Press regulation in the United Kingdom in a changed media ecosystem

PRESS REGULATION IN THE UNITED KINGDOM IN A CHANGED MEDIA ECOSYSTEM

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1. INTRODUCTION: THE AIMS OF THIS CHAPTER

Much has already been written about the state of the United Kingdom's (UK) press as an industry,[1] and how our press is, and perhaps should, be regulated. On the one hand, in his *Inquiry into the Culture, Practices and Ethics of the Press* (*Inquiry*) Lord Justice Leveson was clear that the *regulatory ideal* for the press is independent self-regulation.[2] On the other hand, commentators such as Paul Wragg have convincingly argued that this form of regulation does not work, and that it should be substituted for a mandatory regime.[3] This debate is fuelled by ongoing press malfeasance, in relation to both its newsgathering and publication activities, that has caused, and continues to cause, what Leveson LJ referred to as 'real harm…to real people.'[4]

The concern of this debate has almost exclusively been the institutional press (that is, our established newspapers). This is perhaps not surprising when one considers that our newspapers have historically been the subjects of regulation because of their amplification effect – in other words, their ability to 'control the message' that is received by the public. However, the dawn of the internet, and the ubiquity of social media platforms, has changed all of this. This technology has permanently altered the media ecosystem by enabling citizen journalism, and other forms of independent publishers to flourish. These new media actors have entered the media marketplace and are able to exercise their control over the message. In doing so they are playing an increasingly important role in public discourse, by creating and publishing news content, and by acting as a source of news for the institutional press and wider mainstream media.[5]

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[1] For instance, see: Dame F. Cairncross, *The Cairncross Review: A Sustainable Future for Journalism*, Department for Digital, Culture, Media & Sport, 12 February 2019.

[2] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report,* HC 780, November 2012, 1758, [4.1].

[3] P. Wragg, *A Free and Regulated Press. Defending Coercive Independent Press Regulation* (Hart Publishing, 2020).

[4] Leveson (n 2), 50, [2.2].

[5] See generally: P. Coe, *Media Freedom in the Age of Citizen Journalism,* (Edward Elgar, 2021).

What this means is that 'real harm to real people' is no longer being caused solely by our established newspapers. Citizen journalists and independent publishers are just as capable of causing the type of harm to 'real people' that was once only associated with the press industry.[6] Therefore, any satisfactory regulatory solution must surely be one which extends to the institutional press *and* this new breed of journalist. Indeed, in his *Inquiry* Leveson LJ himself was of the view that it is 'abundantly clear that, for a regulatory regime to be effective, it must be capable of delivering any perceived benefits to online publication as much as to print'[7] and that membership of a regulatory body 'should be open to all publishers on fair, reasonable and non-discriminatory terms, including making membership potentially available on different terms for different publishers.'[8] Yet, despite these statements, perhaps rather short-sightedly, his *Inquiry* was exclusively concerned with the established printed press.[9]

The purpose of this chapter is not to rehearse the arguments that have already been made about the state of UK press regulation in respect of the institutional press. This has already been covered eloquently and comprehensively by other commentators.[10] Rather I intend to consider press regulation within the context of the media ecosystem that has been created by the internet. To this end I begin the chapter with a discussion on the concept of press freedom. In setting out its justifications and its normative bases, which in the UK largely derive from the European Court of Human Right's (ECtHR) interpretation of Article 10(1) of the European Convention on Human Rights (ECHR), I consider how it protects the press, and what is expected of the press in return for this protection. In essence, I suggest that the press is not fulfilling its side of the *bargain*, which has contributed to press malfeasance and the need for effective regulation. The problem, I go on to say, is that the current regulatory regime is not

[6] Indeed, the Alliance of Independent Press Councils of Europe was, until relatively recently, only been concerned with the institutional printed press. In recent years, however, its remit has been widened to cover online iterations of the press and citizen journalists. This is because, according to the Alliance, complaints made by the public against citizen journalists for alleged breaches of journalistic ethical standards to its Councils have increased rapidly. See: A. Hulin, 'Citizen journalism and news blogs: why media councils don't care (yet)' *Inforrm* 16th June 2016.
[7] Leveson, (n 2), 1587, [2.9].
[8] Ibid. 1761, [4.13].
[9] Ibid. Leveson LJ's *Inquiry* did no more than 'observe' the ascendance of citizen journalism (see: 168, [4.3-[4.4], 173, [5.2] respectively). Although it may be defensible that his *Inquiry* was limited in this way, as the institutional press were the 'wrongdoers' in the context within which he was reporting, arguably his regulatory solution to press malfeasance ought to have recognised the increasing influence that citizen journalists are having on the public sphere and what this means for the future of press regulation.
[10] For instance, see the body of work by Wragg, including (n 3); P. Wragg, 'The Legitimacy of Press Regulation' (2015) *Public Law*, Apr, 290; P. Wragg, 'Leveson's Vision for Press Reform: One Year On' (2014) 19(1) *Communications Law* 6; P. Wragg, 'Time to End the Tyranny: Leveson and the Failure of the Fourth Estate' (2013) 18(1) *Communications Law* 12; the work of Hacked Off: https://hackinginquiry.org/; and the work of Lara Fielden, including L. Fielden, *Regulating the Press: A Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, 2012).

satisfactory for the institutional press, let alone independent and citizen journalism. Although the problems I identify in this chapter are perhaps obvious, I recognise that a solution is not. I suggest that although a mandatory regime may work for the institutional press, it is not suitable for citizen journalists. Bearing this, and the deficiencies of the current voluntary self-regulatory regime in mind, what, then, is the alternative? In my view, as I explain at the end of the chapter, an over-hauled voluntary self-regulatory scheme may provide *some* of the answers.

2. PRESS FREEDOM

2.1 Justifying press freedom

The concept of press freedom is founded on the notion that as 'the Fourth Estate' the primary function of the press is to act as a 'public watchdog',[11] in that it operates as the general public's 'eyes and ears' by investigating and reporting abuses of power.[12] Thus, pursuant to the liberal theory of the media, the press is free and independent; it is committed to the discovery and reporting of truth, the advancement of knowledge and, ultimately, to strengthening democracy.[13] This liberal-ideal is reflected in the observations made by Leveson LJ in his *Inquiry* that in recent years the press has played a critical role in informing the public on matters of public interest and concern.[14] The *Inquiry* cites a number of examples of valuable public interest journalism, relating to a wide variety of stories, submitted by Associated Newspapers Limited,[15] *The Guardian*, Northern & Shell,[16] *The Sun*, *The Times* and *Sunday Times* and *The Telegraph*.[17] This type of journalism, that is driven by a commitment to professionalism and

[11] *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153, [59].
[12] *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 183 per Sir John Donaldson MR; See also: E. Barendt, *Freedom of Speech*, (2nd edn. Oxford University Press, 2005), 418; D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577.
[13] J. Charney, *The Illusion of the Free Press* (Hart Publishing, 2018), 3.
[14] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report*, HC 780, November 2012, 451-455.
[15] Associated Newspapers Limited has been known as DMG Media since 2013. It publishes the *Daily Mail*, *Mail on Sunday*, *MailOnline*, *Metro* and *Metro.co.uk*. DMG Media is part of the Daily Mail and General Trust plc (DMGT). In November 2019, DMGT purchased JPI Media Publications Limited and, in doing so, the *'i'* newspaper. The takeover was cleared by the UK government in March 2020.
[16] Northern & Shell published the *Daily Express*, *Sunday Express*, *Daily Star* and *Daily Star Sunday*, and the magazines *OK!*, *New!* and *Star* until these were sold to Trinity Mirror in February 2018. Northern & Shell also owned three entertainment television channels: Channel 5, 5* and 5USA until 2015.
[17] For example, amongst others, these stories include the *Daily Mail's* Stephen Lawrence campaign, *The Sunday Times'* Thalidomide Campaign against Distillers, and its investigation that exposed corruption in the FIFA voting process for determining which nation will host the football World Cup. See: Leveson (n 2), 455-470.

the public interest, is undoubtedly adopted and replicated by the press and its journalists around the world and has led to the communication of some of the most important stories of our time.[18]

In much the same way, citizen journalists and independent publishers are playing their part in disseminating vitally important information, thereby often stepping into the watchdog shoes of the institutional press.[19] They too, through their reporting, continue to have a positive impact on the public sphere. Although their contribution to public discourse can relate to any story or context, arguably it is most obvious in conflict or crisis situations that present significant dangers and/or accessibility challenges to the institutional press. In recent years these journalists have provided vital 'on-the-ground' coverage of, for instance, the spread of COVID-19 in Wuhan (and how the rising number of cases was being concealed to the rest of the world by the Chinese government), the Arab Spring Uprising, the Iraq conflict,[20] and, most recently, Russia's invasion of Ukraine.

