

Mass Media: Privacy and Freedom of Expression

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1. Incorporation of the European Convention on Human Rights (ECHR): Background

Every citizen - not just celebrities and public figures - is entitled to a private life free from media intrusion - unless they specifically invite media attention or can be shown to be engaged in corruption, law-breaking, abuse of power or hypocrisy. That is why we have always argued in favour of the full incorporation of the European Convention on Human Rights into UK law.

Journalism is not the be-all and end-all of human existence. Most of us would insist on a basic human right to lead our lives without let or hindrance from anyone - least of all the state - except insofar as our behaviour might impinge upon the rights of others.

We have no written constitution in Britain, but we operate on the basic principle that anyone can do anything, so long as it doesn't break the law. Britain's laws are reactive, devised by elected representatives usually in response to some perceived public concern that certain types of behaviour are potentially damaging to others.

The old licensing laws are a classic example: passed hurriedly during the First World War because a single MP feared that afternoon drinking by workers at Woolwich Arsenal was damaging the war effort, they remained in anachronistic force for more than seven decades. Similar knee-jerk reactions gave birth to the original Official Secrets Act and the Prevention of Terrorism Act, with their more sinister implications for journalists.

The law is applied by the judiciary, which operates under the principle that an accused person is innocent until proved guilty in court after due process.

There are no current plans for a specific Privacy Act directed against the press, and all recent attempts have failed. Up to the present reliance has been placed on the use of civil remedies for breach of confidence, trespass or copyright, or the obtaining of gagging injunctions and the threat of action for libel. These are remedies for those who can afford them absent a law recognising the right to personal privacy.

Now the Human Rights Bill is making its way through Parliament incorporating into UK law the European Convention on Human Rights (ECHR). It has been a long time coming.

The ECHR was devised in 1950 by the Council of Europe, including the United Kingdom, as part of the reconstruction of Europe after the Second World War. Based on the 1948 Universal Declaration of Human Rights, part of its purpose was to offer a guarantee against totalitarianism to citizens of post-war Europe, including the UK.

It was supposed to signal a shared commitment to ensure that Fascism and Communism would not hold sway in the new Europe. It came into force in 1953, by which time it had been incorporated by 31 of the 36 signatory states - but not by the UK.

For its own peculiar reasons, not least the fact that the UK has no 'citizens', only 'subjects' of a monarch, the UK has lagged behind Europe. Offences committed in the UK which might breach the

Convention must first be tested against the full panoply of domestic laws before the plaintiff can proceed to Strasbourg for a ruling.

Now, at last, we shall have the protection that our neighbours enjoy. Incorporation is a signal of democratic maturity. When it becomes law all future legislation in Britain will have to be tested against its provisions to ensure that everyone enjoys the human rights it encodes.

2. The current debate

Current controversy about incorporation centres on two ECHR Articles. Article 8 which provides for personal privacy and Article 10 which asserts freedom of expression.

Under the terms of Article 8, breaches of a person's private and family life, home and correspondence are legitimate only if they occur in accordance with the law of the land and if considered necessary in the interests of public security, public safety, the economic well-being of the country, the prevention of crime, the protection of public health and morals, or the protection of the rights of others.

Similarly, under Article 10, the right to hold and express opinions and otherwise communicate information is circumscribed only where national security, territorial integrity, public safety, public health or morals, the reputations, rights or confidences of others, or the integrity and impartiality of the judiciary are at risk.

There may be debate about how some of these exemptions should be defined, but all in all they add up to a pretty comprehensive 'public interest' defence. And all of these issues are covered in one way or another by existing statutory regulations which govern broadcasting.

The big problem at the moment is that the newspaper industry has decided that the ECHR is a 'villain's charter'. Lord Wakeham, in his role as chairman of the Press Complaints Commission has taken up cudgels on behalf of the industry which funds the supposedly independent and impartial PCC. Yet previously he has insisted that the big difference between the PCC and the old Press Council is that it no longer has a campaigning role!

Newspaper proprietors argue that people who are corrupt, criminal or hypocritical will be able to hide behind Article 8 and prevent publication of their misdemeanours. Of course the rich and powerful always have the means of protecting themselves when the chips are down. Britain's libel laws are among the most draconian in the world, and are frequently exploited by the 'corrupt, criminal or hypocritical'. The late Robert Maxwell was the supreme example.

