



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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13TH ANNUAL JUSTICE LECTURE

PRESS REGULATION

19 OCTOBER 2011

It is not customary for judges to speak publicly about great issues of the moment, at any rate if there may be the slightest political tinge to the discussion. Nevertheless the topic I have decided to address at this meeting is the press, in the light of virtually daily discussion about the rights and wrongs of press behaviour, and the possibility of greater regulation, and in particular the Leveson Inquiry. This is not a talk about the law of privacy, or anything to do with it. That would be entirely out of order, if only because the issue might arise in court next week, or the week after, or maybe in a few months time. My only concern is press regulation.

Of course, I may come to regret this decision anyway. First, because I am speaking now, and will not have heard the material drawn to Leveson LJ's attention. So I do not know what he will decide to recommend, and his recommendations may not coincide with the views I express today. But in view of some critical comments made recently about Leveson LJ and his involvement with the Inquiry I should explain that when I was consulted, as the statute requires, about the most suitable judge, after discussing it with my most senior colleagues I was the person responsible for putting his name forward as the right person to conduct it. I asked him if he would be prepared to do it. Like me he had no illusions about the burden he

would be undertaking. As judges are, he was prepared to accept it. If he is the wrong judge to conduct the Inquiry, that is not his responsibility, but mine. I have the utmost confidence in him.

The terms of reference are daunting. It is no good fooling ourselves that he has not trodden into a minefield. He is required to make recommendations for a new, more effective policy and regulatory regime which supports the integrity and freedom of the press and its independence, including from government, while encouraging the highest ethical and professional standards. When you listen to those words, and they are only a very small part of the remit, I suspect that it may have occurred to you that this is quite a task. Already the criticisms have come fast and clear. Criticisms of the structure or structures of his Inquiry or the roles and experience of the membership of those who will assist him, and indeed his approach to, for example, the open public meetings which have already taken place, are questions which are open to argument and discussion, and those who disagree with him are entitled to express their contrary views. He has however already been subjected to criticism in personal terms, to which he cannot respond. That hardly advances the debate. And it overlooks that in being prepared to accept this burdensome responsibility, Leveson LJ's obligation is to inquire and make recommendations. He is not providing a judgment which is binding on anyone in any way. When his Inquiry is completed and his recommendations are made, it will then be for Parliament to consider whether legislation is necessary, and if so what form it should take. No one has handed even this distinguished judge a blank sheet of paper upon which to promulgate regulations or constraints on the press, whether collectively, or on a single newspaper. Knowing him as I do, he wants the utmost possible public debate of the issues, not least because he recognises their great public importance.

The debate has now started. The objective must be a discussion about the issues, with, if possible, practical solutions in mind. By speaking today, I am myself engaging in the debate.

My decision to speak now is fortified because, long before the current controversy and concentrated focus on the press arose, I expressed my views publicly on a number of occasions. My views are well enough known to those with any interest in them. On the essential principle they are unchanged. And if some of you have heard me before on the subject, or read my words bear with me. This is a time for me to repeat and emphasise them. My proposition is simply stated.

In a country governed by the rule of law the independence of the press is a constitutional necessity. The principle has not, as far as I can recall, been directly and expressly embedded in statute, although you can look about and from time to time find references in statute to the principle of freedom of expression. We do not have a written constitution, or at least we do not have a constitution which is wholly in writing. The fact that there is nothing in statute which states expressly that the independence of the press is a constitutional principle does not diminish the principle. Anyway, solemn sounding words do not always do the trick. In 1791 in the newly minted United States of America, with its written constitution, an amendment was carried through all the processes necessary for a constitutional amendment and provided that “congress shall make no law...abridging the freedom of speech, or of the press”. It all sounds very obvious. But for the subsequent years in the United States itself there was turmoil and turbulence about precisely what even these apparently clear unequivocal words actually meant. So let us look at the same point from a different angle; in this country we take the principle of judicial independence for granted. The constitutional obligation on the Government to uphold this principle was not enacted in statute until the Constitution Reform Act 2005. That does not mean that the principle was in any doubt, or in any way incomplete before that date. That is one of the blessings of a constitution which is not defined by a written instrument. Such principles can also be founded in a nation’s history.

Given his clashes with the judiciary of his time, the spirit of John Wilkes would chuckle at the thought that a judge, no less, should cite the immortal words written in 1762 in the North Briton.

“The liberty of the press is the birthright of a Briton, and is justly esteemed the firmest bulwark of the liberties of this country”.