Thus, the value of the press, in so far as it plays a critical role in free speech and democracy by engaging in this type of activity, is undeniable. In turn, this 'value' is, understandably, used in political and legal commentary, and by the press themselves, to justify press freedom.[21]

2.2 The concept of press freedom: What is its normative basis? What does this freedom *cost* the press? And what is the press *free* to do? [22]

Press freedom, and more broadly media freedom, is mentioned explicitly in a variety of international treaties and domestic laws. For example, pursuant to Article 11(2) of the Charter of the Fundamental Rights of the European Union (CFREU),[23] 'freedom and pluralism of the media shall be respected'.[24] Similarly, in the US, the First Amendment states that: '[c]ongress

[18] Coe (n 5), 18. For examples from the US, see the Pulitzer Prize winners: https://www.pulitzer.org/prize-winners-by-year. For further examples from the UK see: Cairncross (n 1), 19
[19] Ibid. (Coe), 93.
[20] Ibid. (Coe), 3-7.
[21] See Wragg (n 3), ch. 1.
[22] For more detailed discussion on the extent of the protection afforded to the press and wider media by the concept of press (and media) freedom, see: Coe (n 5) 103-122; D. Tambini, *Media Freedom*, (Polity Press, 2021), ch. 2.
[23] The Charter was initially solemnly proclaimed at the Nice European Council on 7th December 2000. At that time, it did not have any binding legal effect. However, on 1st December 2009, with the entry into force of the Treaty of Lisbon, the Charter became legally binding on the European Union institutions and on national governments: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.
[24] See also: Article 5(1)2 of the German Basic Law provides a separate provision for the specific protection of media expression, thus creating a clear distinction with free expression guarantees for private individuals: '[f]reedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed'; Article 21(2) of the Italian Constitution, Article 25(1) of the Belgian Constitution and the media clauses in Article 17 of the Swiss Constitution, the Swedish Constitution Freedom of the Press Act, Law of July 29th 1881 on the Freedom

shall make no law…abridging the freedom of speech, or of the press…'[25] Within a UK context, the normative basis for press freedom is now, largely, drawn from Article 10(1) of the ECHR, and its protection of *freedom of expression*.[26]

As you will note if you look at Article 10(1), unlike, for instance, the CFREU and the First Amendment to the US Constitution, it does not explicitly provide for the protection of press (or media) freedom[27] in distinction to that of private individuals and non-media institutions. Rather, in interpreting Article 10(1), the ECtHR has attached great importance to the role of the press (and wider media),[28] and in doing so its jurisprudence has clearly established the press' contribution to democracy,[29] and its 'role of public watchdog'.[30] Indeed, its case law recognises a duty on the press to 'contribute to public debate'[31] by conveying information and ideas on political issues and public interest;[32] and the right of the public to receive this information.[33] As a consequence of this the ECtHR affords the press preferential treatment, in that it interprets Article 10(1) to contain privileged protection of the press, even in the absence of express provisions to that effect.[34] It has even said, in *Thorgeirson v Iceland*,[35] that '[r]egard must therefore be had to the pre-eminent role of the press in a State governed by the rule of law.'[36] Thus, pursuant to its jurisprudence, and unlike the dominant position in the

of Press (French Press Freedom Law). See generally: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 59; Barendt (n 12), 417-419.

[25] However, despite a specific free press clause, the US position is very different to the ECHR jurisprudence of the European Court of Human Rights: see note 30.

[26] The concept of press freedom was recognised in UK courts long before the introduction of the Human Rights Act 1998 and its incorporation of the ECHR into domestic case law See notes 11 and 12.

[27] This also applies to Article 19 of the United Nations International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights.

[28] For example, see: *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48]; *Busuioc v Moldova* (2006) 42 EHRR 14, [64]-[65]; *Jersild v Denmark* (1995) 19 EHRR 1; *Janowski v Poland (No 1)* (2000) 29 EHRR 705, [32]

[29] For example, see: *Perna v Italy* (2004) 39 EHRR 28.

[30] *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, [59]; *Goodwin v United Kingdom* (1996) 22 EHRR 123, [39]; *Thorgeirson v Iceland* (1992) 14 EHRR 843, [63]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [62].

[31] *Wojtas-Kaleta v Poland* [2009] App. no. 20436/02, [46].

[32] Ibid. *Thorgeir Thorgeirson* (n 30); *Lingens v Austria* (1986) 8 EHRR 103, [26]; *Oberschlick v Austria (No 1)* (1991) 19 EHRR 389, [58]; *Castells v Spain* (1992) 14 EHRR 445, [43]; *Jersild v Denmark* (1995) 19 EHRR 1 [31].

[33] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, [65]; *Fressoz and Roire v France* (2001) 31 EHRR 2, [51]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [52].

[34] For example, see: *Busuioc* (n 28); *Wojtas-Kaleta* (n 31); *Vejdeland and others v Sweden* [2012] ECHR 242. For analysis of these cases see: Coe (n 5), 98-99. For a detailed discussion on the arguments relating to whether press (and media) freedom is distinct to that of freedom of expression see: Coe (n 5) 96-103, 123-126; Barendt, (n 12), 419-424.

[35] (1992) 14 EHRR 843.

[36] Ibid. [63].

US,[37] press freedom is *special* (and distinct to that of freedom of expression) because a journalist or newspaper is, as Jan Oster explains, 'governed by a different set of factors concerning the scope and intensity of protection when preparing, editing or issuing a publication, compared to freedom of expression afforded to private individuals or non-media entities.'[38] Therefore, the fact that a statement can be classed as media expression, as opposed to expression by a private individual or non-media institution, adds to the burden of justifying its restrictions.[39]

Vejdeland and others v Sweden[40] provides an illustration of how the Court elevates press (and media) freedom above personal freedom of expression.[41] The applicants, who were not associated with the press, had been convicted for distributing homophobic leaflets in a secondary school. The ECtHR unanimously held that there was no violation of Article 10, whilst in a concurring opinion, Judge Zupančič observed: '[i]f exactly the same words and phrases were to be used in public newspapers…they would probably not be considered a matter for criminal prosecution and condemnation.'[42] On this interpretation it follows that the special protection afforded to media expression permits the use of wide discretion as to the methods and techniques adopted to report on matters, and how that material is subsequently presented.[43] Moreover, it allows the media to have recourse to exaggeration and even provocation,[44] including the use of strong terminology or polemic formulations.[45] Additionally, the ECtHR has held that this protection extends beyond the dissemination of the journalist's or media

[37] Although beyond the scope of this chapter, it is worthy of note here that despite commentators such as Justice Potter Stewart, Melvin Nimmer, Randall Bezanson, Floyd Abrams, Vincent Blasi and Sonja West, and dissenting Supreme Court judgments, arguing that the specific free press clause 'or of the press' in the First Amendment to the US Constitution creates a similar distinction between press freedom and personal freedom of expression to that recognised by the ECtHR, this claim has been opposed by commentators such as Eugene Volokh, and resisted by the Supreme Court. For detailed commentary on this (and the views of the commentators and the Supreme Court), see: Coe (n 5) 96-103, 123-126; Barendt, (n 12), 419-424.
[38] Oster (n 24), 59. However, see notes 41 and 65 below.
[39] Ibid.
[40] [2012] ECHR 242.
[41] See also, for example: *Busuioc* (n 28); *Wojtas-Kaleta* (n 31). Although this is perhaps the dominant view that comes from the Strasbourg Court's jurisprudence, it is not the *only* view. For instance, in *Magyar Helsinki Bizzotsag v Hungary* App. No. 18030/11, [168], although the Court made explicit reference to the watchdog function of the press, it was clear that a right to access to information does not apply exclusively to the press. From the UK, see: *AG v Observer Ltd* (1990) 1 AC 109, 201. See also (n 65) and Wragg (n 3), chps. 3 and 4.
[42] [2012] ECHR 242, 20, [12].
[43] *Jersild v Denmark* (1995) 19 EHRR 1 [31]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125 [63]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [57].
[44] *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, [38]; *Thoma v Luxembourg* (2003) 36 EHRR 21, [45]-[46]; R. Clayton QC and H. Tomlinson QC, *Privacy and Freedom of Expression* (2nd edn. Oxford University Press, 2010), 271 [15.254].
[45] *Thorgeir Thorgeirson* (n 30), [67]; *Oberschlick v Austria (No 2)* (1998) 25 EHRR 357, [33]; Oster, (n 23), 59.