If Article 8 is likely to make any difference it will be in providing the press with a 'public interest' defence - and the protection of Article 10.

At the risk of sounding old-fashioned, romantic and idealistic, journalists should be welcoming the incorporation of the ECHR. Many of us regard ourselves as the public's friend in the constant struggle between individual rights and the power of the state and commercial organisations.

The newspaper industry has its own commercial agenda, and does not want to lose its right to boost sales and profits by publishing intrusive (and often inaccurate) stories which may interest the public but are rarely justifiable in the public interest.

Press freedom is not a licence to make money out of other people's misfortune; it is a responsibility to garner and publish factual information, exercised by journalists on behalf of the public.

The industry is further exercised by the possibility that if it is found to be in breach of the ECHR it could end up having to compensate its victims. Millions are spent each year already defending libel claims, where awards have become substantial enough to worry any editor. They fear that the ECHR might open up another avenue of liability.

This argument is being massaged into concern for the public by claiming that the ECHR means everyone will have to resort to lawyers if they want to challenge an alleged breach of their right to privacy. This is patent nonsense.

For a start if editors are satisfied that they have a strong public interest defence and that the information they have published is accurate, they should have little difficulty in quashing a

complaint. As it is they are the first to reach for their lawyers when complaints are made, and journalists are instructed never to admit to mistakes over the phone for fear of incurring a later penalty.

If the PCC ensures that in its deliberations it strikes a balance between the individual's right to privacy and the newspapers right to freedom of expression it too will avoid legal challenges.

And besides any person lacking the means to seek redress through the courts should be able to seek guidance or assistance from a Human Rights Commission, with the power to initiate legal challenges where important issues of principle are at stake.

Even more importantly, the industry maintains that the ECHR is a 'privacy law by the back door', and objects to the notion that judges will rule on whether or not a person's privacy has been breached.

The alternative is for Parliament to define the limits of the privacy rights accorded to citizens in the ECHR. But the industry objects to that, too.

It wants to regulate its own affairs while strenuously objecting, with good reason, to other powerful institutions - Parliament, the police, lawyers and doctors - who insist on doing the same. For some reason the arguments the press marshal against others do not apply to the Fourth Estate.

The industry wants to be the sole arbiter of what is in the public interest and what is a breach of privacy, just as it believes that self-regulation is fine for itself but not for anyone else. In the PCC it pays for a system of public 'justice' in which it is judge and jury.

Now it is saying that the elected legislature should not define our legal rights and the courts should not adjudicate on whether the law has been breached. This is precisely the sort of arrogance from which the ECHR was designed to protect the public.

PressWise welcomes the Home Secretary's proposal that the Human Rights Bill should bring in an automatic right to 'prior restraint', and that a judge may not grant 'gagging injunctions' without hearing representations from the publication concerned.

However we share the concern of the Chairman of the Culture, Media and Sport Select Committee, Gerald Kaufman MP, that amendment to the Bill might mean that the right to freedom of expression (Art.10) is given priority over the right to personal privacy (Art.8) in the event of a legal challenge. In our view both rights must be treated with equality, with the question of the validity of a public interest defence being the deciding factor where the two Articles are in conflict.

3. The problem with self-regulation

The newspaper industry has a variety of solutions in its own hands. Some newspapers - notably *The Guardian* - have begun to demonstrate serious intentions to monitor the quality of their output and publish corrections quickly and systematically.

Following the death of Diana, Princess of Wales, the industry rapidly introduced changes to its Code of Practice which it had previously claimed were not necessary.

This was a clear indication that self-regulation was not working as well as it could. With over three years experience of working with the PCC on the resolution of complaints PressWise knows that it has serious shortcomings, not least of which is the widely-held perception that it is a creature of the industry it is supposed to regulate.

Indeed, addressing the House of Commons on Monday 16 February the Conservative Shadow Home Secretary Sir Brian Mawhinney described it as, "An entirely private body. It is in the ownership of the newspaper industry, funded by the newspaper industry and not fulfilling any statutory function..."

On its own admission the PCC is a body designed to protect the industry from statutory controls. The Code of Practice it polices has been devised more as a piece of armoury for the industry than as a protection for the public, or for journalists. It has been repeatedly defended from criticism and only the overwhelming public reaction to the circumstances of the death of Diana, Princess of Wales forced belated acknowledgement of its continued weaknesses.

