Media Law

Jacob Rowbottom

•HART•
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2018

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Rowbottom, Jacob, author.

Title: Media law / Jacob Rowbottom.

Description: Oxford, UK : Hart Publishing, 2018.

Identifiers: LCCN 2018017518 (print) | LCCN 2018017749 (ebook) | ISBN 9781782256663 (Epub) | ISBN 9781782256656 (pbk. : alk. paper)

Subjects: LCSH: Mass media—Law and legislation—Great Britain. | Press law—Great Britain. | Freedom of expression—Great Britain.

Classification: LCC KD2870 (ebook) | LCC KD2870 .R69 2018 (print) | DDC 343.4109/9—dc23

LC record available at https://lccn.loc.gov/2018017518

ISBN: PB: 978-1-78225-665-6
ePDF: 978-1-78225-664-9
ePub: 978-1-78225-666-3

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

1

Media Freedom

I. Introduction

The concept of media freedom lies at the heart of media law. In each area where the law regulates media activity, a key question is whether the measure is compatible with media freedom. That will be a central theme for the later chapters that look at the substantive areas of law. The question for this chapter is what media freedom means and demands. This includes considering why the media warrants protection that is not afforded to every other type of activity or institution. Another question is what it means to say that a measure violates media freedom? It might be thought that any legal intervention limits media freedom, but in practice many areas of law regulate the media in ways that raise no concern (for example, a newspaper cannot violate sex discrimination laws in its employment practices). Some legal interventions may even enhance media freedom. The challenge lies in identifying those measures that are permissible and those that strike at the heart of media freedom. Addressing these issues requires some understanding of what the media should ideally do and why its functions are important.

To add to the challenges, the concept of media freedom is used as a powerful rhetorical tool. The imposition of a privacy injunction is often greeted with a declaration in newspapers that it marks the end of press freedom.[1] In the aftermath of the Leveson Inquiry into the culture, practice and ethics of the press, steps taken to introduce a system for the official recognition of self-regulatory bodies were said by some newspapers to be the 'death warrant'[2] and 'the death knell for 300 years of Press freedom'.[3] A quick review of the history books shows that the media has not enjoyed unbroken freedom for 300 years and that it has faced far more serious threats in the past. It is important to step back from the rhetoric and identify when such appeals to media freedom are mere strategic slogans and when the concerns should be taken seriously.

[1] T Wells, 'The day free speech drowned in a paddling pool of olive oil' *The Sun* (20 May 2016).
[2] Editorial, 'A dark day for freedom' *Daily Mirror* (31 October 2013).
[3] E Ashton, 'Ministers win fight on Press Charter' *The Sun* (31 October 2013.)

In this chapter, it will be argued that the reason why media freedom is valued rests on a particular vision about what the media should do. In particular, the media should ideally hold power to account, inform people and provide a platform for speakers. It will also be argued that the reasons for valuing media freedom explain why limits on certain activities may be permissible. Laws requiring broadcasters to cover political matters with impartiality are sometimes justified as serving the goals that underpin media freedom by increasing the diversity of viewpoints heard. That example divides opinion, but highlights a tension in which the importance of the media can point to the need for both freedom and restraint.[4] The point sounds like a contradiction in terms, but can be easily explained. Media freedom is important *because* the media is powerful. A powerful set of media institutions has the capacity to expose abuses of power and inform the audience on a scale not found with most other speakers. The other side of the coin is that the media can hurt reputations, mislead and suppress information.[5] Media power calls for some mechanisms to make the media accountable and provide redress for abuses. Later chapters will show that much of media law is a delicate balancing act between these concerns.

This chapter will first place the concept of media freedom in its historical context and look at the way that right is protected in law. After that introduction, the discussion will look at why media freedom is justified and argue that it has a separate foundation to individual freedom of expression. Two key factors will be discussed: the institutional nature of the media, and its communicative power. It will then be argued that media freedom is valued instrumentally for its service to the public, and the key functions of the media in providing that service will be outlined. After that, the chapter will argue not only that media freedom is valued for different reasons than freedom of expression, but also that the content of the right is distinct. The final parts of the chapter will look at two key problems in applying the concept of media freedom: how 'media' institutions are distinguished from other speakers, and what constitutes an interference with media freedom. Many of the issues discussed will recur in later chapters, and the current chapter will provide a framework to evaluate the substance of media law.

II. Historical Background

To get a sense of why media freedom is such a powerful rhetorical concept and given high status in the political culture, it is important to see how the concept developed historically. The first arguments for media freedom emerged as a reaction against

[4] See also J Oster, *Media Freedom as a Fundamental Right* (Cambridge, Cambridge University Press, 2015) 34–35.

[5] ibid, 33.

state-imposed controls on the use of the printing press, which explains why the concept is often referred to as 'press freedom'. During the Tudor period, a system of press licensing was established and such controls were sustained until the end of the seventeenth century.[6] The system of licensing restricted the use of the printing press to those with official authorisation and thereby imposed a 'prior restraint' (as the control was applied before publication). The earlier arguments for press freedom were a criticism of licensing, most famously in John Milton's essay *Areopagitica*, and often defined press freedom in terms of an absence of prior restraints. Under that early view, any penalties imposed *after* publication did not engage press freedom.

When the system of licensing finally lapsed at the end of the seventeenth century, the press continued to be subject to a number of other controls, such as the law of seditious libel. The state also held powers to investigate such crimes, including powers to search premises and seize belongings, which were used to harass and intimidate publishers that were critical of government. Consequently, the arguments for press freedom were developed to target the law of sedition and the use of the investigatory tools. During the eighteenth century, it became recognised that press freedom requires more than just an absence of state licencing and campaigners took significant risks to assert this demand for freedom. The famous case of *Entick v Carrington* is now remembered for upholding the rule of law, but was an important milestone in the campaign for 'liberty of the press' that curbed the use of broad search warrants against writers and publishers.[7]

As well as reacting to the types of control being imposed by government, the arguments for media freedom also owe much to the political and constitutional culture of the time. In the late eighteenth century, writers were starting to identify a constitutional role for the press in checking the powers of government, which fit with the concerns about abuse of power and corruption that were prevalent during that period.[8] As the UK began its transition into a more democratic system of government, an ideal of the press as a 'fourth estate' developed, in which newspapers were said to protect and represent the interests of the people.[9] As the electorate expanded, media freedom was defended as a means to educate the public on political issues.[10] As will be seen in later chapters, these ideas may have been formulated in a different political culture, but continue to have considerable force in contemporary debate.

The classic arguments for press freedom often presented a romanticised view of the media, as crusaders battling a corrupt and overbearing government. The older arguments were made as a response to severe penalties against publishers, so it is understandable that those accounts appear libertarian in orientation. The romanticised view

[6] For background see F Siebert, *Freedom of the Press in England, 1476–1776: The Rise and Decline of Government Control* (Urbana, University of Illinois Press, 1952).

[7] See J Rowbottom, '*Entick and Carrington*, the Propaganda Wars and Liberty of the Press' in A Tomkins and P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Oxford, Hart, 2015).

[8] JL de Lolme, *The Constitution of England* (London, Spilsbury and Kearsley, 1775); J Bentham, *On the Liberty of the Press and Public Discussion* (London, W Hone, 1821).

[9] WT Stead, 'Government by Journalism' (1886) 49 *The Contemporary Review* 653.

[10] See M Hampton, *Visions of the Press in Britain, 1850–1950* (Urbana, University of Illinois Press, 2004).

of the press is less fashionable in an age where journalists suffer a lack of trust and are blamed for a range of problems. The classic narrative, however, helps to understand the ideal of media freedom and its role in the self-image of media professionals. Press freedom as a concept has evolved and changed with the political system, yet the basic ideal has proved to be enduring.

The narrative of the press 'winning' its freedom in battles against oppressive government controls should not be taken at face value.[11] The arguments for press freedom were not dreamed up by detached idealists, but were often used as rhetoric bound up in the politics of the day. Different political factions relied on their own writers to propagate the merits or evils of the press when it suited their strategic interests. Moreover, in some cases the lifting of controls may not have been a simple 'victory' for the press, but may have had more to do with the control being inconvenient for the government or hard to enforce.[12] Consequently, when one restriction was lifted, the government often found other controls to manage the press. That remains true today, with contemporary governments often declining to use legal powers to censor and impose liability, and instead resorting to techniques of news management and other forms of information control. For this reason, the trajectory has not been one of ever-increasing media freedom. Instead, the nature of the constraints change and evolve.

The classic narrative that frames press freedom solely in terms of protection from state oppression has more limited application in the current media environment. Media publishers now include very large corporations that wield considerable communicative power and have the potential to influence government, as well as hold it to account. The concept of media freedom has evolved to reflect this change. During the twentieth century, the concerns about media power led to a shift in thinking, with new accounts of media freedom emphasising the need for 'social responsibility'.[13] The evolution was most clearly recognised with the emergence of the broadcast media, which was subject to an intricate regulatory system. That social responsibility or 'public service' model was also a product of its time, as in the mid-twentieth century many large industries became subject to detailed regulations to promote certain social goals. That approach sits at odds with the hostility to the state under the classic version of press freedom developed in the eighteenth and nineteenth centuries. Many of the debates about media law reflect the division between these different visions of media freedom. The concept of media freedom is complex, with various actors advancing different arguments depending on the political and constitutional culture. Now, the question is whether the concept of media freedom needs to evolve further to accommodate the changes in the digital era.

To understand the meaning of media freedom in the current political culture and communicative environment, this chapter will examine the main justifications for the right, how it is protected in law and what constitutes an interference. The discussion will present a particular view of media freedom being justified in serving the needs

[11] For criticism see J Curran and J Seaton, *Power Without Responsibility*, 7th edn (London, Routledge, 2009) Part 1.

[12] Siebert (n 6) 4, refers to press licensing lapsing on account of it being too 'cumbersome' to operate.

[13] F Siebert, T Peterson and W Schramm, *Four Theories of the Press* (Urbana, University of Illinois Press, 1956).

of audience and stressing certain democratic functions. While this account of media freedom was developed as a critique of the earlier 'libertarian' view that demanded an absence of state interference,[14] it now has considerable support in the UK academic literature (though not a consensus)[15] and can explain the current interpretation of freedom of expression in the domestic courts and the European Court of Human Rights. Before looking at the normative justifications for this account of media freedom, the next section will briefly outline the changing ways the right is protected in domestic law.

