

THE UK: A CASE OF DEMOCRATIC BACKSLIDING?  
TOPIC V: THE MEDIA:

This government has initiated a series of reforms relating to freedom of speech but do these measures threaten press freedom so as to imperil the fourth estate's role in enabling political debate? Ostensibly, the signs are positive for whereas the Culture Secretary seems set to defund the BBC and Channel 4, the Justice Secretary is intent on protecting, and strengthening, press freedom whenever he can.

Whilst the general public's right to speak will be curbed through strict measures contained in the Online Safety Bill, the press will be exempt. Likewise, the government is consulting, presently, on whether tougher measures should be in place to protect the media, in a general sense, from so-called strategic litigation against public participation, which may mean alterations to the Defamation Act 2013. The Human Rights Act consultation will also consider whether the right to privacy needs to be weakened, through legislation, so as to provide greater protection to press freedom. Meanwhile, the government has, since the start of lockdown, provided undisclosed funding to national titles to help defray the cost of Covid.<sup>1</sup> Finally, much has been made of the government's (failed) attempts to install former *Daily Mail* supremo, Paul Dacre, into the role of chairman at OFCOM so as to protect broadcasters from undue criticism over offensive speech.

Closer scrutiny of these measures, though, paints a different picture. A sceptical observer may conclude that the government's policy are not intended to strengthen press freedom so much as weaken it by preserving traditional forms of weak public watchdog scrutiny. Once we open our eyes to this, we see that the legend of the fourth estate is a fairy tale and our democratic way of life much more precarious than we realise.

But let us start with a fiction: the press is a public watchdog, a fourth estate that, like the other three, exists independently and in tension with the others so to ensure that corruption, cronyism, and downright totalitarianism cannot take hold upon this sceptred isle. Why should we have such faith in this scheme? Because unlike the first three estates, in which power is separated, the fourth acts on behalf of the public and is our first line of defence. For if the separation of powers fails, the press will signal the alarm with such force that the public will rise to bring down the government and so preserve our cherished values of tolerance, freedom, plurality, and autonomy.

To see that this vision is fiction requires us to question, and understand clearly, the position of the press.

To demonstrate why this is so, we must reflect upon the different regulatory frameworks that exist in this country for journalism. Whereas broadcast journalists are subject to strict regulatory rules, overseen by OFCOM, print journalists are not. This simple fact is often depicted as a positive distinction that, amongst other things, ensures full freedom of speech; that important but controversial views that could not be delivered through broadcast means, can be through the printed press and then form the basis of discussion on television and radio.

An obvious and well-known example of the difference relates to the formal structure of disseminating information and ideas itself. Whilst the broadcast journalism is subject to tight rules on political impartiality, print journalists are free to be partisan.

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<sup>1</sup> <https://inform.org/2022/03/09/government-refuses-to-reveal-taxpayer-cost-of-secret-covid-subsidy-for-press-brian-cathcart/>

Whereas partisanship would seem to be the essential criterion for realising the vision of plurality on which our tolerant society depends, our lived experience demonstrates, horrifyingly, that it is as likely to breed bigotry, zealotry, and demagoguery, as it is to produce something wholesome and intellectually nourishing. It would be too simplistic to conclude that the contemporary rise of populism is due to press partisanship, but certainly the conditions in which news content is produced, so as to satisfy the narrative of the commoner held back by the elites, only serves to fan the flames of this innate intolerance.

If journalism is to serve its purported purpose, as a source of reliable information by which to inform popular decision-making, as Jurgen Habermas thought, amongst others, that it must if democracy were to survive the populist onslaught he saw in Nazi Germany and the Eastern bloc, and which we now see in the decadent West, then restrictions upon speech is not merely desirable but essential. If, however, sources of news dissipate amongst the established and emerging media outlets, both within and outside reputable journalism, within and outside the jurisdiction, and within and outside rationality, then the power of informed decision-making to correct for reactionist tendencies is bound to diminish. At a time when catastrophic climate change in our lifetime is dismissed by the right as so much hot-headed naivety of youth; at a time when life-saving vaccination policies to tackle economy-crippling pandemics are labelled insidious means of mind-control and worse; at a time when politicians can breach rules that they created with impunity and without consequence, serious discourse demands that we take debate about restrictions on press freedom seriously.

