappropriate in light of the important democratic role played by the press in society. Self regulatory bodies such as press councils, press ombudsmen, codes of practice and journalists’ associations have therefore been established by the print media industry over the past century. More recently, self-regulatory mechanisms have been promoted in policy documents at both domestic and international level as a means of regulating the Internet⁵².

Defining self-regulation

⁴⁹ Supra fn. 41 at para. 44

⁵⁰ Supra fn. 41 at para. 44. See Supra fn. 33 at p. 24

⁵¹ Supra fn. 33 at pp. 24, 25.

⁵² Supra fn. 33, at p. 27

As can be seen from an examination of self-regulatory bodies in Chapter 3, no two self-regulatory mechanisms are the same; they vary from State to State. As such, there are a plethora of definitions as to what constitutes ‘self-regulation’ in the context of the media.

The Inter- Institutional Agreement on better law-making, for instance, defines self-regulation as:

the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level.⁵³

Ofcom defines self-regulation as:

when industry administers and enforces its own solution to address a particular issue without formal oversight or participation of the regulator or government. In particular, there is no *ex ante*, legal backstop in a self-regulatory scheme to act as the ultimate guarantor of enforcement.⁵⁴

According to UNESCO, self regulation is:

[...]a combination of standards setting out the appropriate codes of behaviour for the media that are necessary to support freedom of expression and process how those behaviours will be monitored or held to account.⁵⁵

Although each definition varies, there are common elements, i.e. self-regulatory mechanisms are created and implemented by a group of actors without government involvement. So far the definitions have related to what is known as ‘pure self-regulation’, i.e. regulation that is entirely free from government involvement. The Hans Bredow report on ‘Regulated Self-regulation’ describes “pure” self regulation as “a process of self-regulation where the State has no role to play.”⁵⁶ Other forms of self-regulation exist, which do include government involvement, such as ‘enforced

⁵³ Supra fn. 20 at para. 22 See also Chapter 3

⁵⁴ Ofcom, -Initial assessments of when to adopt self-or co-regulation, Consultation, 27 March 2008, available at <http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/summary/conduc.pdf>, at p.3

⁵⁵ Puddephat, Andrew, ‘The Importance of Self-Regulation of the Media in Upholding Freedom of Expression’, UNESCO, 2011, Brazil, available at <http://unesdoc.unesco.org/images/0019/001916/191624e.pdf> at p.12

⁵⁶ Hans-Bredow Institut, Regulated Self-Regulation as a Form of Modern Government: Study commissioned by the German Federal Commissioner for Cultural and Media Affairs (Interim Report, October 2001) at 3, available at <http://www.humanrights.coe.int/media/documents/interim-report-self-regulation.pdf>

self-regulation’, ‘regulated self-regulation’ and ‘self-monitoring’. Due to the involvement of government, such systems are more characteristic of co-regulation and are therefore dealt with under the section on co-regulation below. It has been argued, however, that self-regulatory bodies are hardly ever completely free from government involvement in that even the threat of government regulation could be seen as government involvement. As examined in Chapter 3, the majority of self-regulatory mechanisms studied were set up in response to threats of statutory regulation of the print media.

As seen in Chapter 3, ‘pure self regulation’ has been advocated as the most appropriate form of regulating the print media industry due to its unique position and relationship with the public, i.e. that the press has an obligation to adequately inform the public and that the public has a right to be informed. Examples of ‘pure’ self-regulatory bodies in the print media were examined in Chapter 3 and include press councils, press ombudsmen, newspaper ombudsmen, codes of practice and journalists’ organisations.

The European Commission has advocated the use of self-regulatory mechanisms as the most appropriate form of regulating the internet and mobile technologies, due to constant technological developments in those areas. The flexibility of self-regulation is seen as the most suitable means of regulating those particular areas.⁵⁷ A number of self-regulatory initiatives, as supported by the European Commission have been adopted by the industry which include, the European Framework for Safer Mobile Use by Younger Teenagers and Children⁵⁸ and the Coalition to make the Internet a better place for kids.⁵⁹

The European Framework for Safer Mobile Use by Younger Teenagers and Children was drafted in response to calls from the European Commission to improve online child safety policies.⁶⁰ The Framework sets out principles and measures as developed by European mobile providers and content providers “to ensure safer use of mobiles

⁵⁷ See http://ec.europa.eu/information-society/activities/sip/self_regulation/index_en.htm

⁵⁸ *ibid*

⁵⁹ See http://ec.europa.eu/information_society/activities/sip/self-regulation/index_en.htm

⁶⁰ See European Commission Press Release, “Commission calls on mobile operators to continue to improve child safety policies” – available at <http://europa.eu/rapid/PressReleasesAction.do?reference=IP/09/596&format=HTML&aged=O&language=EN&guiLanguage=en>

including by younger teens and children”⁶¹. The focus of the principles and measures as set out in the Framework include:

access and control for adult content;
awareness-raising campaigns for parents and children;
the classification of commercial content according to national standards of decency and appropriateness;
the fight against illegal content on mobiles.”⁶²

According to the Framework, signatories were to implement the objectives of the framework through self regulatory measures in EU Member States. The 2010 Implementation Report of the European Framework showed that “[n]ational self-regulatory codes based on the European Framework now exist in 25 Member States, which means that 96% of all EU mobile subscribers are benefitting from this agreement.”⁶³

A recent self-regulatory initiative which has been set up by leading media companies around the world⁶⁴ with the support of the European Commission, is the Coalition to make the Internet a better place for children. The Coalition was established in December 2011 and is a “cooperative, voluntary intervention designed to respond to emerging challenges arising from the diverse ways in which young Europeans go online.”⁶⁵ The Statement of Purpose of the Coalition stipulates that the signatories agree to:

[...] take positive action to make the Internet a better place for kids, and commit to contribute fresh efforts from (their) companies and organisations in order to achieve this goal in the European Union. We intend to work and learn together and as individual companies may take individual initiatives where

⁶¹ European Framework on safer mobile use by younger teenagers and children available at http://ec.europa.eu/information_society/activities/sip/docs/mobile2005/europeanframework.pdf

⁶² *ibid*

⁶³ See http://ec.europa.eu/information_society/activities/sip/self-regulation/phones/index_en.htm Implementation Report of the European Framework is available at <http://www.gsma.com/gsma-europe/>

⁶⁴ Signatory companies of the Coalition include; Apple, BSkyB, BT, Dailymotion, Deutsche Telekom, Facebook, France Telecom-Orange, Google, Hyves, KPN, Liberty Global, LG Electronics, Mediaset, Microsoft, Netlog, Nintendo, Nokia, Opera Software, Research In Motion, RTC Group, Samsung, Skyrock, Stardoll, Telefonica, TeliaSonera, Telecom Italia, Telenor Group, Tuenti, Vivendi and Vodafone.

⁶⁵ Information available at http://ec.europa.eu/information_society/activities/sip/self-regulation/index_en.htm

faster progress is possible if we believe we can help deliver it.⁶⁶

In order to achieve its aims the Coalition will focus on providing solutions to a number of online problems, focusing on:

- Simple and robust reporting tools for users;
- Age appropriate privacy settings;
- Wider availability and use of parental control;
- Effective takedown of child abuse material.⁶⁷

As seen above, with regard to the adoption of self-regulatory mechanisms in the audiovisual sector, self-regulation is perceived as a supplement to other regulatory methods. The AVMSD while recognising the important and significant role that self-regulation can play as a “complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive”, states that self regulatory mechanisms “should not constitute a substitute for the obligations of the national legislator.”⁶⁸ However, the current reality is that in relation to regulation of the Internet self-regulation plays an important complementary role. While major issues such as child pornography and cyber-crime are the subject of national legislation and international conventions, self-regulation plays both a supporting role (e.g. hotlines reporting child pornography) to the legislation and a complementary-arguably a substitute- role in relation to other areas, such as protection of children, as illustrated above, where the legislator has not intervened. Whether the national legislator has any “obligations” in these other areas, of course, is the key question. There are, therefore, areas of internet regulation which are a legislation-free zone in which self-regulation is not only a viable but vital alternative or even “substitute”.

Pros and cons of self-regulation

The most apparent advantages of self-regulatory bodies in the media sector are their ability to adapt and respond to technological advancements and their high degree of expertise in the area they regulate.

