Leveson, press freedom and the watchdogs

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In November 2012, Lord Justice Leveson delivered his report on the culture, practices and ethics of the press. In the report, he sets out proposals for reform in a number of areas, including data protection, media lobbying, and relations with the police. However, most attention has focused on the proposal for a new system of self-regulation. Leveson recommends that a new body replace the Press Complaints Commission, which, unlike its predecessor, will have the power to impose financial sanctions in some cases. The new body would not have any statutory powers, but Leveson proposes that a law should set out criteria to assess whether the new regulator is effective and sufficiently independent of the press, parliament and the government. That law should also ‘provide a mechanism to recognise and certify’ that the new self-regulatory body fulfills the criteria (Leveson, 2012, 1772). The mechanism Leveson proposes is for a ‘recognition body’ to apply the criteria to the regulator, as part of an assessment taking place at least once every three years. The report therefore does not call for a regulator to be set up by statute (as is the case with broadcasting). Nor does it propose that legislation should actually set out the detailed standards for the press to live up to. Instead, the role for legislation is one step removed. Under the proposals, legislation will set out the criteria to evaluate the regulator and empower the body that certifies the regulator. That is the central part of the ‘statutory underpinning’ that will be the focus for discussion here (1).

Much of the debate in the immediate aftermath of the report focused on the statutory underpinning. The Daily Mail wrote that Leveson ‘seems worryingly unable to grasp that once MPs and the media quango become involved, the freedom of the Press from state control will be fatally compromised for the first time since 1694’ (Daily Mail, 2012). Along similar lines, The Daily Telegraph wrote:

it would be wrong to use bad behaviour by the minority as an excuse to introduce the first press statute since censorship laws were abolished in 1695. Whatever the judge hopes, this would be a slippery slope to state meddling. (Daily Telegraph, 2012)

The Independent also wrote that statutory underpinning is ‘not only unnecessary, but undesirable’ (Independent, 2012). Most famously, the Prime Minister told the House of Commons that legislation would cross ‘the Rubicon of writing elements of press regulation into the law of the land’ (House of Commons debates, 2012a, col. 449). By contrast, the supporters of Leveson are dismissive of such concerns and point out that the reforms require minimal legislative input.

In the fierce debate that has followed Leveson, arguments about press freedom have been strategically advanced to further political goals. It is sometimes difficult to see which claims are the hyperbole of political rhetoric, and which should give genuine cause for concern. A further difficulty in assessing the debate lies in the fact that much argument has
focused on the form of press regulation, rather than the substantive question of what the new regulator will actually do. There are, however, important issues of principle and the form of regulation will be relevant to its effectiveness. To assess the arguments underlying the debate on statutory underpinning, it is worth reflecting on the meaning of press freedom.

The nature of press freedom

Early on in the report, Leveson distinguishes freedom of speech, as held by individuals, from freedom of the press. According to Leveson, the former is about self-expression and ‘has its roots in a very personal conception of what it is to be human’ (Leveson, 2012, 62). The same is not true of mass media institutions, which are ‘not human beings with a personal need to be able to self-express’ (Leveson, 2012, 62). He is certainly right to draw this distinction, and it is a difference that also reflects our concerns about the power of the media to reach a mass audience on a regular basis. The traditional mass media, that is newspapers and broadcasters, operate in a one-to-many paradigm. Yet those media institutions that reach a mass audience can only accommodate a limited number of speakers (2). Consequently, we justify press freedom not because we think it so overwhelmingly important that a select group of media owners and professionals get the chance to vent, say what they want to a mass audience, or develop their personalities. It is difficult to justify a freedom in terms of its personal benefits to the speaker when, in practice, only a limited group can exercise that freedom.

If the justification for press freedom does not lie in the speaker's right to self-expression, then instead it tends to be justified by its service to the audience or to the public as a whole. There are many varieties of this argument, some of which stress the functions that the mass media perform in a democracy. Most common are arguments that media freedom is necessary to provide information to the public, to hold the powerful to account, to represent a range of diverse viewpoints, and so on. Taking this approach, Leveson stresses the instrumental value of freedom of the press, as something to be ‘promoted and protected to the extent that it is with the result that it is thereby enabled to flourish commercially as a sector and to serve its important democratic functions’ (Leveson, 2012, 63). Note that he says press freedom is to be protected ‘to the extent’ that it furthers these goals, suggesting that where this is not the case then limits may be acceptable.