III. The Protection of Media Freedom in UK Law

Britain is sometimes said to have a proud tradition of respecting free speech.[16] Whether such pride is warranted is a matter for debate, given that the country has also had its traditions of censorship and secrecy. However, the way in which free speech and media freedom are protected in law has changed significantly in recent decades. Traditionally, media freedom and freedom of speech in the UK were residual liberties, in which persons were free to act where there was no legal restriction. Under this approach, the Victorian scholar AV Dicey explained that freedom of the press was protected through the operation of the rule of law, in which publishers were to be 'subject only to the ordinary law of the land'.[17] If that requirement were followed, publishers would not be subject to a system of licensing or prior restraints that restrict individual liberty without first showing a violation of the law. To Dicey, liberty of the press was not a specific right in the modern sense, but rather a consequence of equality before the law and the absence of penalties imposed by government discretion. That approach offered little protection where a post-publication penalty was imposed by statute. To guard against legislative interference, free speech was dependent upon political support from within Parliament rather than the courts.

The courts gradually came to recognise both freedom of speech and media freedom as rights protected in the common law. This common law right could shape the

[14] T Gibbons, 'Free Speech, Communication and the State' in M Amos, J Harrison and L Woods (eds), *Freedom of Expression and the Media* (Leiden, Martinus Nijhoff, 2012) 22.

[15] For various works in this tradition see E Barendt, *Freedom of Speech* (Oxford, Oxford University Press, 2005); H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford, Oxford University Press, 2006); Gibbons (n 14); O O'Neill, 'The Rights of Journalism and the Needs of Audiences' in J Lewis and P Crick (eds), *Media Law and Ethics in the 21st Century* (Palgrave, 2014); Oster (n 4); J Rowbottom, *Democracy Distorted* (Cambridge, Cambridge University Press, 2010) Ch 7. For a criticism of this general approach, see P Wragg, 'The legitimacy of press regulation' (2015) *Public Law* 290.

[16] *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283; Watkins J in *Verrall v Great Yarmouth Borough Council* [1981] QB 202 at 205; AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (London, Macmillan, 1915) 152.

[17] Dicey, ibid, 152–55.

development of legal doctrines and was relied on to prevent public bodies bringing actions in defamation law.[18] Similarly, the common law right allowed the courts to interpret statutes in ways that avoided interferences with media freedom unless authorised by express words or necessary implication.[19] That did not prevent Parliament from restricting expression and media freedom, but at least required the legislature to 'squarely confront what it is doing and accept the political cost'.[20]

The Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) and thereby brings Article 10, which provides for the protection of the 'right to freedom of expression', into the domestic law. Consequently, media freedom and freedom of expression are no longer residual liberties. The 1998 Act requires courts to go as far as possible to interpret statutes compatibly with the right.[21] If a statute cannot be interpreted compatibly, then the court has the power to issue a declaration of incompatibility, but not to invalidate the statute.[22] Public bodies are also under an obligation to act compatibly with Convention rights.[23] For example, any actions undertaken by the public body that regulates broadcasting, Ofcom, that violate Article 10 will be unlawful. While there are limits to the protection offered, the system under the 1998 Act has allowed the courts to develop their own jurisprudence on media freedom, which shall be elaborated in later chapters.

The protection of media freedom and freedom of speech is not absolute under Article 10 and restrictions are permissible if prescribed by law, serve one of a number of legitimate aims listed in Article 10(2) and are necessary in a democratic society. In applying that provision, there is a presumption in favour of the right and any competing interests should be narrowly construed.[24] In discussions of the legal protection for freedom of speech and media freedom, the qualified protection under Article 10 is often compared with the US First Amendment, which simply provides that 'Congress shall make no law […] abridging the freedom of speech, or of the press'. Unlike Article 10, the lack of an explicit balancing mechanism in the US Constitution thereby gives very strong protection to expression rights. The First Amendment thereby places more pressure on the US courts to define what is 'speech', the 'press' or an 'abridgement' to provide a control mechanism.

Another significant difference is that the US First Amendment explicitly refers to 'the press' in addition to speech. Article 10 refers only to 'the right to freedom of expression'.[25] The protection of the media is nonetheless recognised as an aspect of the Article 10 right and any restriction must be subject to careful scrutiny.[26] What this means in practice will depend on how the court interprets media freedom and determines what weight to assign to the right. As will be seen in later chapters, this generally

[18] *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.
[19] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.
[20] ibid, 131.
[21] Human Rights Act 1998, s 3.
[22] ibid, s 4.
[23] ibid, s 6.
[24] *Sunday Times v UK* (1979–80) 2 EHRR 245 at [65].
[25] The only explicit reference to the media in the text provides that Article 10 'shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'.
[26] *Bergens Tidende v Norway*, App no 26132/95 (2001) 31 EHRR 16 at [56].

depends on the context, with the court taking into account a range of factors. Given the overlap of media rights and individual speech rights in the text of Article 10, it is common to see the terms 'freedom of expression' or 'freedom of speech' being used interchangeably with media freedom. In many cases little will turn on the distinction. However, that does not mean that the two are the same and it will be argued in the following section that media freedom is valued for different reasons than the speech of an individual and that the content of the right is sometimes distinct from that of individual expression.

IV. Why Media Freedom is Different from Freedom of Expression

Before looking at the content of the right to media freedom, it is first important to look at the reasons for protecting the right. It will be argued here that media freedom has a separate foundation to individual freedom of expression. Freedom of speech is partly justified by focusing on the position of the speaker, in terms of individual self-expression and the autonomy to choose what to say.[27] By contrast, media freedom is justified largely in terms of its service to the public, to the audience and to other speakers. As Lord Justice Laws said, the 'journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience.'[28] Two key reasons explain why media freedom is valued for different reasons than individual freedom of expression: that the media is usually an institution and that it holds significant power.

A. An Institutional Speaker

The mass media is an institution and not a human being.[29] In many cases, a media entity is a large organisation composed of various departments and people performing different functions, and subject to various internal hierarchies. The final output of a media entity will be the product of an interaction of various different components, such as multiple reporters, photographers, headline writers and editors.[30] Given this institutional complexity, the arguments for freedom of expression that rest on certain human interests are less forceful in the case of the media. For example, free speech is

[27] See Barendt (n 15) 23–30, contrasting the interests of the speaker with those of the audience and public.

[28] *R (on the application of Miranda) v Secretary of State for the Home Department* [2014] EWHC 255 (Admin), [2014] 3 All ER 447 at [46].

[29] J Lichtenberg, 'Foundations and limits of freedom of the press' in J Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge, Cambridge University Press, 1990) 106.

[30] Barendt (n 15) 417.

often justified as an aspect of individual autonomy, in which people are free to speak their minds and engage with others. Another speaker-based justification is that freedom of expression helps to facilitate self-fulfilment, by allowing for self-expression and the development of one's personality. These arguments, however, do not justify media freedom because, as the Leveson Report noted, 'press organisations are not human beings with a personal need to be able to self-express.'[31] The state is not under an obligation to respect a media organisation's status as a human being by allowing it to speak up for itself.

Similarly, individual freedom of expression is often justified as a form of democratic participation.[32] Allowing a person to freely express an opinion reflects the person's inclusion in the democratic process and is a basic political right similar to voting or writing to an MP. Under this view, freedom of speech is valued as a way of allowing people to influence democratic decisions and know that they have been heard. However, a media institution is not a citizen in a democracy and does not have the same interest in participation. Again, the argument runs that media freedom is not justified by the speaker-based democratic justifications. This line of argument is focused on the traditional mass media, namely newspapers and broadcasters. A citizen journalist self-publishing on the internet is a type of media that operates outside of the traditional institutions. Such a lone reporter will sometimes rely on both individual expression rights and media freedom rights. That such overlap can occur does not undermine the conceptual distinction between the two rights. The central point is that the professional institutions that constitute 'the media' (as typically understood) do not have the same interest as an individual exercising the right to freedom of expression.

A response to these arguments is that while a media institution is not a human being itself, it is composed of individuals that each have their own speech rights. However, the difficulty with this response is that the people working within the media speak on behalf of the institution, rather than in their own right. An analogy can be drawn with a teacher, who does not purport to exercise his or her own self-expression when speaking in the classroom.[33] Instead, the teacher executes the task required by their employment contract. Similarly, the person working in the media is constrained by the rules and conditions of his or her employment. An editor can instruct journalists about the types of story to be prioritised and slants to be taken. Most institutions are established to pursue a certain set of goals that constrain their speech-related choices. The argument runs that when a media institution speaks, it does not simply express the personal views of those people working for it. Of course, the views of the reporter or columnist will often correspond with the editorial line in the paper and no instruction will be required. That, however, does not turn the expression in the institutional setting into the individual's freedom of speech, just as a teacher's agreement with a syllabus does not change the status of that expression. The journalist or columnist is present because he or she fits with the objectives of the media company.

[31] Leveson LJ, *An Inquiry into the Culture, Practice and Ethics of the Press: Report* (HC 780, 2012) p 62.

[32] See J Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine' (2011) 97 *Virginia Law Review* 491.

[33] On the distinct rights of those working in education, see R Post, *Democracy, Expertise and Academic Freedom* (New Haven, Yale University Press, 2012).

Under this view, the institutional speech is not an exercise of 'intellectual free will', but is made to serve the goals of that particular institution.[34]

Even if the media institution does not reflect the personal speech rights of the journalist, the argument that such institutions are separate may be challenged on the basis that media speech reflects the personal speech right of the person setting the terms and goals of the institution, to whom the journalist is responsible. If a dominant proprietor or editor determines a newspaper's content, then it could be argued that it is the exercise of that person's expression rights.[35] Under this view, there are human decisions behind the media institution, and the speech of the institution represents the views of those people.

One response to this argument is that when media institutions are commercial institutions, the decisions are not the free choices of even those leading the organisations. Shareholder companies are structured in a way to limit the discretion of its officials and make sure that decisions are made in the interests of the company. More broadly, any for-profit company will be constrained by economic incentives. Along these lines, Ed Baker argued that speech by a company does not reflect the 'freely chosen expression of the speaker'[36] but is driven by the demands of the market and need to maximise profit. On this view 'the enterprise's profit calculations determine the content, form, and frequency of its commercial speech.'[37] The argument can then be applied to those media entities that are commercially owned. So, a newspaper columnist may choose to write a shock-driven diatribe (with or without any belief in the merits of the argument) to maximise the number of eyeballs on the employer's website. On this view, the difference with the commercial media is not simply that it is an institution, but that '[m]arket determination breaks the connection between commercial speech and individual choice.'[38]

The focus on commercial institutions is, however, too narrow. The state-owned media and charity-owned media may not be constrained by commercial pressures, but are subject to their own institutional constraints and objectives. Again, the head of a charity or public broadcaster does not use the institution's resources as a vehicle for his or her self-expression and its communications are to serve the goals of the institution. The commercial media provides a useful example of how institutional constraints can work, but the point can apply more broadly beyond market pressures.

The arguments so far advanced will not apply to all types of institutional expression. The point can be illustrated with membership interest groups, which are institutions with an internal hierarchy and decision-making process that often represent the views of its members. Such a group can be seen as an agent that is exercising human self-expression rights on behalf of its members.[39] The application of the speech right to representative institutions will still be slightly different than with individual speakers, as the employees of the organisation are still constrained. The example shows that

[34] See R Bezanson, 'Institutional Speech' (1995) 80 *Iowa Law Review* 735.

