

fundamentally altered the media landscape. Established forms of information control (such as the now-reformed Defence Advisory Notice) have struggled to cope with these shifts and have been buttressed with a variety of additional measures. This policy paper will use the example of British censorship in the Second World War to make suggestions about the best way to handle information which is deemed to pose a threat to national security.

News Control and the Second World War

A belief that censorship was necessary to prevent the publication of information which was likely to assist an enemy had become an accepted military principle during the First World War. During preparations for the Second World War, the increased threat of aerial bombardment meant that censorship was treated as a significant arm of defence. The government's *Regulations for Censorship* (1938) established the right to examine all publications and to 'modify or dispose of them' in the interest of 'national defence or public safety'. This was buttressed by Defence Regulation 3 of the 1939 Emergency Powers Act, which forbade the distribution of any information that could compromise national security. The rules applied to all forms of media: from national newspapers to local news-sheets, BBC broadcasts, and illustrated magazines.

In line with the experience gained during 1914-18, government planners believed that the control of news would be most effective if it was integrated with a procedure for its release. It was for this reason that the Committee for Imperial Defence proposed that a bespoke government department – a Ministry of Information – should be established upon the outbreak of war as a nodal point for press censorship and the issue of official announcements. The Ministry's Censorship Division was established on 30 August 1939 and would remain in place until August 1945.

The censorship enforced during this period was based upon a voluntary system of Defence Notices, which had been in operation since 1912. This advisory mechanism allowed newspapers to access confidential guidance and background material on subjects that were proscribed under the terms of Defence Regulation 3. Additional notifications were sent via press agency cables as stories developed, and were used by journalists to decide whether a story was covered by censorship. More sensitive material was sent by private letter. Responsibility for regulation lay with newspaper editors, who would pass any stories they deemed to be in violation to the Censorship Division. Material that successfully passed through this process was guaranteed protection against prosecution.

Controls of the BBC followed the same basic format. However, as broadcasts could not be physically controlled in the same way as print, additional safeguards required all topical material to pass through security censorship prior to broadcast. There was also more editorial interference and a greater concern about maintaining political balance. But the BBC was able to maintain the greater part of its independence, and its staff were responsible for censorship within Broadcasting House.

These measures were designed to balance national security with the maximum possible freedom of the media. When announcing the measures on 28 July 1939 (http://hansard.millbanksystems.com/commons/1939/jul/28/supply#column_1834), the government stressed that they would 'leave the Press with considerable latitude'. News organisations were not required to carry government communiques in full, but were free to interpret official announcements according to their established editorial lines. The Ministry of Information effectively acted as an arbiter between the press and military authorities. And, in cases where rules were breached, it could only pursue legal action with the support of the Director of Public Prosecutions.

Post-war commentators have praised this system for avoiding compulsion. It was, for the historian Nicholas Pronay, a 'novel and sophisticated' approach to information control. The evidence does point in this direction. For instance, the Ministry's Chief Press Censor worked on the assumption that his job was to provide 'advice, guidance and prompting' rather than compulsion, and earned a reputation for siding with Fleet Street against Whitehall. The Ministry dealt some with 650,000 different news stories during the course of the war (processing 955,625 words of domestic news during the week of D-Day alone), but sought only four prosecutions for deliberate infringement.

The Ministry of Information's preference for co-operation provides a useful precedent for contemporary policy-makers. It would, however, be a mistake to see the system as an unmitigated success. Instead the experience of the Second World War shows clearly the practical difficulty of censorship in an otherwise 'open' society. Problems were apparent from the outset of the war and would remain until its end. There is much that can be learnt from those occasions when the system came under particular strain.

Problems of News Control in the Second World War

The system of censorship adopted in 1939 had not been well planned. The government officials who planned the Ministry of Information had been given no control over censorship policy, and lacked channels of communication with the military. This resulted in a clumsy duplication of functions. Moreover, a lack of resources before 1939 meant that the majority of censorship staff received no training, so the system was effectively untested at the outbreak of war. Those responsible had been given little guidance on the specific information that needed to be controlled and had only a rudimentary understanding of the workings of the press. This situation was made worse by the terms of Defence Regulation 3. Its broad definition of national security simply encouraged the Ministry, military authorities and the press to promote their own readings of the rules.