Furthermore, insofar as press freedom is based on a concern for the ‘community’s welfare’, it is something that can be balanced with other factors (Dworkin, 1985, 386-7). If this is the case, then it opens the door to arguments that some regulation of the press is necessary to protect other rights and interests.

Even though the instrumental justification comes with these limitations, the critics of Leveson tend to share this approach to press freedom. Newspaper editorials frequently trumpet the important role of the media in its service to democracy. Despite the implicit limits, this argument offers some advantages to the media. First, by emphasising its service to a democracy, the argument helps to legitimise media power. Second, by separating press freedom from individual freedom of speech, the argument can be relied upon by the media to claim special privileges (Dworkin, 1985, 386). For example, newspapers and periodicals are exempt from the election spending controls that apply not only to candidates and parties, but also to any person that wishes to use their economic resources on electoral campaigning. In that example, the instrumental role of the press as serving democracy is advanced to justify its special status in elections.
The democratic functions of the press

Leveson and his opponents therefore seem to share the instrumental understanding of press freedom. However, the different reactions to statutory underpinning might still be explained by a different view of the key democratic functions that the media are expected to perform. The central concern to the opponents of statutory underpinning is the independence of the press from government. There are a number of reasons why the independence of the press might be valued, but the most commonly asserted reason by those opposing statutory underpinning emphasises the ‘watchdog’ or ‘checking’ function of the press. For example, the website for the Free Speech Network writes that:

The press exists to scrutinise those in positions of power. It could not fulfill that role if those it was scrutinising had authority, however apparently limited, over it. (Free Speech Network, 2012)

A similar argument was put forward in an editorial in The Daily Telegraph:

A free press may be unruly, untamed and occasionally unpalatable, but it is the best defence against abuses of power that would otherwise have gone unchecked. (Daily Telegraph, 2013)

According to the opponents of the Leveson proposals, we should be particularly wary of any use of statute in the system of press regulation, for fear that politicians might use legislative power to dampen scrutiny of its activities. On this view, statute creates a kind of umbilical link between the press and the state, which might serve as a channel of pressure (as Helena See points out in this issue of Renewal, the very threat of statutory regulation can itself be used to place pressure on media outlets).

Invoking the watchdog role of the press provides a powerful argument. The courts have identified this role as being central to press freedom on a number of occasions (for example, Times Newspapers v UK, 2009, [40] and [45]). It is also an argument with a long history. In 1704, Matthew Tindal described the press as ‘a faithful Sentinel’. In the Cato Letters, press freedom was referred to as ‘the great bulwark of liberty’, which ‘is the terror of traitors and oppressors, and a barrier against them’. Fifty years later, Junius wrote that the press are ‘the Palladium of all the civil, political, and religious rights of an Englishman’. In Bentham’s work, the press acted as the key organ of a ‘Public Opinion Tribunal’, which keeps a check on government power. In the nineteenth century, monitoring those in power was a function assigned to the press as the ‘fourth estate’. In more recent times, uncovering abuses of power has remained central to the self-image of the press, with Watergate providing a high point. In the last three hundred years, the system of government may have changed dramatically, but appeals to the watchdog function have had an enduring role in arguments for press freedom.

The watchdog argument also fits with most democratic theories. It is not premised on an idealistic or demanding theory of democracy, in which citizens are supposed to use the press to become well informed on most major issues. Those democratic theories that posit a minimal role for the individual citizen – reduced largely to choosing leaders at an election and having limited political knowledge – still have a role for a watchdog press. On this account, the press are needed to sound the alarm if politicians abuse their powers, in order for voters to know when to punish bad behaviour. According to Michael Schudson, the watchdog function does not even require that all voters pay attention to these alarms,
but simply that politicians ‘believe that some people somewhere are following the news’ (Schudson, 2008, 14). On this view, it is politicians’ belief that they are being monitored that deters abuses of power. However, the watchdog function is not limited to the minimal theories of democracy. The more demanding approaches to democracy will still hope that the press reveal abuses of power, while performing other functions (Baker, 2002). The watchdog role has a wide appeal.

