

CHAPTER 3

COMPETING PUBLIC INTERESTS

1. Context

- 1.1** The public interest in a free press is fundamental. But it cannot be viewed in isolation. As has been demonstrated, it is, itself, an aspect of wider public interests such as the public interest in democracy, for example, in public life and in the rule of law. There are other public interests also of which press freedom is not a major aspect, and with which it may sometimes be in tension. This section considers some of them, in order to put the public interest in a free press in its fuller context, and to reflect on how competing aspects of the public interest are resolved and reconciled.
- 1.2** The ‘public interest’ is therefore not a monolithic concept. Nor is it the particular property of the press or any other organisation or sector. It will often be a matter of balancing a number of outcomes which would be for the common good, but which cannot all be achieved simultaneously. In a democracy, this is principally a role for Government that is, for example, used to grappling with a balance between the public interests in public spending and in low taxes, in liberty and in security, in high accountability and low bureaucracy.
- 1.3** That is by no means to portray any aspects of the public interest as mutually exclusive or zero-sum. On the contrary, the fact that many aspects of public, and indeed private, life may benefit the public makes the task of the decision-maker a much more subtle and skilful one than that. There are critical decisions to be taken about how to balance, weigh and reconcile many things that are in themselves good but not all of which may be simultaneously achievable. So it is a complex task for those charged with it, and one for which accountabilities are rightly demanded. A wider perspective than that of the press is therefore inevitable:¹

“There are more components of the public interest than those that are served by a free press, so that the press may need to control its activity to respect those wider factors. ... Sometimes it seems that the press’s confidence that its activities are serving the public interest makes it insensitive to the complexity of that notion.”

- 1.4** Most proponents of free speech, for example, accept that its exercise must be restricted in order to protect the rights and interests of others. There is an important public interest in free speech, and there is also an important public interest in the civil liberties of individuals. These may sometimes need to be reconciled. Certain acts of speech, such as speech inciting violence or race hate, are so connected with producing specific conduct as to be relatively unprotected. Even Milton, in a passage from the *Areopagitica* overshadowed by his rhetoric in defence of a free press, acknowledged necessary limits to free speech (although not necessarily limits which we would now condone):

“I mean not tolerated popery, and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpate ... that also which is impious or evil absolutely against faith or manners that no law can possibly permit that intends not to unlaw itself”.

¹ pp3-4, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Professor-Christopher-Megone.pdf>

- 1.5** Some of those who place the strongest emphasis on press freedom take their lead from the principally American brand of ‘free speech absolutism’. Free speech absolutists take the injunction of the First Amendment to the United States Constitution at face value: that Congress shall make no law abridging the freedom of speech. Within this tradition, the United States Supreme Court has developed some of the most extensive protections of free speech in the democratic world, including the protection of religious and racist hate speech as a species of ‘political speech’.²
- 1.6** However, even in a culture committed to maximum protection to free speech, the absolutist position has proved impossible to sustain. In practice, the United States Supreme Court imposes extensive restrictions on freedom of speech by identifying categories of speech which are deemed not to fall within the scope of the First Amendment. These categories include for example advocacy of imminent illegal conduct, official secrets, defamation and fraudulent misrepresentation. The Supreme Court has also denied that certain categories of sexually explicit material amount to protected speech and has been prepared to sanction far more extensive restrictions of obscene material than exist in the UK.³
- 1.7** Article 10(2) of the ECHR itself permits “formalities, conditions or restrictions” on freedom of expression so long as they are prescribed by law and necessary in a democratic society. Thus, to the extent that press freedom is protected as an aspect of the protection of freedom of expression under Article 10, certain restrictions will be necessary and justifiable in the overall public interest.
- 1.8** The Inquiry invited thoughts on the place of press freedom within a wider concept of the public interest by asking the following question, both of some of the expert witnesses and more generally of the public at large via the Inquiry website:⁴

In order to maximise the overall public interest, with what other aspects of the public interest would freedom of expression, or freedom of the press, have to be balanced or limited? The Inquiry is particularly interested in the following, but there may be others:

- a. *the interest of the public as a whole in good political governance, for example in areas such as:*
 - *national security, public order and economic wellbeing,*
 - *the rule of law, the proper independence and accountability of law enforcement agencies, and access to justice, and*
 - *the democratic accountability of government for the formation and implementation of policy;*
- b. *the public interest in individual self-determination and the protection and enforcement of private interests, for example*
 - *privacy, including (but not necessarily limited to) the rights to privacy specified in general in Article 8 of the European Convention on Human Rights and in European and national legislation on the protection of personal data,*
 - *confidentiality, the protection of reputation, and intellectual and other property rights, and*

² Barendt, E, *Freedom of Speech* (2nd ed), pp183 -186

³ pp361-363, *ibid*

⁴ para 3, <http://www.levesoninquiry.org.uk/wp-content/uploads/2011/12/Key-Questions-Module-4.pdf>

- *individual freedom of expression and rights to receive and impart information where those interests and rights are not identical to the interests and rights of the press.*

What follows picks up some of the strands of thought in the responses the Inquiry received to these questions, and which seemed to be particularly pertinent.

2. Freedom of expression

- 2.1** As noted above, the rights of individuals to freedom of expression have different origins from the public interest in the free speech of the press. Thus, freedom of expression or speech has value for individuals because of its ability to contribute to individual self-expression and self-realisation.⁵

“Freedom of individual expression is important for the development and maintenance of social identity, and for forming relationships and associations, for developing projects (that may be counter to prevailing opinion or orthodoxy).”

- 2.2** There is a distinct public interest in individual freedom of self-expression. Liberal democracies are composed of individuals free to express and develop themselves. It was put to the Inquiry in this way⁶

“Freedom of thought and expression are also in the public interest because they constitute the public as a society of equals who respect one another: a society in which each member can participate and bring their own views to the public sphere. This is a good independent of the instrumental benefits it brings.”

- 2.3** The public interest in individual freedom of expression is a distinct and different aspect of the public interest to press freedom. Here is one way in which the difference was explained:⁷

“The press has, as it were, no ‘self’ to fulfil, so an argument from self-fulfilment or self-development will not be directly relevant to questions of press freedom. More importantly, however, demands for press freedom are not (or not centrally) demands for free expression, but rather for the communication of information, and even if we think that individuals need to be able to express their views in order to develop fully as human beings, it does not follow that extensive freedom should be extended to those (eg the press) whose primary concern is with communication of information. To put the point starkly, those who aim to communicate must aspire to standards which are inapplicable for those who aim only to express their own views.”

- 2.4** The democratic rationale for freedom of expression in relation to individuals is also different from the democratic interest in a free press. It encompasses the individual’s right to receive information, impart his or her own views and participate in democracy on an informed basis. Democracy benefits from a free press where the press, taken as a whole (a sum of partisan parts), communicate a plurality of views and provide a platform for public debate.

⁵ p6, para 3, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Dr-Neil-Manson.pdf>

⁶ p1, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Dr-Rowan-Cruft.pdf>

⁷ p3, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-of-Professor-Susan-Mendus.pdf>