

Privacy and the right to know

Views from the press and the legal profession in France and Britain

by Ian Davidson

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Seminar paper:

M Charruault's paper on the European Human Rights convention (in French only) may be ordered from the British Section office.

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1. Introduction

The title of our seminar — *Privacy and the Right to Know* — turned out to be slightly misleading. The central preoccupation of our discussions was in fact with a significantly different antithesis, the perennial tension between the right of the individual to the protection of his or her privacy, on the one hand; and the right of the press, or more generally of the media, to freedom of enquiry and expression, on the other.

Among the British participants at the seminar, there were those who argued forcibly in favour of the idea of a Freedom of Information Act, as promised by Britain's Labour Party in its election manifesto of 1997. They claimed that such an act could be expected to alleviate this tension between competing social and political values; and of this, more later. But as things now stand, neither France nor Britain has any statutory provision corresponding to a "Freedom of Information Act", so that the antithesis of our title, between Privacy and the Right to Know, taken literally, is for the moment more hypothetical than actual.

Our discussions were arranged in four sessions.

In the first session, we heard expositions of **The legal framework** in our two countries, as it affects these two principles, of privacy and the freedom of the press. These expositions were complemented by an extensive first-hand account of the role and functions of the Press Complaints Commission in Britain.

In the second session, we heard two expositions of **The journalist's perspective**, and the ensuing discussion underlined the fact that different parts of the press, in France as well as in Britain, evidently have widely divergent commercial interests, and that for this reason, if for no other, they tend to have widely different interpretations of the relative claims of the individual's right to privacy and the media's right of enquiry and expression.

In the third session, devoted to **Ethical questions**, we considered the significance of the essential role of the press (and other media) in democracy, we debated the implications of cases where the media exploits its freedom in ways which are manifestly unethical, and we discussed the importance of the function of journalists' training in maintaining the ethical standards of the press.

In our fourth session, entitled **The future: in which direction does the Human Rights Convention take us?**, we discussed the implications for privacy and press freedom of the European Convention on Human Rights, which has long been directly applicable in France, but which is being incorporated into British law.

2 Salient Issues

Our seminar did not lead to any formally agreed conclusions. But it is possible to identify a number of salient issues, which came up on frequent occasions throughout the day, and which may well be relevant to thinking on policy in the future.

First, the conflict between privacy and the power of the press may sometimes lead to problems of abuse by the press of the rights of the individual, both in Britain and France.

Second, where there is abuse, it comes about primarily as a result of commercial pressures and newspapers' drive for circulation. As a result, some concern was

expressed at the seminar that money values may be tending to drive down journalistic values.

Third, in France the remedies for abusive invasion of privacy come from the legal system and the law courts, whereas in Britain they come, at least in part, from the self-regulation of the newspaper industry and the Press Complaints Commission. Yet despite these procedural differences, it appeared (though it was hard to be sure) that there were significant similarities in the principles that might be invoked in the two countries, in deciding whether a particular press intrusion could be justified or not.

Fourth, the inference from our discussions was that neither country, in all probability, has a perfect system for reconciling the competing claims of individual privacy and press freedom. In Britain it is widely believed that privacy is much more effectively safeguarded in France than it is in Britain. But it was striking, at our seminar, how few of the French participants seemed satisfied with the effectiveness of their national system, while several were unmistakably intrigued by the alternative British approach of self-regulation and the Press Complaints Commission. Conversely, a number of the British participants were openly ambivalent about the working of self-regulation and the Press Complaints Commission.

Fifth, it did not appear that the European Court of Human Rights had yet played any significant role in influencing, in France or in Britain, the adjudication of disputed cases of conflict between privacy and press freedom. But it was eloquently argued that the convention could and should play a key role in developing a uniform European jurisprudence on the question, since not only does it encapsulate in distinct articles the rights both of privacy and of press freedom, but it also defines the democratic principles by which these rights should be governed.

3. The Legal Framework

In France, we were told, the question of privacy and press freedom is based mainly on a law of July 17, 1972. This law allows for the possibility either of criminal sanctions, including prison and/or fines, or of civil actions. But the criminal option is almost never implemented, while the civil option offers only a general and imprecise framework, gives no definition of "private life", and provides little guide to the procedure to be followed. As a result, the subsequent jurisprudence of the courts has proved much more important than the original law itself, in developing a body of rules and principles.

In practice, "private life" (as it emerges from the jurisprudence) includes health, life, death and 'sentimental' life ("la vie sentimentale"). By contrast, the publication of information about someone's income or property does not constitute an infringement of private life ("atteinte à la vie privée").