An analogy with the separation of powers is sometimes made to explain why the independence of the press is so important to the watchdog function. Justice Stewart, of the US Supreme Court, wrote that the US Constitution guarantees press freedom ‘to create a fourth institution outside the Government as an additional check on the three official branches’ (Stewart, 1975, 634). The idea of the press acting as a quasi-constitutional check is not limited to the US. In a recent pamphlet, Tim Luckhurst argued that the checking function is all the more important in the UK given the lack of a formal separation of powers between executive and legislature (Luckhurst, 2012, 27). The point is not new. While Bentham criticised the doctrine of the separation of powers in the formal institutions of the state, he argued that public opinion was ‘the only check’ on ‘the pernicious exercise of the power of government’ (Bentham, 1983).

Of course, there are other reasons why the independence of the press might be valued. If government (or any other powerful actor) can influence the press, there is a concern that the flow of information will be distorted. The powerful actor might seek to ensure a particular story is given higher prominence than it deserves or withhold important stories from public view. Such distortion can be seen to undermine the free competition of ideas and arguments in public debate. However, Justice Stewart distinguishes his watchdog argument from a ‘marketplace of ideas’ justification for press freedom, as the latter might allow for greater government regulation of the press to improve the flow of ideas, such as a statutory right of reply law (Stewart, 1975). On Stewart’s view, a right of reply law would violate press freedom. C. Edwin Baker, explaining such a contrast, notes that the watchdog argument does not aim to promote diverse information, but rather seeks to protect ‘a source that the government does not control’ (Baker, 1989, 233).

It is unsurprising that Leveson himself cited the watchdog role as one of the democratic functions of the press (Leveson, 2012, 65). In one part of his report, Leveson also uses an analogy with the separation of powers. He recommends that the law should ‘place an explicit duty on the Government to uphold and protect the freedom of the press’ (Leveson, 2012, 1781). In making such a recommendation, Leveson follows a similar clause in the Constitutional Reform Act 2005, which requires ministers to uphold judicial independence. We may, however, question the effectiveness of such a clause. The duty to respect judicial independence has certainly not stopped some ministers from criticising court decisions in the strongest terms, and it is not clear that a press freedom clause will be any more effective. Putting this doubt aside, the proposed clause shows how the independence of the press is seen as part of the separation of powers, requiring arrangements that are analogous to those protecting other branches of government.

So far, the watchdog function for the press appears to be an area of agreement between Leveson and his critics. Both see it as a key role for the press. The difference in their positions might be explained if we distinguish between a ‘moderate’ and a ‘strong’ form of the watchdog argument. The moderate version of the argument sees the watchdog function as one among several functions of the press, and requires that we assess whether any laws applying to the press will potentially inhibit that function. This form of the argument can be used to call for a public interest defence to defamation actions or to criminal law controls. It does not, however, stand against any laws involving the press.
Leveson uncut  Leveson, press freedom and the watchdogs

Under this position, the question is not whether statute should be used to implement Leveson, but what the terms of that statute will be. By contrast, a strong form of the argument views the watchdog function as the preeminent role of the press and demands a clear structural separation between press and government. It emphasises the need for a clear separation of powers and assumes parliamentary or government input will threaten press independence. This strong view may explain why some see statute as a Rubicon that should not be crossed. It provides a prophylactic rule, which seeks to act as a barrier between press and government.

The central difficulty with the strong version of the argument is that it prioritises the threat to press freedom posed by state institutions. However, press independence can be jeopardised by private power too. Aside from government, the media can be subject to pressures from markets and from advertisers. Editorial judgment can be influenced by proprietorial pressure. In these cases, some input from the state might help bolster press freedom from these influences. For example, a law requiring certain media entities to guarantee editorial independence or include a conscience clause in journalists’ contracts might promote the independence of the press from private pressures. While a strong form of the watchdog argument might object to such interventions in the internal affairs of the press, the moderate version would be more willing to accommodate such proposals. A similar debate sometimes arises in relation to state subsidies for the press, with a moderate view accepting that such subsidies can aid independence (if structured in the right way), but with a strong view suspicious of the idea.