Lord Wakeham and the industry insist that proprietors and editors should determine what punishment should fit which media 'crime'. Yet it is proprietors and editors who cry loudest about the shortcomings of self-regulation among other professions - from the police to politicians. If it is inappropriate for the police to police the police, it is surely inappropriate for the newspaper industry to be its own judge and jury.

It is significant that the broadcast media is widely regarded by the public as a more reliable medium than the press. It is regulated by largely independent bodies, funded jointly by the state and the industry and with the benefit of statute and powers to fine for misconduct.

PressWise has welcomed the spirit and the letter of the reforms to the Code of Practice adopted by the industry - many of them are suggestions we had been making for over three years which the PCC has previously rejected as unnecessary.

We are especially concerned about the impact of intrusive media coverage on children, and hope that the proposals for the protection of young people and the banning of payments to child informers might eventually lead to an end to the practice of cheque-book journalism altogether.

Our leaflet 'What's the cost of selling your story to the papers' and our earlier Briefings on Cheque-book Journalism [PWB01] and Payments to Witnesses [PWB05] warns of its dangers and encourages journalists and members of the public to avoid it. We have urged the former National Heritage Select Committee and the Lord Chancellor to put an end to the practice of payments to witnesses in court cases.

We are not convinced that the new Code goes far enough to prevent unwarranted intrusion and harassment. It is rare for the PCC to accept the word of a complainant against that of an editor, who would not have been present at the incident, when allegations of harassment are made.

Although news and picture agencies are supposed to be covered by the Code, we have doubts about how effectively the PCC can regulate them. Certainly editors should be aware of and take responsibility for the circumstances under which stories and photographs are obtained before agreeing to publish and pay for them.

The new Code is unlikely to make much difference to the phenomenon of 'media scrums' which cause disruption and offence, and places people under siege. We have been working with others to develop techniques which will result in a calmer approach to media coverage of disasters for instance, but doubt that the commercial imperative can be modified to ameliorate the trauma experienced by victims of major catastrophes.

The Code is primarily concerned with protecting publications from liability, but that hardly explains why it does not include a 'conscience clause' to allow journalists to refuse to undertake unethical assignments.

The Code is supposed to be included in editors' contracts of employment, and it has been mooted that it should also be included in journalists' contracts. Presumably that could mean loss of employment if they are found to be in breach of it - although we note that no editor has yet been fired for failure to comply with the Code.

As it stands journalists have no protection if they refuse an assignment on the grounds that it conflicts with the industry's code, let alone the NUJ Code of Conduct which members have been expected to abide by since 1936. Indeed many newspapers refuse to recognise the NUJ at all, and most have long been hostile to its Code of Conduct.

If the industry were serious about its concern to improve journalistic standards it might at least follow the Swedish example and allow that "a journalist cannot be ordered to write against his/her conviction or to carry out humiliating assignments".

Reporters, with no financial incentives at stake, often have a higher regard for ethical behaviour than their employers. The inclusion of such a clause would enable them to protect personal privacy at the sharp end of journalism.

Newspapers, on the other hand, exist primarily to make money. Editors and proprietors cannot escape their responsibilities by blaming the public appetite for gossip for the unethical behaviour of some journalists and photographers. They have created a market for salacious and intrusive stories and pictures, yet the PCC's only powers are to insist on publication of apologies or corrections.

Prompt and prominent corrections are the remedy that most complainants seek. However, while publishing formal apologies and correction may cause momentary embarrassment to a newspaper the cost to those directly affected by inaccurate or intrusive coverage can be immense. Publication of inaccurate stories can be painful enough, but the emotional and financial cost of seeking redress is not acknowledged.

Lord Wakeham specifically rejects the idea that newspapers should be fined for breaches of the Code, or that compensation should be awarded to their victims. Yet newspapers publish sensational stories to generate new readers, advertisers and profits.

The public are now aware of the enormous harm that unethical behaviour can do, and is more likely to place its trust in a body that has powers to hit commercial concerns where it hurts most if their agents breach professional or ethical standards.

Those editors who breach the industry's Codes of Conduct should be required to compensate their victims, and such 'fines' would be a very effective way of reminding editors and proprietors of their responsibilities.

