

Regulation,  
Regulators, and  
the Crisis of Law  
and Government

# The End of Press Freedom

**Damian Tambini**

Policy Brief

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The Foundation for Law, Justice and Society

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The Foundation for Law, Justice and Society

### **Regulation, Regulators, and the Crisis of Law and Government**

This programme examines the regulatory system in the wake of the global financial crisis, assessing its current weaknesses, the role of legislative and judicial bodies, and identifying measures for future reform of both markets and regulatory regimes. It aims to shed light on the recent failures of regulators, often captive of the very industries they are meant to regulate, and examine ways to improve the accountability and effectiveness of the regulatory system.

This is an edited and extended version of one of three papers submitted by the author to the Leveson Inquiry. The original version, and the other papers are available here: [www.levesoninquiry.org.uk/evidence/?witness=dr-damian-tambini](http://www.levesoninquiry.org.uk/evidence/?witness=dr-damian-tambini)

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# Executive Summary

- Debates on media regulation often refer to the principle of 'press freedom'. However, the term is increasingly used to protect the self-interest of one of many converging media sectors, to block reforms, and close down debate about the appropriate form of media accountability. In order to understand and avoid this, it is necessary to understand some of the key problems with the term 'press freedom' and how the term has developed historically.
- The terms 'freedom of expression' and 'freedom of the press' have often been used interchangeably, which was reasonable when printing presses were the principal information distribution platform. Given the rise of broadcasting and the internet it is no longer appropriate to conflate freedom of expression and of the press.
- Freedom of expression and an effective, ethical media system is not always served by reserving special privileges to certain forms of delivery (e.g., print, or 'the press').
- Size of enterprise rather than medium of delivery, together with the demonstrated ability to self-regulate, should be the guiding principles that determine the scope and nature of regulation.

# The End of Press Freedom

## Introduction: press freedom as a barrier to media reform

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*'We constantly hear naïf claims that because press freedom is important, press regulation is unacceptable. Such assertions beg questions because they fail to consider which conception(s) of press freedom and which conception(s) of press regulation can be justified.'* Onora O'Neill 2012<sup>1</sup>

This policy brief argues that the notion of *press* freedom is in danger of becoming a tired and incoherent mantra — at best a distraction, at worst special pleading for an outmoded technology — in debates about media regulation. The lack of coherence to the term can undermine attempts to protect freedom of expression or to design an appropriate institutional framework for the media. Whilst it often embodies the most cherished constitutional and policy objectives, the term also obfuscates.

Press freedom is often held up as a principle in debates about the future of media regulation, but it is rarely defined and is subject to significant semantic confusion and conflation. In designing a future regulatory settlement for the media, caution should be exercised in assessing arguments based on this principle. In particular: it is necessary to distinguish between notions of press freedom as a legal right, press freedom as an objective in regulatory and constitutional design, and press freedom as a normative principle in policy advocacy.

In the UK and many other countries, press freedom is not a legal right. Freedom of *expression* is protected by Article 10 of the European Convention on Human Rights and the Human Rights Act. It is the right to free expression that journalists turn to in defence against censorship. It is not the case that the press, as opposed to broadcasters, enjoy particular privileges as distinct from the right of freedom of expression; freedom of speech, expression, and communication are rights of individuals rather than of 'the press' or owners of the press. Particular forms of speech, such as political speech, or speakers, such as journalists, may in practice enjoy special protections, but whilst ECHR Article 10.1 does justify licensing of broadcasters it does not positively promote the press as distinct from other media such as the internet.

In policy debates about the future of press self-regulation, press freedom often serves as an orienting goal when it comes to the contemplation of certain forms of regulation: when then Shadow Culture Minister Ivan Lewis contemplated licensing of journalists in response to the phone hacking scandal in 2011 for example, it was seen as violating a principle of press freedom. And defenders of self-regulation see an entirely voluntary system (with no 'statutory' element) as harmonious *per se* with 'press freedom'. Such principled arguments rarely offer a convincing explanation of why, in the current context of convergence, regulatory design should privilege newspapers over other media.