[35] See the discussion in A Koltay, 'The concept of media freedom today: new media, new editors and the traditional approach of the law' (2015) 7 *Journal of Media Law* 36, 50.

[36] CE Baker, *Human Liberty and Freedom of Speech* (Cambridge, Cambridge University Press, 1989) 197.

[37] ibid, 201.

[38] ibid, 224.

[39] Bezanson (n 34) 745–50 refers to this as traceability.

some types of institutional expression can engage speaker-based interests. However, that will not normally apply to a media institution, which is not a representative membership organisation.

Sometimes media companies claim to be acting as a type of interest group, in so far as the content represents the views and interests of its audience. However, the market pressure to maximise sales does not turn the media organisation into a representative of its consumers. There are many reasons why a consumer will choose a particular media product that do not signal approval of the editorial content. For example, a person might buy a paper because it is cheap, has a special offer, or to discover what other people are thinking. Even if the consumer does like what is being said in a newspaper or television programme, that does not mean that the media body speaks on that person's behalf. In any event, commercial pressures do not always make the media responsive to consumers and may lead it to respond to the needs of advertisers. The commercial media is not a pressure group and cannot rely on the representation of its audience to claim a speaker-based interest.

While there is much appeal in arguments that distinguish the media as an institution, there are significant limits in the arguments above as a basis for a separate justification for media freedom. First, there is a danger in overstating the controls imposed by commercial pressures or other institutional goals. Even with commercial pressures, the editor or journalist may retain considerable discretion in deciding what messages to advance in the editorial content.[40] There may be areas where advertisers and the audience are neutral, allowing the editor to choose a slant free from such pressure. Even where the market imposes a pressure to support a particular side in a political debate, the editor is still free to choose the specific details or tone of the content. The desire to maximise profit or serve any other goal is a significant constraint on the institutional media, but does not dictate the editorial line of a newspaper in every case.

Secondly, it is not clear why commercial and institutional constraints are singled out to distinguish the media. If the true motives of speakers are examined to decide whether expressive acts are true statements of a person's belief or values, then much speech is vulnerable to being viewed as 'unfree'. Speech is often constrained by social pressures or professional interests. A person may choose not to express a particular view for fear of offending friends or colleagues, or may publicly express support for a viewpoint that he or she privately disagrees with. To require the exercise of unencumbered free will as a condition for a speaker-based justification to apply would be too demanding. The argument needs to be modified so that there is something about the formalised and consistent institutional constraints that is more significant than the informal social pressures that influence a person's expressive choices.

Finally, the focus on the institutional setting of the speech does not capture all the reasons why speaker-based interests are thought to have less force for the media. Imagine that a wealthy media mogul decides to subsidise a newspaper and shield it from commercial pressures on the condition that he could have final say on all editorial decisions. In such a case, the newspaper would retain its institutional form, but

[40] See Rowbottom, *Democracy Distorted* (n 15) 179. Baker (n 36) 228, notes this point, but argues that it is not sufficient to engage liberty interests in corporate speech.

would function as the mouthpiece of the owner. Think of such a newspaper as equivalent to an interest group with the proprietor as its only member. Many commentators would regard such a situation as the clearest example of an abuse of media freedom, rather than an act of self-expression to be celebrated. The reason for distinguishing the media lies not only with the institutional form, but also with concerns about communicative power, which will be the focus of the following section.

B. Media Power

Singling out media institutions as distinct from individual speakers is intuitively appealing. However, the appeal of that distinct treatment rests on the fact that media institutions generally hold significant communicative power. Focusing on the institutional or commercial nature of the large media entity provides a formal criterion that aims to make a clean division between media freedom and individual speech, but the underlying concern is often with power. That explains why a media company that is bankrolled and directed by an oligarch is not a celebrated example of individual self-expression. Along these lines, Onora O'Neill has argued that while self-expression is particularly important part of freedom of speech, the approach is different when looking at powerful organisations:

> The communication of the powerful can shape and influence, improve and damage others' lives, and in democracies we have long since taken steps to regulate the communication of most powerful organisations.[41]

The point is not just that the mass media is a set of institutions, but that those institutions are powerful.

The argument begs the question what is meant by media power? A large media organisation cannot coerce people into doing something they do not wish to do. In one influential account, Manuel Castells argues that communication is a form of power that operates through the 'construction of meaning'.[42] For example, several decades ago, drink driving was not widely condemned and was even seen as a positive trait in so far as it reflected an ability to hold your drink.[43] A sustained campaign, however, has changed attitudes and a heavy stigma now attaches to such conduct. The social meaning of drink driving has changed over time, partly as a result of a communicative strategy. Power, on Castells' view, lies not just in getting people to do things through coercion, but can be achieved through shaping social meanings.[44] Communicative power is not limited to the ability to get people to *do* certain things. The power of the media lies in being able to shape public opinion more broadly. This can have an impact on politics, in influencing voting decisions or the topics for political discussion.

[41] O'Neill (n 15) 41.

[42] M Castells, *Communication Power* (Oxford, Oxford University Press, 2009) 10.

[43] See L Lessig, 'The Regulation of Social Meaning' (1995) 62 *University of Chicago Law Review* 943 for a range of examples discussing this type of regulation.

[44] Castells (n 42) 10.

The power also has an impact on social lives, influencing how others perceive people. The later chapters will show how the different parts of media law are concerned with the various areas of life that the media can influence.

The power to shape public opinion should not be viewed in crude terms of 'thought control' or direct instruction to the public. Much social science research carried out to investigate the impact of media coverage has concluded that the direct effects of the media are minimal. The research on media effects has shown how mass communications influence audiences not by telling people what to think, but through effects such as framing, priming and agenda-setting. With agenda setting, the 'influence is on the salience, the importance or prominence, of issues and other topics in the news, not on attitudes and opinions'.[45] So a choice to run stories on crime may cause people to think about that issue more frequently and make it into a topic for political discussion. The media can sometimes be said to have an agenda-setting effect on political leaders, in which elected officials respond to issues that have been given a high profile in the news.[46] Priming is the way that issues high on the agenda shape the criteria for making choices.[47] Again, a repeated emphasis on issues of crime may lead people to focus on law and order policies when evaluating the performance of the government. The term framing is sometimes used to refer 'to the way in which opinions about an issue can be altered by emphasising or de-emphasising particular facets of that issue.'[48] On this account, if a newspaper runs a story on immigration, it could emphasise the role played by incoming labour in providing various public services, or it could emphasise the issue in terms of jobs going to foreign workers. The presentation frames the terms of the debate and can influence the direction of opinion. The term 'framing' is also used in a narrower sense to mean the effects based solely on the presentation of equivalent information.[49] A classic example is choosing whether to present a risk in terms of possible losses or gains, which can influence whether a person has a positive or negative response.[50] Effects such as agenda setting, priming and framing show how the power of communications can be subtle, and does not simply operate in the direct way sometimes associated with the old fears about propaganda.

So far, the argument is that communicative resources provide a source of power. That alone does not explain why the communicative power of the media should be treated differently from that of individual speakers. The most common explanation is that with the modern media, communicative resources are concentrated in the hands of a small number of owners, editors and other content producers. Producing professional mass media content on a regular basis has traditionally had high start-up costs and further costs in the dissemination and marketing of content. That concern was

[45] M McCombs, 'The Agenda-Setting Function of the Press' in G Overholser, KH Jamieson, *Institutions of American Democracy: The Press* (Oxford, Oxford University Press, 2005) 158.

[46] S Iyengar, 'A Typology of Media Effects' in K Kenski and K Jamieson (eds), *The Oxford Handbook of Political Communication* (Oxford, Oxford University Press, 2017).

[47] ibid.

[48] S Iyengar, 'The State of Media Effects Research' in J Curran (ed), *Mass Media and Society*, 5th edn (London, Bloomsbury, 2010) 279.

[49] See discussion in M Cacciatore, DA Scheufele and S Iyengar, 'The End of Framing as we Know it … and the Future of Media Effects' (2016) 19 *Mass Communication and Society* 7.

[50] See D Kahneman and A Tversky, 'Choices, Values and Frames' (1984) 39 *American Psychologist* 341.

reflected in AJ Liebling's famous remark that freedom of the press is guaranteed only to those who own one.[51] The economics of the media therefore restricts the exercise of media freedom in practice to a small number of people. There is no reason to privilege the self-expression or participation rights of a select number, where most other people have no similar opportunity to speak in such a forum.

The limit of media power to a small number is not solely based on the economics of publishing and also reflects a basic division of labour. Not everyone can track leading public issues and assess the evidence due to limits of time and expertise. The media therefore develops the resources and expertise to carry out this function and alert the public. As Sonja West explains, the media are 'repeat player specialists'.[52] The allocation of that function gives the media both its public importance and its power. While local media today is rarely thought of as powerful, similar points can apply in so far as it provides a focal point for local attention, has the resources to research what is happening locally, attend court, and has on-going relations with local police and government. That local level power explains why there is often concern about the lack of competition or diversity in some local news sources.

The communicative power of the mass media means that it is a gatekeeper that decides which ideas will most likely be heard or placed high on the political agenda. A media organisation might decide not to carry stories that promote certain viewpoints or that are sympathetic to certain groups. In such a case, the decision of the media can undermine free speech in so far as it stops important views being heard. When acting in such a way, media institutions can become a type of censor. On this view, the power of the mass media means it is not like any other speaker, but *is* the forum in which competing views play out.[53]

The arguments above explain why the justifications for individual freedom of expression do not have the same force in relation to powerful media institutions. Freedom of speech is normally seen as a matter of personal autonomy and self-fulfilment. However, there is no reason why either of those interests require concentrated powers to communicate on a wide scale. As already noted, the concentrated power of the media has the potential to curtail the autonomy and self-fulfilment of others. Freedom of expression is also frequently justified in the name of a democracy. However, the norm in a democracy is one of equality, in which citizens have an *equal opportunity* to influence collective decisions. The mass media, in reaching a large audience on a regular basis, will necessarily have disproportionate opportunities to influence political opinion. However, nobody seeks the elimination of the mass media through the levelling of all speech opportunities. Instead the unequal power of the media is reconciled with political equality by ensuring that it functions to serve the interest of the audience and public, which will be outlined below.

