

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

*“The press provides an essential check on all aspects of public life. That is why any failure within the media affects all of us. At the heart of this Inquiry, therefore, may be one simple question: who guards the guardians?” – Lord Justice Leveson<sup>1</sup>*

The challenge of drawing the boundary between individual privacy and press freedom is one of the most complex legal problems of this century. What began as a slow trickle of encroachments has turned into a flood of morally questionable privacy violations committed in the name of the free press. The problem is primarily caused by the development of new technologies, which has far outstripped the growth of the common law and led to an unstable legal environment. This essay argues that regulation is needed to restore the balance between personal privacy and media freedom, and further, the state rather than an industry-based body must be the regulator.

### **Defining the problem**

It all used to be so simple. The technology didn't exist to invade privacy from a distance. Accordingly, since a person had legal rights to stop others from entering their private sphere, they could generally prevent personal conversations from being overheard and private photographs and documents from being taken or stolen.<sup>2</sup> If that space were invaded, compensation was available. Nowadays personal space extends beyond a person's house into the wilderness of cyberspace. Technology has advanced so that private

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<sup>1</sup> At the opening of hearings in the Leveson Inquiry on 14 November 2011 repeating comments made on 13 July 2011.

<sup>2</sup> Eg. *Prince Albert v Strange* (1849) 64 ER 293

photographs can be taken from kilometers away and private communications can be eavesdropped on remotely. The explosive growth in technology has surpassed the protection afforded by the English common law and the disparity is reaching critical mass.

It is important to note that privacy violations are not limited to public figures. Ordinary people are unwillingly caught in the public eye if, for example, they suffer a personal tragedy that captures the nation's imagination and sorrow. Similarly, privacy is not a purely personal value. Privacy violations undermine the fabric of society by slowly reducing the amount of information we are entitled to keep to ourselves.

### **Why regulate at all?**

The current approach to privacy has seen the argument for a free press trump individual rights and personal freedom at almost every turn. The fundamental problem with the recognizable catchcry of "press freedom" is that media corporations are not solely altruistic bodies committed to the public good. By and large they are corporations run for profit. Why should the press be given a carte blanche to intrude upon personal freedoms in a way that no other corporation or democratic government could do?

It is trite to say that the press plays a vital role in all effective democracies. A free and efficient media keeps governments and the private sector accountable as well as informing the public. However, there must be responsibilities attached to the remarkable freedoms enjoyed by the press.

The public is intrigued by all kinds of information; we are extremely nosy global citizens. Yet, it must be accepted that there is a difference between wanting to know, and having a right to know. Restricting the press to publications that are legitimately in the public interest does not unfairly impinge upon media freedom. It does not limit political comment, in which there will always be legitimate public interest. Nor does it curtail coverage about corporate or personal wrongdoing.

There is no denying that regulation must be crafted in an extremely cautious way in order to avoid unduly restricting the press. That difficult task is within the capabilities of Parliament.

If it is accepted that some form of press regulation is required to restore an individual's ability to control dissemination of their personal information, the question arises: who should be the regulator?

### **Effective regulation must be by the state**

Any regulation governing the press must be an exercise in weighing interests in privacy against interests in publication. Fundamentally, the reason why such regulation cannot be carried out by the press itself, or by an industry based body, is that those parties will always be advocates for publication. The press is well placed to judge what the public wants to read, but ill placed to judge if publication is in the broader public interest.

Regulation that is implemented by the legislature and overseen by an independent judicial body is more likely to be objective, and better able to balance the complex competing public interests involved.

There are a plethora of additional reasons why the state makes a better regulator in the privacy sphere. First, unlike many other professions governed by industry regulation, such as engineers or builders, there is no technical skill involved in determining the standard to which the press should be held. Secondly, regulation that is backed by legal clout is more likely to be a serious deterrent against bad conduct, and hold the press to a higher standard. That is important in an oligarchic industry with powerful players and where an important question of personal freedom is at stake. Thirdly, technology and social attitudes to privacy are constantly developing. The legislature, as a democratic representative of the people, is a more reliable litmus test of those changing attitudes. Fourthly, impartial regulation by the judiciary is more likely to be trusted by the public, and so begin to restore public confidence in the media.

In essence, an industry that is governed by profit cannot be left to self-regulate. As a society we don't permit individuals to judge the legality and morality of their own actions, and there is no reason why should we permit the collective press to do so.

## **Conclusion**

We are at a crossroads in privacy regulation. The decision on the way forward will likely define legal and social consciousness in this area for many years to

come. Just as all civilized societies have developed systems of property rights to delineate private and public physical spaces, the time has come for regulation to redefine informational boundaries.

The only meaningful way to embed privacy protection into the press' moral fabric is through state regulation.

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