

Privacy and the press: is law the answer?

by Dominic Rose

The constitutional law of the U.K. has traditionally protected civil rights through the concept of residual liberty. This means that people are allowed to do anything insofar as their actions do not contravene domestic law. Many criticise this approach, however, for rendering individuals' rights vulnerable to infringement and susceptible to restriction by future legislation. They believe certain rights to be so fundamental as to require positive foundations.

A classic demonstration of this vulnerability occurred in *Kaye v. Robertson* in 1991. Gordon Kaye, an actor in a popular situation comedy, sustained a serious injury in a car accident and was recovering from brain surgery when journalists gained access to his hospital room, interviewing him and taking photographs. Kaye was in no condition at the time to give or withhold his consent and subsequently sought an injunction restraining publication of the photographs. Although he won on the more technical claim of malicious falsehood, he was advised not to argue against any intrusion upon his right to privacy since no law protected such a right. All three judges were concerned about the breach of his privacy, but said legislation needed to step in since no actionable right of privacy existed in English law.

The Government's Human Rights Bill marks a significant departure from this traditional approach by positively enshrining rights through incorporation of the European Convention on Human Rights into domestic law. Article 8 of the Convention guarantees the right to private life, thus ensuring its enhanced protection, although intrusions into private life are permitted when necessary in a democratic society. Individuals could therefore challenge unjustified infringements on their privacy in national courts. However, extreme concern has arisen over a potential conflict with the competing right to freedom of expression, as guaranteed by Article 10 of the Convention. Two consequences in particular are greatly feared.

First, it could lead to a worrying fettering of the media's ability to report information to the public, a criticism frequently levelled at the law of libel. This aims to protect an individual's public reputation but often leads to a concomitant

infringement on freedom of expression. Since the burden of proof is on the alleged libeller actively to prove his publication's contents, influential individuals such as Robert Maxwell and Jonathan Aitken have sought to manipulate and abuse the law in their efforts to discredit or conceal information which should rightly be in the public domain and whose publication was ultimately vindicated. Similar possibilities are feared if a law protecting individuals' privacy is passed, especially if injunctions could be granted to prevent publication.

Secondly, the press fears that the self-regulation achieved by the Press Complaints Commission (PCC) will be compromised if the Commission's decisions become subject to judicial control. This is because the PCC has now been acknowledged to be a "public authority" under the Human Rights Act. Applicants could therefore challenge its decisions by way of judicial review, even though the PCC already aims to protect individuals' privacy except where there are competing public interest considerations.

Anomalies might also occur as a result of distinctions in the definition of what constituted a public body. A point might be reached where bodies such as the BBC, the Advertising Standards Commission and the Broadcasting Standards Commission had to respect individuals' rights to privacy to an extent that purely commercial entities such as ITV and the press did not. This would be in spite of the fact that such bodies already recognise a right to privacy. Only recently the Broadcasting Standards Commission, for example, upheld a complaint from the Social Security Minister, Frank Field, against makers of the television programme *Watchdog*. It stated that "the infringement of privacy was unwarranted" when he and a group of M.P.s were secretly filmed whilst on a genuine assignment in Chile to learn about the country's pensions system.

Nevertheless, such problems could be obviated if the margin of appreciation permitted in implementation of the Convention ensured that authorities such as the PCC could retain their discretionary judgement, thereby largely maintaining their self-regulation. A degree of latitude would be afforded to the PCC and its powers of adjudication without its falling foul of non-compliance with the Convention. Judicial review would therefore exist only to correct errors of law or clearly improper decisions.

The PCC in turn would be left to determine the exact balance between the right to privacy and the right to freedom of expression. This would have the added benefit of keeping judges away from making political decisions except in the most extreme circumstances, a policy which would be greatly enhanced if individuals wishing to complain were denied access to the courts until they had at least first sought a decision from the PCC or relevant body. The only exception would arise when an injunction was sought, since only the courts have jurisdiction to grant such a remedy. However, judges should be extremely wary of granting it, given the speed with which news becomes out-of-date and the public interest in freedom of information.

One final argument for allowing the press essentially to regulate itself through authorities such as the PCC lies not so much in legal justification as in the question of realistic viability. Rapid advances in technology have led to a proliferation in the methods by which information is disseminated and the speed with which this is achieved. Media such as the Internet ensure that information can be published throughout the world in very little time indeed. This will make the effective regulation of publications increasingly problematic, if not impossible. The injunction granted to prevent publication of the *Spycatcher* book in the U.K., for example, appeared almost farcical when the book was so readily available elsewhere in the world. In the light of this increasing globalisation, consensual submission to the guidelines of authorities specifically set up to regulate the press's freedom of expression are generally far more likely to protect an individual's right of privacy than an antagonising and largely retrospective judicial interference.

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