Privacy and the press: Is law the answer?

The incorporation of the European Convention of Human Rights (ECHR) by the Government's Human Rights Bill will give Parliamentary endorsement to the right of privacy. Judges supportive of developing a common law right[1] will be given free rein to develop and extend the existing concepts of confidence, copyright, defamation, trespass and harassment[2] to enforce the Convention's rhetoric. In the moral panic after Princess Diana's death there was widespread outcry for greater control of the press, but is our law really inadequate? The Commission does "not consider that the absence of an actionable right to privacy under English law shows a lack of respect for the applicant's private life" -- given the existence of other remedies[3]. The late Robert Maxwell ruthlessly employed injunctions by threatening libel actions to gag the press from revealing his villainy. Conspicuous and extreme intrusions at the forefront of our minds should not blind us to the overwhelming benefit to society of a free press.

The difficulty is to find a satisfactory balance for distinguishing unwarranted intrusions on private lives while allowing investigative journalism of real public interest. This tension is reflected in the Human Rights Bill which will incorporate the ECHR into national law. Article 8(1) of the Convention elevates privacy as a right worthy of protection. It guarantees an individual "the right to respect for his private and family life, his home and his correspondence". A.10 guarantees freedom of expression subject to those exceptions necessary in a democratic society. The bill does not vest a right to privacy in the individual; it provides that it is unlawful for a public authority to act in a way which is incompatible with

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[1] Judicial enthusiasm for developing a common law right from existing offences has been evident since the standing rebuke of Kaye v Robertson 1991. Lord Keith held in AG v Guardian Newspapers 1990 that "breach of confidence involves no more than an invasion of privacy". Laws J in Hellewell v Chief Constable of Derbyshire 1990 "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his disclosure would..amount to a breach of confidence...In such a case the law would protect what might reasonably be called a right of privacy".

[2] Protection from Harassment Act 1997

[3] Winer v UK 1986

A8 and empowers victims of a public authority to bring court proceedings. "Public authority" is not defined. It is clear a Murdoch owned tabloid would be excluded, but the courts and the Press Complaints Commission (PCC) do exercise "functions of a public nature".

Suppose a woman having an affair with a prominent politician makes a claim against a journalist for invasion of privacy. It is highly unlikely, but the argument could be put, that the court in rejecting the complaint against an individual are themselves a "public authority" in breach of the Convention.

If the PCC as in Julia Carling's case in 1995 concluded: "Privacy can be compromised if we voluntarily bring our private lives into the public domain," could she take the PCC to court for failing to protect her right of privacy? Lord Irvine clarifying the Government's position said: "The courts will regard the PCC as the primary body to provide effective protection to persons who suffer from press abuses. Provided self-regulation is strong and effective the courts will not intervene." Is this a "primary role" for the PCC or merely a preliminary one before court proceedings? Is the Lord Chancellor effectively calling time at the last chance saloon? The Press clearly believe so and are lobbying hard for Lord Simon of Glaisdale's amendment to exempt the press and PCC from the bill.

The effect of the PCC being considered a "public authority" will be that decisions of the PCC will be far more open to judicial review. Only one application has so far been made to judicially review the PCC[4] following publication by The Sun of a photograph taken with a telephoto lens of Ian Brady. The application was dismissed as there was no arguable case that the PCC had misapplied its Code of Practice. However, after the Human Rights Bill becomes domestic law will the Code's provisions be considered by the courts sufficient to restrain the press and give meaning to Article 8? David Pannick QC argues that only in exceptional

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[4] R v PCC, ex parte Stewart-Brady 1996

circumstances will the court review the decisions of the PCC[5]. In similarity to planning cases against the UK, he believes the European Court will leave technical questions of judgement to the relevant specialist body.

Self-regulation in Westminster and the City is bankrupt. Self-regulation in Fleet Street can only survive if it distances itself still further from its origins as a confidence trick. The PCC in similarity to the Advertising Standards Authority (ASA) is not a statutory body, but is funded and organised by the industry itself. Unlike the ASA it lacks a fatal sanction (adverts in breach of the code are not published at all). The PCC cannot grant complainants an injunction to stop publication, nor does it fine publishers or award compensation to successful complainants. Chris Smith, the Secretary for Culture, Media and Sport has indicated his support for fortifying the code by including formal arrangements for newspapers to pool interviews for crime victims, giving third parties the ability to lodge complaints, and awarding compensation to victims of press intrusion.

If the code remains a public relations exercise judges will assume the role of arbiter between press freedom and an individual's right to privacy. Their judgements on safeguarding a journalist's right to protect his sources leave many investigative journalists seriously concerned. Only two months ago the Court of Appeal ordered disclosure of the documents at the centre of the Camelot directors' pay bonus scandal. The court held that the public interest in enabling Camelot to discover a disloyal employee was greater than the public interest in enabling him to escape detection. In 1989 a journalist, Bill Goodwin refused to disclose his source and was fined and ordered to pay costs of over £100,000. In 1996 the European Court of Human Rights ruled in his favour.

The argument in favour of a privacy statute (as found in nearly every American state) as opposed to judge-made law is that it would clarify the rights and defences available to the

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[5] The Times (November 18 1997)

media. If A.8 of the ECHR is incorporated into English law without any statutory direction judges will find it extremely hard to find for an undefined public interest over a tangible loss to private rights. A law of privacy defined by Parliament in consultation with the press would be more certain and coherent than the mosaic of existing laws. Two former Home Office Committees[6] rejected the creation of a statutory tort because neither the concept of privacy nor the corresponding defence of public interest could be satisfactorily defined. Why cannot the PCC's code be made the basis of a statutory tort on which any plaintiff may count on in embarking on expensive legal action. Equally why cannot a public interest defence be defined on which a journalist can rely in the preparation and publication of his story?

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[6]The Younger Committee (1972) The Calcutt Committee (1990)