Despite Lord Wakeham's earlier proposal to extend the scope of the PCC into areas of digital publication, the new Code contains no specific requirement to ensure that cuttings files and news/feature databases are tagged with corrections to ensure that inaccurate information is not constantly regurgitated.

Whatever the virtues of the changes to the industry Code, the fact remains that the Press Complaints Commission continue to work to rules drawn up by editors and by no disinterested party.

4. The impact of the Human Rights Bill

The industry has taken up cudgels against the Human Rights Bill because it fears that the PCC will be regarded as a 'public authority' and be 'caught' by a requirement that the press should respect basic human rights which have been enjoyed in the rest of Europe for almost 50 years. That could mean they become liable in some form for the modest damages that might eventually be awarded by the courts.

All the industry needs to do is to recognise that inaccuracy and intrusion can cost people immense and unjustifiable suffering and ensure that offending publications pay compensation from the profits they have earned from the offence. Complainants may need the independent advice and support provided by PressWise but they will not have to run up hefty legal bills.

It is worth pointing out that complaints about inaccuracy far outweigh those about intrusion of privacy, yet inaccuracies can cause far-reaching damage to the private lives of those affected.

The PCC often hides behind a 'get-out clause' (Clause 1(ii) of the industry Code) which requires corrections and apologies only when 'a significant inaccuracy' has been published. Editors and the PCC are allowed to determine how 'significance' is defined - not the complainant, and they usually couch their justification in terms of 'significance within the story as a whole' - ignoring completely the actual significance for the person who has been traduced.

And to add insult to injury it is often the PCC that breaches the privacy of complainants by requiring the disclosure of information that journalists have not been able to uncover or to which they have no right.

The PCC offers no guarantee of confidentiality since all material divulged in the course of a complaint is supposed to be available to both sides for comment. This deters many people from pursuing complaints for fear that they might have to reveal intimate personal details in order to 'disprove a negative'. PressWise has argued successfully against this practice on several occasions, but that is the exception rather than the rule.

Ironically, under the new Data Protection Bill which should be in force by this summer, journalists now look certain to be exempt from disclosure of information they collect about people - even if it is wrong. Their targets may seek correction of published data if it is incorrect but it may not be possible for them to gain access to data gathered as part of a journalistic investigation.

Nonetheless journalists may well find that the Data Protection Registrar becomes more of a guardian of personal privacy than the courts.

In our view everyone should be welcoming incorporation of the ECHR, just as everyone should welcome the belated arrival of Freedom of Information legislation. (Yet that too may contain provisions that protect the personal privacy and the confidences of public servants.)

Both assert people RIGHTS. Journalists exist to defend and extend those rights and should be seeking to ensure that agenda is not muddied by the arrogant self-interest of the commercial imperatives of the industry.

It was the European Court on Human Rights that upheld journalist Bill Goodwin's right to protect his source after he had been fined £5,000 under the Contempt of Court Act 1981 for refusing to reveal who had supplied information gathered for a story which had never even been published.

Indeed as the Home Secretary Jack Straw told the Commons on 16 February, all past evidence shows that the European Court of Human Rights in Strasbourg has used Article 10 of the Convention "to buttress and uphold the freedom of the press against efforts by the State to restrict it." In other words a responsible press should have little to fear from the Human Rights Bill.

These new 'rights-based' regulatory measures will strengthen the case for drastic amendment of Britain's libel laws, if not their repeal.

It is significant that *The Independent* has come out in favour of the draft Privacy and Defamation Bill produced by *The Guardian* (Saturday 7 February 98), which proposes a new approach to dealing with libel actions following the US model where the burden of proof is shifted onto the plaintiff who claims to have been libelled.

Even the most recent reform of the Defamation Act (1996) remains primarily a weapon of the rich and powerful, since the fast-track procedure this introduced can only work if the (normally wealthy) publication admits to a libel and agrees to a judge awarding limited damages to save everyone's legal bills. Faced with a person of limited means who may well have been libelled, all the publication has to do is refuse to play ball and the plaintiff is left with no means of obtaining redress.

There are lessons from history to be learned here. The original 1952 Defamation Act came into force because the industry had refused to set up the General Council of the Press called for by the NUJ and the First Royal Commission on the Press in 1947. The General Council of the Press, precursor to the old Press Council, was eventually set up in 1953.