Those concerns with communicative power also explain why the argument that free speech aids the discovery of the truth applies differently with the mass media. The classic truth argument for free speech runs that if ideas can be freely expressed, then the process of scrutiny and debate will allow the best ideas and arguments to

[51] AJ Liebling, *The Press* (New York, Ballatine, 1964) 30–31.
[52] S West, 'Press Exceptionalism' (2014) 127 *Harvard Law Review* 2434, 2445.
[53] Lichtenberg (n 29) 123.

be identified. While the media can serve this function by providing a platform and evaluating credible arguments, the power of the media can also be used to distort the process. The gatekeeping function of the media means that certain ideas may gain an undue advantage in the marketplace of ideas because they happen to be favoured by a particular media owner or editor. The power of the media means that the marketplace does not function on a level playing field.[54] Consequently, it may be important to provide mechanisms in which the choices of the media can be contested and challenged in order to facilitate the discovery of the truth.

The arguments based on media power advanced above are open to challenge in the light of the developments in digital communications. In particular, the costs of entry for publishers have declined significantly in the digital era, as have the costs of distribution. When user-generated content became a mass phenomenon, people were quick to point out that everyone had become their own media outlet.[55] People can write on whatever topics they want and have the potential to reach a wide audience. Accordingly, there is now a question of whether the media continues to hold significant communicative power beyond that held by individual speakers.

While the media system remains in transition, it is argued here that it would be premature to consign concerns about media power to history.[56] Many people can speak and make their thoughts available to the public at large, but that is not the same as a media institution which provides comprehensive and authoritative coverage across a wide range of areas, or produces high quality dramas, comedies or reality shows. The production of significant quantities of high quality and diverse media content on a regular basis normally requires significant expertise, resources and manpower. News organisations still need to cultivate sources and invest in the processes of research and investigation. As Eli Noam points out, when the expense of producing the content is coupled with the relatively low cost of reproducing another copy to each audience member (especially on the digital media), there is an economy of scale that works to the advantage of large companies and can generate a level of concentration.[57] The digital media may even increase some costs, such as digital marketing or the acquisition of data about audiences that helps the content reach a wide audience.

The trend is also supported by the economics of attention. A number of studies have shown that a small number of sites tend to gain a disproportionate amount of attention in the digital media, and that there is a long tail of sites that get much fewer views—called a 'power-law' distribution.[58] That explains why certain large organisations have become more rather than less powerful in the digital era. *The Guardian* and *New York Times* are no longer geographically limited, but have become brands with a

[54] S Ingber, 'The marketplace of ideas: A legitimizing myth' (1984) *Duke Law Journal* 1.

[55] D Gillmor, *We the Media* (Sebastopol, CA, O'Reilly, 2004).

[56] For example, the Competition and Markets Authority recently found that traditional media institutions continue to have political influence and are a main source of news in the UK, see Competition and Markets Authority, *Anticipated Acquisition by 21st Century Fox, Inc of Sky Plc: Provisional Findings Report* (23 January 2018).

[57] E Noam, *Media Ownership and Concentration in America* (Oxford, Oxford University Press, 2009) 36.

[58] The trend was identified over a decade ago, see M Hindman, *The Myth of Digital Democracy* (Princeton University Press, 2008) and discussion in J Rowbottom, 'Media Freedom and Political Debate in the Digital Era' (2006) 69 *Modern Law Review* 489. See also J Webster, *The Marketplace of Attention* (Cambridge Mass., MIT Press, 2014), discussing how various forces mean 'cultural consumption across all forms of media remains surprisingly concentrated', 19.

global audience. Once that audience has been established and gains a reputation, then audiences are likely to come back. Not every traditional media outlet will be so fortunate and an established newspaper may be superseded by a popular website. However, such a development may represent a change in the elite, in which a web-based media company takes the place of a print-based publisher.

An even bigger change comes with the presence of the giant tech firms that provide a type of media service in organising and providing access to the content found online. Companies such as Google and Facebook may not produce media content in same way as a newspaper, but perform a gatekeeping function that wields significant power on a global scale and which also tends to be concentrated in the hands of a small number of companies. That power is increased by the data collected about users, which can be used to tailor and target services to maximise the company's impact and command of attention. The types of media company and activity that have access to a mass audience are evolving, but there remain sets of institutions that wield significant communicative power. This is not to overlook the significant changes resulting from digital communications. The relationship between the media and audience is changing, with greater input and scrutiny from the readers. It will be noted later that drawing the line between the media and other speakers is no easy task, but that issue of definition should not be mistaken for a level playing field.

The argument so far is that media freedom is justified for different reasons than individual freedom of speech. However, the discussion has not set out a positive case for protecting media freedom. It is argued here that the central reason for valuing media freedom is instrumental, namely that a free media will serve the interests of the audience and the public more generally. Along such lines, Lichtenberg emphasises an instrumental justification for press freedom that is 'contingent on the degree to which it promotes certain values at the core of our interest in freedom of expression generally.'[59] Under this view, not everything done by the media engages media freedom. Tearing down a person's name with scant evidence would constitute an abuse of media power, rather than an exercise of its freedom. By contrast, when the media engages in serious and careful reporting of a matter of general interest, its freedom will be of strongest importance, as it serves the interest of the audience. This account of media freedom is reflected in the European Court of Human Rights statements that Article 10 comes with various 'duties and responsibilities', which can require the media to act in accordance with professional ethics in order to benefit from the strongest protection.[60] The justification for media freedom is therefore conditional.

This explains why the argument is not against media power, but rather to ensure the power is exercised responsibly and in accordance with democratic values. A powerful media is necessary for a number of reasons: to bring audiences together; to facilitate communication among citizens in the same political system; and to be able to challenge the government—all of which promote the values underpinning freedom of expression.[61] By contrast, a small media may be easily bullied and would not have the

[59] Lichtenberg (n 29) 104.

[60] See *Bladet Tromsø v Norway*, App no 21980/93 (2000) 29 EHRR 125 and *Stoll v Switzerland*, App no 69698/01 (2008) 47 EHRR 59.

[61] Gibbons (n 14) 36.

resources to investigate important issues. For this reason, in many systems the state provides support for the media in order to maintain the power of certain institutions. The power of the media is, however, worthy of protection only in so far as such freedom enables certain functions to be performed.

C. Non-instrumental Arguments for Media Freedom

Before considering the functions of the media further, an objection to the instrumental account of media freedom should be considered. Ronald Dworkin has warned that instrumental justifications for media freedom amount to mere policy arguments that invite the rights of the media to be balanced with other competing interests.[62] The argument runs that if media freedom is valued for serving the interests of the audience, the media may be restricted where it is thought to be in the audience's interest. For this reason, he argues that the rights of the media should be assimilated with the human right to expression. The argument was advanced in the USA, where individual expression tends to be afforded stronger protection. The argument has less appeal in the United Kingdom, where the expression rights of individuals can be balanced with competing interests in any event. However, a more general issue with Dworkin's argument is that it assumes other competing interests should not qualify media freedom. That still begs the question why the media should enjoy such strong protection in the first place.

One line of argument that could support Dworkin's view is that media freedom should be protected to respect the autonomy of the audience. The argument runs that if media freedom is restricted because it is feared the content will lead audience members to have false beliefs or behave in a way that is harmful, then the restriction shows a lack of respect to the audience as rational autonomous agents.[63] According to this view, responsibility for consequent action lies with the listener, not with the speaker. That justification can apply to both freedom of expression and media freedom, in so far as it looks at *why* the government chooses to restrict content.

There are many areas of media law where this principle will not come into play. For example, if the legislature provides that newspapers include a 'conscience clause' in journalists' contracts (so that reporters cannot be required to act in ways considered unethical), that would not show a lack of respect for the audience. Privacy law arguably does not engage this principle in so far as it does not rest on a concern about people having false beliefs or acting in a way that is harmful. With privacy, the disclosure of the information is the harm itself.

The argument based on audience autonomy is strongest where liability is attached to the publication of particular content on the basis that it will change a person's views or beliefs in a way that is harmful. The censorship offences considered in Chapter 4 provide the best examples. If the government prohibits the publication of state secrets

[62] R Dworkin, *A Matter of Principle* (Oxford, Clarendon Press, 1985) 385–86.
[63] T Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy & Public Affairs* 204, 213.

to protect itself from embarrassment or for fear of criticism, that restriction infringes audience autonomy. However, some state secrecy laws raise no such problem, such as where the prohibition is to stop foreign countries seeing information that would reveal confidential sources. While Thomas Scanlon, who set out a powerful case for audience autonomy, argued that the principle applies with equal force to all types of expression,[64] there are certain areas where the interests of audience autonomy are more forceful. For example, censoring political information can be particularly objectionable, as showing respect for each person equally as autonomous agents is a key element of democratic citizenship.

There are reasons to be sceptical of this argument. The case for audience autonomy assumes that the media and other content providers can influence beliefs through the provision of *reasons*, while in practice such influence can arise through more subtle effects such as framing, as outlined earlier. There may also be cases where the people wish government to protect them from certain types of message. If the audience mandates a restriction, then it may be compatible with audience autonomy.[65] That can be more pressing still where the media is concerned, as its power and authority mean that citizens can plausibly ask for channels of accountability and the prevention of abuse of communicative power. The argument to respect audience autonomy could also have far-reaching consequences.[66] Such an argument would object to a ban on cigarette advertising, which has been widely accepted and upheld in the courts.[67] Whatever theoretical appeal it may have, the audience autonomy argument does not fit with the practice of freedom of expression in the UK and Europe. The argument therefore cannot be taken as an absolute and does not defeat an instrumental justification for media freedom. However, it provides an important consideration in determining how the interests of the audience are served and for evaluating restrictions on content in media law.

V. The Functions of the Media

So far, the argument has been that media freedom is valued not because it serves the interests of the media as a speaker, but because it serves the public interest more generally. The media can promote the values associated with freedom of speech by educating the audience, promoting awareness of different cultures, providing entertainment, and so on. The most commonly stated reason for protecting media freedom, which

[64] ibid, 223.

[65] See R Amdur, 'Scanlon on Freedom of Expression' (1980) 9 *Philosophy and Public Affairs* 287.

[66] Which led Scanlon to move away from this account of expression in a later work: see T Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 *University of Pittsburgh Law Review* 519.

[67] Barendt (n 15) 17.

elevates that right to its constitutional status, is the important role played by the media in a democracy. Two democratic functions assigned to the media recur in the literature on media freedom and the Article 10 jurisprudence. The first is the role of the media in 'imparting information and ideas' and the second is in acting as a 'public watchdog'.[68] In addition to those two well-established functions, two more functions are of increasing importance in the digital era: providing a platform to other speakers, and 'curating' the mass of content that can be found in the digital media. Each will be considered below.

A. Imparting Information and Ideas

In imparting information and ideas, the media is seen to facilitate opinion formation and decision-making among the public. While the free expression of individuals also plays an important role in opinion formation,[69] the media performs a special function given its capacity to collect, filter, verify, package and disseminate information. The point was underlined by Lord Bingham in *McCartan Turkington Breen v Times Newspapers*, stating that in order to 'participate in the public life of their society' people rely on the media to be 'alerted to and informed about matters which call or may call for consideration and action.'[70] Similarly, in its landmark ruling in *Lingens v Austria*, the European Court of Human Rights stated that '[f]reedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.'[71] Under this view, the media is an accessible source for information, which members of the public may use to develop their own views and arguments.