An infamous example of this occurred on Monday 11 September 1939, when the military forced the Ministry of Information to apply retrospective censorship to news about the arrival of the British Expeditionary Force in France. The crisis had begun at midday when an official broadcast in Paris wrongly announced that British troops were engaged in offensive action against Nazi forces. The claim was repeated in a second broadcast, and cabled to journalists around the world. Although the whereabouts of British troops was subject to a Defence Notice, the Ministry concluded that the news was no longer of military significance and asked the War Office to 'release' it from censorship. This was agreed at 9.40pm. However, when journalists began to submit for censorship drafts prepared using the press agency cables, the War Office was panicked by the prospect of misleading headlines about active combat. At 11.30pm, the Ministry of Information was asked to re-impose the original ban.

This muddle was made more serious because the War Office doubted that editors would comply voluntarily. They instead requested the Home Office to intervene and Scotland Yard was asked to seize all of the next day's papers. By 1am on Tuesday 12 September 1939, police officers had been deployed to newspaper offices and wholesale newsagents throughout Britain, roadblocks had been erected in Fleet Street, and trains carrying newspapers had been stopped from leaving London. It was only when French authorities released additional information that the Ministry of Information was successful in its petitions for a second reversal of policy. The ban was finally lifted at 2.55am. This was the context to the press criticism of 'Gestapo' tactics outlined above.

It is unsurprising that this chain of events led to a storm of criticism. The press could not understand why the Ministry of Information had been forced to retract the news, the military did not understand why the news had been released in the first place, and the public were no better informed than they had been before. The government concluded that the system was broken beyond repair, and created an autonomous Press and Censorship Bureau in an attempt to de-politicise the issue.

The shift in responsibility was not enough to overcome the difficulties inherent in the system. Indeed, a failure to improve co-ordination between civil and military authorities meant that the Press and Censorship Bureau faced many of the same problems as its predecessor. The military's mistrust of civilian censors meant that some news had to pass through two separate censorship processes. This created delays and inconsistent rulings, to which some newspapers responded by refusing to engage with the system. The confusion caused by the lack of a coherent process brought the self-regulated system to the brink of collapse. After just six months, the Press and Censorship Bureau's functions were re-absorbed by the Ministry of Information.

In June 1940, the War Cabinet called for new proposals to tighten the system. The Minister of Information suggested that advisory Defence Notices could be replaced by legally-binding orders issued by a Censorship Board including representatives from the various interested parties. This proposal was a compromise that compared favourably to an alternative proposal whereby all newspapers would be compelled to publish the same headlines. However, a lack of communication led journalists to suspect that the Ministry was pushing for a compulsory system, and the proposals were vigorously opposed. Precious little had been achieved and the government's relationship with the press was soured.

Relations were strained further when the government sought to circumvent the voluntary system to clamp down on criticism of the British war effort. Indeed, whereas the terms of Defence Regulation 3 were limited to security, other parts of emergency legislation could be used to censor opinions. For instance, the communist *Daily Worker* was banned from export in the summer of 1940 and closed down on 21 January 1941 under legislation which forbade publications 'calculated to foment opposition'. In March 1942, the publication of a controversial cartoon showing a stranded British sailor led to similar threats against the *Daily Mirror*. Winston Churchill contemplated political censorship before other newspapers rallied to their defence.

The situation only settled down after the Ministry of Information re-asserted its responsibility for the release of news in June 1942. Working on the principle that news should be released, and censorship should be applied 'solely to save human lives and preserve our national existence', the Ministry was able to make successful representations to military authorities on behalf of the press. This fostered a spirit of 'friendly co-operation' between censors and journalists, and made it easier to manage a voluntary system that relied on trust. It was this period that would be praised by post-war commentators.