And yet, we do not. We do not either because we find the very idea so counterintuitive as to be revolting or because we do not see the problem. Perhaps, for some, this is because we conclude that any restriction on press freedom is bound to weaken the vital democratic principle we attribute to it so easily and so uncritically. The press is the fourth estate. Any restrictions upon it are bound to diminish its power to hold the powerful to account when the time comes.

If journalism is to be a source of political accountability, rendering it an actual, rather than figurative, fourth estate, then there must be due impartiality, independence, and the means to hold errant press practices and cultures to account. None of this exists in the printed press context. The printed press is not some extension of the public sector (driven by a sense of community or public responsibility), it is a cutthroat industry in the private sector, where the principal duty is owed only to the shareholder, hardly the public. Newspapers print what sells and not what needs to be said.

Newspapers have a duty to produce accurate information and to avoid, actively, misinformation, distortion, and falsehood. This much is true. But that duty cannot be described as a legal obligation; it is purely ethical, and is no more demanding or limiting than the duty we all have to love our neighbour or honour our parents.

Unlike broadcast journalism, the code of conduct that newspapers must abide by is voluntary. Moreover, it is a code that is administered and upheld by the industry itself. Newspapers can choose to belong to a regulator. They can choose to belong to IMPRESS, the UK's only recognised regulator under the official scheme established after the Leveson inquiry, as many ethically-minded online and local/hyper-local titles do. Alternatively, they can choose to belong to the industry-established IPSO (the independent press standards organisation), as most of the national and many of the regional titles do. Or, they can choose to operate outside of regulation altogether, as *The Guardian*, *The Independent*, and the *Financial Times* does.

Those that belong to IPSO can be fined for 'serious and systematic' breaches of the code. Since its creation in 2014, IPSO has failed to *commence* an investigation that could end in fines being issued, let alone issue any. This is entirely unsurprising. In a system that depends upon goodwill and co-operation for its very existence, it is to be expected that the regulator should choose to act leniently toward its members. For those disgruntled with IPSO could leave the scheme without consequence, as Northern and Shell left IPSO's predecessor, the press complaints commission, when its chair, Richard Desmond, took umbrage, leaving victims of press malpractice by the Daily/Sunday Express without regulatory recourse.

The press *can* act as a public watchdog but it is not obliged to. The arguments we hear said about Channel 4's poor offerings as a broadcaster apply equally to a domestic press committed to, using Lady Hale's well-known phrase, 'vapid tittle tattle about footballer's wives' than it is in holding government to account.

How can this be, though, given that the courts themselves speak of the press as under a duty to act as a public watchdog? For example, the European Court of Human Rights has said, consistently, that 'the press plays an essential role in a democratic society.... Its duty is... to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest'.<sup>2</sup> Yet, Strasbourg uses this ideology in a prescriptive sense that does not create some corresponding right on the part of the demos to insist the press performs its role. Instead, it is used as a means of delineating the rights-invading protections afforded to the press. Thus, the courts will protect (limited) reputation-tarnishing speech where it serves a valuable, wider purpose:

'by reason of the "duties and responsibilities" inherent in the exercise of the 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'.<sup>3</sup>

According, the press's 'obligation' to serve the public is but ethical. The law will protect public interest expression when it arises but allows for no positive right by which the public could make the recalcitrant press hold the government to account.

This is not to say that steps could not be taken to edge closer to a more accountable system of press freedom. The much-maligned s40 Crime and Courts Act 2013, a complex costs-shifting provision, would have privileged members of a recognised regulatory scheme conforming to the recommendations made by Leveson. This provision is not yet in force, and is unlikely to be whilst the present government is in power. It would have introduced much needed independence into the system of press regulation.

The solution to the riddle of press freedom as a public watchdog lies solely with us, the public. The press has no *obligation* to do good. We are the ultimate source of power in that we stimulate copy through our buying choices and through the publicity we give to good, positive, beneficial journalism. There are plenty of civic forms of good journalism out there. We can and should do more to support it. Only through active popular support can we stand a chance of creating this fourth estate we seem to think should exist.

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<sup>2</sup> *De Haes and Gijssels v Belgium* [1998] 25 EHRR 1, [39].

<sup>3</sup> *Bladet Tromsø v Norway* (2000) 29 EHRR 125, [65].

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April 2022