⁶⁶ “A Better Place for Kids” Statement of purpose of the Coalition available at http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition_statement.pdf

⁶⁷ *ibid*

⁶⁸ *Supra* fn. 41 at para.44

Self-regulatory bodies are better able to adapt to the ongoing advancements in communications technology and problems brought about by convergence than statutory bodies. The terms and conditions of statutory bodies are set out in law and are as such much more difficult to change. Self-regulatory bodies on the other hand can adapt and update their codes and standards with ease.

The inclusion of a high level of industry experts in self-regulatory bodies is another major advantage of self-regulatory bodies. Industry members provide expert knowledge of the operation of the specific media sector and are as such in a better position to establish workable codes and standards. The inclusion of a high level of industry experts also ensures credibility in the eyes of the industry itself. It has been argued, however, that self-regulatory bodies operate in their own best interest rather than in the interest of the public. This problem can be addressed through ensuring that self-regulatory bodies are not dominated by industry members. As seen in Chapter 3, the success of any self-regulatory press council is contingent upon its perceived independence from the print media. This rationale applies to self-regulatory bodies across all media sectors.

As examined in Chapter 3, the legitimacy of self-regulatory bodies has often been criticised on the basis of their lack of effective accountability. The most frequent reason cited for this is the weakness of their sanctions. As seen in Chapter 3, many self-regulatory bodies are dependent on a system of peer pressure to enforce their sanctions. The main sanction imposed by self-regulatory press councils for example, is that member publications which are found to be in breach of the respective code of practice are obliged to print the press council's decision. The effectiveness of this sanction depends on full co-operation from the industry (see chapter 3).

The 'legitimacy' or 'democratic deficit'⁶⁹ argument indicates that self-regulatory mechanisms, which are created and implemented by private actors are less accountable than state bodies which are made up of democratically elected representatives.⁷⁰ Price and Verhulst argue that due to this fact, self-regulatory bodies

⁶⁹ Supra fn. 33 at p.31

⁷⁰ Marsden, Christopher, T, Co and Self-Regulation in European Media and Internet Sectors: The Results of Oxford University Study in Moller, Christian, Amouroux, Arnaud (Editors) *The Media Freedom Internet Cookbook* (Vienna: OSCE. 2004) at 93

can never completely replace statutory bodies in the media sector since it is the responsibility of the state to protect fundamental rights.⁷¹

However, self-regulatory mechanisms are arguably better suited to regulation of the current media sector than traditional statutory regulation in that they do not impinge as much on freedom of expression, particularly in relation to regulation of the print media and Internet.⁷² As self-regulatory bodies, any curtailments of freedom of expression, as expressed in codes of practice for example, are voluntary rather than imposed by the state. As such, self-regulation can be seen as a self-restriction on freedom of expression in recognition of other (competing) interests such as privacy for example. On the other hand, it can also be argued that self-regulatory bodies do little to protect the rights of others due to issues such as the weakness of their sanctions and lack of democratically elected members.⁷³

Co-regulation

In the most basic terms, co-regulation, in the context of the media, means co-operation between law and industry. As such, a co-regulatory system can be seen as a hybrid of self regulation and statutory regulation of the media as it displays elements of both, i.e. state actors and a number of other actors including industry actors and possibly consumer representatives and NGOs.⁷⁴ Co-regulation is distinguishable from statutory regulation by its greater autonomy from government.⁷⁵ This description of co-regulation is however overly simplistic.

Over the years, there have been numerous definitions on what constitutes a co-regulatory body.

⁷¹ See Price, Monroe, Verhulst, Stefaan, "In Search of the Self: Charting the course of self-regulation on the Internet and global environment", in Marsden, Christopher, *Regulating the global information society*, London, Routledge, 2000, at p. 65. See also supra fn. 33

⁷² See also 98/560/EC: Council Rec of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by providing national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity which recommends the use of self regulation as a "supplement to the regulatory framework....for the protection of minors and human dignity, in the audiovisual and information services." (Recommendation 1)

⁷³ see supra fn. 70 at p.93

⁷⁴ Supra fn. 33, at 36

⁷⁵ Palzer, Carmen, "Self Monitoring v Self-regulation and Co-regulation", *Co-regulation of the Media in Europe*, European Audiovisual Observatory, 2003 Strasbourg, at 29.

Defining co-regulation

Dr. Carmen Palzer described the co-regulatory model as that which is:

[...] based on a self-regulatory framework (in its broadest sense) which is anchored in public authority regulations in one of two ways: the public authority either lays down a legal basis for the self-regulatory framework so that it can begin to function, or intergrates an existing self-regulatory system into a public authority framework.⁷⁶

Co-regulation as it applies to EU policy has been defined as:

the mechanism whereby a Community legislative Act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations.)

This mechanism may be used on the basis of criteria defined in the legislative Act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned....

The competent legislative authority will define in the Act the relevant measures to be taken in order to follow up its application, in the event of non-compliance by one or more parties or if the agreement fails.⁷⁷

According to the AVMSD, co-regulation:

in its minimal form (constitutes) a legal link between self regulation and the national legislator in accordance with the legal traditions of the Member States...and should allow for the possibility of State intervention in the event of its objectives not being met.⁷⁸

Although these definitions vary as regards the exact scope of the concept of co-regulation, co-regulation can be distinguished from 'pure' self regulation and statutory regulation based on the degree of involvement of both the state and the industry in the regulatory process. For co-regulation to exist, it must consist of elements of both.⁷⁹

In an attempt to determine a working definition of co-regulation as applied to the media sector in Member States, the Eurpoean Commission commissioned a study on

⁷⁶ Palzer, Carmen, "European provisions for the establishment of co-regulatory frameworks", in Nikoltchev Susanne (editor) *Co-regulation of the media in Europe*, IRIS Special, Strasbourg, European Audiovisual Observatory, 2003, at p.4

⁷⁷ Supra fn. 20 at para 18, See also Supra fn 4 at 17 and Supra fn 41 at 29

⁷⁸ Supra fn. 41, para. 44

⁷⁹ Supra fn. 33, at p. 40

co-regulatory measures in the media sector in 2005.⁸⁰ The aim of the study was to identify and critically assess co-regulatory systems around the world in an attempt to develop a working definition and to determine best practice. The study provides an analysis of such co-regulatory bodies in 23 different countries, consisting of 19 European countries and four other countries, i.e. Malaysia, South Africa, Canada and Australia.⁸¹ The study defined co-regulation as the combination of “non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation.” The study also developed a list of criteria that a regulatory body must fulfill in order to be classified as a co-regulatory body according to their definition. The criteria are as follows:

- The system is established to achieve public policy goals targeted at social processes.
- There is a legal connection between the non-state regulatory system and the state regulation (however, the use of non-state regulation need not necessarily be mentioned in acts of parliament).
- The state leaves discretionary power to a non-state regulatory system.
- The state uses regulatory resources to influence the outcome of the regulatory process (to guarantee fulfilment of the regulatory goals).⁸²

The Hans Bredow study purposely refrains from referring to the non-state component of co-regulatory bodies as self-regulation since the term commonly refers to systems of regulation “based solely on the industry’s self-responsibility”. As highlighted above, other forms of self-regulation exist which do include government involvement such as ‘enforced self-regulation’, ‘regulated self-regulation’ and ‘self-monitoring’. Due to the varying degrees of state involvement associated with each of the above regulatory forms, it is argued that such systems are more characteristic of definitions of co-regulation and are for the purposes of this thesis treated as such. For example, self monitoring regulation must not be confused with ‘pure’ self-regulation. Dr. Carmen Palzer distinguishes between the two regulatory models: “The self-regulatory model should be distinguished from a self-monitoring or self-control system. The latter is limited to monitoring compliance with a given set of regulations, laid down

⁸⁰ Supra fn 6

⁸¹ Co-ordinated by the Hans Bredow Institute, University of Hamburg, supra fn.6

⁸² Supra fn. 6 at p. 35

by another party, e.g. a public authority”⁸³ whereas a self regulatory body is a non-statutory body whose standards are established and implemented by a voluntary system established by the industry.⁸⁴ The concept of “enforced self regulation”, must also be distinguished from pure self-regulation. The Hans Bredow study defines “enforced self-regulation” as comprising an organisation which establishes codes of practice which set out legal requirements and terms and conditions as well as ensuring independent control of that organisation.⁸⁵ The control of the government regulator is restricted to “control of this control”⁸⁶.

As articulated in the Hans-Bredow study on co-regulation, there exists a “pyramid of enforcement strategies” with regard to regulatory bodies, with traditional command and control regulation at the top of the pyramid and ‘pure’ self regulation at the bottom.⁸⁷ It can be inferred from this that anything in between constitutes a form of co-regulation.