News Control and the Incedal Trial

Contemporary information control measures have struggled to achieve the same degree of 'friendly co-operation'. This is brought home clearly by the trials of Erol Incedal and Mounir Rarmoul-Bouhadjar in 2015. Although journalists co-operated and obeyed the censorship policies implemented, they were far from content with the system. The trials instead gained media attention because commentators saw their secretive nature as a worrying departure from Britain's long-standing principle of open justice.

Public trials are regarded as a means of holding judicial processes to account, and the ability of the press to report on trials forms part of their established role as a 'watchdog' acting in the public interest. These principles are complemented by Article 10 of the European Convention on Human Rights, which protects the right to freedom of expression and an individual's right to 'impart' and 'receive' information. While open justice is understood as a fundamental feature of the rule of law, English law also recognises that information can be legitimately restricted in the interests of national security and the proper administration of justice. For example, where there is a 'serious possibility' that publicity could frustrate the administration of justice by discouraging the Crown to prosecute a case, access to proceedings may be restricted.

In the Incedal case, originally listed as *R v AB and CD* at the Old Bailey, the presiding judge decided to hold the entire trial *in camera* – with the public and media excluded. Such measures, deemed necessary to protect the administration of justice and national security, were enforced by court order and ministerial certificates. The media's legal challenge of these unusual restrictions seems to have been contingent on the actions of a journalist who happened to spot the reporting restriction notice on a printed list; there does not appear to have been proactive notification of media organisations.

The Court of Appeal (<http://www.bailii.org/ew/cases/EWCA/Crim/2014/1861.html>)'s ruling in June 2014 led to a slight relaxation of restrictions. The media were now able to report on a small number of open sessions (including the swearing in of the jury, the judge's introductory remarks, verdicts and sentencing). Ten 'accredited' journalists from the organisations involved in the appeal were also allowed access to some of the private sessions, although they still could not report on the proceedings. Other sessions would remain entirely closed. According to a BBC report (<http://www.bbc.co.uk/news/uk-31989581>), 10 hours of evidence were heard in public, 28 were heard by the 'accredited' journalists, and 30 were heard in private. This three-tier system led to the case being widely characterised as a 'secret trial'.

Some of the journalists who were allowed inside the private sessions used tweets and articles to remark on the 'unique' nature of proceedings. They described how they were obliged to lock their mobile phones inside a soundproof box and put their 'secret' notebooks in a safe. Ian Cobain, senior reporter for the *Guardian*, has explained (<http://www.theguardian.com/law/2015/mar/26/erol-incedal-case-secret-trial-terror>) how these restrictions were not limited to the court room as reporters were only able to take legal advice in "a confidential meeting" (i.e. in a closed room in which mobile phones were switched off and no notes were taken). The system was not failsafe. Indeed the *London Evening Standard* reported (<http://www.standard.co.uk/news/crime/secret-terror-trial-ends-in-farce-as-student-is-cleared-of-targeting-blair-10136455.html>) that one journalist 'was stopped from leaving court even though he had taken no notes' and that 'a second was threatened with arrest at his home when he had not even been in court'.

The reasons for the decisions taken during the Incedal case remain unclear. The media has not been able to report the prosecution's main argument, the evidence that led the jury to find Incedal not guilty of preparing an act of terrorism, nor the reason why these matters have been concealed. Despite the apparently serious nature of the allegations, the ad hoc approach to media participation suggests a serious lack of planning. The decision to allow access to ten journalists from the organisations involved in the appeal was arbitrary, relied upon their initial intervention, and failed to represent newer forms of media. This was the result of an accountability system which is no longer fit for purpose. As the legal scholar Lawrence McNamara has argued (<http://ukhumanrightsblog.com>

/2014/06/12/secret-trials-a-little-transparency-a-lot-to-worry-about-lawrence-mcnamara/), there was a strong case for other types of organisation, such as legal professional bodies and specialist NGOs, to have been given the status of independent observers.