The function of the media in informing people seems self-evident, but there are varying interpretations of this function that make different demands of the media and the public. At its most demanding, the informational function suggests that the media provides accurate, in-depth and analytical coverage, to which members of the public will pay attention, assess and then form their judgment accordingly. The more demanding version of this view points to an ideal in which the media enables people to become 'informed citizens' with an understanding of public affairs.[72] Such arguments are often influenced by the work of Jurgen Habermas, stressing the role of rational-critical debate in the process of the formation of public opinion, which is then transmitted to government through formal processes such as elections.[73] Under such an account, individuals engaging in rational and reasoned debate should be as well informed as possible.[74]

[68] *Observer v UK*, App no 13585/88 (1991) 14 EHRR 153 at [59].

[69] For the classic democracy-based justification for freedom of expression that looks at the benefit to the audience, see A Meiklejohn, *Free Speech and Its Relation of Self-Government* (New York, Harper, 1948).

[70] *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277, 290–91.

[71] *Lingens v Austria* (1986) 8 EHRR 407 at [42].

[72] For discussion of this model of citizenship, see the concluding chapter of M Schudson, *The Good Citizen* (New York, The Free Press, 1998).

[73] J Habermas, *Between Facts and Norms* (Cambridge, Polity, 1996) 356 and 382.

[74] See also J Mansbridge et al, 'A systemic approach to deliberative democracy' in J Parkinson and J Mansbridge (eds), *Deliberative Systems* (Cambridge, Cambridge University Press, 2012) 20, J Fishkin, *When People Speak* (Oxford, Oxford University Press, 2009) 33.

The account can seem unrealistic and takes an idealistic view of citizens and the media. Most people lack the time, motivation or cognitive capacity to form opinions on public matters through such a rational process of debate. Moreover, the idea of the media providing sober briefings on political matters and policy analysis seems a far cry from what the media actually does.[75] In later work, Habermas accepts that there are limits to what the media can do in facilitating informed debate, but still sees an important role for the media in the overall system that aids the formation of public opinion.[76] Even when the realities are accepted, the demanding version is still often taken to be an ideal and provides the basis for evaluating the media. Under that view, the modern media is often criticised for its focus on sensationalism, preoccupation with strategy and personality, and attention to matters of marginal public importance. The implication is that the media should be doing more to inform the public in a way that is serious and in depth. While the demanding version of the informational function may be unrealistic, some critics argue that media standards should be improved to move closer to the ideal.

The informative function of the media can be modified into an account that is less demanding. On this account, it is accepted that media content will simplify and that the public lack the time, inclination and expertise to make a thorough assessment of all the relevant information. The content provided by the media can nonetheless perform a valuable function, in so far as it sends a signal about matters of public importance and allows the public to rely on shortcuts to process information quickly. A newspaper story detailing a politician's social circle may appear trivial, but can provide a cue that enables the assessment of the person's character.[77] The argument runs that the media does not facilitate a high-minded reasoning process, but enables the public as a whole to make reliable collective assessments.[78] This modified version of the argument means that some of the sensationalist or personality-driven coverage should not be dismissed as lacking in value to the audience. It is not, however, a free-for-all argument and still requires the media to engage with matters of public importance with accuracy and seriousness. However, it does not impose unrealistic expectations about the levels of political information among citizens or the quality of media coverage.

B. The Watchdog Function

The second function assigned to the media is to act as a 'public watchdog'. Under this function, the media have a role in holding the government and other powerful institutions to account. The argument runs that the media exposes corruption and abuse of power, and forces those in office to explain their actions. The power of the mass

[75] See J Parkinson, 'Rickety Bridges: Using the Media in Deliberative Democracy' (2006) 36 *British Journal of Political Science* 175.

[76] J Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension?' (2006) 16 *Communication Theory* 411, 415.

[77] See S Popkin, *The Reasoning Voter* (Chicago, University of Chicago Press, 1991).

[78] B Page and R Shapiro, *The Rational Public: Fifty Years of Trends in Americans' Policy Preferences* (Chicago, University of Chicago Press, 1991).

media is therefore justified as a force that checks other centres of power. The argument is incredibly popular and is frequently asserted by the media (especially in response to calls for stronger media laws). The media thereby uses the watchdog argument to legitimate its own power and claims that it is acting on behalf of the public.

The idea of the media acting as a watchdog has a long-standing pre-democratic pedigree. During the eighteenth century, the idea developed that the press could supplement the checks and balances among the formal institutions of government to guard against abuse of power.[79] That further developed into the quasi-constitutional function of the press, acting as a fourth estate. The ideal remains powerful, with the defining image of the modern watchdog function reflected in the Watergate scandal, in which the journalist is presented as a crusader uncovering the abuse of high-level power. In the aftermath of Watergate, US Supreme Court Justice Potter Stewart put forward a strong version of this argument, in which the primary purpose of the constitutional protection of the press is 'to create a fourth institution outside the Government as an additional check on the three official branches.'[80] Today, the reporting of numerous political and corporate scandals in the media continues to be justified by the watchdog role.

The watchdog argument stresses the importance of the media being separate from government. The argument claims that whenever government pursues an action that might regulate or gain leverage over the press, alarm bells should ring. If government has the power to punish the media, then abuses of power are more likely to go undetected. However, a sharp division between government and the media is not realistic. The media and government are in a relationship of mutual dependence. The media needs access to government officials and information, while the government relies on the media for publicity. The watchdog function does not therefore demand a complete separation, but requires protection from attempts to *dominate* the media or to engage in collusion concerning the direction of reporting. To avoid dominance or bullying, it is important that the media remains powerful and that it has some protection from the possible channels of pressure.[81]

Another key aspect of the watchdog function is that it is relatively undemanding of citizens. The watchdog argument does not ask the media to educate people, nor does it ask citizens to be attentive and knowledgeable of public affairs. It requires the media to watch government, process the information for the public and then sound an alarm in the event of any foul play. The media thereby tells the public when their attention is required. The watchdog function requires only that some of the people are listening to the alarm in order for the deterrent effect to work.[82] The role for the media as a public watchdog is also rooted in an implicit mistrust of government, in which abuse of power is often suspected and government actors require constant monitoring. Given the high levels of cynicism and mistrust in modern politics, it is unsurprising that the argument remains salient.

[79] de Lolme (n 8).
[80] P Stewart, 'Or of the Press' (1975) 26 *Hastings Law Journal* 631.
[81] See J Rowbottom, 'Leveson, press freedom and the watchdogs' (2013) 21 *Renewal* 57.
[82] M Schudson, *Why Democracies Need an Unlovable Press* (Cambridge, Polity, 2008) 14.

C. Providing a Platform and Curating Content

Another key function for the media is the provision of a platform for other individual speakers. Such a function is closely connected with the provision of information, as by allowing other people to speak, the public become informed about the range of views in society and the intensity with which they are held. The provision of access to speakers has long been an element of the media's functions. For example, newspapers have accepted letters from readers. In previous decades, there have been experiments with public access television, though these earlier forms of access required considerable moderation from the media body. However, the primary function of the media was traditionally to present its own summary of events and perspectives, and access was at the discretion of the editor and limited due to shortages of space.

In the digital era, the media does not have the same constraints of space and thereby can provide more opportunities to engage with the public. The most obvious example is the role of user comments underneath media articles on a website. The change should not, however, be overstated. The main function of the media generally lies in the provision of its own content. Not everyone can appear on a popular television programme or write a newspaper article. Even where the media provides a platform for others, that will not normally give the individual speaker the same level of prominence as the media body's own content. That is unsurprising, as the provision of a platform supplements the more traditional media functions, rather than replaces them. While it is valuable to hear what others think, many people will still gain greatest value in accessing the professionally produced content. The position is a little different with digital intermediaries that do not produce their own content, but host that produced by others. The provision of the platform to various speakers provides a core element of what an intermediary company does, which can be regarded as a distinct type of media activity.[83]

The provision of a platform function is more closely aligned with freedom of expression than the other functions of the media, as the media company is facilitating the expression of others. Those individuals using the platform may not be subject to institutional constraints or wield power. More broadly, the provision of the platform may have greatest value for the speaker rather than for the audience receiving that content. However, the important point is that the media providing the platform does not itself hold an expressive interest as a speaker. The role of the host is valued only in so far as it serves the interests of the speakers using the platform or the members of the audience receiving the content.

Another key function of the media that is especially prominent in the digital era is curation. Given the mass of content that is made available to the public, people need some way to navigate the material. There are various ways that the media can perform this role. When producing edited content, the journalist can draw on various digital sources, help to summarise the diversity of views and direct others to where such content can be found through links. It is common to hear news reporters summarising the reaction on Twitter to various events. More broadly, the media can help people

[83] *Magyar Tartalomszolgaltatok Egyesulete v Hungary*, App no 22947/13 (2016) 42 BHRC 52 at [79].

to find what they are looking for. Such functions are most obviously performed by digital intermediaries, whether through providing a search engine, by allowing users to recommend content or through other methods of aggregation.

The platform and curation roles are complementary. The provision of the platform helps more people to express themselves and publish, while the curation function helps audience members sift through that content. There are, however, some tensions. While providing a platform serves the speech interests of the individual user, the curation function is clearly aiming to serve the interests of the audience. When a media company or digital intermediary provides a platform, it will also provide some mechanism to prioritise the content made available. The difficult question is how that decision should be made. A traditional news organisation might see this simply as an exercise of editorial freedom, in selecting certain views for promotion. The digital intermediary may, however, operate in a different way and rank content based on popularity or relevance rather than according to traditional news values. There are also questions as to whether certain speakers should be denied a platform in certain circumstances. Such denial of access may arguably serve the interests of the public in certain cases, but limits the extent to which the free speech interests of the individual speakers are served.

There are other arguments for media freedom, but the informational and watchdog functions are two key themes that are commonly advanced in the literature. The platform and curation roles are also becoming increasingly important in relation to the digital media. These functions are often associated with the 'liberal' account of the media, which is sometimes criticised as legitimating the power of the media with reference to lofty ideals, when in practice it provides cover for publishers to pursue profits and avoid any rigorous accountability for the harms it may cause. Moreover, there are many occasions where the media fails to perform these functions and sometimes can misinform and mislead. The democratic functions should not provide cover to evade responsibility, but provide a standard for evaluation. The media is thereby protected on the condition that its power is used in pursuit of these functions. Ultimately, media law is about getting the balance right, so that media entities can perform their important functions outlined above, while curbing the opportunities for that power to be abused.

