Moses' theory for IPSO: less independence, not more

LSE Media Policy Project director Damian Tambini responds to Sir Alan Moses' speech on IPSO and the future of press regulation, given at the LSE last week.

Alan Moses has offered a spirited and entertaining defence of the Independent Press Standards Organisation (IPSO). As a theoretical justification of his approach to IPSO however, it is dangerous, because he proposes a regulator that is far too enmeshed with the newspapers it should hold to account. Moses' attempt to parry criticism from press reformers can only undermine his case to reform IPSO, if indeed he genuinely wants reform.

Moses' argument, which draws extensively on the work of my LSE colleagues such as Julia Black, who has already published a response, runs as follows:

1. Self-regulation and 'meta' or co-regulation require dialogue and closeness to the regulated entities. Without this they will be ignored. Calls for clear blue water between IPSO and the press should therefore be resisted.
2. In the case of press regulation, the objectives of regulation are not clear. This is demonstrated by public demand for prurient stories.
3. Press regulation is not professional regulation because of the lack of control of market entry through licensing. Therefore it has to seek accountability and legitimacy from its close relationship to regulatees.
4. The newspapers are not 'defying the will of Parliament' by not establishing a recognised regulator, because Parliament wanted the press to *voluntarily* self-regulate.
5. The IPSO board is negotiating with the newspapers that fund it (via the Regulatory Funding Company) to change the rules. This is a delicate and private negotiation that is progressing well. But I cannot tell you anything else.

The argument as a whole, and each of these elements, fail to persuade.

1. The straw man with whom Sir Alan is locked in combat does not exist. No one is claiming that the IPSO should not engage in dialogue with the press. Whilst arguments are made that IPSO should be more independent – in terms of its rules and procedures – to claim that there should be no communication between IPSO and the press would be preposterous, which is why Moses is unable to cite anyone actually making this claim.

Moses draws upon contributions to regulatory theory of my esteemed LSE colleagues. However he does so selectively and disingenuously. The advantages of responsive regulation, as Black and others describe, and meta-regulation (or as it is more often referred to in the specialist literature on media self-regulation, 'regulated self-regulation' or 'co-regulation'), are non-controversial. They enjoy legitimacy and work with the grain of the industry. But there are also of course disadvantages and endemic dangers of capture that have to be balanced. To derive from this subtle theory a sweeping, self-serving, one-sided argument that neglects any notion of the danger of regulatory capture – as Moses seems to be doing – is selective to the point of absurdity. Black herself has already raised questions to this effect.

2. Moses goes through some uncomfortable contortions in his attempt to stand up his claim that the objectives of regulation in his field are unclear. Here he strays towards the familiar media law canard that the definition of the public interest is what the public is interested in. It is not entirely clear why he needs to do this. Is he concerned that the current Editors' Code does not offer clear unambiguous standards? Surely this is where the objectives are set out, and they appear to be

non-controversial. Perhaps I am missing his point here, but I cannot really explain what he is claiming here.

3. Drawing on the work of Andrew Scott and Julia Black, Moses argues that because there is no licensing control of market entry or statutory backing, legitimacy for press regulation will have to come from the press themselves. This is another argument against independence of regulation, and another argument that is over-stated. The standards reflected in the editors' code explicitly reflect and draw upon existing European Court of Human Rights standards of freedom of expression and privacy, for example, and in this sense such self-regulation codes do derive authority from legal standards even without formal delegation. And whilst professional closure in journalism is not 100% effective, it is the case that the employment contracts of journalists tend to ensure that breaching the PCC (now IPSO) code does constitute breach of contract and therefore facilitates exclusion from the profession (if you breach the code, you tend to get sacked). This does not undermine the argument that legitimacy in the eyes of the regulatee is important. But (i) legitimacy could of course come from recognition under the charter or elsewhere and (ii) it certainly comes from legal and professional standards, and in any case to derive a blanket justification of capture from such an argument is bogus.

4. Are the newspapers, in openly saying they will not seek regulation, denying the will of Parliament? This is where Sir Alan has half a point. It is certainly possible to construe what emerged from Leveson via Parliament: i.e. the Crime and Courts Act and the Royal Charter, as *not* willing that the press form a recognised regulator. But this is a grey area: Schedule 2 of the Royal Charter does require the Recognition Panel to report to Parliament annually and specifically to report if there is no recognised regulator, and this does indicate that Parliament has a view that some workable regulatory framework should emerge under the charter. Parliament has to take a view on receipt of such a report of what it should then do. |And to draw a parallel between press intransigency and judicial review of government decision-making does smack of constitutional hubris.

5. Yes, negotiations are sensitive, but there has to be a limit, surely and after all we have been through the public has a right to know more about what is going on. Given all that Moses has now said about his intention to draw on LSE law scholars' regulation theories to encourage ever-closer union between IPSO and the newspapers, the public, victims, and other parts of the media will be much more keen to understand what is going on in these negotiations, and will be much less trusting of Moses' intentions.

Unfortunately, in order to build his argument, Moses feels compelled to over-claim, and seems full of paranoia. Who, precisely, is claiming that no more debate is necessary, and extending this to an argument that sir Alan should forthwith cease communication with the editors that fund him? The straw man is nowhere to be found.

It is to be hoped that this speech is merely a filibuster, an attempt to get Sir Alan out of a little local difficulty. Because if it is a serious attempt to sum up a strategy and approach for the regulator, it is a dangerous one. This is a rather thin and selective theoretical rationale for a tighter embrace between IPSO and its paymasters, not a real attempt to understand the challenges of genuinely independent public interest regulation.

This article gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics and Political Science.

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