organisation's own opinions, to encapsulate those expressed by third parties in the context of, for example, interviews.[46]

The ambit of press freedom is not just limited to stronger protection for press speech; instead it extends to rights that are not, in any way, available pursuant to freedom of expression guarantees. Consequently, press freedom and freedom of expression differ in relation to the intensity of the protection they offer, and in respect of the scope of the protected action. This position equates to institutional protection of the media that, in turn, guarantees rights that are not exclusively concerned with expression; it extends to the press's and wider media's newsgathering or editorial activities,[47] and even to the existence of an independent media.[48] This institutional protection afforded to the press can be categorised as being both defensive, in that it protects the media against interference by the state, and positive, as it entitles the media to state protection.[49]

In relation to the defensive category, undoubtedly effective journalism is dependent upon the use of sources, who tend to be insiders working in or associated with the subject matter of the publication, to provide the most effective information.[50] Accordingly, case law from the ECtHR and the UK is clear that a fundamental tenet of press freedom is the protection of journalistic sources, because '[w]ithout such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.'[51] As Lord Denning

[46] *Jersild* (n 43).
[47] Editorial freedom has been consistently recognised as a fundamental element of the right to freedom of expression, and the enhanced right to media freedom, pursuant to Article 10 ECHR (for example, see: *Melnychuk v Ukraine* [2005] App. no. 28743/03, 6; *Manole and Others v Moldova* App. no [2009] 13936/02, [98]; *Centro Europa 7 S.R.L. and Di Stefano v Italy* [2012] App. no. 38433/09, [133]). Furthermore, it has been held by the ECtHR, and in the UK, that editorial judgement allows the press to determine the technique of reporting adopted and the form in which the ideas and information are conveyed. From the ECtHR see *Jersild v Denmark* [1994] App. no. 15890/89, [31]; *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, [39]. From the UK see *Flood v Times Newspapers Limited* [2012] UKSC 11 per Lord Mance, [132], [170] and Lord Dyson, [194], [199]; [2010] EWCA Civ 804 per Moore-Bick LJ, [100]; *Re Guardian News and Media Ltd* [2010] AC 697 per Lord Rodger, [63]; *In re British Broadcasting Corporation* [2010] 1 AC 145 per Lord Hope of Craighead, [25]; *Jameel and others v Wall Street Journal Europe Sprl* [2006] UKHL 44 per Lord Hoffman, [51]; *Campbell v Mirror Group Newspapers Limited* [2004] 2 AC 457 per Lord Hoffman, [59].
[48] Ibid. *Manole*, [98]; *Centro Europa 7 S.R.L.*, [133]; Oster (n 24). 60.
[49] Ibid. (Oster).
[50] Coe (n 5), 116.
[51] *Goodwin v United Kingdom* [1996] App. no. 17488/90, [39]. See also (from the ECtHR): *Roemen and Schmit v Luxembourg* [2003] App. no. 51772/99 [57]; *Cumpănă and Mazăre v Romania* [2004] App. no. 33348/96 [106]; *Radio Twist a.s. v Slovakia* [2006] App. no. 62202/00 [62]; *Voskuil v Netherlands* [2007] App. no. 64752/01 [65]; *Tillack v Belgium* [2007] App. no. 20477/05 [53]; *Financial Times Ltd and others v United Kingdom* [2009] App. no. 821/03 [59]; *Sanoma Uitgevers BV v Netherlands* [2010] App. no. 38224/03 [50]; *Nagla v Latvia* [2013] App. no. 73469/10. From the UK, see: *Ashworth Hospital Authority v MGN Ltd* [2002] 4 All ER 193.

observed in *Attorney-General v Mulholland and Foster*[52] '[the journalist] can expose wrong-doing and neglect of duty which would otherwise go unremedied…the mouths of his informants will be closed to him if it is known that their identity will be disclosed…'[53] The importance of this protection is illustrated by the fact that the Strasbourg Court has consistently held that journalistic rights pursuant to press freedom are interfered with by virtue of the very existence of an order to disclose a source's identity, regardless of whether or not the order is actually enforced.[54] Furthermore, if the sole or predominant purpose of the search of press or media premises, and the seizure of journalistic material, is to identify sources then the search and seizure are in direct conflict with the right to press (and media) freedom, as they have 'an intolerable chilling effect on journalistic work and may also deter informants from providing information that they are only willing to provide confidentially.'[55] Indeed, the Strasbourg Court has held that the mere threat to search media premises causes a 'chilling effect' and is, prima facie, irreconcilable with media freedom.[56]

This defensive protection afforded by press freedom extends further than source protection: its beneficiaries are protected against unjustified interferences with activities related to all forms of newsgathering. Thus, in *Társaság a Szabadságjogokért v Hungary*[57] the ECtHR stated that 'the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information[, which] is an essential and preparatory step in journalism and … an inherent, protected part of press freedom.'[58] And in *Halis Dogan and others v Turkey* the Court found that press freedom includes the protection of the newspaper distribution infrastructure.[59] It has also been held that

[52] [1963] 2 QB 477.
[53] Ibid. 489.
[54] *Financial Times Ltd and others v United Kingdom* [2009] App. no 821/03 [56]; *Sanoma Uitgevers BV v Netherlands* [2010] App. no. 38224/03 [50]; *Roemen and Schmit v Luxembourg* [2003] App. no. 51772/99 [57]; *Telegraaf Media Nederland Landelijke Media BV and others v Netherlands* [2012] App. no. 39315/06 [127]. See also the House of Lords case of *British Steel Corporation v Granada Television Ltd* [1981] 1 All ER 417.
[55] Oster, (n 24), 54.
[56] *Sanoma Uitgevers BV v Netherlands* [2010] App. no. 38224/03 [71].
[57] [2009] App. no. 37374/05, [27].
[58] Ibid. It is important to note that *Társaság a Szabadságjogokért* is a non-governmental organisation. According to the ECtHR, [27]: 'The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs … The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social 'watchdog' … In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press.'
[59] *Halis Dogan and others v Turkey* [2006] App. no. 50693/99 (ECtHR, 10th January 2006), [24]. See also: *Gsell v Switzerland* [2009] App. no. 12675/05 [49].

journalists cannot be made to give evidence concerning confidential information or sources, even if it has been obtained illegally.[60] They are also exempt from certain data protection and copyright provisions.[61] With regard to the positive category, states are required to: protect journalists from acts of violence in the course of their work,[62] and from undue influence by financially powerful groups[63] or the government.[64]

2.3 The *deal-breaking* press?

On the face of it the ECtHR's *deal* for the press is straightforward: in exchange for the press fulfilling a public watchdog role by contributing to discourse on matters of public interest, and by acting ethically and in accordance with the tenets of responsible journalism, the Court provides the press, through its interpretation of Article 10(1), and its concept of press freedom, with enhanced protections distinct to those provided to individuals by the right to freedom of expression.

The press's side of this *bargain* has been consistently articulated by the Strasbourg Court as a 'duty', or its 'duties and responsibilities'.[65] For instance, in *Axel Springer v Germany*[66] it said:

> '…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.' Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."[67]

[60] *Goodwin v United Kingdom* (1996) 22 EHRR 123, [39]; *Radio Twist as v Slovakia* [2006] ECHR 1129, [62]; *Sanoma Uitgevers BV v Netherlands* [2010] ECHR 1273, [50].
[61] For example, see: Article 85 of the General Data Protection Regulation and paragraph 26, Part 5 of Schedule 2 of the Data Protection Act 2018. See also: Article 9 Data Protection Directive 95/46/EC, OJ L281/31; Article 5(3)(c) Copyright Directive 2001/29/EC, OJ L167/19.
[62] *Ozgur Gundem v Turkey* [2000] ECHR 104, [38 ff].
[63] Article 21(4)(2) EC Merger Regulation 139/2004, OJ L24/1; Part 5 Chapter 2 Communications Act 2003 ch 21.
[64] *Manole* (n 47), [109]; *Centro Europa* (n 47), [133].
[65] This duty-right construct that runs through Strasbourg jurisprudence is not without its critics. Chiefly among them is Wragg, who provides an excellent counter argument to this dominant jurisprudential narrative. Indeed, as Wragg acknowledges, even the ECtHR has, by virtue of some of its own jurisprudence, undermined it. See (n 41) and Wragg (n 3), 85-95.
[66] [2012] EMLR 15.
[67] Ibid. [79]. See also: *De Haes and Gijsels v Belgium* [1998] 25 EHRR 1, [39].