Pros and cons

The advantages of co-regulation as an alternative to statutory regulation are dependent on the degree of government involvement in the regulatory process.

Viviane Reding, in a speech at an ICRA Roundtable in Brussels when she was European Commissioner responsible for Information Society and Media, defined co-regulation as a system “where public authorities accept that the protection of societal values can be left to self-regulatory mechanisms and codes of conduct, but where they reserve the right to step in in case that self-regulation should prove to be ineffective.”⁸⁸

⁸³ Palzer, Carmen, *Self-Monitoring v. Self-Regulation v. Co-Regulation*, Co-Regulation of the Media in Europe, European Audiovisual Observatory, (Strasbourg, 2003) at 29

⁸⁴ *ibid* at 30

⁸⁵ *Supra* fn. 6, at. 16

⁸⁶ *ibid*

⁸⁷ *Supra* fn. 5 at p. 16

⁸⁸ Speech by Viviane Reding Member of the European Commission responsible for Information Society and Media on Freedom of the media, effective co-regulation and media literacy: cornerstones for an efficient protection of minors in the EU, ICRA Roundtable Brussels “Mission Impossible”, Brussels, 14 June 2006.

Thus, a co-regulatory body may provide legitimate media accountability while at the same time providing all of the merits of self-regulation such as industry expertise and flexibility, depending on the extent of its autonomy from government. For example, if the state merely plays a hands-off supervisory role and its terms and conditions are set out in general rather than in detail in statute then there is scope for the regulatory body to be flexible; likewise if the state merely retains back-stop powers to allow it to intervene if the regulatory body is not carrying out its role. However, if the terms and conditions and for example a code of practice are set out in great detail, or it engages in micro-management, the regulatory body will be constrained and it will be more difficult for it to be flexible and responsive to new or changing circumstances. Also changing legislation is a slow process, thereby making the regulatory body less readily adaptable to technological developments in the industry.

Self and co-regulation as alternative regulatory instruments to statutory regulation

The rapid growth in communications technology along with the inflexibility of statutory regulation has led to questions about the future effectiveness of traditional statutory regulation of the media. It has been widely acknowledged that soft law regulatory approaches such as self and co regulatory mechanisms, though not without their difficulties and shortcomings, could prove to be more suitable with regard to the media of the twenty-first century in light of rapidly evolving communications media services and changing norms and values in society.⁸⁹ It is essential for the future effectiveness of media accountability mechanisms that regulatory measures are reactive and “responsive”⁹⁰ to further technological advancements.

Expert knowledge of the ever changing media landscape is also of immense importance to ensure effective accountability to the public. The Hans Bredow study on co-regulation in the media sector questioned the appropriateness of traditional “command and control regulation”⁹¹ in the information age. It considers that such traditional regulation fails to take account of the interest of those it seeks to regulate and as such may create an environment of “resistance rather than co-operation.” As well as this, the report maintains that “the regulatory state displays a knowledge gap

⁸⁹ Supra fn. 6, at 14

⁹⁰ *ibid* and Nonet and Selznick’s concept of “Responsive Law” Philipp Nonet and Philip Selznick, *Law and Society in Transition*, New York: 1978, p.78+. cited Supra fn. 6, at 14

⁹¹ Supra fn. 6, at 12

and this gap is growing.”⁹² In an era of constant and rapid advancements in communications technology, statutory regulators are constantly playing catch up. It is therefore logical that statutory regulators co-operate with those they seek to regulate in order to obtain expert knowledge in the area and provide effective regulation.

Despite issues of convergence blurring the lines between different types of media, sector specific regulation of the media remains important, especially in light of regulation of the print media. McQuail has commented that there will always be arguments in favour of sector specific regulation of the media. McQuail identifies the merits of public control of certain parts of the media in the interest of diversity and pluralism, universal access and protecting personal rights.⁹³ (See Chapter 2)

Proposals to implement co-regulatory measures in the media sector have been met with opposition from both advocates of self-regulation and state regulators.⁹⁴ Promoters of self regulatory measures legitimately fear that systems of voluntary self-regulation, which rely on co-operation from the media industry would be threatened and undermined by the introduction of a co-regulatory system. Conversely, state regulators fear that the introduction of co-regulatory measures in place of statutory regulation would be ineffective.⁹⁵

According to the findings of the Hans Bredow report, co-regulatory mechanisms were deemed to be sufficient to implement European directives in respect of their effectiveness of regulation as well as their compatibility with legal requirements.⁹⁶ The study showed that many of the co-regulatory bodies were able to effectively safeguard policy objectives but that their effectiveness was dependent on a number of factors such as:

- 1) “Incentives for co-operation and enforcement”,
- 2) “ State resources used to influence the outcome of the non-state regulatory process”,

⁹² *ibid.* See also Keller, Perry, *European and International Media Law- Liberal Democracy, Trade and the New Media* (UK: Oxford University Press, 2011) at.31

⁹³ *Supra* fn. 12, at 113

⁹⁴ *Supra* fn. 6 at 12

⁹⁵ *ibid*

⁹⁶ *Supra* fn. 6 at 177

3) “Clear legal basis and division of work” and

4) “Process Objectives”.⁹⁷

With regard to the first element, i.e. ‘incentives for co-operation and enforcement’, there must be sufficient and clear incentives for the industry to co-operate with the state in the establishment of a co-regulatory body. The most common incentive has been the threat of statutory regulation. The study also reports that the existence of “adequate and proportionate”⁹⁸ sanctions appears to be necessary for an effective system of co-regulation. For example, in order for non-state actors to enforce standards, they must be able to impose effective sanctions as supported by the state.⁹⁹ The study showed that even where the legal element played a very background role, it still provided support to the non-legal element. The Press Council of Ireland also seem to feel a certain security in having legislative recognition and qualified privilege for their decisions.

In relation to the second element, i.e. the importance of state resources used to influence the outcome of the non-state regulatory process’, the state has the ultimate responsibility to protect public policy objectives and therefore must provide adequate funding in support of such initiatives.¹⁰⁰

The third element, i.e. there must be a ‘clear legal basis and clear division of work’ is self-explanatory. As a co-regulatory body may consist of both state and non-state regulators, it is imperative that its legal basis and division of responsibilities are clearly set out. If these factors do not exist, the regulatory body will lack transparency as well as incentives for the industry members.¹⁰¹

The final element, i.e. ‘process objectives’ relates to the third element. The study has shown that a major weakness of co-regulatory bodies is their lack of transparency in their process objectives; ¹⁰² i.e. “...proportionality, openness, transparency and clarity

⁹⁷ Supra fn. 6 pp 119-121

⁹⁸ Supra fn 6, at 120

⁹⁹ *ibid*

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*

of regulation”.¹⁰³ The report recommends that such procedural objectives should be set by the state element of the co-regulatory process in the interest of transparency.¹⁰⁴

With regard to the operation of co-regulatory bodies as alternative regulatory instruments to state regulation, the broadcast media, which has been traditionally subject to command and control regulation, can be seen as the most appropriate media sector in which to establish such bodies in comparison with the print and new media. The introduction of co-regulatory measures in this sector transfers some of the power from the state to the broadcast industry and can thereby alleviate some of the problems faced by statutory regulation such as lack of expertise and inability to adapt quickly to ongoing technological advances while at the same time ensuring important public policy objectives through such factors as objectives set out in statute and effective legal sanctions. Co-regulation is already widely used in video games classifications, for example the Irish Film Classifications Office (IFCO) in Ireland and the British Board of Film Classification (BBFC) in the UK.

The legality of implementing European directives into national law by establishing co-regulatory systems was addressed in the Hans Bredow study¹⁰⁵. The study *inter alia* considered the compatibility of co-regulatory measures with Article 10 of the European Convention on Human Rights which protects freedom of expression. The study found that in accordance with the definition of co-regulation, i.e. co-operation between law and industry, the legal element of co-regulation gives it sufficient authority to limit freedom of expression under Article 10.2 ECHR. According to this reasoning ‘pure’ self regulatory bodies, i.e. regulatory bodies with no legal connection, may not be compatible with Article 10.2 unless used in conjunction with or alongside other measures. As such, self-regulatory measures as mechanisms for providing legitimate media accountability should not be overlooked. Self-regulatory mechanisms can operate on their own or as a supplement to other forms of regulation.¹⁰⁶ For example, there is legislation on child pornography but self-regulatory hot-lines play a complementary role in a number of European states, including Ireland, with European wide liaison and co-operation.