Those making a strong watchdog argument might reply that we should show greater concern about government interferences with press freedom, and that tolerating some scope for private interference is a price which must be paid in order to minimise the threat of government control. Such an answer is premised on a mistrust of government. This mistrust manifests itself in two ways. First is a view that the watchdog function of the press is primarily about monitoring state actors. It assumes that state power is the main threat to people’s liberty and is where the checking function is needed most. Secondly, because the press is guarding against abuses of state power, the most important aspect of its independence is the structural protection from the state. The argument then runs that if we mistrust officials and assume that, where there is an opportunity, power will be abused, then we should not trust those officials with a power that could be used to stifle public criticism and prevent exposure of their wrongdoings. On this view, state interventions in the press, even when made for good reasons, pose a risk of harm greater than that posed by private sources of power. By taking these steps, the strong form of the instrumental watchdog argument can be constructed into a libertarian appeal to press freedom (3).

The Leveson proposals

Against this background, it is interesting to look at some of the arguments that have been advanced against statutory underpinning. One argument is that any form of state input will allow politicians to influence the regulator, and thereby impose some control on the press. For example, in the House of Commons debate, Peter Lilley expressed the concern that the recognition body may use its power of certification to pressure the regulator to ‘follow either the Government’s prejudices or its own’ (House of Commons debates, 2012b, col. 662). This line of argument suggests that the power to certify will jeopardise the independence of the regulator.

Those taking the strong version of the watchdog argument would accept this argument on the assumption that any type of state input poses such a risk. By contrast,
the moderate version treats this issue as one concerning the design of the statute, rather than as an argument against any statute. Take, for example, the proposed legislative criteria to be applied by the recognition body when deciding whether the self-regulatory body is sufficiently independent and effective. Leveson proposes the criteria should include the self-regulatory body having a code of practice for the press that takes into account free speech, while also providing standards to deal with the conduct of the press, to show appropriate respect for privacy and to provide for accuracy (Leveson, 2012, 1763). This might be thought to raise two issues. First, the legislative criteria may give scope for politicians to indicate which standards the press must fulfill. The criteria proposed by Leveson is, however, stated at a level of generality and includes matters that would most likely have been included in the new code in any event (and which are already included in the Press Complaints Commission Code). If this were still cause for concern, the criteria relating to the code could be less specific. For example, Labour’s draft bill on implementing Leveson, published in December, omits any reference to protecting privacy in its criteria relating to the code of practice. The criteria in Lord Lester’s bill to implement Leveson are at an even greater level of generality, for example in asking that the new regulator encourage and maintain ‘high professional standards and good practices’ and deal with ‘professional misconduct’. The merits of the different formulations can be debated, but the point is that the statute can frame the criteria in a way that is not overly prescriptive.

The second concern is that even if the legislation provides only very general criteria, the recognition body might use its power to influence the direction of the regulator. For example, the recognition body could refuse to certify the regulator if it believes the code fails to protect free speech or fails to set high enough standards. Yet the terms of the Leveson proposals do not create a ‘procedure that provides for structured, authoritative government pronouncements regarding the performance of the press’, which is the core concern of one leading proponent of the watchdog theory (Blasi, 1977, 590). Recognition and certification is a very blunt tool that operates by looking at the workings of the system of regulation as a whole. It would not be used to express a verdict on a particular newspaper or even a particular decision from the regulator. Furthermore, the decision by the recognition body would be limited to the criteria in the statute and its conclusions would be reasoned. Finally, the process would not offer a government pronouncement, as long as the recognition body is independent of government. This independence would depend on how the recognition body is appointed. Leveson at first proposed that Ofcom should perform this function, but, due to concerns about that body having a government-appointed director, that possibility now seems to be off the table. Instead, negotiations are focused on an alternative body to perform this role, with some proposing members of the judiciary. The point being made is that the statute can be drafted in such a way as to minimise the scope for government or parliamentary influence. The argument against any statutory input seems to be premised on a level of mistrust, which suggests even the most limited risk is not worth taking.