D. Democratic Functions—Which Democracy?

So far the discussion has referred to a number of democratic functions. Such discussion may give a misleading impression that there is a clear agreement about what the media must do to serve the needs of a democracy. There are various theories of democracy, which have different expectations of citizens, and will consequently have differing views about how the media can best serve the public.[84] For example, a 'minimalist' democrat, that sees little role for citizens beyond voting in periodic elections, will not expect the media to make members of the public well informed on public issues.[85]

[84] For discussion of the way the media can perform functions in various models of democracy, see CE Baker, *Media, Markets and Democracy* (Cambridge, Cambridge University Press, 2002) and C Christians et al, *Normative Theories of the Media* (Urbana, University of Illinois Press, 2009) 102.

[85] J Schumpeter, *Capitalism, Socialism and Democracy*, 5th edn (London, Routledge, 1976).

Instead, the minimalist democrat will tend to stress the watchdog function, in which the media acts on behalf of the public.[86] By contrast, those theories at the other end of the spectrum, which seek to maximise the participation of citizens, may assign a bigger role for the media in providing a platform for others. Other theories may characterise democracy as a competition of interests, which may then expect the media to represent and mobilise key groups in society.[87] That account of democracy may value a partisan media that engages in robust advocacy. By contrast, a deliberative theory of democracy stresses the role of reasoned discussion in the process of collective decision-making.[88] A deliberative democrat will therefore tend to emphasise the role of the media in informing the public and in facilitating debate among different sections of society.[89] The examples above are not exhaustive, and there are many other perspectives on what democracy requires.

It is easy to make much of these various differences and argue that there is no such thing as general 'democratic functions' of the media. There are important differences between the theories and each will pull in slightly different directions. However, most democratic theories will broadly accept the types of function assigned to the media discussed above, even if there are differences in emphasis. Any theory of democracy will assign some role to the media in informing the public on some matters and acting as a watchdog (even if there are differences in how the public use that information). To analyse many of the practical questions of media freedom, a fairly simplistic model of democracy can be employed that does not require a clear choice to be made between the competing theories. A rough and ready approximation of how a democracy works is for the most part sufficient for us to identify the key role of the media in the political system and the reasons for valuing media freedom.

In practical terms, it is important to remember that no political system fully reflects a coherent theory of democracy and the UK political system has evolved pragmatically. This means that most systems will have practices that reflect different democratic models. A system that has institutions reflecting a mixture of democratic theories offers a number of advantages, with the strengths of one offsetting the disadvantages of other.[90] The benefits of such a mixture will be important when looking at the multiple systems of media regulation discussed in Chapter 6. Each theory of democracy contributes something to our understanding of an effective democracy, and it is important to learn from the various insights even if we do not subscribe to any particular theory in its entirety.

While the argument here does not track a particular democratic theory, it will be argued in later chapters that changes in political culture and the practice of democracy have important implications for media law. At its most obvious, the traditional culture of deference and secrecy has given way to a culture that prioritises transparency and

[86] V Blasi, 'Checking Value in First Amendment Theory' (1977) 2(3) *Journal of the American Bar Foundation* 521, 542 connecting the watchdog role with minimal democracy.

[87] See Christians et al (n 84) 98 and Baker, *Media, Markets and Democracy* (n 84) 177.

[88] J Cohen, 'Democracy and Liberty' in J Elster (ed), *Deliberative Democracy* (Cambridge, Cambridge University Press, 1998) 186.

[89] Mansbridge et al (n 74) 20. See also the 'public journalism movement' in the USA, J Rosen, *Getting the Connections Right: Public Journalism and the Troubles in the Press* (New York, Twentieth Century Fund, 1996).

[90] See Baker, *Media, Markets and Democracy* (n 84) for an account of 'complex democracy'.

open debate on matters of general importance (or at least claims to). While that change has taken place over a number of decades, in more recent years there has been a further shift away from political activity within formal democratic institutions, such as political parties and parliamentary politics.[91] The new politics may envision little hope for the informed citizen and can be hostile to experts. This is sometimes labelled as a 'post-representative' account of a democracy and sees many actors outside of formal politics, such as NGOs or more loosely connected networks of activists, performing important democratic functions. Under this view, the democratic system can be seen as more chaotic, in which unelected and self-appointed representatives speak on behalf of others.[92] This change can have significant implications for the way concepts such as the 'public interest' or 'public figures' are understood. While such changes mean that the authority of the media is under challenge from various alternative sources of information, there is a significant role for the media in such a system to fill the gaps left by the decline of other democratic institutions, to monitor those in power and highlight injustice.[93] The extent to which such changes describe what is happening to democracy in the UK is open to debate and the formal institutions of representation remain important. The point for present purposes is that the practice of democracy is not static and consequently the functions of the media in a democracy continue to evolve.

VI. How is Media Freedom Protected?

The argument advanced so far has been that media freedom is justified instrumentally by its capacity to perform certain democratic functions that serve audiences, speakers and the public. While media freedom has a different theoretical foundation from freedom of speech, that does not mean that the two rights will necessarily be different in content.[94] Accordingly, the various differences in the reasons for protecting media freedom outlined above may be accepted, but the legal right itself could be much the same as that held by the individual.[95] That approach was the tradition in the UK and in *A-G v Guardian Newspapers (No 2)*, Sir John Donaldson MR stated that:

> it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is

[91] For example, see the 'monitorial' model of democracy in J Keane, *Democracy and Media Decadence* (Cambridge, Cambridge University Press, 2013).

[92] ibid.

[93] See J Zaller, 'A New Standard of News Quality: Burglar Alarms for the Monitorial Citizen' (2003) 20 *Political Communication* 109 and Keane (n 91) 241.

[94] Baker, *Human Liberty and Freedom of Speech* (n 36) 234.

[95] See Barendt (n 15) 419 on treating media freedom as equivalent to freedom of expression.

> because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees.[96]

Importantly, Donaldson MR accepted that the rights of the media are protected for different reasons than freedom of expression, namely acting for the benefit of the general public. However, he reasoned that because the media is a 'trustee' of the public, the content of the media freedom rights is the same as that of the rights held by individual members of the public.

The problem with Donaldson MR's formulation is that it does not explain any mechanism that bestows such status as a trustee on the press or guards against abuse of trust. That account does not factor in the specific ways that the media can serve the public and is blind to the differences in power.[97] To give the same right to a media organisation that is given to an individual would simply entrench its power to amplify its views and exercise disproportionate influence over the political system. There are occasions where media organisations should be subject to regulations that would not be appropriate in relation to an individual speaker.[98] For example, broadcasters in the UK are subject to requirements to cover matters of political controversy with 'due impartiality', a requirement that would be unthinkable in relation to individual expression. Conversely, the media is sometimes entitled to greater protection than individual speakers, which includes the protection of journalists' sources and access to certain types of information. An approach that treats freedom of speech and media freedom identically would not be able to account for such differences.[99]

Despite the inability to accommodate special privileges for the media under such identical treatment, many media institutions may nonetheless see considerable appeal in holding the same rights as individual speakers. While special protection for the media appears to help it act as a public watchdog, one criticism is that such protection weaves the media into the fabric of the state, and thereby undermines the very independence that lies at the heart of the fourth estate.[100] This has practical implications too, as any benefits granted to the media can be used as leverage. The government may use threats to limit a benefit or cut a subsidy as a tool to influence media coverage.

These concerns may explain why media representatives are sometimes reluctant to accept special protection that at face value seems to be beneficial. For example, media representatives were critical of proposals to make liability for contempt of court in relation to internet archives conditional on receiving prior warning from the Attorney General.[101] The concern lay in the fact that liability would turn on the direction of a government officer. Some parts of the industry were wary about accepting special protection in relation to police search powers under the Police and Criminal Evidence Act 1984, for fear that differentiation from the ordinary citizen might in the

[96] *A-G v Guardian Newspapers Ltd (No 2)* (n 16) 183.
[97] Fenwick and Phillipson (n 15) 21.
[98] See Fenwick and Phillipson, ibid, 27, describing a 'variable geometry' model for media freedom that allows for distinct privileges and responsibilities.
[99] Barendt (n 15) 420.
[100] A Hutchinson, 'Moles and Steel Papers' (1981) 44 *Modern Law Review* 320, 324.
[101] See Ch 3.

long term weaken the position of the media.[102] Most parts of the newspaper industry have rejected a system of self-regulation that offers potential shields for legal costs, for fear that any system of regulation with an element of state support would undermine the independence of the press.[103]

A rejection of special protection may reflect a strategic decision that the media has less to risk by having the same protection as an individual than by accepting special privileges. Under this view, the media can protect itself through its political power, rather than through special legal rights and privileges. Along these lines, a prosecutor or litigant will have to think carefully before bringing an action against the media, for fear that it may result in adverse publicity. Attempts to censor the media often result in a public backlash against the government. That potential can sometimes offer more protection to the media than a legal guarantee. Consequently, even if the media had identical legal rights to an individual, it would in practice be treated differently as a consequence of media power. The idea underlying the argument is that a media institution can fend for itself, needs no separate protection and should exist outside the formal constitutional system. The point should not be overstated and the press has on a number of occasions accepted some special privileges, which will be considered in later chapters, and thereby does not demand identical treatment. In any event, the argument is not convincing. Whatever appeal it may have for the media, it is less compelling from the perspective of the public, as the protection secured in practice through the political power of the media may not be aligned with the service to the audience and wider public. A media institution may rely on its political power to avoid its democratic functions and responsibilities.

While Donaldson MR's approach represents the tradition in the UK, the law has since moved away from treating media freedom and individual speech as identical. In *Commissioner of Police of the Metropolis v Times Newspapers Ltd*, the High Court endorsed Lord Donaldson's approach and stated that there 'is no special Convention right for proprietors, editors or journalists.'[104] However, Tugendhat J then stated that 'there is a distinction between different types of speech, and different roles that people may play, which is not captured by Lord Donaldson's statement of the law.'[105] In particular, the 'activity of journalism' may be subject to some special protection, which indicates a shift away from Donaldson MR's thinking and shows that different considerations may come into play when looking at journalism as opposed to other speech activities. The Court of Appeal in *Marine A* similarly said that the law has 'evolved' since Lord Donaldson's statement in which 'those who inform public debate on matters of public interest as journalists (whether in the print, broadcasting or internet media) are accorded a special position, given the role of journalism in enabling proper and effective participation in a democratic society.'[106] The statements show that the media is not treated identically to an individual speaker in practice.

[102] G Robertson and A Nicol, *Media Law*, 5th edn (London, Sweet and Maxwell, 2007) 340.
[103] See Ch 6.
[104] *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] EWHC 2705 (QB), [2014] EMLR 1 at [127].
[105] ibid [129].
[106] *R v Marine A* [2013] EWCA Crim 2367, [2014] 1 WLR 3326 at [56].

This, however, begs the question of how media speech is identified and distinguished from other types of speech.