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ *Supra* fn. 6, at 147

¹⁰⁶ See *supra* fn.6 at 117

Media literacy as a means of ensuring effective media accountability

One of the main implications of the trend towards deregulation of the media industry is that more emphasis has been placed on self-regulation and self-accountability of media consumers.¹⁰⁷ Media literacy or media education initiatives are also indicative of a move away from the traditional, protectionist view of media consumers as passive to the “empowerment”¹⁰⁸ of consumers as active, participatory citizens. Media literacy initiatives began in the US in the 1980s as a reaction to the development of cable and satellite technologies. Politicians, parents and educators were concerned about the negative effect of the media on children particularly with regard to violence and commercialisation in the media; hence the fact that prominence is placed on the protection of minors in present day media literacy initiatives.¹⁰⁹ Later, media literacy initiatives included a focus on adult responsibility, including responsibility of parents, schools and the media itself to both protect children and enable them to become knowledgeable media users and participants.¹¹⁰

In the digital era, much emphasis has been placed on the importance of media literacy in ensuring active and participatory citizenship and thus it plays a pivotal role in ensuring a democratic society. Media literacy now includes “everything from having the knowledge needed to use old and new media technology to having a critical relationship to media content in a time when the media constitute one of the most powerful forces in society”¹¹¹ and includes everyone from “young and old...teachers and parents...people who work in the media industries and...NGOs.”¹¹² Media literacy has thus developed into an all encompassing concept which has proved problematic to define.¹¹³ Media law critics have attempted to summarise the concept of media

¹⁰⁷ Supra fn. 12 at 114

¹⁰⁸ Buckingham, David, “The future of media literacy in the digital age: some challenges for policy and practice” in *Media Literacy in Europe: Controversies, Challenges and Perspectives* (EuroMeduc, 2009) at 16

¹⁰⁹ McGonagle, Tarlach, “Media Literacy: No Longer the Shrinking Violet of European Audiovisual Media Regulation?” extract from the publication IRIS plus 2011-3 “Media Literacy” 2011 European Audiovisual Observatory, Strasbourg, (France) at p. 13

¹¹⁰ Carlsson, Ulla, “Raising Media and Internet Literacy: Activities, Projects and Resources” in Carlsson, Ulla (Ed), *Regulation, Awareness and Empowerment: Young People and Harmful Media Content in the Digital Age* (Sweden: International Clearinghouse on Children, Youth and the Media, 2006) at 158

¹¹¹ *ibid* at 157

¹¹² Supra fn. 108 at 15

¹¹³ Supra fn. 110 at 159

literacy in terms of access, understanding and creation: “media literacy implies having access to the media and creating/expressing oneself using the media.”¹¹⁴

At international level, UNESCO has played a significant role in the development of media literacy initiatives. In 1982, UNESCO established the Grunwald Declaration on Media Education¹¹⁵ which emphasised the importance of media literacy in democratic society stating:

The role of communication and media in the process of development should not be underestimated, nor the function of media as instruments for the citizen’s active participation in society. Political and educational systems need to recognise their obligations to promote in their citizens a critical understanding of the phenomena of communication.¹¹⁶

UNESCO has since then consistently supported media literacy initiatives under UNESCO Action for Media Education and Literacy. Its activities in this regard have included: ‘an International Expert Group meeting on Teacher Training Curricula Enrichment for Media and Information Literacy (Paris, June 2008)’, ‘Educating for the Media and the Digital Age, Conference Vienna 1999’, and ‘Training of Media and Information Professionals’ (see below).¹¹⁷

At European level, a civil society initiative to create awareness of the importance of media literacy and media education in society resulted in the drafting of the European Charter for Media Literacy.¹¹⁸ The Charter stipulates that media literate people “should be able to”¹¹⁹:

Use media technologies effectively to access, store, retrieve and share content to meet their individual and community needs and interests;

Gain access to, and make informed choices about, a wide range of media forms and content from different cultural and institutional sources;

Understand how and why media content is produced;

¹¹⁴ See Buckingham (2005) and Livingstone (2005) cited supra fn 108, at 157-8

¹¹⁵ The Grunwald Declaration on Media Education, Grunwald, Germany, 1982

¹¹⁶ *ibid*

¹¹⁷ Information on media literacy initiatives by UNESCO available at: http://portal.unesco.org/ci/en/ev.php-URL_ID=27056&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹¹⁸ *Supra* fn. 102 at p.9

¹¹⁹ The European Charter for Media Literacy, 2004, (para.2), available at <http://www.euromedialiteracy.eu/charter.php>

Analyse critically the techniques, languages and conventions used by the media, and the messages they convey;

Use media creatively to express and communicate ideas, information and opinions;

Identify, and avoid or challenge, media content and sources that may be unsolicited, offensive or harmful;

Make effective use of media in the exercise of their democratic rights and civic responsibility.¹²⁰

In the EU regulatory sphere, the AVMS Directive¹²¹ advocates the development of media literacy initiatives in member states. Tarlach McGonagle considers the specific inclusion of media literacy in the AVMSD as a “major regulatory development” which is indicative of the increased significance of media literacy initiatives in EU policy in recent years. The definition of Media Literacy as set out in Recital 47 of the Directive refers to the 2006 Recommendation of the European Parliament¹²² on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry, which recommends possible means of promoting media literacy including:

continuing education of teachers and trainers, specific internet training aimed at children from a very early age, including sessions open to parents, or organisation of national campaigns aimed at citizens involving all communications media, to provide information on using the Internet responsibly.¹²³

The 2006 recommendation identifies the need to ensure continuous education and training of teachers and trainers as well as children, which is essential to effective media literacy in the ever changing and expanding media landscape.

Council of Europe recommendations have advocated the importance of media education in democratic society for a number of years, specifically concerning human rights, democracy and the protection of freedom of expression.¹²⁴ Recommendations include- Recommendation 1466(2000) on Media education, Recommendation

¹²⁰ Supra fn. 119 para. 2

¹²¹ Supra fn. 41 at para. 47

¹²² Recommendation of the European Parliament and the Council of the 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services Industry

¹²³ Supra fn 41, at para. 47

¹²⁴ See a note prepared by Paolo Celot, European Association for Viewers Interests (Brussels, 4 December 2007)- available at http://www.eavi.eu/joomla/images/stories/Conferences/Other_Conference/getsmart.pdf at p. 4

(2006)¹² on Empowering children in the new communications environment, Recommendation 1789 (2007) on Professional education and training of journalists, Recommendation 1836(2008) on Realising the full potential of e-learning for education and training and Recommendation CM/Rec (2009)(5) on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment.

An example of the inclusion of media literacy provisions at national level can be seen in the 2009 Broadcasting Act. The 2009 Act provides that the BAI must “...encourage and foster research, measures and activities which are directed towards the promotion of media literacy, including co-operation with broadcasters, educationalists and other relevant persons.”¹²⁵ Media literacy is defined in the Act as follows:

media literacy means to bring about a better public understanding of:

- (a) the nature and characteristics of material published by means of broadcasting and related electronic media,
- (b) the processes by which such material is selected or made available, for publication by broadcasting or related electronic media,
- (c) the processes by which individuals and communities can create and publish audio or audio-visual material by means of broadcasting and related electronic media, and
- (d) the available systems by which access to material published by means of broadcasting and related electronic media is or can be regulated.¹²⁶

The BAI’s Strategy Statement 2011-2013 sets out the BAI’s ‘Themes and Strategic Goals’ for the three year period.¹²⁷ Strategic goal 7 sets out its objectives in accordance with its statutory obligations with regard to the promotion of media literacy objectives which entails the promotion of:

[...] media literacy initiatives, which will enhance the public’s ability to appreciate and evaluate programme content and to understand, interact with and participate in the broadcasting environment.¹²⁸

Media literacy and media accountability systems

¹²⁵ Broadcasting Act 2009 Section 26(2)(g)

¹²⁶ *ibid* Section 2

¹²⁷ The BAI Strategy Statement 2011-2013 available at http://www.bai.ie/wordpress/wp-content/uploads/BAI_Strategy_2011-13_v2ENG.pdf

¹²⁸ *Supra* fn. 127 at p.22

Viviane Reding, speaking in her former role as European Commissioner responsible for Information Society and Media in 2007, commented on the importance of media literacy in the digital age stating:

In a digital era, media literacy is crucial for achieving full and active citizenship [...] The ability to read and write- or traditional literacy- is no longer sufficient in this day and age. People need a greater awareness of how to express themselves effectively, and how to interpret what others are saying, especially in blogs, via search engines or in advertising. Everyone (old and young) needs to get to grips with the new digital world in which we live. For this, continuous information and education is more important than regulation.¹²⁹

In accordance with this statement, which prioritises media literacy over media regulation, media literacy can be seen as another alternative method to media regulation. It is submitted that media literacy initiatives can be used as alternative mechanisms for ensuring effective media accountability to the public in two particular ways, 1) through educating the public with regard to media accountability mechanisms and 2) through the education of journalists.