In some cases, the claims of the immunity of "private life" can give way to the claims of the right to publish information on grounds of public interest. This was so, for example, in the case of the consignments of blood contaminated with HIV, at the time of the Socialist government of M Laurent Fabius.

In a later session, we were told that there are two levels of "private life" in French jurisprudence: simple "vie privée", and "l'intimité de la vie privée", the latter being more rigorously protected than the former, and being defined (to the amusement of some British participants) as the "torrid" aspects of sentimental life.

In Britain, by contrast, (we were told), there is no general right of privacy under English law, and no general right of restraint in the taking of photographs in a public place. In practice, privacy can be protected in four different ways:

1. the law of confidentiality, which has developed recently;
2. the law of defamation, which may cover invasion of privacy, especially where the newspaper is unable to prove the accuracy of its report;
3. the law of anonymity, where the identity of victims of rape and blackmail, and the identity of children, may be protected;
4. the non-legal complaints system, operated through the Press Council until 1991, and the Press Complaints Commission in more recent years.

Some very senior British judges (we were told) believe that Parliament ought to legislate on privacy; the alternative is that the courts will develop their own jurisprudence on privacy, on the basis of article 8 of the European Convention of Human Rights, once it comes into force in January 2000.

It was also argued that the introduction in Britain of a Freedom of Information Act would be helpful in defining the right of privacy, since the case law arising from disputes over Freedom of Information would inevitably begin to define the zone of privacy as compared with the zone of the right to know.

During this session we also heard a first-hand account of, and an apologia for, the Press Complaints Commission. It was pointed out that there is, in Britain, no special regime for regulating the press (except in war-time); that in any case the law is costly and slow; and that a better alternative was self-regulation by newspaper editors.

The current manifestation of this approach is the Press Complaints Commission, which is funded by the press, which operates a code drafted by the newspaper editors themselves, but where only a minority of the members of the PCC are themselves from the press. Currently the PCC handles around 3,000 cases a year, and in 90 per cent of them it secures an amicable settlement within 44 working days. We were told that 75 per cent of complaints were about inaccuracy of reports; a further 15 per cent concerned infringements of privacy, and the remaining 10 per cent harassment. In some cases, editors sought the advice of the PCC before running a story.

The code says that "Everyone is entitled to respect for his or her private life, home, health and correspondence". But it also says that intrusion may be justified where it can be demonstrated to be in the public interest, for exposing a crime, for protecting public health and safety, or for preventing the public being misled.

Some British politicians have argued that the PCC ought to have powers in reserve, for the 10 per cent of cases where there is no amicable settlement. But the uncertain question, we were told, is whether the newspaper editors would be as likely to co-operate on a voluntary basis in the 90 per cent of cases, if they knew they could be compelled in the 10 per cent of cases.

Some French participants commented that the British system was better than the French, but doubted whether any French editors would voluntarily seek advice. But one British participant pointed out that only 1 per cent of cases are adjudicated in favour of the complainant, and argued that the code had been devised by editors to avoid legal constraints, whereas it would be better to have a code which satisfied the public as well as the editors. Another British participant pointed out that the PCC could not, in general, resolve disputed issues of fact, since it had no powers to call evidence.

4. The journalist's perspective

In this session, it emerged clearly that, in Britain at least, some of the respectable broadsheet newspapers had a different standpoint, and different interests, from most of the tabloid press.

From the broadsheet point of view, we were told, what was wrong with the present situation was that there was too little right to know vis-à-vis the rich and powerful, and too little protection for the privacy of the poor and powerless. What was needed was a privacy law to protect ordinary people, a Freedom of Information Act, and a reform of the libel laws, which at present give too much protection to the rich and powerful.

The tabloids, we were told, do not agree with this at all, since they show less interest in investigating the rich and powerful, but at the same time give much lurid play to the sex-lives of the poor and powerless. It was also pointed out that the regional newspapers, too, give a lot of space to the sex-lives of the poor and powerless.

This point of view was strongly supported by another British participant, who argued that the prevalent British culture of secrecy on public affairs inevitably diverts the news media into poking into the private lives, not just of politicians and stars, but also of ordinary people. Most of the complaints to the PCC concern stories about ordinary people.

There was discussion of the fatal illnesses of President Georges Pompidou and President François Mitterrand, which were not reported in the French press until very late in the day. Some participants asked whether the French press would have been protected, on public interest grounds, if they had reported these illnesses, or whether they would have been prevented by the specific protection in France for medical information ("atteinte au secret médical"). There was no clear answer; except that the French press did not in fact uncover these illnesses.