And in *Bladet Tromsø and Stensaas v Norway*[68] it held:

> '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.'[69]

This principle resonates in press regulatory codes across Europe,[70] and in the UK, in his *Inquiry*, Leveson LJ based his explicit reference to the 'duty of the press to hold power to account'[71] on the Strasbourg Court's jurisprudence.[72] Yet despite this, although as demonstrated by the examples in section 2.1 there are journalists and newspapers engaging in high quality public interest journalism, certain sections of the press, it seems, choose to ignore, or perhaps (because of the perilous financial state of much of the industry) must ignore,[73] its side of the press freedom *bargain*. History tells us that the power associated with the privileged position that the press enjoys is very often abused, for reasons such as financial gain, political leverage, or ideological advancement.[74] Indeed, an increasing number of newspapers are choosing to engage in and publish lucrative clickbait, rather than reporting on matters of public concern.[75] This has led to a number of commentators arguing that the press' public watchdog role gradually diminished towards the end of the twentieth century as its focus shifted onto commercially viable, and often self-serving, stories.[76] Moreover, newspaper ownership, and

[68] (2000) 29 EHRR 125.
[69] Ibid. [65]. See also: *Bédat v Switzerland* (2106) 63 EHRR 15, [50].
[70] For instance, as Wragg explains, the Danish Pressenævnet refers to the press's duty 'to publish information correctly and promptly.' The word duty is also used in the respective codes of conduct of Austria's Österreichischer Presserat, Norway's Pressens Faglige Utvalg, the Press Council of Ireland, the Deutscher Presserat, and Belgium's and the Nederland's Raad voor de Journalistiek. The Swedish Allänhetens Pressombudman justifies the obligations it imposes on the press by reason of 'the role played by the mass media in society and the trust of the public of these media'. The Belgian Raad voor de Journalistiek refers to 'the public's right to know the truth' (which is similarly used by the Finnish Julkisen Sanan Neuvosto). See Wragg (n 3), 85.
[71] Leveson (n 2), 1495, [8.7]. The re-drafted IMPRESS Standards Code and Guidance (at page 2) says that 'It has been developed to enable those regulated by IMPRESS to produce high-quality journalism in the public interest.' The guidance to Clause 5 (at [5.12]) makes explicit reference the press's 'watchdog role.' In contrast, the IPSO Editors' Code of Practice does not refer to press duties or the watchdog role of the press. See section 3 below for detailed discussion of IMPRESS and IPSO and the UK's regulatory system.
[72] Ibid. 1848, [2.18]; 1863, [2.71]; 1884, [3.104].
[73] See Coe (n 5), chs. 1 and 2.
[74] Ibid. 178.
[75] Numerous examples are provided by Leveson LJ in his *Inquiry*: Leveson, (n 2), 539-591.
[76] For example, see: T. Aalberg and J. Curran (eds), *How Media Inform Democracy: A Comparative Approach* (Routledge, 2012); C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 341; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain*, (7th edn. Routledge, 2010), 96-98; T. Gibbons,

the power derived from it, and the expectations placed on the modern mass media (including newspapers), such as the need for twenty-four hour news coverage,[77] means that there is a constant conflict between the press' watchdog role, or gatekeeper, and commercial reality.[78] It has been observed that during the twentieth and twenty-first centuries investigative journalism has been negatively affected by increased concentration of newspaper ownership,[79] which is now vested in a relatively small number of wealthy individuals or large and powerful companies,[80] and the commercial pressures imposed by this corporate ownership model,[81] that has in turn resulted in the proliferation of 'churnalism'[82] – the recycling of news from other sources by journalists.[83]

Undoubtedly, this situation that the press industry finds itself in contributes to press malfeasance which, as I explained in the Introduction to this chapter, Leveson LJ acknowledged in his *Inquiry* causes 'real harm to real people.'[84] By this he meant that press abuses not only affect a small minority, such as celebrities, sports men and women, or politicians, but also ordinary people. These people do not tend to have the financial resources required to fund litigation, nor do they have access to lawyers or reputation management and public relations advisors to help them respond to and spin negative stories.[85] Accordingly, as Wragg observes: '…these are people that the press become fascinated with, often briefly, and whose lives are destroyed or irrevocably damaged for reasons of titillation, curiosity, or

'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219, 214; T. Gibbons, 'Freedom of the press: ownership and editorial values' (1992) *Public Law* 279, 296; T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 485; R. McChesney, *Rich Media, Poor Democracy Communication Politics in Dubious Times* (University of Illinois Press, 1999), 275; A. Kenyon, 'Assuming Free Speech' (2014) 77(3) *Modern Law Review* 379-408, 387-391.

[77] Ibid. (Gibbons) 'Building Trust in Press Regulation' 214.

[78] C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989), 250.

[79] Gibbons, (n 57), 'Freedom of the press', 286; S.L. Carter, 'Technology, Democracy, and the Manipulation of Consent' (1983-1984) *Yale Law Journal* 581, 600-607; P. Garry, 'The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept' (1989) 72 *Marquette Law Review* 187, 189; O.M. Fiss, 'Free Speech and Social Structure' (1985) 71 *Iowa Law Review* 1405, 1415. See also Leveson LJ's assessment of the commercial pressures on the press: Leveson, (n 2), 93-98; Media Reform Coalition, *Who Owns the UK Media?* 12th March 2019.

[80] P. Thomas, 'Media Democracy' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 627-630, 628; Ibid. (Media Reform Coalition). Media ownership and the impact that the dominant proprietor and corporate ownership models have had on press freedom are discussed in detail in Coe (n 5), ch. 2.

[81] N. Fenton, 'Regulation is freedom: phone hacking, press regulation and the Leveson Inquiry – the story so far' (2018) *Communications Law* 23(3) 118-126, 119.

[82] See generally: N. Davies, *Flat Earth News* (Vintage, 2009).

[83] See generally: Coe (n 5) for a discussion on the symbiotic relationship that now exists between 'traditional' institutional journalists and citizen journalists.

[84] Leveson (n 2), 50, [2.2]. See also: Wragg (n 3), 60-61.

[85] Ibid (Wragg).

prurience.' Consequently, he says, these victims alone are reason enough to seek a satisfactory regulatory solution to the problem.[86]

This brings me on to following section, in which I explain three things: Firstly, the rationale and theory behind the UK's voluntary self-regulatory system; Secondly, why the UK's current regime does not offer an adequate solution to the challenges posed by ongoing press malfeasance, and why it is ill-suited for regulating modern journalism; Thirdly, why mandatory regulation is not a viable alternative, at least for regulating citizen journalists.

3. PRESS REGULATION IN THE UK

3.1 Voluntary self-regulation: a brief history of libertarianism *v* social responsibility

Voluntary self-regulation as we know it today[87] is underpinned by social responsibility theory. The origins of this theory can be found in the work of William Hocking,[88] and two reports published on either side of the Atlantic Ocean in the 1940s: The Royal Commission on the Press[89] in the UK and the Hutchins Commission report[90] in the US. Both reports were born out of diminishing faith in libertarianism's optimistic notion that its self-righting process[91] carried efficacious 'built-in correctives' for the press.[92] This disillusionment gave rise to an extreme anti-libertarian movement, grounded in paternalism, that resulted in increased pressure on the UK and US governments to regulate the press.[93]

[86] Ibid. 61.
[87] See section 3.2 below.
[88] W.E. Hocking, Freedom of the Press: A Framework of Principle (University of Chicago Press, 1947).
[89] The Royal Commission on the Press, 1947–1949, Report (Cmnd. 7700).
[90] The Commission on Freedom of the Press, A Free and Responsible Press (University of Chicago Press, 1947).
[91] This process underpins libertarianism. It was laid down in the sixteenth century by John Milton in *Areopagitica* (see: J. Milton, *Areopagitica*, (Clarendon Press Series, Leopold Classic Library, 2016)). The process dictates that everyone should be free to express themselves and, ultimately: 'The true and sound will survive; the false and unsound will be vanquished. Government should keep out of the battle and not weigh the odds in [favour] of one side or the other. And even though the false may gain a temporary victory, that which is true, by drawing to its [defence] additional forces, will through the self-righting process ultimately survive.' See: F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 45.
[92] Ibid. (Siebert et al), 77.
[93] Ibid. 77.

