

The perceived breakdown in the legal regime of privacy protection can be addressed by certain amendments to the Human Rights Act

Following on from an [Index on Censorship](#) debate on privacy, free speech and a feral press at LSE, [Andrew Scott](#) reviews events of the 'Privacy Spring' and finds that while we do not need a new privacy law, some refinements to the Human Rights Act might be able to address the perceived breakdown in the legal regime of privacy protection.



This week, the LSE hosted an [Index on Censorship](#) debate under the title of [Injunctions are a necessary evil: privacy, free speech and a feral press](#). It's a timely theme. What was once a niche specialism in legal practice and scholarship has burst onto the media – and hence the political – agenda, and received an almost incredible level of attention in the public sphere (even though as regards the informational privacy of the average person, it is perhaps not the most salient of those issues canvassed in [the current issue of the *IoC* magazine](#)). In the policy sphere, a Parliamentary joint committee is to investigate the matter further in the autumn, following on from [the broader work of the Culture, Media and Sport Committee](#), the related ongoing [joint committee inquiry into libel law](#), and the Radio 4 PM's pre-emptive [Privacy Commission](#).

The Injunction System

The ins and outings of the 'Privacy Spring' hardly need to be rehearsed, but the basic rules regarding the award of injunctions somehow remain under-explained. In publication cases other than those involving libel, s12 of the Human Rights Act provides that injunctions should be granted when the claimant is more likely than not to win at full trial. The injunction itself is a shortish document that sets out the identities of those involved, sketches the information that may not be published, and explains the ramifications of breach (a contempt of court punishable by fine or imprisonment). A recent innovation is that they now also set a date for the matter to return to court.

Judgments on interim hearings are usually published, albeit with salacious details left in a confidential appendix. A few years ago, however, given the increased capacity for 'jigsaw identification' by way of internet searches (the ready association of the 'story' with the 'person(s) involved'), judges began to impose the now notorious 'super-injunctions'. These prohibit the communication of not only the private information concerned, but also the very fact that the order exists. As the [recent Neuberger report](#) confirmed, though, this particular issue is all but yesterday's news. Recognising the importance of open justice, for the past eighteen months judges have tended instead just to anonymise the identities of the parties. Hence, we have been consuming alphabet soup.

The 'Privacy Spring'

These judicial attempts to cope with the developing technologies of the public sphere have been but one element underpinning the recent privacy fixation. Other new factors have also entered the mix.

First, we have witnessed a not-yet-concluded one-man crusade for the right to prior notice of the publication of private details. Max Mosley's pained but graceful presentation has impressed and persuaded many who have listened to his argument. How can it possibly be accepted, he presses, that an individual's most personal information can be stolen, traded and exploited for no reason other than an insensate dedication to profit?

Secondly, some ill-advised Parliamentarians have undermined court orders granted by judges with singular access to the fullest available knowledge of the factual circumstances. [As Sir Stephen Sedley put it recently](#), "the naming of Goodwin and Giggs... disrupts the historic equilibrium between the judiciary and the legislature". Parliament must keep its houses in order.

Thirdly, the advent of new media – for some the welcome dawning of an era of open information, but for others [Panopticon](#) and [Leviathan](#) combined – has enhanced the capacity for anonymised gossip and whistle-blowing. There is good reason to be sceptical as to whether micro-blogging platforms necessarily render the existing legal architecture obsolete in some irresistible, technology-driven shift towards radical openness.

Fourthly, newspapers have dedicated their considerable energies to fighting legal constraints on their business in their pages rather than in the courts (and woe betide anyone who picks a fight with those who buy ink by the barrel). As Sedley put it, “the media may present themselves as amused spectators, but it is they who have provoked and exploited the breakdown of an element in the democracy they themselves inhabit”. Individual journalists may not have been directly involved in leaking the details of injunctions on Twitter, but a number of British newspapers have certainly deployed implicit allusion, innuendo and intrigue to ‘push’ people online to search for the gossip. That ‘everyone’ knew the identities of the people involved was a singular achievement not of ‘new media’, but rather of old-style hacks exploiting a new wheeze.