Media accountability systems, particularly self-regulatory instruments are very often unknown to the public due to lack of publicity and visibility. Self-regulatory systems which rely on financial aid from the media industry often have very small budgets and are thus financially unable to publicise their work. Media accountability systems are therefore largely under used. It is recommended that media literacy initiatives should include the promotion of awareness of media accountability systems in order to provide more effective media accountability to the public.¹³⁰

In order to ensure a thorough understanding of media accountability mechanisms, it is essential that the public are sufficiently informed of the important role played by the press in democratic society. This will ensure greater public understanding and respect for the importance of press freedom. The public should then be provided with information on media ethics and consider the different codes of ethics/practice of various media accountability mechanisms.¹³¹ Study of media accountability

¹²⁹ Viviane Reding” cited in Europa press release, Brussels, 20 December, 2007- at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1970>

¹³⁰ Divina Frau-Meigs (ed.) *Media Education, A Kit for Teachers, Students, Parents and Professionals*, (UNESCO, 2007) at 83- Part of Mentor Project initiated by UNESCO and supported by the European Commission. The handbook is available at <http://unesdoc.unesco.org/images/0014/001492/149278e.pdf>

¹³¹ *ibid*

mechanisms in schools for example could include an examination of the history of media accountability and how current media accountability systems operate under systems of self-regulation, co-regulation and statutory regulation. For example, it has been suggested, in the Internet Literacy Handbook by UNESCO, that activities for understanding self regulatory bodies in schools could include assignments such as “Write up the standards of practice for the high school newspaper.”¹³²

The adoption of education regarding media accountability mechanisms into media literacy curricula would generate greater awareness of such systems and provide the public with knowledge as to how to utilise such systems in order to ensure the maximum benefit.

The provision of education on media accountability mechanisms should begin at primary and post-primary level to ensure optimum awareness of such systems in future generations. The inclusion of media literacy initiatives in the Irish education system is quite fragmented, although the situation has improved recently due to the increased amount of promotion at national, European and international level for example, the inclusion of media literacy in the 2009 Broadcasting Act and the AVMSD. Primary and secondary media literacy education in Ireland does not however include the study of media accountability mechanisms in their media literacy curricula.¹³³

Educating the public, particularly students, with regard to the existence of these mechanisms, their *raison d’être* and information as to how such mechanisms can be utilised by the public would undoubtedly create more effective media accountability systems and thereby contribute to the provision of greater media accountability in the future. It can be argued that the rise of citizen journalism, in the form of blogs and other user generated content online, means that the public in general should be included in such media literacy initiatives. Media literacy curricula at primary and post primary level should therefore include the study of media ethics and responsible journalism to ensure optimum levels of media accountability in the future.

¹³² *Supra* fn. 130 at 91

¹³³ The Radharc Trust, *Critical Media Literacy in Ireland* (Dublin: DCU and DIT, 2007) at pgs 27-28. See also the website of the National Council for Curriculum and Assessment at <http://www.ncca.ie> “for current national curricula, syllabuses, guidelines and frameworks for schools and educational settings in Ireland”. Also see <http://www.curriculumonline.ie/en/>

Media literacy-media professionals

Continuous information and education in light of the ever expanding developments in communications technology is not only important for the public but for the media industry too. Education of those who work in the media sector is another important means of achieving greater media accountability to the public as it promotes knowledge of media ethics and high standards in the sector.

At International level, UNESCO has promoted the improvement of the education of media professionals through programmes such as the UNESCO programme on the training of media professionals, which focuses on the provision of high quality media training institutions and access to information. The programme aims at: “increasing the competency of media training institutions, improving accountability, ethical and professional standards in journalism; and providing training on investigative journalism.”¹³⁴ UNESCO have also encouraged the education of media professionals through publications such as ‘Model Curricula for Journalism Education’, which provide information for media professionals on areas such as media ethics and reporting techniques.¹³⁵

At European level, the 2006 Recommendation of the European Parliament and of the Council on the protection of minors in relation to the competitiveness of the European audiovisual and online information services industry¹³⁶ recommends that member states promote “a responsible attitude on the part of professionals, intermediaries and users of new communications media such as the internet ...)”¹³⁷ The Council of Europe has also recommended the education of media professionals, most notably, in Recommendation 1789 (2007) on the professional education and training of journalists. In this recommendation, the Council of Europe recognises that fast paced

¹³⁴ See UNESCO website at www.unesco.org (Training of Media Professionals)

¹³⁵ *ibid*

¹³⁶ Recommendation (2006) of the European Parliament and of the Council on the protection of minors in relation to the competitiveness of the European audiovisual and online information services industry.

¹³⁷ *ibid*

technological developments place “new demands” on the media that require “new skills, greater knowledge and ongoing training.”¹³⁸

The Organisation for Security and Co-operation in Europe (OSCE) provides training and support for journalists in Europe, particularly in less developed countries.¹³⁹ The OSCE offers training courses to journalists in such areas as the use of the new media. For example, in April 2012, the OSCE began a training course for Kazakh-language journalists in Kazakhstan on “using the internet and new media tools.”¹⁴⁰ According to the OSCE, training courses such as this “will help the journalists from the region to learn about legal and ethical aspects of online journalism, as well as about various aspects of Internet usage, including how to create blogs and effectively use social networks.”¹⁴¹

Training courses such as those provided by UNESCO, the OSCE and other bodies are of immense importance particularly in countries which are less media literate. They give journalists and media professionals in such countries an opportunity to gain knowledge of appropriate online tools as well as crucial knowledge of legal and ethical aspects of the new media.

Due to the ever developing and changing nature of the media, it is imperative that journalists and media professionals, whether or not they have had professional training, stay up to date with technological advancements in their particular sector with regard to such factors as the use of new online tools or updates in legal or ethical issues. This can be achieved through regular seminars in the newsroom by the legal team or outside training courses such as those provided by UNESCO or the OSCE.

Overall, education of media professionals ensures greater awareness of media ethics and as such promotes greater quality in the media sector. Media education can therefore be seen as an important tool in providing for legitimate media accountability to the public now and in the future. As such, the specific education of media professionals should be promoted at both European and national level.

¹³⁸ Recommendation 1789 (2007) on the Professional education and training of journalists at para 2

¹³⁹ See OSCE website at <http://www.osce.org/what/media-freedom>

¹⁴⁰ See <http://www.osce.org/astana/89831>

¹⁴¹ *ibid*

CHAPTER FIVE: CONCLUSIONS

As examined in this chapter, issues such as globalisation and media convergence have questioned the legitimacy of traditional approaches to providing for media accountability to the public in the twenty-first century. As such, there has been a move away from the application of paternalistic social responsibility principles in media regulation, such as traditional command and control regulation of the broadcast media, to neo-liberalist principles, which emphasise market forces and consumer sovereignty.

In light of such developments, this chapter has considered the strengths and weaknesses of alternative regulatory instruments (ARI's) to statutory regulation such as self and co-regulation.

Regulatory theories such as the 'responsive' regulation model and the 'governance' model have contributed towards a de-regulatory or liberalising trend in media regulation policy. Such theories advocate the involvement of a number of different actors in the regulatory process and thus have contributed significantly to the establishment of alternative instruments such as self and co-regulation.

An analysis of the strengths and weaknesses of self and co-regulatory mechanisms has shown that both forms of regulation are capable of providing legitimate media accountability to the public in certain instances. The study showed that justifications for sector specific media regulation remain legitimate at present.

The European Commission has, for example, advocated the use of self-regulatory mechanisms as the most appropriate form of regulating the internet and mobile technologies due to constant technological developments in those areas. The flexibility of self-regulation is seen as the most suitable means of regulating those particular areas. As seen in Chapter 3, self-regulation has also been widely accepted as the most appropriate form of regulating the print media due to its unique position and relationship with the public, i.e. that the press has an obligation to adequately inform the public and that the public has a right to be informed. With self-regulatory bodies, any curtailments of freedom of expression are voluntarily imposed rather than imposed by state. Self-regulation can therefore be seen as a self-restriction on freedom of expression in recognition of other interests.