Ultimately, in the US, because the Hutchins Commission feared that the imposition of compulsory regulation could act as a catalyst for official control of the press,[94] it was clear in its report that the press should regulate itself.[95] However, it left the door ajar for government intervention in press practices by stating: 'Without intruding on press activities…government may act to improve the conditions under which they take place so that the public interest is better served.'[96] It went on to say that any such laws or preventions should be permissive rather than restrictive, in that they should not be 'subtractions from freedom', but rather a 'means of increasing freedom, through removing impediments to the practice and repute of the honest press.'[97] Thus, the upshot of the Commission's adoption of social responsibility theory was its formulation of a compromise between libertarian ideology and paternalism. This compromise was founded on faith placed in the press by the Commission's members, who emphasised that the press needed to refocus its efforts on serving the public, which would 'obviate governmental action to enforce [its public responsibility]' through regulation.[98]

In the UK this faith placed in the press to *do the right thing*, and a dogmatic resistance to anything other than voluntary self-regulation as a means to prevent state control of the press, has run consistently through government policy from 1949, when the Royal Commission on the Press presented its findings, right up to the recommendations made by Leveson LJ at the conclusion of his *Inquiry*[99] and the present day. The result of the first government inquiry was the creation of the Press Council, whose primary function 'should be to safeguard the freedom of the Press; to encourage the growth of the 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 in it.'[100] If we fast forward to the publication of Leveson LJ's *Inquiry* in 2012, the same sentiments come through in his ideal outcome for the press: 'what is required is independent self-regulation. By far the best solution to press standards would be a body, established and organised by the industry, which would

[94] See generally: D. Davis, 'News and Politics' in D. Swanson and D. Nimmo (eds) *New Directions in Political Communication* (Sage, 1990); J. McIntyre, 'Repositioning a Landmark: The Hutchins Commission and Freedom of the Press' (1987) *Critical Studies in Mass Communication* 4, 95-135.
[95] Hutchins Commission, (n 71), 126.
[96] Ibid. 127. In making this recommendation the Commission drew on the work of Hocking, (n 69).
[97] Ibid. 127-128.
[98] Hutchins Commission, (n 90), 91.
[99] Coe (n 5), 159.
[100] Royal Commission, (n 89), Ch. XI, [683]-[684].

provide genuinely independent and effective regulation of its members and would be durable.'[101]

Unfortunately, despite the commendable rationale that underpins the idea of voluntary self-regulation of the press, a devotion by successive UK governments to a blunt and self-serving version of the system (more on this in the following section) represents nothing more than an idealistic *hope* that the press will fulfil its side of the press freedom bargain; a hope that has been, and continues to be, consistently undermined by the behaviour of the press and its ongoing malfeasance.[102] Thus, in the final section of this chapter I will set out my ideas for a regulatory scheme that although draws on social responsibility theory, and operates within a voluntary and approved self-regulatory model, differs significantly to the current regime. However, before considering this 'solution' I will explain the state of press regulation in the UK today, and why it is not fit for purpose.

3.2 An overview of regulation in the UK today

As I have alluded to in the previous section, among the key recommendations made by Leveson LJ in his *Inquiry* was the creation of a system of voluntary self-regulation that is 'genuinely independent' from the government and the press industry.[103] In the words of the Press Recognition Panel (PRP) Leveson LJ 'proposed a genuinely independent and effective system of self-regulation, with processes in place to ensure that regulators met the minimum required levels of independence and effectiveness.'[104] As a result the Royal Charter on Self-Regulation of the Press (Royal Charter) was granted on the 30th of October 2013,[105] which subsequently

[101] Leveson, (n 2), 1758, [4.1]. As Wragg observes, this 'sanguinity' has not just been found in either public inquiries (Wragg, (n 3), 66). For instance, in 2012, Lord Chief Justice Igor Judge endorsed the idea that self-regulation is the 'only' way to ensure independence from government. See: Lord Judge, 13th Annual Justice Lecture, 'Press Regulation', 19th October 2011.
[102] Coe (n 5), 159. For examples of recent 'press harm' see: Press Recognition Panel, *Annual Report on the Recognition System*, 10th February 2022, ch 6.
[103] Leveson, (n 2), 1758, [4.1]. However, although he was clear he was not recommending it at the time, Leveson LJ did leave open the possibility of a statutory backstop regulator being established by the government if self-regulation failed. 1758, [3.34]-[3.35].
[104] PRP (n 102), 7. Pursuant to paragraph 1 of Schedule 4 of the Royal Charter on Self-Regulation of the Press a "Regulator" means 'an independent body formed by or on behalf of relevant publishers for the purpose of conducting regulatory activities in relation to their publications.' See: Royal Charter on Self-Regulation of the Press.
[105] Ibid.

created the PRP,[106] a body corporate empowered to approve press regulators that meet the conditions set out in the Recognition Criteria pursuant to Schedule 3 of the Charter. In line with Leveson LJ's recommendation for genuine independence from the government and the press industry, paragraph 1 of Schedule 3 prescribes that an: 'independent self-regulatory body should be governed by an independent Board. In order to ensure the independence of the body, the Chair and members of the Board must be appointed in a genuinely open, transparent and independent way, without any influence from industry or Government.'[107] As things currently stand, the UK has two press regulators: The Independent Press Standards Organisation (IPSO),[108] and IMPRESS. [109] Of the two regulators, IMPRESS is the only one approved by the PRP and therefore regarded as being 'Leveson-compliant.'[110] It has the power to fine members who breach its Code, and it offers an arbitration service that settles disputes without the need for litigation. IPSO has the power to fine,[111] but it has yet to exercise that power,[112] much to the frustration of commentators given the press' ongoing tendency for malfeasance.[113] Common to both schemes is their reliance on members of the press to voluntarily join them.

3.3 Why is the system problematic?

IPSO's apparent lack of desire to fine its members aside, why, then, is this system problematic? Firstly, despite the voluntary self-regulatory nature of IMPRESS and IPSO there is a framework in place for a more incentivised, and arguably more coercive, regime. In light of Leveson LJ's recommendations to 'encourage' press membership of a regulator approved by the PRP (which, as I have said above, is currently IMPRESS), section 34 of the Crime and Courts Act 2013 enables a court to award exemplary damages against any 'relevant

[106] The PRP came into existence on the 3rd of November 2014.
[107] Pursuant to paragraph 2 the Chair of the Board must be nominated by an appointment panel that must also be independent of government and industry. Paragraph 3 sets out the composition requirements for the panel, including that a substantial majority of the members are 'demonstrably independent' of the press. Paragraph 5 prescribes the composition of the Board, according to which the majority of the members should be independent of the press, it should not include any serving editor, and members must be independent of government and politics.
[108] https://www.ipso.co.uk.
[109] https://impress.press.
[110] IMPRESS was recognised by the PRP as the first 'Leveson-compliant' independent press regulator on the 25th October 2016. https://www.impress.press/about-us/faq.html.
[111] https://www.ipso.co.uk/monitoring/standards-investigations/.
[112] Indeed, IPSO's annual reports of 2015 to 2020 show that it has not yet even launched a 'standards investigation' – the process that would lead to the imposition of a fine. The reports are accessible here: https://www.ipso.co.uk/monitoring/annual-reports/.
[113] Wragg, (n 3), 261-262; P. McGrath, 'Bob the Builder: can IPSO fix it?' *Inforrm*, 8th November 2018; B. Cathcart, 'Manchester United, the Sun and that complaint to the "press regulator" IPSO' *Inforrm*, 11th February 2020; B. Cathcart, 'IPSO: The Toothless Puppet Rolls over for its masters (again)' *Inforrm*, 26th October 2018; B. Cathcart, 'Sam Allardyce, the Telegraph and another IPSO failure' *Inforrm*, 3rd September 2018.

publisher'[114] in litigation who is *not* a member of 'an approved regulator'. Among the requirements for approved status that are prescribed by the Royal Charter is that the regulator will have a low-cost arbitration system to reduce legal costs for both claimants and the press.[115] Section 40 *could* be at the core of this 'costs incentives regime' as it empowers the court to award adverse costs against non-members of an 'approved regulator' by forcing the 'relevant publisher' to pay the claimant's legal costs even if the publisher is successful in defending the claim, subject to certain exceptions.[116] However, section 40 has not been enacted, and is likely to be repealed, meaning that Leveson LJ's recommendations have only been partially implemented.[117]

Consequently, as stated in the PRP's latest *Annual Report on the Recognition System* the approved regulation system is frustrated by political involvement, in that section 40 is dormant and remains unenforceable until it is activated by the Secretary of State for Digital, Culture, Media and Sport,[118] which as I have explained is unlikely in light of the government's recently announced proposals to repeal it.[119] The effect of this is that it renders approved regulation a blunt instrument, as it disincentivises membership of an approved regulatory scheme and it ultimately, and fundamentally, undermines its purpose,[120] thereby effectively inverting approved regulation into a self-serving system.[121] As the PRP states, not only has this contributed to a large number of significant publishers choosing not to join IMPRESS,[122] it can also have serious implications for the press and the public:

