

# Regulation and democracy

[Politics](#), [Democracy](#)



## **Introduction**

The findings of the last major inquiry into the press, commissioned by the House of Commons in the 2006-07 session (DCMS, 2007) after media invasions of Kate Middleton's privacy and the imprisonment for phone hacking of Clive Goodman, the former Royal Editor of the News of the World, is ample evidence that Philips, Couldry & Freedman's assertion has the ring of truth about it (2010, p. 51). Dissatisfaction with self-regulation is evident in the inquiry's conclusion and echoes to some extent the strong criticism leveled at the press by Sir David Calcutt. His seminal critique of the Press Complaints Commission is prescient even today (Curran & Seaton 1997, p. 335) despite some modest improvements in self-regulation and what has been described as a "sea change" in the Code of Conduct provoked by the death of Diana when being pursued in Paris by the paparazzi (DCMS, 2007, p. 25). Despite the strong criticism they concluded that self-regulation is the only solution albeit with some improvements (DCMS, 2007, p. 26).

Now, in 2011, events are coming full circle, and once more the press seems inclined to drink in their regular last chance saloon (Mcnair, 1994, p. 197): the News of the World story has spun out of control with Clive Goodman being not so much a single "rogue reporter" (Robinson, 2011) as he appeared to be to the last inquiry, but part of a wide-scale hacking operation with over 7,000 people reputedly about to bring claims against the paper (Watt, Wintour & Sabbagh, 2011) and a slow trickle of ever more senior journalists (Amelia, 2011) being arrested amid allegations that this affair goes to the very top: Rebekah Brooks the Chief Executive of News International (Esther, 2011). The Press Complaints Commission (PCC), the

press regulator, reported shortly after the outbreak of the affair that there was “no new evidence” (PCC website, 2009) of phone hacking: a report which was branded a whitewash and which now looks, with hindsight, to be another example of the failures of the PCC (Coad, 2009, p. 14). The question of whether self-regulation is the ‘least worst’ system is again relevant: the chairman of the Commons culture, media, and sport select committee has recently accused the PCC of not being up to the job and has called for a public inquiry (Holliday, 2011).

This essay will begin by looking at the system of self-regulation and the liberal theory of press freedom before examining the Press Complaints Commission (PCC) and the criticisms aimed at it. The second part of the essay will focus on the alternatives and, by exploring the possibility of a statutory regulator such as OFCOM, a statutory press tribunal, and a law of privacy, will explain why the statement quoted in Fenton, although generalistic and ultimately unhelpful, is ultimately correct: there is no meaningful alternative to self-regulation in the UK if a free press is to be maintained and the traditional role carved out for it as the “fourth estate” of the realm in upholding scrutiny of the government and encouraging debate (Murphy, 1976, p. 1) as envisaged by Thomas Carlyle is upheld: “Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.” (Robertson & Nicol, 2003, p. 3)

## **Part 1: Self Regulation and the PCC**

Self-regulation of the press has been a reality for half a century but the present organization that regulates the press has been in existence for only

20 years (Curran & Seaton, 1997, p. 368). The liberal theory of press freedom appeals to a self-righting process first advocated by John Milton in the *Aeropagitica* who argued for freedom of expression in a marketplace of ideas where bad ideas would wither and good ideas would ultimately prosper (Siebert, 1956, p. 44). Evolving away from an authoritarian past where the Crown controlled the press England moved towards libertarianism in the 18th century (ibid) and ultimately in 1953 established a body that was run by the industry to regulate the press (Royal Commission on the Press, 1974, p. 1). It was Sir David Calcutt's Royal Commission into the press that ultimately rejected the predecessor, the Press Council, by proposing the PCC's formation (McNair, 1997, p. 186, Curran & Seaton, 1997, p. 368, Stuart, 1999, p. 181).