We embrace that statement. The significance of what John Wilkes said was not, as those connected with the media sometimes suggest, that the statement is upholding the liberty of the press. That is undoubtedly a direct consequence of what John Wilkes said, but in reality on close examination what he was saying was much more profound. He was asserting that the liberty of the press is the birthright of every citizen, that is, the community as a whole. It is birthright of the citizen that the press should be independent. It is therefore not a right of one section of the community, not just a sectional right. It is the right of the community as a whole. It is, if you like, our right, the right of every citizen. And that is why, if you accept it as I do, the independence of the press it is not only a constitutional necessity, it is a constitutional principle.

We should perhaps draw attention to Article 10 of the European Convention of Human Rights, which encompassed what was believed to be common law principles at the time when it was written in 1950. Article 10 provides the right to freedom of expression. Interestingly, it did not prevent the state from requiring that broadcasting, television or cinema enterprises should be licensed, but this potential restriction was not extended to the press. Ideas and information may be imparted without interference by public authority, unless limitations are imposed for identified specific policy reasons. None of those reasons for limiting the imparting of information ever extends to information with which the government or authorities of the day, or indeed a large body of citizens, may disagree or view with distaste. All this may lack the inspiring quality of John Wilkes. But it is making the same point.

There is an element of introspection in my expression of these views. Again, I am saying nothing new. I have said what I am about to say time and time again. The independence of the judiciary and the independence of the media are both fundamental to the continued exercise, and indeed the survival of the liberties which we sometimes take for granted. These are critical independences which are linked, but separate. As far as I can discover, there has never been and there is no community in the world in which an independent press flourishes while the judiciary is subservient to the executive or government, or where an independent judiciary is allowed to perform its true constitutional function while, at the same time, the press is fettered by the executive.

In the sense that I have identified a community of interest, I should declare it. Although judges are frequently the victims of press criticism, sometimes indeed of wholly unjustified press criticism, the constitutional arrangements which underpin the independence of the press provide support for the principle of an independent judiciary, just as an independent judiciary does an independent press. These are “twin independences”, each of us utterly independent of the other, but both fundamental to the welfare of the community as a whole.

A word about practical realities. An independent press, or one or other of its constituents, will from time to time behave appallingly, or employ individuals who in order to pursue a story will commit criminal offences. No editors, I think, have ever advocated that they are entitled to some special journalistic privilege if they do so, immunising them or their employees from criminal prosecution. Of course not. So that is not the issue.

An independent press, or one or other of its constituents will also from time to time behave if not criminally, with scandalous cruelty and unfairness, leaving victims stranded in a welter of public contempt and hatred or uncovenanted distress. But on the very same day one of the other constituent parts of the independent press may reveal a public scandal. The scandal of telephone hacking which took the form of cruelty and insensitivity to one family and

ultimately led to the setting up of the Leveson Inquiry was uncovered and revealed by a different constituent part of the press. The first of these scandals – the cruelty and unfairness - should never happen. The second – the revelation of a public scandal - must be allowed to continue to happen. My own view is that the public value of the second is priceless. Whatever means of regulation are designed to reduce the occasions of unacceptable behaviour by elements of the press they must not simultaneously, even if accidentally, diminish or dilute the ability and power of the press to reveal and highlight true public scandals or misconduct.

Any system of regulation which is consistent with an independent press – and no other system would be acceptable - must be achieved in the context of two realities of modern life which are rather removed from the high flown rhetoric. First, the press is no more exempt from the rapidly changing technological world of communication than the rest of us. That does not mean that when we are seeking to identify the standards which should govern the press, we should equate them with the lowest common factor to be found in communication systems. But it does lead to the further consideration. There can be no independent press if the independent press cannot survive in the marketplace. The different newspapers have to sell, and they sell in greater or lesser numbers as the public chooses to buy the product. And as the public chooses to buy, so the advertisers will pay for advertising space. Whether we call it choice, or competition, we need a press which responds to the demands of everyone who buy newspapers. And of course, it is part of the exercise of our own constitutional freedoms, that we should be able to choose for ourselves the newspapers we buy and read. We are not cut from identical cloth.

It is no secret that the press, both in the country, and nationally, faces huge financial problems. So, again getting away from the rhetoric, if there is no press to be independent, the issue of an independent press might become entirely academic: a wonderfully interesting topic for a PhD thesis 25 years after the last independent newspaper had closed down.

And there is this further consideration. We shall not then lack printed news material. It will be plied through our letterboxes and our computer systems. It will consist of the handouts prepared at the expense of the taxpayer by government, government departments, and the various different authorities which are central to our lives. While we tend to concentrate on the risk of emasculation of the independent press by regulation and statute, we need to be no less keenly aware of the risks to it provided by financial pressures and technological advances.