> 'The failure to commence section 40 also means there are limited incentives to encourage publishers to sign up to the recognition system and no low-cost way for the public to raise legal complaints against the vast majority of news publishers…the absence of section 40 means there is limited incentive in place for people bringing complaints against its member publishers to use IMPRESS's

[114] Section 41 sets out what is meant by 'relevant publisher'. This is qualified by Schedule 15 which excludes certain persons and organisations from this definition and, therefore, from the ambit of sections 34 to 42. The scope of section 41 is discussed below.
[115] Royal Charter, (notes 104 and 105), Schedule 3, [22].
[116] These exceptions are dealt with below.
[117] At the time of writing, on the 10th of May 2022, the annual Queen's Speech to the House of Commons revealed a number of legislative changes that will affect the UK media, including the Media Bill. If enacted in its current form the Bill will repeal section 40. See: Queen's Speech 2022: Background briefing notes, 10th May 2022, 41-42.
[118] PRP (n 104), 8-9, ch 5.
[119] See note 97.
[120] Coe (n 5), 268.
[121] Ibid.
[122] PRP (n 104), 19.

> arbitration scheme to settle disputes. This maintains the chilling effect on free speech (which section 40 would remove) as it means that even IMPRESS publishers may still have to defend costly libel actions through the courts rather than through IMPRESS's arbitration process.'[123]

Furthermore, the PRP argues that the fact the recognition system is (at least at the time of writing) in a state of limbo has, paradoxically, maintained a political presence within press regulation; a situation that undermines a self-regulatory system and Leveson LJ's recommendation that politicians should not be involved in press regulation, other than in legislating for a 'backstop' regulator.[124] In the view of the PRP '[f]ull implementation of the recognition system would safeguard against ongoing political interference.'[125]

Secondly, citizen journalists rarely join the various regulatory schemes that exist across Europe.[126] Indeed, in his *Inquiry* Leveson LJ acknowledged that technological changes in the past few decades have led to a fragmentation of the media (and its audience), as it has introduced new actors, such as citizen journalists, that do not tend to engage with voluntary regulation.[127] He states that the internet is an: 'ethical vacuum…[that] does not claim to operate by express ethical standards, so that bloggers and others may, if they choose, act with impunity'[128] and, specifically, '[b]logs and other such websites are entirely unregulated.'[129] Consequently, regulators, such as IPSO and IMPRESS, that can only deal with complaints against their members, are hamstrung when it comes to investigating complaints against non-members. [130]

In the UK, this issue has not been helped by IPSO's Code of Practice[131] and the Crime and Courts Act 2013. In respect of IPSO, which as explained above is not a PRP-approved regulator, citizen journalists are only covered by its Code if they submit material to the publishers that it regulates.[132] This requirement would seem to exclude most citizen journalists

[123] Ibid.
[124] Coe (n 5), 268; See Leveson, (n 2), 1758, [3.34]–[3.35].
[125] PRP (n 104), 19.
[126] Hulin (n 6).
[127] Leveson, (n 2), 165-166, [3.7]-[3.8].
[128] Ibid. 736, [3.2].
[129] Ibid. 171, [4.20].
[130] Coe (n 5), 269. For example, the Austrian and Dutch Councils and the French and Flemish Councils in Belgium will investigate complaints about any media content, regardless of the publisher. Norway's Council has recently enacted a rule change to enable it to deal with complaints against non-members.
[131] Although the same cannot be said for IMPRESS' Code which does cover citizen journalists.
[132] https://www.ipso.co.uk/faqs/editors-code/.

as the very nature of citizen journalism dictates an inherent tendency to eschew the mainstream media, including members of the institutional press that make up the bulk of IPSO's membership.[133]

As explained above, sections 34 and 40 of the 2013 Act apply to any 'relevant publisher'. According to section 41(1) a 'relevant publisher' is a person who, in the course of a business,[134] publishes news-related material that is written by different authors and is subject to editorial control. Section 41(2) tells us that this means that a person, who does not have to be the publisher, has editorial or equivalent responsibility for the content and presentation of the material, and the decision to publish it. Crucially, section 41 has the potential to exclude a large number of citizen journalists for two reasons. By definition, many citizen journalists are not publishing news-related material 'in the course of a business.' Moreover, citizen journalists tend to be both the author and publisher of their material, as opposed to publishing material 'written by different authors.'[135] Thus, the Act's definition of 'relevant publisher' is fundamentally flawed, and seems to go against Leveson LJ's view that greater press regulation is required to prevent 'real harm caused to real people', and that membership of a regulatory body 'should be open to all publishers…including making membership potentially available on different terms for different publishers.'[136] This situation therefore begs two (currently unanswered) questions: Firstly, why should a member of the institutional press, whether it publishes material in print, or online, be captured by sections 34 and 40 (if it were enacted), yet a citizen journalist, by virtue of not publishing in the course of a business, and being both the author and publisher of the material, not be? Secondly, surely, a citizen journalist who is gathering and publishing news should be eligible to join the same regulatory scheme(s), albeit perhaps on 'different terms', as a member of the institutional press?[137]

3.4 Why is mandatory regulation not a solution *for citizen journalists*?

As I said in the Introduction to this chapter, Wragg has convincingly argued for mandatory regulation of the institutional press.[138] He gives three reasons why this form of regulation would offer better protection for individuals. Firstly, although the 'market' provides adequate

[133] Coe (n 5), 269. See: https://www.ipso.co.uk/complain/who-ipso-regulates/.
[134] Whether or not carried on with a view to make a profit.
[135] Coe, (n 5), 269-270.
[136] Ibid; Leveson (n 2), 1761, [4.13].
[137] Ibid. (Coe).
[138] Wragg, (n 3), ch. 9

protection of rights against press malfeasance, via causes of action such as defamation, misuse of private information, and data protection law, it still fails most ordinary people. This is because 'accessing' this market is 'significantly curtailed' by the financial costs (and let's not forgot the emotional and mental toll) involved in pursuing these claims; especially against members of the institutional press who benefit from a well-stocked armoury of lawyers, and an ability, through their publications, to control narratives to their advantage. As Wragg says, 'in the UK…we can point to a broad range of legal measures, but none of that is any comfort to the press victim who simply cannot afford to pursue a legal action…media law is a luxury that very few can afford.'[139] Rather, he says that regulation offers a solution, by providing inexpensive and fast complaints handling (which he also argues should be supplemented by the regulator being given the power to awarded compensation[140]) and an arbitration service to settle disputes without the need of involving the courts.[141]

The second reason relates to the first and is something I have already alluded to: in addition to the financial burden of bringing a claim, all litigation, relating to any cause of action, against any defendant, can be emotionally and mentally draining. Arguably however this 'cost' is exacerbated when suing members of the institutional press because of their ability to control the message, both during and after litigation, through their outlets, and because the would-be claimant risks 'painting a target on their back.'[142] In Wragg's opinion regulation could alleviate this burden, through not only the faster and more efficient resolution of complaints, but primarily because it creates 'a barrier between the victim and the oppressor'; chiefly by the regulator having the power to initiate claims against publishers of its own volition, which 'presents an opportunity for victims to be shielded from the press's bullying behaviour.'[143] The final reason he advances relates to the second. Regulation makes press wrongdoing transparent in a way that litigation cannot. It does this because the market relies on individuals 'championing' their own individual rights to hold malfeasance to account. These individuals, therefore, are not able to come together as a 'homogenous mass' to tackle press wrongdoing. Because of the inequality of arms between them and the press they are often isolated and easily picked-off by a would-be defendant in a far superior bargaining position. This means that the

[139] Ibid. 279-280.
[140] Ibid. ch.9.
[141] Ibid. 280.
[142] Ibid. This issue was also acknowledged by Leveson LJ in his *Inquiry*. See Leveson (n 2), 481, [2.39]-[2.40], 516-517, [4.35], 704-709.
[143] Ibid. (Wragg), 281.

success of an individual's claim often comes down to their 'resolve and capacity to ensure the stultifying effect of the defendant's litigation strategy' rather than the merits of their claim. Consequently, these individual claims are often settled before trial, so the public is unaware of the wrongdoing, and / or they are portrayed by the press as isolated incidents, rather than systemic abuses (if that is the case). Thus, in Wragg's view, regulation provides the only means of holding this power wielded by the press to account, because, unlike individuals, it is not susceptible to the same pressures, and it cannot be 'bought off'.[144]

Despite these valid arguments, as I have previously explained in my book, *Media Freedom in the Age of Citizen Journalism*, there are practical reasons why mandatory regulation is not a viable alternative to voluntary self-regulation *for citizen journalists*, which I will summarise here.[145]

Firstly, Wragg suggests that mandatory regulation should be created by legislation that would 'determine the field of members.'[146] With the institutional press, identifying those members would be easily achievable by virtue of their corporate status. To the contrary, the same cannot be said for citizen journalists because: (i) Citizen journalists do not tend to operate 'in the course of a business', therefore they are not identifiable as corporate entities. (ii) The sheer number of citizen journalists operating at any one time, and the transient nature of citizen journalism, in that they may dip in and out of journalism, and may publish in an irregular or ad hoc manner, would arguably make it impossible for a regulator to implement a system of regulation that takes regulation *to* the subject (in other words, imposes mandatory regulation on the citizen journalist), and is able to monitor their journalistic activity.