VII. What is the Media?

If media freedom has distinct content, then the key question is who benefits from the protection and is subject to any additional responsibilities? In other words, what is the media? To answer that question, a distinction can be drawn between institutional and functional definitions of the media.[107]

A. Institutional Definitions

Under an institutional definition of the media, particular types of speaker are identified as media bodies and then subject to a separate scheme of rights protection.[108] That is recognised in Justice Stewart's famous argument that treats the media as analogous to a branch of government under the separation of powers, which therefore requires the identification of media institutions to be protected from government interference.[109] The media is then institutionally defined in much the same way as the executive, judiciary and legislature.

One objection to distinguishing the media to offer enhanced or more limited protection is that a scheme of differential rights amounts to discrimination based on the identity of the speaker.[110] The approach may also be seen as elitist, in so far as special privileges are afforded to a type of institution. The earlier discussion explained that these objections are misguided and the differentiation of media freedom is partly based on its institutional nature. The media is also singled out for special treatment as a way of addressing concerns about communicative power while recognising that it performs important functions in a democratic society. Rather than amounting to an *unfair* discriminatory application of the right to expression, the media simply holds a

[107] I take the distinction between institutional and functional definitions of the media from R Danbury 'The Full Liberty of Public Writers: Special Treatment of Journalism in English Law' (DPhil thesis, University of Oxford, 2014). A distinction between 'functional' approaches and 'institutional protection' is also drawn in J Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5 *Journal of Media Law* 57. The functional definition is also used in I Shapiro, 'Why Democracies need a Functional Definition of Journalism now more than ever' (2014) 15 *Journalism Studies* 555. I use the terminology of functional and institutional definitions to draw on Barendt's second and third perspectives on media freedom, see (n 15) 420–2, to which the following discussion is also indebted.

[108] See discussion in Barendt, ibid.

[109] Stewart (n 80) 633.

[110] In relation to distinctions based on corporate identity, see *Citizens United v FEC* 558 US 310 (2010) at 346 and 350. See also Barendt (n 15) 421 and Oster (n 4) 25–26. For a response to such criticisms in the US, see F Schauer, 'Towards an Institutional First Amendment' (2005) 89 *Minnesota Law Review* 1256.

different type of right. By analogy, a school is not the holder of classic speech rights when performing its function as an educator, and the curriculum can be regulated. That is a form of differential treatment based on institutional status and function, which is not regarded as unfair. The same can be said of the media, and the different treatment of that class of speaker is not an invitation for the state to discriminate between viewpoints.

A more common and compelling objection is that it is hard to identify particular speakers as media institutions. There has always been a blurred boundary between the media and other speakers. For example, should a person handing out leaflets be viewed as the media in its role in providing information? However, prior to the digital era, in many cases it was relatively straightforward to identify a media institution. It was clear which entities were engaged in broadcasting and held a licence. Similarly, a definition of a newspaper could be drawn—based of the scale of distribution across a region, the frequency of publication and nature of the content—even if it lacked sharp boundaries.[111] Given the developments in digital communications, identifying the media has become a bigger challenge. The point was summarised by Tugendhat J in *Commissioner of Police of the Metropolis v Times Newspapers Ltd*:

> In the past, in order to communicate with the public at large, it was necessary to have access to the costly equipment associated with printing on paper, or broadcasting through radio and television. It was therefore possible in most cases to identify the activity of journalism with the activities of those who were engaged professionally as proprietors, editors, broadcasters and journalists. What the internet has done is to enable any member of the public to communicate directly with the rest of the public at large at almost no cost. So the difference today is that the activity of journalism can in practice be carried on by amateurs who do not need professional publishers or broadcasters, and it is in fact carried on by amateurs in that way to an increasing extent.[112]

Both individual speakers and the media to some degree rely on the same digital technology and distribution on the internet, which makes the two harder to separate. In the European Court of Human Rights, Judges Sajo and Vucinic went as far as to say that the distinction between journalists and other speakers is 'rapidly disappearing.'[113] The discussion of media power earlier explained why the distinction has not collapsed and it is a mistake to assume that the digital media creates a level playing field. Digital communications are now more like a spectrum of different content producers rather than a rigid division between sectors. At one end of the spectrum are individual speakers posting their own messages and at the other there are still large media organisations that employ people to produce content or facilitate the publication of other people's content. There is much in between, such as amateur websites covering a niche area or small-scale news providers with a handful of employees. Some interest groups produce digital publications that shape public debate. There are also loose networks of individuals that contribute to particular forums or act in concert to produce content. The difficulty lies in identifying which institutions have significant communicative power and can be expected to perform certain democratic functions.

[111] For example, a newspaper was defined in the Newspaper Libel and Registration Act 1881, s 1 (most of the provisions have since been repealed).

[112] *Commissioner of Police of the Metropolis v Times Newspapers Ltd* (n 104) [130].

[113] *Youth Initiative for Human Rights v Serbia* (no 48135/06) (2013) 36 BHRC 687.

While it is difficult, identifying media institutions is not impossible in the digital era. For example, under the Criminal Practice Directions, accredited journalists enjoy a stronger presumption of access to certain documents in court.[114] Accreditation can be demonstrated by showing a press card, which a person can apply for if they work professionally in the media and their work involves 'the gathering, transport or processing of information or images for publication in broadcast electronic or written media'.[115] The Crime and Courts Act 2013, s 41 was enacted as part of a scheme to provide incentives to 'relevant publishers' to join a newspaper self-regulator. That provision defines a relevant publisher as someone 'who, in the course of a business […], publishes news-related material (a) which is written by different authors, and (b) which is to any extent subject to editorial control.' Similarly, in competition law, if a special regime of merger controls applies to newspapers and broadcasters, that also assumes those types of media institution can be identified.[116] There are various examples and each will have its own flaws, but each shows that it is possible to find criteria to separate media institutions for the purposes of certain media laws.[117] While it raises the usual problems in deciding where to draw the line, that problem is not unique to the definition of the media.[118]

B. Functional Definitions

While it is possible to define the media in institutional terms, an alternative objection is that it may not be desirable to limit media freedom in such a way. The benefits of media freedom could be extended to all those that produce journalistic content and meet the responsibilities assigned to the media. Under this view, if the main concern with media freedom is to serve the interests of the audience, then the issue is how far the speaker is serving those interests, rather than the status of the speaker. The focus on media institutions may also seem out of step with current trends, as media functions are more fluid and can be performed by a number of individuals and amateurs, and not just designated media bodies. For this reason, a functional definition of the media is often preferred in the cases and literature.

A functional definition looks at what the speaker is doing to decide if media freedom rights apply.[119] In the *Marine A* decision mentioned earlier, it was noted that the protection of media freedom is afforded to 'journalistic activity' rather than to a distinct institution.[120] Under this approach, media freedom is to be respected whenever the speaker is acting in accordance with the democratic functions of providing information and ideas, acting as a public watchdog or providing a platform. The media is therefore defined by a set of products or processes that we associate with journalism.

[114] Criminal Practice Directions [2015] EWCA Crim 1567, 5B.26–30.

[115] See www.ukpresscardauthority.co.uk (last accessed 17 January 2018). The criteria includes 'internet-based services'. See also the discussion in Danbury (n 107).

[116] For example, The Enterprise Act 2002, s 58 has a provision referring to 'newspaper' mergers.

[117] See West (n 52) 2458–62, Koltay (n 35) 48–49, Oster (n 4) Ch 2.

[118] See also Oster (n 4) 27.

[119] See Oster (n 107). Barendt endorses such an approach in his 'third perspective' on media freedom, (n 15) 421–24.

[120] *R v Marine A* (n 106).

For this reason, the Strasbourg Court has recognised that an NGO performing a watchdog function benefits from the heightened protection for media freedom.[121] Similarly, the public interest defence in the Defamation Act 2013 and the protection of journalists' sources are open to anyone, as long as they meet the required conditions. So as long as the duties and responsibilities associated with journalism are met, then any speaker can receive heightened protection. This also means that media institutions will not receive automatic protection and will have to show that their activities fulfil the criteria for journalism. Opening up media freedom in this way does not collapse the distinction between media freedom and freedom of expression. Not everything a person says falls within media freedom; instead the expression only qualifies for protection when it is part of a journalistic activity.

The functional approach is not as simple as it may first appear and can potentially be as elitist as the institutional approach. While the functional approach claims to protect anyone engaged in the activity of journalism, that begs the question of how 'journalism' is defined. This is no less difficult a question than defining the media as an institution. In practice, journalistic activity tends to be defined by reference to the products and processes associated with the traditional mass media. Content is more likely to be protected as journalism if it concerns a matter of public interest and been through a process that meets the professional and ethical standards expected of journalists, such as verification and fact-checking. While the functional protection of media freedom can apply to anyone, if the standards are defined with reference to traditional media organisations, then those organisations are most likely to fulfil those standards. For this reason, the difference between institutional and functional definitions may not be as significant in practice as it may first seem.

A functional definition also risks conflating issues of media freedom and individual freedom of speech that were distinguished earlier. Where individual freedom of speech and media freedom perform similar democratic functions, such as informing the audience, there is a case for offering heightened protection to both. However, the individual or non-media body will also hold interests in freedom of speech that are not held by media institutions. With a functional approach, there is a risk of losing sight of this difference and generalising the expectations of media institutions to all speakers, even where non-media functions are performed. For example, in *Medžlis Islamske Zajednice Brčko v Bosnia and Herzegovina*, the Grand Chamber of the European Court Human Rights stated that an NGO, as a social watchdog, was expected to follow the duties and responsibilities of a journalist even when it made allegations in a private letter to a state authority (as opposed to publishing the content to the world at large).[122] Such missteps are not inevitable under a functional definition, but it is important to be aware of such risks when developing the standards under Article 10.

Both the institutional and functional definitions of the media have shortcomings. There is, however, a role for both, and the appropriate definition will depend on what question is being asked. If the question is whether the media should be subject to a specific regulatory regime or have privileged access to certain types of information, then it makes sense to specify the type of institution. For example, publishers will

[121] *Steel v UK*, App no 68416/01 (2005) 41 EHRR 22 at [89].

[122] *Medžlis Islamske Zajednice Brčko v Bosnia and Herzegovina*, App no 17224/11 (2017). Compare the dissent of Judge Sajo.

need to know whether they are subject to a particular regulatory system in advance. Similarly, the purpose of providing special media access to the family courts would be defeated if anyone could claim to be the media and attend sensitive family cases. By contrast, if the question is whether a publisher should have a defence to a particular cause of action, then it makes sense to take a functional definition, so that anyone fulfilling journalistic standards can benefit. On the latter questions, the court can apply the functional definition on a case-by-case basis. The combination means that the institutional approach will help to identify those core institutions that are clearly recognisable as media entities, while the functional approach recognises the fluidity in the communicative environment and allows for the protection of journalistic activity that takes place outside established media institutions. The two approaches can also be combined, so that certain protections might only be available to media institutions when performing certain types of journalistic function.