The large number of campaigning NGOs promoting press freedom worldwide<sup>2</sup> use the normative principle of freedom of the press to describe their important work protecting the lives of journalists and the role of media in holding power to account. Such campaign groups in practice tend to be concerned with all journalists and bloggers rather than newspapers *per se*, however. But given the confusion surrounding the term and the current crisis of the press sector narrowly defined, it is time to revisit the value and definition of this doctrine and slogan.

## Press freedom: semantic confusion

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The terms 'freedom of the press', 'free press', and 'press freedom' are subject to considerable semantic confusion in legal, policy, and theoretical debates. The term 'press' has been one source of confusion. It is sometimes taken to refer to the news media in general, but is also taken to mean newspapers in contrast to other media and in some cases a more literal meaning of printing presses (or the news delivery technologies) is intended.<sup>3</sup> It has often, for example, been remarked that 'freedom of the press is guaranteed only to those who own one'.<sup>4</sup>

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In the contemporary context of convergence, press freedom faces a further challenge. The press (as newspapers or printing presses) are a means of delivery of news and other information. Digital delivery of journalism is no longer bounded by distinctions between different media of delivery. A term that serves to delineate one form of delivery — newspapers — from others such as ‘regulated broadcasting’ should be re-evaluated in such a context.

Other reasons that the notion of press freedom is contested have more to do with the term ‘freedom’. A coherent definition of press freedom that would serve as a useful policy principle would need to specify whether press freedom should be conceived negatively (freedom from the state) or positively (rights or freedoms to do specific things). Since press freedom could hardly be absolute, a coherent notion of press freedom would need to specify under what conditions and by what means it can justifiably be constrained. It would have to specify the subject of liberty: whether this is a freedom of readers, journalists, editors, or owners of printing presses. These terminological challenges have been well discussed in the relevant literature.<sup>5</sup> The lack of any consensus on them helps explain why the term ‘press freedom’ tends to be used as a slogan to defend press interests rather than as an analytical term, or as a term that delineates a specific legal right of certain individuals.

In regulatory design press freedom is often shorthand for the idea that newspapers, by contrast particularly to broadcasting, should be free of any form of ‘statutory’ regulation. According to Associated Newspapers’ closing submissions to the Leveson Inquiry, for example: ‘The public interest in freedom of expression demands a free press. The right of free speech encompasses the right to communicate to the widest possible audience. If that right were to be restricted by law to certain persons only, for example state-licensed broadcasters, there could be no real freedom of expression.’<sup>6</sup>

In practice, how these broader questions of press freedom should be addressed is not amenable to resolution by reference to one overarching principle, but is historically specific: how much freedom and

how it is to be balanced by various forms of accountability and responsibility depends on the degree of ‘professionalization’ of journalists and the media; that is, the extent of public interest-oriented ethics and the existing regulatory framework for the media, in particular for ‘media pluralism.’<sup>7</sup> It also depends on the size of media corporations because dominant providers will be expected to have higher standards than niche media.

‘The press’ in each of the three formulations indicated above should be fully independent, but not free to do whatever it likes, so this freedom is not absolute. Conversely, the public interest in press freedom may be undermined if newspapers demonstrably fail to act in the interests of the public, or if the market structure permits unacceptable concentrations of power. If some of these conditions are met, or if journalists fail to pursue the public interest and ethical restraint, then it is self-evident that arguments that they should be more free, or that their freedoms should somehow be unchecked are wrong.

Press freedom also relates to but is not reducible to press independence. Government regulation of all media is subject to deep and endemic conflict of interest. As long as the press are the key gateway in the representation of the government to those that elect it, then direct control of the press by the government should be avoided. The principle of independence is not a feature of the press per se, however, but of all media and also their regulators. Media independence is often, therefore, a more useful policy principle than press freedom.