Secondly, if citizen journalists perceive regulation as being restrictive by virtue of it being forced upon them they are less likely to engage with it, regardless of whether it is mandatory, and irrespective of whether it is, in fact, permissive and beneficial. Of course, the same argument could be made in respect of institutional journalists. However, for the reasons discussed in the previous paragraph, unlike institutional journalists that are readily identifiable, enforcing mandatory regulation on citizen journalists would be at best extremely difficult, and at worst impossible. The combination of these two factors may lead to many citizen journalists

[144] Ibid. 282.
[145] For more detailed analysis of this, see: Coe (n 5), 270-273.
[146] Wragg, (n 3), 256.

falling through the cracks of regulation, as it would encourage them to participate in 'underground' and unregulated journalism. This would be detrimental to both the public, in that it would further limit the protection they have against the malfeasance of citizen journalists, and citizen journalists themselves, as they would be denied the opportunity to engage with regulation that, contrary to their perception, may be empowering. Taking this argument a step further, this is a situation that could negatively impact public discourse. If citizen journalists feel forced to participate in journalism that avoids regulation then, because of the 'risks' associated with practising journalism in this way (I am thinking here, predominantly, of the risk of liability for participating in journalism whilst not being a member of a mandatory scheme), this, in itself, is likely to reduce the number of citizen journalists, and therefore the voices that are able to contribute to the public sphere. It could also impact upon the quality of their journalism, by virtue of them not being able to take advantage of the beneficial services provided by a regulator, or simply because they cannot conduct their journalistic activities in the same way, and using similar resources, as their regulated (and 'legal') counterparts. A combination of these factors is likely to limit the size of the audience that journalism undertaken in this way can reach. Of course, others may be discouraged entirely from participating in public discourse for fear of being subjected to forced regulation.[147]

4. (DESPERATELY) SEEKING A REGULATORY SOLUTION

In the previous sections I hope I have made three things clear: Firstly, putting our trust in the press to fulfill its side of the press freedom bargain is idealistic. Ongoing press malfeasance serves as a clear reminder of the need for regulation. Secondly, despite this need for regulation, the current version of the UK's voluntary self-regulatory system does not work (and arguably never has worked) and is certainly not appropriate for citizen journalists. As Wragg has said:

> '…the twenty-first century press shows no remorse for not only decades of public distrust but also, moreover, the shame, in the strongest sense, arising from the litany of unethical – and illegal – practices that Leveson uncovered in his inquiry. Quite

[147] Coe (n 5), 271-272.

> obviously, reliance solely upon self-directed, ethical decision-making is a poor means of improving press standards.'[148]

Thirdly, therefore, we need to find a suitable regulatory solution. Mandatory regulation may work for the institutional press, but it does not work for citizen journalists. Because this new type of journalist now plays such an important role in the gathering and publication of news in the UK (and, I would argue, worldwide), any regulatory 'solution' must, as Leveson LJ acknowledged (and I have already referred to), extend to 'all publishers',[149] including citizen journalists.

I have previously advanced a blueprint for a 'reimagined', and robust, approved self-regulatory framework that addresses the question of how citizen journalists could be regulated alongside their institutional counterparts.[150] This framework has been finessed by my involvement with IMPRESS, and my work with the regulator in re-drafting its Standards Code and Guidance.[151] Setting out this scheme in totality is beyond the scope of this chapter. Rather, in the following section I have provided a sketch of its core principles.[152]

4.1 Voluntary approved self-regulation: version 3.0

4.1.1 Influence from other jurisdictions

This modified scheme of regulation is informed by reviews, recommendations, and regulatory schemes from other countries. It draws on Lara Fielden's extensive *Comparative Study of International Press Councils*,[153] and it pays close attention to three wide-ranging reviews of the press from Australia (the Australian government's *Finkelstein Report* and *Convergence Review*)[154] and New Zealand (the New Zealand Law Commission's *The News Media Meets*

[148] Ibid. 65.
[149] Leveson (n 2), 1587, [2.9], 1761, [4.13].
[150] Coe (n 5), ch 9.
[151] At the time of writing, the public consultation on the re-drafted Code and Guidance had just closed: https://www.impress.press/page/code-consultation.html.
[152] For a detailed explanation of the scheme, see: Coe (n 5), ch 9.
[153] Fielden (n 10).
[154] The *Finkelstein Report* and the *Convergence Review* are reviews of Australia's media and its regulatory framework. Both were published by the Australian Government in 2012: Australian Government, *The Report of the Independent Inquiry into the Media and Media Regulation*, 28th February 2012 (*Finkelstein Report*); *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012).

'New Media' Rights Responsibilities and Regulation in the Digital Age report),[155] as they have, to varying degrees, considered the impact of online news publishers, including citizen journalists, on their respective regulatory frameworks, whilst taking into account Leveson LJ's recommendations in his *Inquiry*.

4.1.2 Eligibility

In advancing this reimagined regulatory scheme I rely on a new conceptual foundation for the media that I call the media-as-a-constitutional-component concept.[156] This concept adopts a functional, as opposed to institutional, approach to defining media, as it focusses on the functions that are performed by media actors, as opposed to their inherent characteristics. In essence, it determines that adherence to certain norms of public discourse (in other words the *type* of speech conveyed by the actor) and standards of professional behaviour (for example, acting ethically and in good faith, and publishing content that is based on appropriate research to verify the provenance of it and its sources), rather than the education, training or employment of the actor, can help to identify who is a 'journalist', and therefore who should benefit from the enhanced right to press freedom and be subject to its concomitant duties and responsibilities. Thus, pursuant to this concept press freedom can apply to any actor that conforms to the definition, which is: (1) a natural and legal person (2) engaged in the process of gathering information of public concern, interest and significance (3) with the intention, and for the purpose of, disseminating this information to a section of the public (4) whilst complying with objective standards governing the research, newsgathering and editorial process.[157]

The *Finkelstein Report* and the NZLC recommended that their proposed models of regulation should only apply when publication is regular and, in the case of the *Finkelstein Report*, meets threshold figures. To my mind, this is over-exclusive. Actors can fulfil the definition of media that I have advanced, and make a valuable contribution to the public sphere, on one-off occasions or on an ad-hoc basis.[158] Significantly, this can be the case within a citizen

[155] New Zealand Law Commission, *The News Media Meets 'New Media' Rights Responsibilities and Regulation in the Digital Age,* March 2013, Report 128 (NZLC).
[156] Coe (n 5); P. Coe, 'Redefining "Media" Using a "Media-as-a -constitutional-component" Concept: An Evaluation of the Need for the European Court of Human Rights to Alter Its Understanding of "Media" Within a New Media Landscape' (2017) 37(1) *Legal Studies* 25.
[157] Ibid. (Coe, n 5), 281.
[158] *Editions Plon v France* App. no. 58148/00 (ECtHR 18 May 2004) [43]; *Lindon, Otchakovsky-Laurens and July v France* App. no. 21279/02 and 36448/02 (ECtHR 22 October 2007) [47].

journalism context, in which valuable contributions to public discourse can be made intermittently, and via different platforms. Thus, an individual can be acting as media, and therefore subject to the right to press freedom and its duties and responsibilities, even if they are publishing on an irregular basis.