Another argument against statutory underpinning is that even if the legislation starts off as modest, there is nothing to stop it being amended and extended into more onerous forms of legislation (see Maria Miller, House of Commons Debates, 2012b, col. 598). This is a type of slippery slope argument. Again, it is a view premised on a concern that any precedent for legislating in this area, no matter how well-intentioned, is likely to be abused by some future government. If this is a concern, then it is one that can apply to a range of others laws, which could all be amended to make life for the press more difficult, such as the Contempt of Court Act 1981 or the Defamation Bill (still going through Parliament at the time of writing). The risk of politicians interfering with press content is more direct with
the examples of contempt of court and defamation, as Parliament actually decides in those laws what detailed standards the press has to fulfill. In the Leveson proposals, Parliament will not set those standards. Furthermore, the Communications Act 2003 creates a system of content regulation for broadcasters. If statute constitutes the Rubicon, it appears to have been crossed already. Maybe the Leveson proposals can be distinguished from these examples, as Leveson proposes a new system of regulation specific to the press. However, if the concern is only with certain types of statute, then those types of statute need to be identified before we can formulate a prophylactic rule. In any event, Parliament is subject to some checks and any statutory amendments made in future could be subject to challenge under the Human Rights Act 1998 if it unduly interferes with press freedom.

We might reject the outright opposition to any statute to implement Leveson partly because we do not prioritise the risks of state power to the exclusion of concerns about other sources of power. The press needs to check private sources of power and therefore needs independence from powerful private actors. If we take the view that private sources of power can be detrimental to press freedom, it becomes clear why the system of regulation needs to have some independence from the industry. Just as there are dangers with government pressuring a regulator to decide an issue one way or another, there are also dangers that the industry could pressure the regulator to make decisions that are favourable to its commercial interests. The Leveson proposal therefore seeks to mediate between these competing pressures. The press has some say in so far as it can choose whether to join the regulatory scheme. The body will be self-regulatory and established by the press. However, the statutory recognition process seeks to ensure that these connections with the industry do not undermine the regulatory body and that it remains sufficiently independent. The system combines statutory underpinning and input from the industry, in the hope that neither source of power exerts control over the regulator. There might be risks with government or parliamentary input, but there are ways of reducing those risks. If a system is to be established that allows for some state support, and does not leave the industry to regulate itself, then this is a risk that needs to be taken.

So far, the choice seems to be between some form of statutory underpinning or allowing the press to continue to regulate itself. The Conservative Party has successfully sought to advance a separate approach that avoids this stark choice, by underpinning the new regulator through a Royal Charter. Given the Conservatives’ stance against statute, this proposal is somewhat surprising. It is puzzling that, having advanced arguments that any statute would undermine press freedom, all these objections to state input seem to be abandoned in relation to a prerogative power. The libertarian approach described is concerned with state input in whatever form. According to that view, even with a Royal Charter, the psychological barrier to state action would be crossed and the apparatus to support the regulatory system, once established, could be tinkered with in future. Given this, it is difficult to see why a Charter is more acceptable for the strong view of the watchdog argument than statute.

The Conservative Party, subsequently followed by Labour and the Liberal Democrats, have argued that there are ways a Charter could be protected from subsequent amendment by the executive, through provision that amendments can only be made with approval of the leaders of the three main parties and by a resolution in Parliament. Even if a Charter could be protected from future amendment by prerogative powers, Parliament would still have the power to legislate to override provisions of the Charter or impose new obligations on the recognition body. The attempts to entrench the Charter would therefore not so much fortify the Rubicon, but create a Maginot Line that would be easily by-passed through legislative means. If cross-party agreement is desirable before any changes are
made to the new system, this could be achieved in relation to legislation through a constitutional convention. So the Charter does not seem to offer an advantage over legislation. It can also offer some disadvantages in so far as it gives greater scope for the terms of the system for recognition and certification to be decided behind closed doors through bargaining between interested parties (and that bargaining would produce an outcome which the Conservative proposals would then seek partly to entrench). While it is undesirable for MPs to influence the regulator, there is something to be said for using the legislative process that would allow MPs to scrutinise properly and publicly debate the general framework of the recognition system.

