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Privacy and the Press - Is Law the Answer?

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'A newspaper's primary office is the gathering of news. At the peril of its soul it must see that the supply is not tainted. Comment is free, but fact is sacred.'

C. P. Scott

The idea that the British press represents the fourth estate of the realm, a constitutional watchdog supervising the necessary checks and balances on the political establishment, is no longer fashionable. The current controversy surrounding privacy highlights public distrust of the press and distaste at its working practices. Repeated intrusions have brought the newspapers into a series of confrontations with the three undoubted estates of Crown, Parliament and judiciary. While editors and politicians vie over the ideal mechanism to balance the right to be let alone with the public's right to know, recent developments suggest that lawyers are unlikely to remain on the sidelines for much longer.

The legal systems of England and Scotland are rare in their refusal to acknowledge an individual's right to privacy. The absence of such a right in English law was confirmed with great reluctance by the Court of Appeal in 1991. Actor Gorden Kaye failed to prevent the *Sunday Sport* publishing an interview and photographs procured whilst he lay in hospital suffering from severe head injuries sustained in a road accident. Bingham LJ said that although the paper's conduct amounted to "*a monstrous invasion of privacy*" such behaviour, "*however gross, does not entitle him to relief.*" Other legal authorities take a different view.

In 1890 Boston lawyer Samuel Warren was so dismayed at prurient press coverage of his daughter's wedding that he, alongwith future Supreme Court judge Louis Brandeis, used the *Harvard Law Review* to advocate legal recognition of a 'right to be let alone'. This was necessary to prevent the press "*overstepping in every direction the obvious bounds of propriety and of decency.*" They used English case law to demonstrate that such a right existed without any formal expression. A century later this article has proved so influential that, despite the silence of the U.S. Constitution, the Supreme Court has expressly recognised a privacy right and adapted it to justify a woman's right to abortion in the landmark case of *Roe v. Wade*. No English court has dared to interpret the common law in such an expansive manner.

The unlikely guardian of privacy in this country is the Press Complaints Commission (PCC), established by newspaper proprietors in 1991 to enforce self-regulation in an industry not renowned for its self-restraint. The PCC has been at the forefront of the campaign to resist moves towards a privacy law. Lord Wakeham, PCC Chairman, has vigorously asserted that such a development would amount to a 'villain's charter', enabling the rich and powerful to use the courts to suppress legitimate inquires carried out in the public interest. The press lobby argues that the success of tough self-regulation should not be sacrificed for a vague and unworkable privacy right. This would herald the death of investigative journalism by judicial stealth.

The desire to preserve a free and robust press *is* compatible with an individual's right to privacy. Whenever privacy has been acknowledged as a legal right its boundaries have been shaped by a variety of defences, the greatest safeguard of press freedom being a comprehensive public interest defence. The concept of privacy is no more obscure than that of libel or breach of confidence which are subject to daily judicial interpretation. The decisive test of whether legal intervention is necessary in this area must be the success or otherwise of self-regulation. Since former Heritage Secretary David Mellor's warning that the press were 'drinking in the Last Chance Saloon' the PCC has acted as landlord, struggling to keep a leash on marauding

newshounds with repeated modifications of its Code of Conduct. The Code illustrates how self regulation effectively translates as self-interest. Drawn up by the very editors it is designed to restrain, the Code lacks any effective sanctions to ensure compliance. It has singularly failed to curb the worst excesses of the tabloid pack who have gone on to drink the saloon dry, defecate in the landlord's shoes and abuse the goodwill of the public wherever possible. The only effective solution lies with the law.

The current debate may appear a *fait accompli* as a bill seeking to incorporate the European Convention of Human Rights (ECHR) currently progresses through Parliament. English courts will soon arbitrate between the two competing rights of privacy and freedom of expression conferred on citizens by the ECHR. Lord Chief Justice Bingham's declaration that incorporation will imply "*a clear duty on the courts to protect privacy*" signals the end of the judiciary's impotence in this area. Doubts have been expressed over the Lord Chancellor's assertion that "*press freedom will be in safe hands with our British judges.*" An English court disregarded arguments concerning freedom of expression in 1989 when a journalist was heavily fined for failing to disclose a source, before waiting seven years for Strasbourg to find in his favour. The likelihood that judicial attitudes will undergo a dramatic reappraisal following incorporation seems fanciful.

Despite its misgivings the interests of the press lobby would be best served by parliamentary rather than judicial intervention. Only the creation of a statutory tort will assuage public concerns about oppressive press conduct without inhibiting legitimate investigation. Open public debate and parliamentary scrutiny will result in equitable remedies for substantial distress caused by an unwarranted invasion of privacy. Only a statute will enshrine public interest and other defences in sufficient authority to withstand the attacks of an over-zealous judiciary. This would put the press on a similar statutory footing to journalists working in television and radio and help restore public confidence in the fourth estate.

Law exists to arbitrate between conflicting interests and provide remedies for serious wrongs. When an institution such as the press consistently abuses its powers and privileges causing serious public disquiet it is imperative that the law acts to bring it to heel.