A further recommendation made by the NZLC is that any actor wishing to join its regulatory scheme must be willing to comply with its code of practice, complaints process and any subsequent rulings.[159] The regulatory scheme that I propose would adopt a similar expectation in that it too would require its members to adhere, and be accountable, to a standards code. This raises three questions: Firstly, because citizen journalists are not necessarily socialised into the norms of professional journalism, should they be subject to the same law and regulation as their institutional counterparts? Secondly, should citizen journalists be subject to the same or similar duties and responsibilities as the institutional press? The functional rather than institutional definition of the press I have set out above determines that the answer to these questions is yes, albeit when law or regulation is applied the nature of citizen journalism should be taken into account.[160] Any actor fulfilling the definition of media under the media-as-a-constitutional-component concept's definition would be expected to adhere to the same standards, or duties and responsibilities, including the same standards code, regardless of whether they are a citizen journalist or a member of the institutional press. This leads to the final question: Because they should be subject to the same law and regulation as institutional journalists, should the nature of citizen journalism, and the needs of citizen journalists, at least be considered for the purposes of implementing regulation? In respect of the practical operation of a standards code my answer to this question is yes. To encourage participation in the regulatory scheme the standards need to be applicable and accessible to citizen journalists. Significantly, this does not mean that they should be subject to *different* standards to institutional journalists, or that they need to be. Rather, and quite simply, the standards should be accompanied with clear guidance on their application to citizen journalists who are predominantly operating in an online environment. Taking the modified IMPRESS Standards Code (which as I have said, is currently subject to public consultation[161]) as an

[159] NZLC, (n 155), 182, [7.121].
[160] To a large extent, this accords with the Court of Appeal's judgment in *Economou v de Freitas* [2018] EWCA Civ 2591; [2019] EMLR 7 in respect of the application of the Defamation Act 2013 section 4 defence of 'publication on a matter of public interest'. The judgment, and its implications for citizen journalists, is discussed in Coe (n 5), ch 8 section 3.2.2.
[161] See n 151.

example, it provides significant contextual guidance on each Code clause, and the nuances associated with each clause, and on aspects of journalistic practice that citizen journalists may not be immediately familiar with.[162]

4.1.3. Incentivising membership

In respect of statutory incentives, my reimagined scheme contains incentives similar to sections 34 and 40 of the Crime and Courts Act 2013.[163] However, the issues associated with these provisions would be remedied, in they would: (i) (in the case of section 40) be enacted and operational; and (ii) unlike the 2013 Act, apply to citizen journalists, as they would capture actors that are operating as the author and publisher of material and those that are not publishing in the course of a business, in the same way as those that are.

As I said have alluded to throughout this chapter, the concern of regulation is protecting the public from 'real harm' being caused to 'real people.' Yet, incidentally, the quality of discourse within the public sphere can be improved, and journalists themselves can, to an extent, be shielded from liability, and even empowered, by virtue of the non-statutory incentives, or 'services' offered by a regulatory scheme.[164] Thus, my scheme proposes a number of such incentives, or services, as follows: [165]

1. The *Cairncross Review* has recommended the introduction of a government innovation fund to develop new approaches and tools to improve the supply of public-interest news.[166] It also recommends the introduction of new forms of tax relief, including extending zero-rated VAT to digital newspapers and magazine, as well as digital-only publications.[167] This scheme would take this one step further, in that members could access public funding for publications adhering to its standards code.[168]

2. A mediation service would be accessible to both complainants and members of the scheme to encourage the cost-effective and efficient settlement of cases which may otherwise proceed to court.

[162] For further analysis of these issues, see Coe (n 5), ch 9 section 6.2.2.
[163] See sections 3.2 and 3.3 above.
[164] Coe (n 5), 291.
[165] Ibid. these are explained in detail at pages 291-293 but are summarised here.
[166] *Cairncross* (n 1), 90-102.
[167] Ibid.
[168] A similar recommendation was made by the NZLC, (n 155), 181, [7.115]-[7.117].

3. Members would be able to access training[169], education resources, law and policy updates, and advice to help them to develop their journalistic practice, apply for funding, understand and to comply with the scheme's standards code and, for instance, to provide them with a requisite level of knowledge to report appropriately on court proceedings (and therefore to avoid allegations of contempt of court). This incentive would also help them to meet, for instance, the statutory requirements of Defamation Act 2013 defences, and to comply with data protection law. This incentive would be particularly attractive to citizen journalists who are unlikely to have had any 'formal' journalistic or legal training or have access to a legal team. Although not a complete shield, access to training, education and advice is likely to reduce members' risk of liability. At the same time, a member's engagement with these incentives indicates to the public that they are making every effort to operate professionally and within law, and in doing so that they are trying to insulate themselves from unnecessary litigation risks, which leads on to the following incentive.

4. Membership of this scheme would provide reputational, or brand, advantages. It would demonstrate to the outside world that members are journalists that place a high value on, and have bound themselves to act, responsibility. It says that they will abide by the scheme's standards of professional behaviour and norms of discourse and are, ultimately, prepared to be accountable for their actions. Something akin to a 'kitemark' could be awarded to members to enable them to demonstrate membership of, and compliance with, the scheme's standards code. This will also enable anonymous actors to advertise their membership without having to be named.

5. Many citizen journalists choose to operate anonymously or pseudonymously.[170] To encourage membership of the scheme from these actors, and to ensure they can continue to publish in this way, it would 'protect' their anonymity and pseudonymity so long as they adhere to its standards. This 'protection' would manifest in different ways. For instance, these journalists would not be named (or their pseudonym would be used) on

[169] T. Gibbons, 'Conceptions of the Press and the Functions of Regulation' (2016) 22(5) *Convergence: The International Journal of Research into New Media Technologies* 484, 487.
[170] P. Coe, 'Anonymity and pseudonymity: Free speech's problem children' *Media & Arts Law Review*, 22 (2), 173-200.

the regulator's website and in correspondence, briefings or reports etc, and it would extend to any proceedings relating to alleged breaches of its code. Only in extreme cases, such as in the event of criminal conduct, would the actors be named.[171] This means that not only can anonymous and pseudonymous citizen journalists join the scheme and take advantage of its incentives, safe in the knowledge that their identities are protected, but the audience will know that these actors are members of a scheme committed to responsible journalism by virtue of the award of a kitemark.

4.1.4 The regulator: powers and sanctions

The regulator with oversight of the scheme would have the power to impose sanctions on members for breaches of its code. These include the issuing of fines and/or requirements to: (i) publish an adverse decision in the publication concerned, with the regulator having the power to determine its prominence and positioning (including the placement on a website and the period for which it will be displayed); (ii) take down specified material from a website; (iii) correct incorrect material; (iv) grant a right of reply to a person; (v) publish an apology, with the regulator having the power to direct its prominence and positioning. In exceptional cases the regulator would have the power to suspend or terminate the membership.[172]

5. CONCLUSION

In this chapter I have explained the current status of the approved voluntary self-regulatory system in the UK, and why I think it needs to be overhauled. My starting point is that I do not think that approved voluntary self-regulation is a lost cause. Far from it. If we accept that most (although certainly not all) members of the press cannot be trusted to *do the right thing* and fulfil their side of the press freedom bargain, and if our government and our press regulators are prepared to reimagination a voluntary self-regulatory system with more 'teeth', and that is adaptable to our changed media ecosystem, I firmly believe that we can repair what is so evidently broken. The scheme that I have summarised in the preceding section could regulate members of the institutional press and citizen journalists without compromising the right to

[171] D.K. Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014), 239.
[172] For further analysis, and for consideration of non-members, see Coe (n 5), 293-295.

freedom of expression and the enhanced right to press freedom.[173] However, despite this optimism that a workable regulatory solution is possible, I am forced to end this chapter on a pessimistic note. The UK government's continued reluctance to enact section 40, and its recently published, and it must be said, unsurprising intention to repeal it, provides further evidence that unfortunately ours is a government that remains in the thrall of our institutional press. And for that reason, despite the possibilities and the benefits that regulation could bring to bear on the institutional press, citizen and independent journalists and, perhaps most importantly, us as ordinary members of the public, a scheme of regulation that would meaningfully discourage, and could intervene in, press malfeasance, and ultimately help to protect the public and public discourse, is a long way away.

[173] By sketching the contours of this scheme I have undoubtedly created new questions that are beyond the scope of this chapter to answer, but are nevertheless vitally important for any potential regulator to consider. For instance, it leaves open questions relating to how these non-statutory incentives, or services, could be offered: Does the regulator have the expertise, resources, and capacity to offer these services, or would they need to be contracted to a third party? Either way, would this expose the regulator to liability and, if so, how would this risk be managed? The composition of the standards code, and its contextualisation for citizen journalists also need to be determined. Indeed, these questions, amongst others, have been considered by IMPRESS in its recent Code and Guidance re-drafting exercise. See (n 151).