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

Recently most British newspapers have called for increased state control of banks, electricity companies, care homes and the BBC. Yet when it comes to themselves, they prescribe a different medicine.

The press is not just claiming differential treatment from the industries on which it reports. It is also refusing to follow the lead of doctors, lawyers and medics – all of who have shifted to statutory oversight. In those fields, a democratic state is understood to balance competing public interests better than the industry itself.

I believe the press should be brought in line with these industries for three broad reasons: a state regulator would offer a fairer balance of privacy and free speech, it would not facilitate censorship, and it would cover new players as well as the heirs of Fleet Street.

1. Protecting privacy

The press's activities are already subject to statutes, as Rebekah Brooks is finding out.

What we do not have is a body backed by statute that provides a shortcut to the courts. Instead the Press Complaints Commission acts as the primary arbiter between privacy and free speech, and its approaches are given weight by the courts.

On paper, this matters little. The Editors' Code has a virtually identical conception of privacy to Ofcom, the statutory broadcasting regulator. However, in practice, the PCC's imbalance is clear.

Take the case of Geoffrey Peck, who was filmed attempting to commit suicide. The broadcasting regulators and the courts found that privacy considerations should have prevented the images being shown. Yet the PCC saw no such problem.

Similarly, the Commission found no obstacle to publishing photographs of the actress Kate Beckinsale and her daughter holidaying on a public beach. The courts, following *Von Hannover* and *Murray v Express Newspapers*, would have taken a stricter line.

A responsible regulator would have looked at the courts' subsequent rulings, and relayed them to the press. But there is no evidence that the PCC has done so. The *Daily Mail*, for example, sees no expectation of privacy in public places.[1]

Justice is not solely about outcomes. It also requires fair processes. A press regulator, which gives representation to editors and which acts as the industry's cheerleader, lacks credibility. Consequently, several claimants have decided to bypass the PCC and go straight to court. That undermines one of the regulator's purposes – to alleviate the flow of legal claims.

Self-regulation once possessed advantages, but they have disintegrated. The PCC supposedly offered insider expertise, but it knew less about phone-hacking than the *Guardian*. It was meant to have relieved Parliament of a regulatory burden, but we now have a costly inquiry just two decades after the Calcutt report.

Lord Black, chair of the PCC, says that self-regulation could be reinvigorated. His favoured body would have less industry representation. Like Ofcom, it would have powers to investigate and fine. Perhaps, to paraphrase Deng Xiaoping, it doesn't matter whether the cat is statutory or self-regulatory, so long as it catches mice?

In fact, it does matter. First, a self-regulator cannot force publications to accept its oversight. "Bollocks to the Press Council," the *Sport* proclaimed when censured for publishing photos of Gordon Kaye. It could do likewise under a state regulator, but it would have to pay the fine regardless.

Second, to support self-regulation is to favour hope over experience. On three occasions during Lord Justice Leveson's lifetime – 1953, 1990 and 1993 – statutory press

[1] See http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Transcript-of-Morning-Hearing-11-January-2012.pdf (pp. 10-11).

regulation was seriously proposed. Each time self-regulation was chosen and proved disappointing.

2. Avoiding censorship

When the press exposes corruption, the interests of the politicians and the public diverge. Critics argue that state regulation could be a Trojan horse for censorship.

There is little evidence for this fear. Parliament has been a defender of free speech. Currently it is strengthening press freedom by reforming defamation laws. Some MPs have even used parliamentary privilege to defy court orders on privacy.

Occasionally, the legislature and the executive have tried to influence what can be published. Yet these attempts have little to do with the regulator. When the Labour government wanted to influence the BBC during the Iraq war, it didn't use the regulator; it used public opinion and a judicial inquiry. When MPs wished to curb publication of their expenses, they simply tried to pass a law.

So it would be under state regulation. Politicians could try to pass laws, but any repressive legislation would likely be incompatible with the Human Rights Act.

Of course, scenarios of censorship can be dreamt up. However, the risks to free speech are no greater than those posed by private ownership of newspapers.

3. Into the blogosphere

So far I have argued that self-regulation has given too little weight to privacy, and that a state regulator would not be so careless with free speech. Now I want to address the assumption underlying self-regulation: that it makes sense to have a body exclusively for the press.

The line between old and new media is increasingly blurred. Already blogs such as Guido Fawkes can rival newspapers' influence. In the naming of Ryan Giggs and Lord McAlpine, there already exists an uncanny interplay between the press and Twitter.

Any regulator must therefore deal with both the traditional press and the newcomers. But the PCC has shown no interest in the latter, who in turn reject its legitimacy. The result is unsatisfactory for claimants, who are denied recourse except in court, and for the public, who benefit from joined-up oversight.

Some worry that a state regulator would be outwitted by the internet. In fact, recent events involving Lord McAlpine show the opposite. Users can be identified where they infringe individuals' rights to reputation and privacy.

Conclusion

For nearly sixty years, self-regulation of the press has failed to give due weight to privacy. For the past decade, statutory regulation of broadcasting has not produced censorship. Perhaps the question should be, why is the burden of proof still on those proposing statutory regulation?