Since the death of Diana, Princess of Wales, media lawyers have been suggesting that the 1997 Protection from Harassment Act - originally designed to protect people from stalkers - can and should be used against 'door-stepping' journalists, putting them and their editors at the risk of hefty fines and imprisonment.

It is not far-fetched to suggest that these are inevitable consequences of a failure by the mass media to heed the concerns of the public and Parliament about the abuse of media power. If the industry continues to display arrogance by seeking to place itself somehow apart from the restrictions that others must comply with, we could see demand grow for yet more restrictive measures aimed specifically against the press.

5. A coherent, unified rights-based approach to media regulation

What is required is a genuinely independent regulatory system which protects everyone's rights - including the freedom of the press - with power residing neither with government nor the industry.

The time has come for a new and more coherent regulatory system. Cross-media ownership has now reached a point where it is difficult if not inappropriate to distinguish between where a company's involvement in one medium ends and its involvement in another begins. And digital compression means that sound, vision, telephony and print are merely data - and so 'caught' by data protection legislation. [Dealt with in our Briefing Paper No. 8]

In an environment where the main players are likely to be transnational corporations, a single body dealing with issues of licensing, ownership and control, distribution/delivery, technical quality and employment across all forms of media would be better able to ensure that domestic and cross-border regulations are enforced. This body would combine the functions of, for instance, the Independent Television Commission, the Radio Authority and Oftel.

Increasingly media workers are expected to be 'multi-skilled' - able to operate in different media and with all the latest technology. It is ludicrous to expect them to abide by different standards as they switch between media. They should be guided by a joint Code of Conduct devised and recognised by their unions (NUJ/BECTU/GPMU/UCW etc.) as well as by the industry, and guaranteed a 'conscience clause' allowing them to refuse to operate unethically.

A separate regulator will be required to deal with 'content' issues - accuracy, fairness, privacy, taste, decency and diversity - based upon this Code, and replacing the PCC, the Broadcasting Standards Council and possibly even ICSTIS.

That will require a clear and accessible system for adjudication on complaints and the awarding of redress across all media. Independent advice and support should be available to complainants. The regulators should include representatives of the general public, the industries and media workers appointed after appropriate scrutiny (either directly by Select Committee or through a lay Panel delegated with the task by Select Committee).

Both systems should be 'rights-based' to ensure that the basic human rights are enjoyed and respected by the public and the media. Breaches should be dealt with like any other violation of human rights' with appropriate sanctions including compensation for the 'victim'.

Financing of the new regulators should follow the model currently used in broadcasting, with a mix of public funds to protect the democratic agenda and levies upon the communications companies.

Such a system would certainly allow us to place past recriminations behind us and move forward into 'the information society' with more certainty that narrow (commercial or political) agendas will not determine what we see read and hear from the mass media, and that the public can begin to trust journalists to be their eyes and ears.

6. Conclusions

Full incorporation into UK law of the European Convention on Human Rights should be welcomed by all democrats, including the mass media.

The present system of self-regulation, financed entirely by the newspaper industry, is demonstrably flawed and does not enhance personal liberty.

A rights-based system of media regulation best serves the interests of all concerned. Articles 8 and 10 of the ECHR should be treated with equality in all deliberations by regulators and the courts. The right to personal privacy (Article 8) should only be outweighed by the right to freedom of expression (Article 10) where a clear and valid public interest defence can be demonstrated.

Every effort should be made to ensure that the mass media, and all the media regulators including the Press Complaints Commission, comply with the spirit and the letter of the ECHR. There should be no exemption to place the print and broadcast media above the requirement that the rights of all citizens should be respected.

Technological convergence and cross-media ownership make it appropriate to consider a new, unified and more coherent approach to media regulation.

This might best be achieved by a two-tier system. Licensing and technical matters should be handled by a single body covering all mass communications and harmonising domestic and European/cross-border regulatory frameworks. Content issues should be dealt with by a separate body properly equipped to deal with the print and broadcast media, including public service broadcasters.

Funding for the system should come from a mix of public and private sector finance. However, the regulators should be as independent of government and industry as possible with a strong element of public involvement at all levels, reflecting the diversity of society.

Adequate provision needs to be made for an independent, consumer-oriented body, like PressWise, to provide free advice and assistance to those with complaints about any aspect of abuse of power by the mass communications industries.