Privacy and the Press: Is state regulation in the public interest?

In between all the sorry tales heard in the Leveson Inquiry, the worst-off individual by far is Lord Leveson himself. He is caught in the midst of a fierce if familiar battle between two great Articles of the European Convention on Human Rights: that of the freedom-fighting Article 10 and the privacy-protecting Article 8.

Whilst other judges have been faced with the same battle in the court room, they have been able to steer a rickety course through the battle on a case-by-case basis, determining when breaches of privacy are too flagrant to stomach, and when defences of public interest ought to succeed. Lord Leveson has no such choice. He must recommend a policy applicable to *all* cases. He must, in essence, decide what balance between the two Articles is necessary for the public interest.

Both sides have deployed powerful arguments. The press has argued that freedom to publish any information is essential to a democracy. Those advocating state regulation maintain that methods of information collection deployed by some journalists are an affront to people's privacy. What most of these commentators have apparently failed to realise is that, on the whole, they attack different points. The same decision need not apply to both published content and methods of researching that content.

The press are right to argue that regulating what they may legitimately publish is not in the public interest. Occasionally a revelation by the press is of fundamental importance: the exposure of the MPs' expenses scandal in 2009 is a good example. The rarity of such exposures possibly demonstrates what an effective deterrent publication can be. Perhaps without that threat, there would be no safeguard to keep public figures from behaving dishonestly. It is no defence to argue that much of the content published in the press has no relevance to how well public figures perform their jobs. Different information is important to

different people: only members of the public can decide whether the information is relevant, and they can only do so if they have access to such information.

It would actually appear that any regulation of content needs to be expansive rather than restrictive. Tony Blair's complaint in the Leveson Inquiry was that if public figures offend a section of the media, they are 'effectively barred from getting their message across'. This is a serious problem if in fact true. The arguments of nineteenth-century theorists were based around the importance of the press to lively political debate. Article 10, likewise, enshrines the right to 'receive and impart information and ideas without interference'. If the allegations are true, therefore, it suggests that the most ardent supporters of Article 10 have forgotten that their function is not merely to hold public figures to account: it is also to encourage lively debate – a necessary ingredient of which is to allow political opinion. Any state regulation of the publishable content must not focus on what the press *cannot* publish, but what they cannot *refuse* to publish.

The relationship between how the press gathers such information and the public interest is another matter. Some journalists have failed to respect any boundaries of privacy, even those imposed by statute. Worse, during the Leveson Inquiry they have failed to produce a single example where their illegal breaches of privacy produced a story of public interest. This must be better regulated; laws cannot apply to some individuals and not to others. As Ivor Jennings argued, 'if everybody is free to do as he pleased there is no liberty for anybody to do as he pleases'.

The greyer area consists of those methods deployed by some members of the press which are not illegal but which are, to most people, morally repugnant and a gross invasion of privacy. Article 10 cannot unquestionably trump Article 8. Everyone, regardless of whether they are public figures or private individuals, is entitled to some element of privacy. When we agree to remove that right from some individuals, we risk the line being extended beyond our

control. Maintaining everyone's right to privacy is essential to the public interest because otherwise every member of the public is at risk of having that right removed from them.

'Press hounding', however, cannot be easily regulated. Such regulation risks the concealment of public deception. A politician's affair, for example, which throws his integrity into question, is more discoverable if members of the paparazzi are following politicians constantly as a matter of course. It is clear self-regulation has not worked – the temptation of several thousand pounds for a single picture is too much. Yet it is hard to accept that state regulation is the answer.

Nor is the awarding of damages for gross breaches of privacy sufficient. Such judicial regulation compensates only when the damage has already been done. What can be done for those individuals who, aside from their public role, lead a thoroughly unexciting life that means nothing of a private nature is ever published about them, but they are nonetheless subjected to press hounding 'just in case'? This is the conflict between Articles 10 and 8 at its core.

It is a conflict that cannot be resolved in a way the Leveson Inquiry is expected to do. There is no question about what the press can legitimately publish – any state regulation that attempts to be restrictive is certainly not in the public interest. Yet the methods of gathering information are trickier. Whilst existing laws must apply to everyone, the line between the public interest and privacy is murky at the end governing less obvious breaches of privacy. This line cannot be regulated by statute, however unsatisfactory this might be for those with no claim to bring to the courts. The area is grey for a reason. To bring it into sharp relief risks either public deception or the removal of a fundamental human right from some individuals.

Yes, poor Lord Leveson. He is expected to draw such a line.

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