Finally, the phone-hacking scandal has exposed some of Fleet Street’s guiltier secrets. The combination of Sienna Miller, Prince William, and – least appealingly, but most importantly – the extraordinary diligence of a handful of journalists, lawyers and MPs has dragged the wretched, squalid truth into the sunlight. It takes some chutzpah for newspapers to push the privacy issue at what should be their historic nadir.

New rules on privacy injunctions?

We must now decide whether anything need be done to address the perceived breakdown in the legal regime of privacy protection. Do we need a privacy law, or perhaps some revision of section 12 of the Human Rights Act? [A first and not unreasonable answer is ‘no’](#). Certainly, few would wish to upset the generality of the balance reached by the courts as to when privacy should prevail over free speech and vice-versa (which is not to say that it is impossible to quibble at the fringe). Section 12 might be refined, however, so as to emphasise the importance of free speech on matters of public interest, to avoid the judicial licensing of stories, and yet to accommodate the demands for prior notification. What follows is a proposal in four parts.

The primary move is the reinvigoration of the original Parliamentary intention to emphasise free speech at the injunction stage. One clear message of the Strasbourg judgment on Mosley’s case was that damages can be an effective remedy for breach of privacy. So, if in some cases claimants are wrongly denied an injunction but instead win damages, then society can be satisfied with that (which is not to licence exploitation of privacy willy-nilly).

One way to proceed would be to make it (marginally) harder to obtain an injunction by **emulating the threshold test that prevails in libel cases**. The ‘rule in *Bonnard v Perryman*’ provides that injunctions are denied in libel if the defendant promises credibly to defend the case at trial. In the privacy context, a promise to demonstrate that the privacy interest either did not exist or was overridden by the public interest in the given story could be sufficient to see an injunction denied.

This approach would avoid the risks of crystal ball-gazing. As Judge Eady emphasises at almost every interim hearing, at that stage judges proceed on the basis of partial ignorance. They can only guess at the outcome of a final trial. The existence or weight of any privacy interest remains under-determined. Only at full trial is evidence tested by cross-examination. Before that time, the court is effectively asked to take the claimant’s word on the prospective harm. The rights that judges then balance are simulcrum only. At first glance, this approach may not shift the outcome of many interim hearings. What it would do, however, would be to emphasise the editor’s perception of the public interest and place the decision on publication firmly back in his or her hands rather than those of the judge.

One obvious risk is that this rule would be ‘gamed’ by canny editors. To avoid this, additional components could be ‘bolted on’. Parliament could provide for **sanctions for publishers who deliberately mislead the court at the interim stage**. This might include punitive damages, costs penalties, or perhaps even contempt proceedings where the publisher had deliberately ‘cheated’.

There is also the criticism that by still allowing publication of intrusive stories the defrocked claimant is expected to expose themselves to further humiliation in courtroom cross-examination and reporting. Mosley’s own favourite analogy is that of the unfortunate who, having already had one leg broken, has the other broken by the legal system before being asked to pay handsomely for the pleasure (damages being rarely sufficient to meet even a successful litigant’s costs). It may be though, that it is the fear of litigation-induced penury and not that of further embarrassment that deters claimants from suing. To limit any financial barrier to the bringing of claims, **Parliament might set out principles for a workable ‘account of profits’ remedy that would strip the publisher of all revenues generated by the privacy breach**. This would disincentivise cheating by extracting the ill-gotten gain.

Finally, as presumptive public interest cases would be separated from merely salacious tales, Parliament might reconsider the proposal for prior notification. Musing on the theme last year, the [Commons Media Committee](#) suggested that the goal could be met by amendment of the PCC *Code of Practice*. This would eliminate the difficult issue of to whom the obligation should apply. Only those that subjected themselves to

industry self-regulation would be covered. Therein lies the limitation of any such scheme however. It would not cover all publishers, and might encourage more proprietors to follow the example set recently by Northern & Shell – publishers of the *Express* and *Star* newspapers, *OK!* magazine and other print publications – and simply withdraw from industry self-regulation.

In addition, therefore, Parliament might introduce **a system of fines for breach of the notice obligation**. If action could be taken only by or with the consent of the Attorney General (as in the statutory contempt cases), they would bite only where the public interest dictated. Neighbours gossiping over the privet would be safe; not so multinational media organisations exploiting privacy for profit. In addition, where meeting the prior notice obligation risked destruction of evidence or intimidation of sources the Attorney General could demur from acting.