Whether an institutional or functional approach is taken, the definition of the media is not static. As the means by which people communicate and the practices of the media change, so too does our understanding of what the media is. Thirty years ago, the term 'media' was generally used to describe either mass printed material, such as newspapers and magazines, or broadcasters. Now the digital media has transformed the ways in which people can communicate. In the light of this change, there are now multiple media sectors. Some digital intermediary companies primarily provide a platform to speakers and do not promote messages based on the news values of a newspaper editor. Social media companies and search engines do not engage in traditional journalism, but they help organise and distribute the mass of information. The provision of those platforms and the selection of content through algorithms is increasingly recognised as a type of media function. Consequently, this develops how we understand what a media institution or activity looks like.[123] There are also a range of responsibilities and expectations that are gradually being applied to such companies, which will be considered further in Chapter 7. For present purposes, the point is that the yardstick by which we define the media and its processes continues to evolve.

VIII. Interferences with Media Freedom

The final question to consider is what constitutes an interference with media freedom and what the media should be protected from. When discussing media freedom, it is most common to have state censorship in mind. At the start of this chapter, it was

[123] While this shows how the definition of the media evolves, it continues to reflect the practices of certain professional institutions, and the difficulties identified with a functional definition discussed earlier can still arise.

noted that the earlier theories of media freedom were a reaction against a system of state licensing. Licensing was a particularly objectionable prior restraint as it allowed a government official to restrict the speaker before publication. Along these lines, Blackstone saw press freedom as the right of a person 'to lay what sentiments he pleases before the public', but not to protect that person from post-publication penalties.[124] The arguments that primarily focused on licensing were generalised to include concerns about judicially imposed prior restraints. The suspicion of prior restraints is especially forceful where the measure restricts content before any legal wrong has been established, such as a pre-trial injunction. Prior restraints can be particularly damaging for the media, where the content may soon go stale and even a temporary injunction may thwart the main reason for publication.[125] For this reason, the courts will rarely grant a pre-trial injunction in defamation cases[126] and the European Court of Human Rights has also warned that prior restraints 'call for the most careful scrutiny on the part of the Court'.[127]

In the USA, the Supreme Court has taken a robust stance with a strong rule that state-imposed prior restraints are presumptively invalid.[128] While the UK and European jurisprudence expresses caution about such restrictions, there is no strict rule forbidding prior restraints. Several types of prior restraints are widely accepted in the UK, such as privacy injunctions and cinema licensing.[129] Moreover, not all prior restraints are equally problematic.[130] A narrowly-drafted order that has been contested in court may raise concerns about media freedom, but not of the same magnitude as a control resting on administrative discretion.[131] The issue for media freedom will depend on the type of restraint. In recent years increasing concern has been expressed about new forms of prior restraint being imposed through techniques such as the blocking of internet content by digital intermediaries, which stops material being accessed without a determination of its legality and with decisions being made by a private company. There is no hard and fast rule against prior restraints, but the use of such measures remains a live issue in media law.

The concern with prior restraints should not obscure the problems with post-publication penalties.[132] A punishment—whether a fine, damages, criminal or regulatory sanction—all constitute an interference with the freedom of the media. A post-publication penalty can have a significant chilling effect on expression. If the penalty is particularly harsh, if the procedure for defending the publication is complex or if the law is vague, then publishers may simply choose not to publish and thereby avoid the risk of legal proceedings. The self-censorship caused by such a chilling effect

[124] W Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765–1769* (Chicago, University of Chicago Press, 1979), also noting that if a person 'publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity'.

[125] *Observer v UK* (n 68).

[126] *Bonnard v Perryman* [1891] 2 Ch 269.

[127] *Observer v UK* (n 68).

[128] See *New York Times v United States* 403 US 713 (1971).

[129] See Barendt, *Freedom of Speech* (n 15) Ch 4.

[130] ibid, 118.

[131] See the dissent of Justice Butler in *Near v Minnesota ex rel Olson* 283 US 697 (1931), and the discussion in I Cram, *A Virtue Less Cloistered* (Oxford, Hart, 2002) 130.

[132] Barendt, *Freedom of Speech* (n 15) 118–21.

may be worse for media freedom than some prior restraints in so far as the issue is not tested by a court at any stage.

Both prior restraints and post-publication penalties provide formal measures that are at least scrutinised by the system of human rights protection, which imposes a burden on government to show that a restriction serves a recognised legal interest and is necessary. As will be seen in later chapters, the government sometimes resorts to more subtle techniques of censorship. Government can make veiled threats to the media, seek to restrict access to certain events or information, refuse to cooperate with the media outlet in future, or publicly criticise the media entity. As such methods do not rely on an open and formal exercise of public power, the techniques of control are hard to challenge in courts as a violation of a fundamental right. However, it is important to recognise that such techniques used by government can be a challenge to media freedom, and to look for mechanisms to guard against such pressures.

The state is not the only threat to media freedom, and challenges can come from private actors. Some media entities may depend on the infrastructure owned by private companies to disseminate their content. A digital intermediary has the power to block content, push content lower down the search rankings or suppress certain stories on the list of trending issues. The intermediary can decide which media bodies to promote and make more visible. Such private intermediaries, however, are not required to respect the rights of others and there are arguments that such choices are an aspect of the intermediaries' editorial autonomy. However, as with a powerful media organisation, there are increasing demands to make digital gatekeepers subject to some form of accountability for their decisions. Such demands reflect the view that intermediaries are developing into a new type of media company that exercise a distinct type of communicative power.

Pressure can come from other types of private actor. The pressure from advertisers to carry or not carry certain content may be seen to inhibit media freedom. Again, such pressures are hard to guard against, as the media entity is not entitled to advertising revenue. A company is free to withdraw its advertising. More complex still are claims of internal private censorship. The power of a newspaper mogul to put pressure on journalists or editors to spike a story can be seen to undermine media freedom. However, some would argue that such pressure is simply a legitimate consequence of the hierarchy and management within the media company rather than a matter of fundamental rights.

The challenge in relation to private censorship lies with identifying those pressures that are legitimate and those that are a threat to media freedom. One answer to this question is that private censorship occurs when a concentration of private power seeks to subvert the journalist or media from performing its democratic function in accordance with professional norms. A letter from an individual to a newspaper complaining about its coverage and threatening to stop buying it is not censorship. By contrast, a large company's threat to withdraw advertising if certain content is published can be seen as private censorship in so far as a single entity has the power to impose significant adverse consequences in response to media coverage. This view sees media freedom not simply as an absence of state interference, but as the autonomy of the journalist and editor to act according their professional judgement. Media freedom requires independence from the state and the various centres of power, including the market.

The protection from private censorship often requires some positive state action to regulate the private actors. Laws requiring access to the infrastructure of communication on fair terms provides one example.[133] The law does not simply restrict the media, but can insulate it from other external pressures. Measures to support professional standards may reinforce the autonomy of journalism. Freedom of information laws can arguably make the media less dependent on insider sources for certain information. A state-imposed condition prior to a media merger, requiring editorial appointments to be made by a board independent of the proprietor, may uphold editorial autonomy. Some types of media law can work to uphold rather than restrict media freedom. Consequently, it is important to recognise that while state action can be a threat to media freedom, it is not the sole threat and nor does every state measure pose a risk of censorship.

IX. Conclusion

The discussion started out showing that media freedom is not the same as freedom of speech. The justification for media freedom does not rest on the same human values that typically support freedom of expression. The primary reasons for this differentiation are based on the fact that media bodies are institutions and wield considerable communicative power. Accordingly, much of media law is about constraining the abuse of media power, making that power accountable and harnessing the power for socially useful purposes.

The protection of media freedom is thereby conditional on the media serving the interests of the public, namely the key democratic functions. While some basic democratic functions of the media have been outlined, the specific ways these functions are performed will be taken up in later chapters. The various functions assigned to the media have evolved both with the political system and communications environment. Along these lines, the watchdog function of the press was articulated before the UK became democratic. As the country moved to a mass democratic system, the media began to perform a role in informing the public to equip them as citizens and democratic participants. Both the political culture and technology has developed to provide greater direct participation by individuals. Accordingly, the media (broadly defined to include digital intermediaries) now performs a function both in providing a platform for speakers and in curating the mass of content found online.

The changes in technology also mean that the media has been undergoing a period of rapid change. Facing stiff competition from the online publishers and declining revenues, many of the old models of journalism appear to be under threat. There is a

[133] See *Centro Europa 7 SRL and Di Stefano v Italy*, App no 38433/09 (2012) 32 BHRC 417 at [133], *Animal Defenders International v United Kingdom*, App no 48876/08 (2013) 57 EHRR 21.

constant stream of stories about established media bodies having to make cuts to their departments and a decline in local news sources. For all the talk of formal media institutions, looser networks of individuals can also perform some journalistic functions. A group blog written by specialists may not have a formal staff or any training, but can be a valuable source of information. There is an ongoing debate about whether the media will retain the institutional form that is prevalent today and whether the power of the traditional institutions will wane.

In the medium term, despite all the changes, some parts of the media landscape from the pre-internet era are likely to continue to perform an important function. The UK market can still support a significant number of national newspapers and the public service broadcasters remain a key source of news. In the longer term, it is hard to predict what will happen. If more newspapers or news providers close, that might enhance the power of those media institutions that survive. In other words, if the market can support a smaller number of papers and television channels, those entities will face less competition and wield greater influence. Moreover, the old media elites may be replaced by a new elite group of companies. This has already been witnessed with the growth of the tech giants such as Apple, Google, Facebook and Amazon. Collectively they wield a power that the press barons of a century ago could only envy. Digital media is disrupting many traditional models and practices, but so far there remains an elite set of media-related companies that have considerable communicative power. While the discussion focuses on the national elites and international actors, these arguments can also apply where power is exercised by the local media and specialised publications that also have a type of elite status and special function within the relevant field.

The argument in this chapter has been that a powerful set of institutions providing content on a regular basis to a large audience has been both necessary and a possible threat to the operation of the UK's democracy. With this background, the following chapters will examine the substance of media law, looking at whether the law successfully constrains the abuse of traditional media power and how it is responding to the developments in digital communications. At the same time, the impact of the law on media freedom will be a key theme. It is important to be alert to the risk that media laws can be vulnerable to abuse by those in positions of power and used to censor. The discussion will also show how the role of public opinion has evolved in the current political culture, which demands a greater role for citizens in the evaluation and scrutiny of public matters. The various developments in political culture, media business models and technology are collectively changing the expectations and demands made of the media. While these changes continue at rapid pace, there remains a consistent role for the media in serving the public and performing a set of functions that are vital to the health of a democracy.