It is also evident from this examination, however, that self-regulatory bodies may not sufficiently protect the rights of others due to issues such as weakness of sanctions to enforce standards and lack of democratically elected members. It could be argued therefore that self-regulatory bodies can never completely replace statutory bodies in the media sector, since it is the ultimate responsibility of the state to protect fundamental rights. From a thorough examination of the wording of the AVMSD in its definition of self- and co-regulation, it can be deduced that self-regulation is viewed by the European Commission as a supplementary form of regulation rather than a viable alternative to statutory regulation in the audio-visual media sector. Co-regulatory bodies have been largely advocated as alternatives to state regulation in the audiovisual sector, which has been traditionally subject to command and control regulation. The introduction of co-regulatory measures in this sector would transfer some of the power from the state to the industry, thereby alleviating some of the problems of statutory regulation such as lack of expertise and inability to adapt quickly to ongoing technological advances while at the same time ensuring important public objectives are met through such factors as effective legal sanctions and objectives being set out in statute.

The merits of media literacy and media education initiatives have been increasingly emphasised in recent years and are also indicative of a move away from the traditional, protectionist view of media consumers, as emphasised by social responsibility theorists, to the empowerment of consumers as active, participatory citizens. Media literacy initiatives can thus be seen as fulfilling a vital democratic role in twenty-first century society. This study has shown that media literacy curricula should include the study of media accountability systems to ensure greater awareness of such mechanisms - thus ensuring optimal levels of media accountability in the future. Media education of media professionals, especially in light of ever-changing media technologies, is also vital to ensuring higher media standards and effective accountability to the public now and in the future. It is recommended that specific education of media professionals should be promoted.

OVERALL CONCLUSIONS

This thesis has involved a comprehensive examination, analysis and assessment of the strengths and weaknesses of the various methods currently used to ensure media accountability in Ireland and in other jurisdictions. The goal has been to assess whether these are effective or whether alternative approaches need to be considered to achieve media accountability in the twenty-first century, in light of new technological developments and changing norms and values in society.

Major technological advances in the media field have increased the variety of media available and changed the way the traditional media exert power over people's lives. Technological developments have created the need for a greater understanding of how law, co-regulatory, self-regulatory and other mechanisms such as incentive and market based instruments and educational and information based approaches,¹ can best provide for transparent and independent systems of accountability.

Overall, this study has shown that all media accountability systems need to be continuously updated and adapted in light of such issues in order to provide effective accountability to the public of the twenty-first century. This study has found that there are a number of key elements that must be in place in order to provide an effective means of media accountability whether by legal or non-legal methods or by the use of alternative approaches. These core factors are as follows:

1) Media accountability mechanisms must be proportionate.

As examined in Chapter 5, regulation of the media must be proportionate with regard to the aim pursued in accordance with the principle of proportionality, widely espoused by national courts and the ECHR.² The 2011 Council of Europe

¹ See Hepburn, Glen, *Alternatives to Traditional Regulation*, OECD Report, 2009, available at <http://www.oecd.org/dataoecd/17/5/42245468.pdf> at p.10

² For a critique of the importance accorded to the principles of proportionality in the ECHR, see Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?", Jean

Recommendation of the Committee of Ministers to Member States on a new notion of media sets out criteria for identifying media and guidance for a graduated and differentiated approach to regulation of the new media which has been addressed to a certain degree in the AVMS Directive. One of the criteria is that:

Policy making and, more particularly, regulatory processes should ensure that due attention is paid to the principle that, as a form of interference, any regulation should itself comply with the requirements set out in Article 10 of the European Convention on Human Rights and the standards that stem from the relevant case law of the European Court of Human Rights. Regulatory responses should therefore respond to a pressing social need and, having regard to their tangible impact, they should be proportionate to the aim pursued.³

2) *Media accountability mechanisms must be independent.*

Independence in the decision making process of media accountability mechanisms can be achieved through for example, ensuring that the composition, appointments processes and funding of such systems are free from political or economic pressures or undue influence from industry as discussed in Chapters 2 and 3. This study has also shown that independent bodies with lay and industry membership may be preferable to wholly self-regulatory bodies.

3) *Media accountability mechanisms must be transparent.*

It is important that such systems are transparent. Transparency can be ensured for example through a periodic independent review of such systems, which is publicly available. Media accountability bodies must ensure transparency in their decision-making functions to show that decisions are being made in an impartial manner. As such, the decision-making processes of such systems must be made available for public scrutiny. They should also be user-friendly or at least straight forward enough for people to be able to understand because a system that

Monnet Working Paper 09/08, NYU, available at <http://centers.law.nyu.edu/jeanmonnet/papers/08/080901.html>, where he argues inter alia that the ECHR has elevated proportionality to the status of a basic principle of interpretation of the European Convention on Human Rights.

³ Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a new notion of media.

is unduly complex of which involves unnecessary hurdles or an overload of information for complainants or the public at large is not transparent in the true sense of the word. This issue is dealt with in Chapters 2, 3 and 4.

4) Media accountability systems must be visible and accessible.

Visibility is of vital importance to an effective accountability mechanism. Such mechanisms must promote public awareness through for instance, the use of advertising campaigns, informational seminars, and information booklets and media education initiatives on a regular basis. It is also essential that such systems are easily accessible and easy to use through, for example, an easy to navigate online complaints making system and process. Accountability systems must also cater for the disabled or elderly who cannot for whatever reason use on-line systems; a telephone service for instance whereby such members of the public can call for information or request a complaints form to be posted to their homes free of charge. An empirical study of complaints made to the Press Council of Ireland showed that a high percentage of third party complaints were made by relatives of a person who had been personally affected by a publication - in many cases on behalf of a minor, elderly, incapacitated or deceased relative. This data provided a good indication of who uses the PCI system, i.e. in many instances persons acting on behalf of more vulnerable members of society who are not in a position to make a complaint themselves. This is an important factor which should be highlighted by the PCI in its complaints procedures in order to encourage more people to complain on behalf of the vulnerable (see chapter 4).

The Press Council of Ireland has recently set up an awareness campaign in an effort to increase its visibility. The empirical study of the complaints made to the PCI showed that the majority of complaints were made from the Dublin area. The high concentration of complaints from the Dublin area may be indicative of a lack of awareness of the PCI in the rest of the country. It is recommended therefore that the new awareness campaign should specifically target different parts of the country to ensure equal awareness of the PCI (see Chapter 4).

5) Effective enforcement powers and sanctions must be in place.

Enforcement powers and sanctions must be proportionate and provide a genuine and effective means of deterring the offending party as well as acting as a deterrent to other parties.⁴ This study has shown that the effectiveness of enforcement powers and sanctions with regard to self-regulation is particularly dependent on full co-operation from the industry. The European Court of Human Rights has recognized the possibility that “heavy sanctions” on the press could have a “chilling effect” on journalistic freedom.⁵ As examined in Chapter 2.2, in the case of *Fatullayev v Azerbaijan*⁶ the Court stated that the:

[...] nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of the interference with the freedom of expression guaranteed by Article 10. The Court must also exercise the utmost caution where the measures taken or sanction imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of public concern.⁷

The imposition of proportionate fines on the broadcast media, however, may remain justifiable based on the historic rationales for stricter regulation of the broadcast media, although these are becoming increasingly obsolete in light of technological developments and media convergence and therefore need to be re-addressed. Broadcasters in Ireland, for example, can be fined under the Broadcasting Act 2009. The Broadcasting Authority of Ireland (BAI) has recently imposed a financial sanction on Radio Telefis Eireann (RTE), the national public broadcaster, of €200,000 for a breach of section 39(1)(b) and (e) of the Broadcasting Act.⁸ It may be argued that even statutory bodies such as the BAI, which is not a court of law, should not be entitled to impose fines – indeed, there is a safeguard in this respect in the 2009 Broadcasting Act in which the BAI can

⁴ See Ofcom Submission to the Leveson Inquiry on the future of press regulation. A response to Lord Justice Leveson’s request. Available at <http://media.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf> at p.6

⁵ *Armoniene v Lithuania* (App no. 36/9/02) (25 November 2008), para. 47

⁶ *Fatullayev v Azerbaijan* (Application no. 40984/07) 22 April 2010

⁷ *ibid* at para. 102

⁸ See http://www.bai.ie/wordpress/wp-content/uploads/20120504_StatementofFindings_vFINAL_SO.pdf

only recommend a fine for a court to impose unless the broadcaster concerned is willing to accept the BAI's fine without recourse to a court.⁹