The process adopted during the Incedal case has been roundly criticised. Asked about it at a press conference in November 2014 (<https://www.judiciary.gov.uk/wp-content/uploads/2014/11/lcj-transcript121114.pdf>), the Lord Chief Justice, Lord Thomas, said that 'there ought to be very much clearer guidelines and rules' in future. He stated that the press should be able to 'see such material as can be shown to them so they know what the argument is about' and hoped that a 'proper way of dealing with [anonymised defendants]' could be developed. Media organisations sought to overturn an unsuccessful application to report some of the "core issues" in the private sessions but their case in the Court of Appeal was rejected in February 2016 (<http://www.theguardian.com/law/2016/feb/09/media-groups-lose-appeal-against-secret-trial-of-erol-inedal>), with the court finding that a departure from the principle of open justice was necessary for justice to be done.

The appeal also drew attention to another information handling deficiency: the judges were not satisfied with the information on which they had to rely. They observed (<http://www.bailii.org/ew/cases/EWCA/Crim/2016/11.html>) that normally they would look to previous decisions to determine issues which were similar. But for this case relevant 'closed judgments' "are not retained within the court files or, as far as we have been able to ascertain, in any specified place within the court". It has requested that a working group should be set up to advise the court on further action.

It is beyond the capacity of this paper to assess the impact of the reporting restrictions imposed in the Incedal case. The authors are simply not privy to all of the details. However it is clear that the case raises significant questions about the interpretation of national security guidelines, procedures for notification, the heavy-handed approach to information control and the documentation of decision-making.

Conclusions

There are significant differences in the technological, political and cultural context of the Second World War and the present day. Yet, as exemplified by the Incedal case, the perceived threat of terrorism means that information control (or security censorship) is still a part of the media environment. The Incedal case is particularly striking because it reveals an *ad hoc* and heavy-handed approach that echoes Second World War censorship at its worst.

The authors share the view of many commentators that censorship should be a last resort: it is not our intention to act as advocates of information control. However, we recognise that it is sometimes legitimate to withhold information in the interests of national security, and argue that it is important that a clear system should be in place to manage this need. We therefore suggest that:

There is a need for coherence. Information control measures should be uniform and cover all sources of news. In situations like the Incedal case, clearer rules were needed to protect the public interest in freedom of expression and access to criminal trials.

Clear guidelines are required to allow interested parties to assert their rights. The guidelines should not be overly restrictive, and should include a degree of latitude in the interests of freedom of expression. These guidelines would defend against pre-publication censorship. They should be designed in consultation with the media and other third parties.

National security must be defined and latitude allowed for opinions. There must be clear rules that require authorities to demonstrate a genuine threat to national security. This is especially important in the case of terrorism-related legislation, where there is often limited transparency during the drafting of new powers.

A degree of self-regulation is necessary. In an open society, any system of information control will depend upon a degree of self-regulation, even if overseen by the state. The alternatives are impractical and ideologically unacceptable.

There should be a proactive approach to notification and documentation in cases like the Incedal trial. The current system of accountability works only when the desires of local and national media organisations overlap with the needs of a democratic society. This cannot be guaranteed.

Co-operation should be encouraged by transparency and dialogue. Those responsible for national security must consult with those who hold them to account. Such dialogue should not be limited to national media

organisations, but should include NGOs, academics and other representatives of the public interest.

The public interest in imparting and receiving information must be upheld. This should determine the whole information control process, and must not be considered only as an afterthought. National security must be balanced with the public's right to receive information. These rights should be acknowledged from the outset of the censorship process.

Note to readers

In October 2014 the second defendant Mounir Rarmoul-Bouhadjar pleaded guilty to possessing a terrorist document. At trial, the first defendant Erol Incedal was found guilty of an offence contrary to section 58 of the Terrorism Act 2000 (collection of information) but the jury failed to reach a verdict on an offence contrary to section 5 of the Terrorism Act 2006 (preparation of terrorist acts). In a second trial in spring 2015, he was acquitted. Rarmoul-Bouhadjar and Incedal were sentenced to imprisonment for three years and three and a half years, respectively, for their possession of a bomb-making document.

Further Reading

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