### **Press freedom vs freedom of expression**

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The well-known classical defence of freedom of expression, deriving from the work of Milton, J. S. Mill, and early judgements of the US Supreme Court, consists in three main arguments: the argument from Truth, the argument from Democracy, and the argument from Autonomy or Self-Expression. None of these makes a primary distinction between print and other media of delivery. The concern, rather, is with (i) the primary value of the effective working of the democratic form of government, in which informed deliberation of policy and informed selection of representatives can occur;

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(ii) the circulation of ideas, often referred to in US jurisprudence as the ‘free marketplace of ideas’ which will permit competition among them; and (iii) self-expression as itself a justification of free expression that is independent of the other arguments about the social function of expression.<sup>8</sup>

Press freedom can conflict with freedom of expression of individuals. A citizen might claim a right to reply in a newspaper, but enforcement of this might be viewed by the newspaper as an infringement on its ‘press freedom’. In an environment in which printing presses and newspapers constitute the major bottleneck in the distribution of ideas, control of such gateways can engage speech rights, but the position of privately controlled gateways has always been difficult. Whilst UK citizens have rights of free expression under the European Convention on Human Rights, the question of whether we have rights to mass communication using the means owned by others is more controversial.<sup>9</sup> Though case law on the ‘horizontal effect’ of ECHR speech protection is ambivalent on the extent to which private bodies such as newspapers or media companies can be expected to offer access to those who claim rights to use them for expression, positive obligations to promote access to expression have resulted in some countries in rights to access radio, for example, or to more affordable community radio licenses, or rights to reply.<sup>10</sup>

Any positive development in freedom of expression in this direction has been resisted by press owners. Associated Newspapers argues that:

It is of course no part of the Article 10 right that private individuals should be able to require media organisations (or the state for that matter) to further their own rights to free speech. The Article 10 right is a right to exercise free speech *without interference*: it is not a positive right to use someone else’s newspaper or television channel. It is fundamental to free speech that an independent newspaper publisher must never be told what it must include in its own newspaper. (Emphasis in original).<sup>11</sup>

Press freedom is thus not only itself a confused notion, it has a difficult and often confused relationship with the more fundamental right to free expression. At the centre of this is an unresolved question regarding how to hold powerful media to account without undermining their independence.

### **The historical conflation of press and speech freedom**

A longer term perspective can aid understanding of our current predicament. Historically, the terms ‘press freedom’ and ‘freedom of expression’ have been used interchangeably. This was reasonable when the sole means of mass communication were printing presses, but this is no longer the case.

#### ***Phase 1: printing presses as the communication platform***

In England, freedom of the press has had a shifting meaning through the centuries. The seventeenth century saw an increasing number of independent pamphleteers and dissenting Stationers. This, with the lapse of the Licensing Act in 1694, led to unlicensed printing: a form of de facto press freedom.

Between the seventeenth century and the rise of broadcasting in the twentieth, some conflation of press freedom and freedom of expression was inevitable. Whilst direct speech and the emergence of a ‘public sphere’ in the coffee shops of the period were important, printing permitted expression beyond physically limited co-present interactions. Before the advent of broadcasting, printing presses thus constituted the means of distribution necessary for widespread public expression, and therefore when powerful interests wished to suppress information they tended to focus their energies on printing presses.

Early constitutional expression of the principles of free expression reflect this technological context. The first amendment to the US Constitution, for example, states that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble’. The text of the first amendment makes a superficial distinction between speech and printing, but US law in practice

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does not distinguish between freedom of speech and freedom of the press.<sup>12</sup>

### **Phases 2 and 3: broadcasting and the internet**

Broadcasting has eroded the monopoly of the press on distribution, and more recently, mass access to internet delivery of information has fundamentally altered the nature and value of press freedom. When printing presses were the only means of distribution, freedom of the press was the key condition that must be in place to guarantee free communication. When citizens have free access to other media, the relationship between freedom of the press and freedom of expression changes. This is not to say that licensing of printing is more justified in a context where broadcasting or the internet exists, but it is self-evident that where these technologies are widely available, state control of printing as a technology would have a less decisive impact on the free circulation of ideas in society.

The press has, in practice, been treated as a special case for secondary reasons. For example, the appropriate regulatory systems for broadcasters have struck an entirely different balance with regard to content regulation and free expression due to the scarcity of channels and spectrum and because of the pervasive, invasive, influential nature of broadcast media. In broadcasting, the notion that public interest regulation can be applied because of the size and influence of broadcasters has been uncontroversial in Europe. Broadcasters were licensed; newspapers were not.

The press (as newspapers, or printing presses) has, in this sense, been 'more free' than broadcasters. In a world divided between mass media of broadcasting and the press there has been a clear public interest in a distinct approach to 'press freedom'.