**Relations between politicians and the press**

The threat to press independence does not only come from formal legal interventions. If senior media figures and politicians develop close ties in which each can offer the other mutual benefits, then the watchdog role is compromised. While distinct from statutory power, this informal link could lead to a situation where the press holds back on a story or does the bidding of the government on a particular issue. While Leveson found no evidence of any backroom deals between politicians and senior media representatives, he concludes that the relationship had become ‘too close’ (Leveson, 2012, 1439). As with judicial independence, Leveson states that in the absence of any direct collusion, there is at least a problem with ‘public perceptions’ that independence is being jeopardised (Leveson, 2012, 1439). Consequently, Leveson calls on the party leaders to devise stronger transparency rules in relation to communications with senior media executives and their agents. He argues that this should go beyond recording details of formal meetings and should include some information about informal communications, such as email.

It would be difficult to go any further than this. Lobbying can provide important information to ministers and civil servants, and there will be a need for senior media executives to communicate with government at times. This shows that a complete separation between press and politicians is not possible, and the two often rely on each other to perform their functions. Transparency at least provides a way to monitor the extent of the communications. However, it also shows that greater self-restraint should perhaps be shown by politicians and the press. In his discussion of lobbying by the press, Leveson’s criticism focuses on the politicians, finding that they had acted in ways that have ‘not served the public interest’ (Leveson, 2012, 1439). Leveson states that the issue raised by lobbying is the accountability of politicians, not ‘the conduct of the press’ (Leveson, 2012, 1451). By taking this view, Leveson places all responsibility on the politicians and treats the press like any other private enterprise that seeks to advocate its interests forcefully. This view, however, overlooks the claim made by the media that they are different from other industries and that they perform a quasi-constitutional function in holding government to account. If the press are to have such a role, then they too have a responsibility to show caution in developing close links with government on matters of policy. Certainly, if the press is seen to be too close to government, then they risk undermining the legitimacy of their claim to act as a quasi-constitutional check. The closeness of press and government therefore poses a real challenge to the watchdog function.

**Conclusion**

It is easy to write off much of the debate following the Leveson Report as self-interested positioning by the media industry or privacy campaigners. Claims being made about press
freedom are being advanced in the context of political advocacy and should not be taken at face value. However, this essay has sought to identify the understanding of press freedom that underlies the criticism of the Leveson proposals for statutory underpinning. The criticisms appear to fit most closely with a structural understanding of press freedom as guaranteeing an absence of state interference. There are lessons that can be taken from this argument, in particular in understanding the risks that statute may pose. This does not mean stopping at any imagined Rubicon concerning the use of legislation. Instead, it entails that we seek to frame legislation in a way that minimises those risks – though this should not be used as an excuse to water down the Leveson proposals simply to please the industry.

This essay has looked at one argument concerning the use of statute. There are many other parts of the Leveson proposals that need consideration, such as the impact of the incentives for joining the new regulator. Once the new regulator is established, the impact of its code of practice will also need to be evaluated in the light of its effect on the watchdog function. While important, the watchdog role is not the only democratic function of the press. Those other functions might on occasion call for a different relationship with the legislature and executive. Ultimately, the argument here is that concern about mistrust of government power, while important, should not be taken to an extreme that precludes any measures seeking to address abuses of other sources of power. While the protection for speech under the US First Amendment is often associated with a mistrust of government, the culture in the UK is different and shows ‘more concern about the excessive power of media magnates to influence public opinion’ (Feldman, 1998, 170). That means we should address abuses of private sources of power, including the press. If there is one lesson to take from Leveson it is that as well as emphasising the checking function of the press, we also ask what checks the press are subject to.

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References


Notes

1. There are other parts of Leveson’s scheme that raise issues of controversy, such as some of the incentives to encourage membership of the new regulator, that are beyond the scope of this article.

2. Of course, the use of comments sections on newspaper websites does open the forum to many other speakers. However, only a relatively small number can contribute to the main articles and set the agenda of the newspaper.

3. Siebert et al. note that the emphasis on the watchdog argument is a distinguishing characteristic of the libertarian view (Siebert et al., 1956, 56).