As was the case with the Press Council, however, the PCC is legitimized not by hard sanctions but by the consensual behavior of the press to conform to these rulings by the PCC where it chooses to adjudicate (Royal Commission on the Press, 1974, p. 196). The need for consensus has been, in the eyes of Curran & Seaton, one of the biggest drawbacks of the system (1997, p. 369). Despite this ominous lack of support, there is clear evidence that the PCC is building up a corpus of jurisprudence which is, along with increased awareness of its role and some promising statistics, lending authority to its' judgments (Meyer, 2006). The statistics for the year 1991-1992 were of 2, 069 complaints of which 481 were resolved between the editor and the complainant with 51 being upheld. In the year of 2009, by way of contrast, there were 2, 752 complaints in just the six months from April to September

of which 322 were resolved and 10 upheld of 22 adjudicated upon (PCC website, 2011).

Even back in 1996 and 1997, when there were around 3, 000 complaints in both years, Mcnair interpreted these statistics as evidence not of a drop in the ability of the British tabloids to offend but rather as evidence that awareness of the PCC was steadily growing. What the PCC cannot do, however, is impose sanctions and it is notable that even the judiciary has commented upon its’ “ toothless” nature (Justice Eady, 2011). The complaints that the PCC receives are dealt with either by being adjudicated upon or they are resolved between the editor and the complainant that often involves an apology and/or a correction in the newspaper (PCC Website, 2011). The former method is applied with extreme caution: only 22 of the 2, 752 complaints in the 2009 statistics quoted above were actually adjudicated upon. Christopher Meyer’s assertions that a corpus of jurisprudence has evolved around the code are cast into doubt given that less than 1% receive the benefits of what he describes as the “ sophisticated” (Meyer, 2006, p. 27) rules.

The Code itself has been hailed as a success and indeed has acquired a quasi-legal status in the Human Rights Act (1998, s. 12(4)) which has seen its definition of the public interest be adopted by some major cases on libel and breach of confidence both at home and in Strasbourg (Amos, 2002, p. 755). Sanders has argued that standards have improved under the code (2003, p. 145) and Mcnair draws attention to the reformed code after 1997 which dealt with reinvigorated provisions on privacy and rules regarding the reporting of children (1994, p. 196). Thus while the code has truly evolved the PCC,

despite some modest improvements which include a greater amount of lay members than industry members (PCC website 2011), still remains toothless and at the whim of a journalistic consensus which seems notably lacking in 2011.

## **Part 2: The Alternatives**

### **(a) Statutory Tribunal**

Sir David Calcutt first proposed the idea of a statutory tribunal in his second inquiry into the press, which was published on 14th January 1993 (Stephenson & Bromley, 1998, p. 74). Calcutt's recommendations came in the heated climate of 1993 with accusations from David Mellor, the National Heritage Minister, that the press was drinking in the last chance saloon and if the PCC were to fail in their remit then a statutory tribunal would be necessary (ibid). Despite Calcutt concluding in 1993 that self-regulation had failed, the press remarkably escaped unscathed (Hansard, January 1993) save for a tightening of the code and some remarkable criticism: " The Commission is...a body set up by the industry, financed by the industry, dominated by the industry, operating a code of practice devised by the industry and which is over-favorable to the industry" (Stephenson & Bromley, 1998, p. 74).

A statutory tribunal would bring the press under the full power of the state and it was immediately recognized at the time that this would be akin to censorship of the press and would include, in the words of Magnus Linklater: " legal powers to restrain publication, to force corrections, to impose fines and to award costs."(Linklater, 1993, p. 7) Linklater goes on to point out that such a system of prior restraint would be the most dubious

aspect of such a tribunal that would protect the innocent as much as the guilty (ibid). Such a system would run counter to an English convention inspired by the Duke of Wellington's famous phrase "publish and be damned" (Robertson & Nicol, 2003, p. 19).