As highlighted in Chapter 3, recent inquiries into press standards such as the Leveson Inquiry and Australian and New Zealand reports have questioned the effectiveness of self-regulatory press councils in upholding journalistic standards. Proposals have been made for statutory recognition of press councils and the introduction of co-regulatory measures in place of self-regulation in an effort to strengthen regulation of the print media. Press council sanctions have been widely criticized as weak in that they rely on full co-operation from their members in order to enforce their sanctions. As such, questions have arisen regarding the introduction of backup powers if press council members fail to comply with press councils. Incentive based regulation is a viable option as it encourages membership and co-operation with press councils. As examined in Chapter 3, statutory recognition of press councils can offer a number of advantages to the print media industry. In the case of the statutorily recognised PCI, for example, the Defamation Act 2009 confers on the Press Council and Ombudsman certain protections including the defence of qualified privilege in relation to defamation law (Sch.1, Part 1). Additionally, in cases where member publications plead the defence of fair and reasonable publication on a matter of public interest, the court "shall" take into account the publication's membership of and co-operation with the adjudication process of the Press Council/Ombudsman system as well as its adherence to the code of practice (s.26(e)). The Act does offer the same protection to non-Press Council members that adhere to an equivalent set of standards (s.26(f)) The offer of this security alone acts as a good incentive for responsible journalism and membership of the Press Council.

In the case of the self-regulatory Advertising Standards Authority of Ireland (ASAI), the Board is also empowered to exercise a disciplinary function over ASAI members, which includes suspending members from all or any privileges of membership as well as expulsion from membership in serious cases.

⁹ Broadcasting Act 2009, Chapter 2 (financial sanctions), sections 54-55.

Suspension and expulsion of membership from press councils could prove to be very effective sanctions with regard to press councils, although any such sanction must be exercised with due process and be proportionate. If this sanction applied to the PCI for example, PCI members would lose out on the protections bestowed upon members as examined in Chapter 3 and would lose credibility in the eyes of the public.¹⁰

6) Flexibility and adaptability.

This study has shown that in order to provide effective accountability to the public, media accountability mechanisms in the twenty-first century must be flexible and adaptable to the ever-changing media environment as well as changing norms and values. As considered in Chapter 5, the rapid growth in communications technology along with the inflexibility of statutory regulation has led to questions about the future effectiveness of traditional statutory regulation of the media. It has been widely acknowledged that soft law regulatory approaches such as self and co regulatory mechanisms, though not without their difficulties and shortcomings, could prove to be more suitable with regard to the media of the twenty-first century in light of rapidly evolving communications media services and changing norms and values in society.¹¹ It is essential for the future effectiveness of media accountability mechanisms that regulatory measures are reactive and “responsive”¹² to further technological advancements.

The question as to how these objectives and necessary attributes of effective media accountability can be achieved in practice was addressed in Chapters 2, 3, 4 and 5 of this thesis. The discussion involved consideration of the role of law and the role of alternative mechanisms.

¹⁰ See generally Morgan, Bronwen, Yeung, Karen, *An Introduction to Law and Regulation*, (Cambridge University Press, UK, 2007)

¹¹ Schulz, W. et al. (2006): *Final Report: Study on Co-Regulation Measures in the Media Sector*, commissioned by the European Commission at p. 14

¹² *ibid* and Nonet and Selznick’s concept of “Responsive Law” Philipp Nonet and Philip Selznick, *Law and Society in Transition*, New York: 1978, p.78+. cited *Supra* fn. 11, at 14

The role of law

The law will always play an important role in regulating the media through safeguarding the fundamental rights of the public. The media is accountable for its actions under the ordinary laws of each jurisdiction. As such, the media is subject to the same legal constraints as all citizens. The media must adhere particularly to ‘proscriptive legal rules’ in their everyday work such as those contained in tort and criminal law, which include laws on contempt of court, defamation, trespass, professional secrecy and discrimination. These laws protect individual rights and the public interest. In relation to regulation of the broadcast media, statutory law has traditionally set out the powers and functions of regulatory bodies in the broadcast media in relation to a variety of issues, including economic matters such as licensing and funding, public interest concerns such as the protection of minors, plurality and diversity and general technological standards.

As examined in this thesis, there has been a move away from traditional command and control regulation of the media based on social responsibility principles in favour of neo-liberalist principles that advocate market based regulation and consumer sovereignty. This has led to de-regulatory trends in media regulation. Regulatory theories such as the ‘responsive’ regulation model and ‘governance’ model have contributed towards this de-regulatory or liberalizing trend in media regulation policy. Such theories advocate a number of different actors being involved in the regulatory process and thus have contributed significantly to the establishment of alternative regulatory instruments such as self and co-regulation, which seek to minimize some of the shortcomings of traditional regulation. Other alternatives to traditional regulation include incentives and market based instruments as well as educational and information-based approaches.¹³ Hajer, talking about politics and policy-making, uses the term “network governance” to refer to the approach to public problem-solving in which we no longer simply rely on the state to impose solutions, but instead conceive of problem solving as a collaborative effort in which a network

¹³ Hepburn, Glen, *Alternatives to Traditional Regulation*, OECD report, 2009, available at <http://www.oecd.org/dataoecd/17/5/42245468.pdf> at p.10

of actors, including both state and non-state organizations play a part.¹⁴ As noted by McQuail, a system of governance, which has been described as ‘government without politics’, is particularly suited to regulation of the media since political intervention in media regulatory policy is especially sensitive in light of the vital democratic role played by the media in the dissemination of information to the public.¹⁵

This study has shown that the state, industry and the public can collaborate to ensure universal, active and participatory citizenship and thus make a significant contribution to upholding important democratic principles particularly in the audiovisual sector through public service media regulation for example. It is submitted that with regard to the statutory accountability mechanisms examined in this thesis, i.e. public service media, complaints’ bodies, right of reply mechanisms and codes of conduct, may provide greater accountability to the public under a co-regulatory system rather than a purely statutory system. A comprehensive study of co-regulatory measures by the Hans Bredow Institute has shown that the introduction of co-regulation in place of statutory regulation may alleviate some of the problems faced by traditional command and control regulation in the twenty-first century, such as lack of expertise and inability to adapt quickly to ongoing technological changes while at the same time ensuring that important public policy objectives are met.

Re-regulation of the print media

Despite the application of neo-liberalist principles and a trend towards de-regulation of the audiovisual media, this study has shown that there has been a marked trend towards stricter regulation of the print media in recent years, as reflected in the recent jurisprudence of the European Court of Human Rights and government inquiries into freedom of the press such as the Australian reports and the Leveson Inquiry. Likewise, there is some evidence that national broadcasting and communications legislation, for example, the Broadcasting Act in Ireland, is

¹⁴ Hajer. A. Maarten, *Authoritative Governance: Policy-making in the Age of Mediatization*, Oxford University Press, 2011 at pp. 32-3

¹⁵ McQuail; 2003, at p.91

becoming much more detailed and micro-managing than previously and, indeed, the AVMSD, despite its relaxation of certain rules, and its embrace of graduated regulation in respect of linear and non-linear media, retains tight controls on television broadcasting.

An examination of the ECtHR's interpretation of the duties and responsibilities of the press under Article 10(2) showed a number of inconsistencies. In previous case law, such as *Jersild*, *Thorgeirson* and the *Observer and Guardian*, the Court has taken a strong "pro press" stance which favoured a broad interpretation of freedom of the press. In recent cases however, such as *Stoll v Switzerland* and *Flux v Moldova*, the Court has placed a significant emphasis on the scrutiny of journalistic ethics, including the subject matter of publications and the manner in which publications are researched, edited and presented instead of focusing on more important issues such as the public importance of the subject matter and the protection of investigative journalism. These recent restrictive trends on press freedom may be a reaction to the increasingly sensationalist and privacy intrusive activities of the media, which have come to light in particular in the Leveson inquiry. In *Stoll*, the Grand Chamber cited the powerful influence of the media of the twenty-first century on public opinion as a reason for an increased need to "monitor" compliance with journalistic standards and as justification for a more limited interpretation of freedom of the press. This appears to be in stark contrast with the Court's reasoning in the subsequent case of *Times Newspaper Ltd v UK* in which the ECtHR acknowledges the vital role played by the new media, particularly the internet, in making news and information available to the public. In this case the ECtHR referred to the vital function of the internet in twenty-first century democratic society as an *addition* to the traditional 'public watchdog' role of the press. This could indicate that the Court has seen the error of its ways in *Stoll* and is now returning to normal course. It is submitted that the Court should re-focus its energies on upholding the well established principles as set out in cases such as *Jersild v Denmark*, *Goodwin v UK*, *Lingens v Austria* and *Barthold v Germany*, the judgments of which focus on upholding and safeguarding freedom of expression and the vital role played by the press in democratic society. While the right to freedom of expression belongs to everyone and must be safeguarded, with the increasing development of citizen journalism

it will become even more crucial that the media which set and adhere to editorial standards are supported.