The European model of media regulation in the twentieth century therefore combined a 'free' and robust press and a regulated broadcasting system. The press has been permitted to be more opinionated and has also pursued newsgathering more aggressively. The broadcasters acted as a filter: they tend to be more trusted by the public, though they are also reliant on newspaper journalism, which breaks more stories. But this role is not necessarily linked to paper as a delivery medium, and arguably the role of the freer, more robust

newsgathering and distribution medium has already been supplanted by the internet. As the distinctions between different delivery media break down, it is clear that the claim of the press to be 'free' in contrast to broadcasting is weaker. Both the press and delivery of video is, in fact, subject to various overlapping ethical codes and accountability relationships.

None of this undermines the importance of freedom of expression, but it does undermine the claim that freedom of printing presses is necessarily the principal means to the end of freedom of expression for any society. This is for a range of reasons, but principally because the suppression of a fact, idea, or view is demonstrably more difficult when new platforms enabling individuals to impart and receive ideas without access to printing presses are more widely available, as recent controversies about privacy on Twitter bear witness.

### **Free expression as a relative and qualified right**

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Freedom of expression rights are not absolute, but conditional and qualified in relation to the rights of others and other rights. Press journalists in the UK are not subject to any licensing regime; however, most are subject to the Editorial Code of the Press Complaints Commission (PCC), and all to the general law. Parliament has repeatedly asserted the principle that newspapers, in particular, should be permitted to regulate themselves — if they prove that they can do so effectively.

The media and journalism are arguably one of the key guarantors of good political governance in serving accountability and playing a watchdog role. But they can also undermine good governance. The Leveson Inquiry has heard evidence that policy favours have been traded for, or adjusted, in return for favourable coverage. And it has heard evidence that media have abused the privileges available to them in pursuit of stories that have no public interest justification.

The key questions in relation to these balancing rights concern who does the balancing and whether that balancing is effective in establishing an ethical system so that the standards established by courts and self-regulatory bodies are effectively deployed across the media system. It has been demonstrated

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in the case of the UK newspapers that (i) the role played by self-regulation in balancing freedom of expression of newspapers and the rights of others has been inadequate and (ii) the PCC has not acted as an effective form of redress which has established standards that are observed across the industry. The PCC has failed to incentivize industry to balance these rights in their everyday practices, and this is the fundamental failure.

### **Conclusion: a licence for size?**

Press freedom as a principle in law, policy, and normative debate has become increasingly problematic. The conflation of freedom of the press with freedom of expression may have been justified historically, but it is increasingly untenable, and the distinction between licensed broadcasting and the 'free press' has broken down. In light of this, references to 'freedom of the press' in policy debate should be carefully interrogated. If we free policy debate from the constraining notion of freedom of the press, but apply stringent tests of independence and freedom of expression, we are more likely to achieve a policy settlement that stands the test of time.

In comparison to other developed democracies, the UK has an enviable news media. However, the public interest could be much better served by a reformed regulatory system. Events leading to the Leveson Inquiry have indicated that self-regulation has been insufficient incentive to prevent harmful and unethical practices, and that there is a need for new principles to govern the design of media regulation.

This is not for a moment to advocate licensing of newspapers or heavy-handed regulation by government. But it is to argue that there is nothing about paper, as a delivery medium, that makes it deserving of special treatment compared to electronic media. In the longer term, media regulation will not be determined by delivery platform. In an environment in which moving pictures and sound are distributed without licensed spectrum and newspapers as well as broadcasters deliver video news to the mass market, it is hard to

sustain special privileges whereby the 'press' is 'free' and 'broadcasting' is licensed. Another principle will be needed to determine what relationship between state, public, and media is appropriate, and be likely to deliver the appropriate balance between autonomy and accountability. The answer is not to licence all media, but neither should a blunt notion of freedom without responsibility prevail.

The principle should be that size of enterprise, and its importance in opinion formation, rather than medium of delivery should determine the framework for responsibility and accountability.<sup>13</sup> Larger enterprises should be subject to more public-interest regulation and accountability enforcement. Competition regulation could monitor the size and impact of key communications bottlenecks and gateways and trigger the imposition of a range of public interest and accountability requirements on larger communications providers. Smaller and medium sized providers should remain free of such detailed regulation. This should not be presented as an argument for 'government meddling' because independent regulation can be made to work. Obligations could be imposed by self- or co-regulatory bodies, but clear and strong lines of accountability, backed by the law, are likely to be necessary.