### **(b) A Statutory Regulator: OFCOM?**

OFCOM currently presides over the telecommunications industry in Britain and has subsumed the roles of 5 bodies (OFCOM website, 2011). While it was mooted by the Culture, Media and Sport Committee that OFCOM itself could take on responsibilities for podcasts streamed videos, and even the online versions of newspapers the Committee envisaged that applying a two-tier regulation system with the PCC responsible for print versions of newspapers and OFCOM responsible for the online versions as too problematic to work in practice (DCMS, 2007, evidence p. 6 & 12). Clearly, with a statutory regulator, it must be all or nothing and not necessarily the overburdened OFCOM. The argument against a statutory regulator is a familiar one: excessive censorship by the state (Meyer, 2004).

The failings of OFCOM have undermined this argument to an extent and it has very recently been subject to some brutal spending cuts and questions linger over its' effectiveness (Brown, 2010). If OFCOM were to assume control of the press, backed up by a new Communications Act, this would constitute an interference with freedom of expression and the prospect of heavy fines could conceivably have a "chilling effect" similar to the punitive libel laws (Barendt et al, 1997). Although a £400, 000 fine was administered against the BBC for faking phone-ins in 2008 was justified the effect on legitimate journalism could be grave (BBC News Online, 2008). The idea of

OFCOM assuming responsibility for the press has been mooted before, most significantly by the Liberal Democrats in 2002 as an amendment to the 2002/2003 Communications Bill, but the idea was shelved due to Labour's opposition (Campaign for Press & Broadcasting Freedom website, 2003). The case against either OFCOM or another statutory regulator remains powerful.

### **(c) A Law of Privacy**

This argument, principally because of the Human Rights Act 1998, which incorporated Convention Rights in domestic courts, is becoming redundant. The development of breach of confidence as a virtual right to privacy has been commented upon already (Mackey & McLean, 2007) and the need for a tort to privacy, along the lines of France for example, is highly debatable (Delaney & Murphy, 2007, p. 568). Calcutt, along with his recommendations for a statutory tribunal, also recommended a tort of privacy in 1993 but this proposal was again shelved due to its unworkable nature (Linklater, 1993, p. 7).

It has also been observed that a tort of privacy in French law has not resulted in their newspaper's behaving better and that the debate along the lines of a tort of privacy has become "sterile" (Sanders, 2003, p. 145). A quick glance at the development of the balancing exercise between Article 8 and Article 10 deployed by the European Courts reveals a tendency for the courts to find breaches of privacy even when the person being photographed, for example, is in a public place (Crook, 2010, p. 128). Consequently, European developments and the law of breach of confidence have to a large extent, superseded the argument for a law of privacy. The experience of France, furthermore, demonstrates that a law of privacy would



not necessarily improve press standards (Campbell, 2008 & Sanders, 2003, p. 145) and the House of Commons' Heritage Committee in 1995 reported that the government was simply unable to “construct legislation” (Frost, 2000, p. 121) for a tort of privacy and the matter was shelved.

## **Conclusion**

In conclusion, the assertion quoted in Fenton is undoubtedly true. The criticisms of the PCC and self-regulation are obvious: The toothless nature of its decisions, a domination of the Commission by the press and a tendency to turn a blind eye, the need for consensus and the lack of respect it enjoys as well as myriad other criticisms including its remit and the lack of a proper appeal system (Coad, 2009, p. 14) have all been well documented.

There is hope though and through the undoubtedly high awareness of its procedures, the raising of standards through a code which now enjoys elevated status under the Human Rights Act and a corpus of decisions being built up around a respected code the rationale for self-regulation is gaining legitimacy albeit always under the shadow of the latest celebrity scandal. The alternatives are all defective in some fashion with all, a statutory press tribunal, a statutory regulator, and a privacy tort being susceptible to state censorship that would be a danger to freedom of expression. These alternatives are far worse than the PCC and even its current chairman recognizes that the PCC, with all its' flaws, is the best solution: “We will make mistakes, we have our rough edges and we are never complacent about the scope for improving our service to the public. But regulation by the State or Brussels or some combination of the two would mark the beginning

of the end of freedom painfully acquired over the centuries” (Meyer, 2006, p. 32).

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#### **4.0 Case Law**

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