There has been hot debate regarding regulation of the print media in recent years, which has been highlighted most recently in the UK by the Leveson Inquiry on the Culture, Practice and Ethics of the Press, the findings of which are due to be published in October 2012. The launch of the inquiry has, most notably, led to the demise of the Press Complaints Commission in the UK. A number of submissions to the Leveson inquiry have made recommendations as to the regulatory structure of a new body to take over from the PCC. A number of submissions have recommended a co-regulatory system for the press. For example, Lord Hunt of Wirral, former Chairperson of the PCC, in his submission to the inquiry, recommended the strengthening of the self-regulatory system through “proper legal underpinning” and “compliance procedures” in the event of serious breaches of the Editor’s Code of Practice.¹⁶

In another submission to the Leveson Inquiry, Ofcom recommended a strengthened system of self-regulation of the press, which could possibly be statutorily recognized in an effort to provide incentives for membership, similar to the PCI system in Ireland.¹⁷ As highlighted in this thesis, any form of statutory regulation of the print media is far from ideal as it risks government interference or control of the sector. Legislation once in place can be amended to provide for greater statutory controls to the detriment of press freedom. As recommended in Ofcom’s submission, this risk could be reduced somewhat: “by ensuring that there is no provision in primary legislation to enact secondary legislation.”¹⁸ It is recommended that the introduction of any sort of statutory recognition of press councils should be a matter of last resort only after all other options have been exhausted. The focus should be on strengthening self or independent regulatory systems through, for example, the introduction of a press ombudsman to work in conjunction with a press council as in the Swedish and Irish models which can

¹⁶ Leveson Inquiry into the Culture, Practices and Ethics of the Press, Witness Statement-David James Fletcher, Lord Hunt of Wirral, at p. 18

¹⁷ *Supra* fn. 4 at p. 16

¹⁸ *ibid*

improve accountability to the public through providing a two-tiered and more visible and transparent complaints system. The dual system and appeals process may also promote greater public confidence that complaints are being handled thoroughly and objectively. Self-regulation of the press is, however, dependent on full co-operation from the print media industry.

An empirical study of the complaints system of the Press Council of Ireland along with a comparative study of other press councils has shown that self-regulatory mechanisms can provide an effective means of media accountability to the public with regard to a number of common issues of concern, such as online matters, defamation of the deceased, privacy and protection of children. The study showed that with regard to certain issues which need to be dealt with as quickly as possible to ensure optimum damage control, most notably, protection of reputation of both the living and of the deceased and privacy protection, self-regulatory/independently regulated complaints bodies can be more effective than a formal legal remedy in that they offer remedies through a much faster process that is free of charge. However, the right of access to the courts must be maintained in cases where a cause of action exists. This study has also shown that the role of newspaper ombudsman or readers' representative can provide greater accountability to the public with regard to the print media, as it lessens the gap between newspapers and their readership. As Perotta has pointed out

[n]o matter how each newspaper defines the role of its ombudsman, he serves an important purpose in giving the reader limited access to the newspaper and showing him that editors care what he thinks.¹⁹

Tessa Jowell, former Secretary of State for Culture in the UK, has recently recommended that all national newspapers in the UK establish readers' representatives/editors as a "step in the right direction" towards "improving journalistic standards."²⁰ As noted by Jowell, the appointment of such positions in newspapers would improve standards and accountability to the public, while at the same time not unduly restricting freedom of expression.

¹⁹ Perrotta, John, "The Unpopularity of Ombudsmen", *The Press*- December, 1982, p. 5

²⁰ Jowell, Tessa, "Redress for All- Not Only the Rich and Powerful, *British Journalism Review*, Vol. 22, No. 4, December 2011

Convergence

Convergence of the media has called into question the appropriateness of traditional sector specific regulation of the media. For example, audiovisual media regulation has had to adapt as television has become available online and on demand. The regulatory response to this issue has been to categorise these new online services as “television like” services where editorial responsibility can be established.²¹ In its submission to the Leveson inquiry, Ofcom highlighted the fact that a new regulatory body for the press would have to consider similar issues in relation to “press like” services which can be accessed online. The scope of regulatory bodies in relation to regulation of such “press like” services is a matter of concern which needs to be addressed.²²

Despite issues of convergence blurring the lines between different types of media as well as a questioning of the historical justifications for stricter regulation of the broadcast media than any other sector, sector specific regulation still remains relevant in order to achieve important public interest objectives. McQuail has commented that there will always be arguments in favour of sector specific regulation of the media and identifies the merits of public control of certain parts of the media in the interest of diversity and pluralism, universal access and protecting personal rights.

As such, convergence of media regulation policy, as recommended in recent inquiries into media regulation in Australia²³, which were set up in response to the Leveson Inquiry in the UK, may be premature. In its submission to the Leveson Inquiry, Ofcom described the possible establishment of a “single cross media regulator” as “undesirable”, but highlighted the importance of different

²¹ Supra fn. 4 at p. 15

²² *ibid*

²³ Report of the Independent Inquiry into the Media and Media Regulation by the Hon R. Finkelstein QC, Assisted by Professor M. Ricketson, Report to the Minister for Broadband, Communications and Digital Economy, 28 February, 2012 Available at http://www.dbcde.gov.au/digital_economy/independent_media_inquiry and Convergence Review: Final Report, March 2012 (Department of Broadband, Communications and Digital Economy, Australia) available at http://www.dbcde.gov.au/data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf

media regulatory bodies working together “to ensure that there are common and consistent principles applied across digital media.”²⁴ For example, press councils could provide for “opt in” membership of authors of “press like” material that can be accessed online, such as information posted online by citizen journalists and bloggers. The Press Council of Ireland, for example, has recently received a request for membership from an online news site. The main incentive for joining the press council would be that the material would be seen by the public as having a higher standard than other online material and therefore may ensure greater credibility, regular adherence and hits. Another option to establish higher standards for “press like” material online is the creation of an alliance of bloggers and citizen journalists whereby members set and adhere to an agreed set of standards, such as those of Press Councils, and liaise periodically or in response to particular problems or complaints. Such accountability mechanisms would allow the public to distinguish between bloggers and citizen journalists who adhere to standards and those that do not.

Media Literacy

The merits of media literacy and media education initiatives have been increasingly emphasized in recent years and are also indicative of a move away from the traditional, protectionist view of media consumers, as emphasized by social responsibility theorists, to the empowerment of consumers as active, participatory citizens. Media literacy initiatives can thus be seen as fulfilling a vital democratic role in twenty-first century society. As noted by McQuail however, there may be negative effects of this trend towards de-regulation of the media, for example, the emphasis on consumer empowerment means that the public are increasingly expected to protect themselves from harmful or offensive material. McQuail observes that there still remains a major imbalance of power between the media and the public, despite the change in relationship between the

²⁴ *ibid*

media and the public as a result of technological developments, most notably, interactive media technology.²⁵

This study has shown that in order to provide greater awareness of media accountability systems, media literacy curricula in schools and colleges should include a study of such systems, as this would ensure optimal levels of media accountability in the future. Media education of media professionals, especially in light of ever-changing media technologies, is also important to ensuring higher media standards and effective accountability to the public now and in the future. It is therefore recommended that specific education of media professionals should be promoted.

Concluding Remarks

The plethora of sources of information available in the twenty-first century means that the relationship between the public and the news media requires more transparency than ever before.²⁶ The public is ever more reliant on the media to provide it with accurate and reliable information. In order to achieve a relationship of transparency and trust, newspapers and media organizations must ensure that effective media accountability mechanisms are put in place and reviewed and revised as necessary in light of developments in technology and other societal forces.

²⁵ McQuail; 2003 at p. 114

²⁶ Begbie, S. "Defining A News Ombudsman in a Digital World: Differentiating the news from the rumour mill and learning to sing about it", Organisation of News Ombudsmen Conference, Oxford, May 13, 2010 available at http://www.newsombudsmen.org/wp-content/themes/sink_ono/documents/begbieoxfordenglish.pdf)

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