In the end, all these issues are for public discussion. Leveson LJ has made clear that he wants these issues to be discussed as publicly as possible. In the end, he will have to make recommendations. The greater the extent of public debate, the more likely that he will have all the different considerations in mind and the greater his opportunity to listen to and understand some of the conflicting interests, the better informed his Inquiry is likely to be.

The conundrum which faces us, and Leveson LJ in particular, is how best to avoid dilution of the essential constitutional principles. It would be easy, on the basis of a number of disturbing instances in recent times to say that self-regulation has failed. Let me examine this, recognising that some very sad examples of press misbehaviour have happened.

First, crime is crime. If and when crime is committed by reporters with or without the support and encouragement of an editor, it should be investigated, and if on the available evidence there is a reasonable prospect of a successful prosecution, he or they are prosecuted. We do not say that the General Medical Council and self-regulation have failed when, as sometimes happens, a doctor sexually molests one or more of his patients, or like Dr Shipman murders them.

The Press Complaints Commission is now 20 years old. Not long after its 10th Birthday the Media Committee of the House of Commons pointed out that the PCC has neither authority nor resources “other than what is ceded voluntarily to it by the press industry”. Membership is not obligatory. The Commission has no investigative power. In reality it has no disciplinary power. When it works, as most of the time it does, it is because the press itself is prepared to comply with its rulings, not because it is under legal compulsion to do so. Its main role, and I do not seek to diminish it with faint praise, is to provide a sort of ombudsman/mediation service between the newspaper and an individual or group which is aggrieved by an article. It cannot award compensation. To criticise the PCC for failing to exercise powers it does not have is rather like criticising a judge who passes what appears to be a lenient sentence, when his power to pass a longer sentence is curtailed.

Nevertheless the PCC has been subjected to a number of criticisms. I repeat, I am deliberately not commenting on them, or whether they are justified. The point I want to advance is different. Even if they are fully justified, the criticisms of themselves do not automatically exclude self-regulation or a form of self-regulation in the future. In other words, it does not follow that we should jump from the present system to government regulation or regulation by a government appointed body which would give ultimate power to government. I hasten to add that I will be equally unenthusiastic about regulatory control in the hands of the judiciary. That would diminish the twin independencies about which I spoke a few minutes ago.

We must remember, that whatever lies ahead, the ordinary law of the land will continue. Crime will be crime. Injunctive relief where appropriate, with alleged breaches of any Code will be available to be deployed in argument in support of the application. Contempt of court powers will remain. So will liability to damages for breach of confidence and defamation.

May I offer just a few thoughts very brief on how the PCC might be strengthened. What should be its new powers? Perhaps the first question is whether it should continue to be called the PCC. Is the brand's name too damaged? I shall call it an improved PCC, by which I mean a more powerful body. It is immediately attractive to suggest all sorts of controlling and disciplinary powers being vested in the new body – that it must not be a toothless tiger. But we need to be careful. There is no point in a toothless tiger, but the concept of giving what would in effect be censorship and licensing powers over a constituent part of the press to a body vested with responsibilities for the whole of the press should set alarm bells ringing. And the problems would be aggravated by the fact that in a self regulatory body, at least some of the members will be editors of rival competing newspapers, and this might then call into question the fairness of any such adjudicating system. Should the body have power to prevent publication, or should its role be limited to remedies for publication outwith the Code?

The first responsibility of the new PCC would be, of course, to continue the conciliatory/mediation work which is so successfully carried now. But consideration would have to be given to whether it would be vested with power to make express findings that the code then current had been broken, and if so to direct the terms of any apology or appropriate article in the offending newspaper, and if the power is granted, to make an order for compensation. Two further points. The new PCC – that is the new body currently in my contemplation in any new system of self-regulation - must be all inclusive. You might perhaps be willing to discount a news sheet circulated to about 25 people, but any national or regional paper would have to be included. In short any new PCC would require to have whatever authority is given to it over the entire newspaper industry, not on a self-selecting number of newspapers.

The final point for mention, just for this afternoon, is the issue of the appointment of the membership of the new regulatory body. I suggest that the sensible approach would be to

avoid all government involvement in the process. The choice of members and their removal should similarly be independent of government. Again the structures would arise for discussion. There are a very large number of bodies operating in the public interest which are independent of government. One example is the Bar Standards Board. Another is the Judicial Appointments Commission. It is, of course, essential to the way in which any of this may work that the membership should include a significant number of editors, and/or representatives of the newspaper industry as well as what I shall describe as “civilians”. All I am saying is that structures like these are not beyond the realm of achievement.

I have, as is obvious, joined the debate. If he were here, I expect that Leveson LJ would say that none of these issues is straightforward. And I would agree with him. But we all need to think, and think very hard, about how to assist the debate.

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