News media face a double crisis. A crisis of sustainability and a crisis of regulation. Potential responses to the crisis of sustainability have included subsidies, new models of public trust ownership, and a new compact between the state and the media. Responses to the crisis of regulation include giving a statutory backstop to self-regulatory bodies, reforming self- and co-regulation, bolstering media plurality, and developing new principles to underpin a new compact between state, public, and the media. All of these responses contain dangers to the free flow of ideas and citizens' access to the information they need. All these proposals for reform should be discussed with care. The use by a self-interested sector of the media of such ill-defined concepts as 'freedom of the press' should be greeted with scepticism.

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## Notes

- 1 O'Neill, O. (2012) 'Regulating for Communication', FLJS Policy Brief. Oxford: Foundation for Law, Justice and Society. Available at <http://www.fljs.org/uploads/documents/ONeill.pdf>
- 2 The author is a trustee of Reporters Without Borders and a member of the advisory board of Open Rights Group.
- 3 See Youm, K. (2001) 'Freedom of the Press'. In *International Encyclopedia of the Social & Behavioural Sciences*. Available at: <http://www.sciencedirect.com/science/article/pii/B008043076704331X>
- 4 Variations on this quote have been attributed to many people. The earliest I could find was Abbot Joseph Liebling (1960) 'Do you belong in journalism?', *The New Yorker* (14 May 1960).
- 5 See Schauer, F. (1982) *Free Speech: A Philosophical Enquiry*. Cambridge: Cambridge University Press; Sunstein, C. R. (2000) 'Television and the Public Interest', *California Law Review* 88(2): 499. Craufurd-Smith, R. (1997) *Broadcasting Law and Fundamental Rights*. Oxford: Oxford University Press.
- 6 Associated Newspapers (2012) Closing submissions to the Leveson Inquiry, para 7. Available at: <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Closing-Submission-from-Associated-Newspapers-Ltd.pdf>
- 7 See for a detailed discussion R. Craufurd-Smith and D. Tambini (2012) 'Measuring Media Plurality in the United Kingdom', *Journal of Media Law* 4(1): 35-63.
- 8 See Barendt, E. (2005) *Freedom of Speech*. Oxford: Oxford University Press, 9-20.
- 9 This was one of the main controversies in the 1970s UNESCO debate on the 'Right to Communicate', in which it was argued that common resources of communication including the mass media were conditions of citizenship, and individuals should have improved rights to access and use them, including rights to reply. The notion was rejected in the broadcasting age, but many experts such as Karol Jacubowicz have argued that new technologies would permit a stronger notion of rights to communicate to prevail. See Jacubowicz, K. (2011) 'Do we Really Need a Right to Public Expression?'. Available at: <http://www.mediapolicy.org/2010/11/do-we-really-need-a-right-to-public-expression/>
- 10 Ibid.
- 11 Associated Newspapers. Closing Submissions to the Leveson Inquiry, para 17.
- 12 Bollinger, L. (2010) *Uninhibited, Robust and Wide Open. A Free Press for a New Century*. Oxford: Oxford University Press.
- 13 This, broadly, is the proposal of the Committee for Media Reform, an umbrella group of media academics in the UK. <http://www.mediareform.org.uk>



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**Damian Tambini** is Senior Lecturer in the Department of Media and Communications, LSE and convenor of the MSC in Communication Regulation and Policy. He is also Associate Fellow at the Institute for Public Policy Research (IPPR) and at the Oxford Internet Institute, a Fellow of the Royal Society of Arts, and a member of the advisory groups of the Oxford Media Convention and Polis. His recent work addresses a range of current issues in media law and policy.

He was previously Head of the Programme in Comparative Media Law and Policy at Oxford University; Postdoctoral Fellow at Nuffield College, Oxford; and Lecturer at Humboldt University, Berlin and the European University Institute, Florence.

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The Foundation for **Law, Justice and Society**

Wolfson College  
Linton Road  
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · [info@fljs.org](mailto:info@fljs.org)

W · [www.fljs.org](http://www.fljs.org)

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