5. Ethical Questions

Our discussion on the ethical aspects of the question of privacy and the right to know, started with opening presentations which offered a nice contrast between the conceptual and the down-to-earth.

Our French presenter set out an high-minded account of the ethical role of the press and its essential function in democracy: to preserve the moral health of society, to make us reflect on the development of society, to inform us of the world as it is, and to respect the dignity of the individual and the functioning of democratic life.

Our British presenter argued that the central issue was accuracy, and that the job of the press is not to cultivate democracy but to find out the facts: ethical questions should be addressed, he thought, not to journalists, but to their proprietors.

The first presenter argued that we could not count on the law to maintain ethical standards, nor could we count on the public; therefore we were forced to rely on the journalists for maintaining ethical standards. Therefore he, like others, argued the importance of the training of journalists for maintaining standards.

But while our down-to-earth presenter agreed with the importance of training journalists, he thought that training seldom had much ethical input. A French colleague opined that there was virtually no training of journalists in France.

Whether our two presenters really had such different views of the function of the press as their presentations suggested, or whether their differences were mainly magnified through the prisms of national stereotypes, remained unclear. The general tone of the discussion suggested that most speakers had poor expectations of the ethical standards of the press; until, right at the end, one participant pointed out that Britain had five respectable national broadsheet newspapers, which he advanced as an indication that the standards of the press were not so bad after all.

6. The Future: in which direction does the Human Rights Convention take us?

Our two presenters agreed that the European Convention on Human Rights had not so far had the effect of clarifying the relationship between privacy and the freedom of the press. But they reached this conclusion from opposite starting points, as it were, and they disagreed rather profoundly as to whether the Convention was likely to clarify the relationship in the future.

Our British presenter argued that the Court of Human Rights would not develop the jurisprudence on the relationship between Article 8 (privacy) and Article 10 (freedom of the press) in the European Convention, because it would not have any opportunity to do so. The reason for this, he said, was that the Court is directed primarily at actions of states, which are not in the business of disseminating information about people's private lives.

Moreover, he pointed out, the statute incorporating the Convention into British law says that it is unlawful for a "public authority" to act in contravention of a Convention right. This wording might apply to the BBC, but it could not directly apply to a newspaper, which is not a "public authority"; so the only way in which the Convention could be invoked against a newspaper, he argued, was via a case in a British court of law, which would be a "public authority".

Our French presenter opened with a frank admission. He had, at first, assumed that of course the European Court must have already developed, in its fairly long history, jurisprudence to balance the claims of Article 8 and Article 10; and he had been surprised that the organisers of the conference had posed their questions in the future tense — "How will the European Court of Human Rights develop the relationship between Articles 8 & 10 of the Convention?" etc.

On closer examination, however, he had found that his initial assumption had been quite mistaken. In the nearly 39 years which had elapsed, between its installation on April 20, 1959, and December 31, 1997, the Court had handled 903 cases. Of these 903 cases, 38 decisions were related to Article 8 of the Convention (privacy); and 16 decisions were related to Article 10 of the Convention (freedom of the press).

But none of these cases was related to the relationship between Article 8 and Article 10, with the result that the Court had not clearly defined the criteria for the necessary equilibrium between these two apparently contradictory rights: the right to revelation and the right to secrecy.

Nevertheless, our presenter believed that the jurisprudence of the Court did indirectly indicate how this equilibrium should be struck. For he noted that the essential and only criterion which was admitted, in Article 8 and in Article 10, as a reason for limiting the right to privacy and the right to publication, was that it was necessary in a democratic society.

To be sure, he said, this did not necessarily make it easy to decide in any particular case. But he believed it did establish the essential "lines of force" for a decision. Moreover, he implied, the European Court was the only place where the equilibrium between the two articles could authoritatively be decided, and would therefore be the decisive source for establishing that equilibrium in all the member states.

As the account shows this seminar concerned a subject which is currently much debated but in which uncertainties, both legal and practical, ethical and conventional, abound. It is not surprising that the seminar did not come to firm decisions or recommendations. But the exploration and sometimes clarification of the issues raised was of considerable benefit to the participants and will also be drawn to the attention of other policy makers on both sides of the Channel.

Privacy and the right to know
The Law Society, Chancery Lane, London on 2 December 1998

PROGRAMME

09:00 Arrivals/registration

09:30 Introduction by the joint Chairmen: John Tusa and Mme Simone Rozès

09:45 **1. The legal framework**

Introduced by M. Christian Lacabarats and Sir Louis Blom-Cooper QC

To what extent does the law in France and Britain protect individual privacy? What balance is struck between freedom of the press and the protection of individual privacy? Is that balance the right one?

DISCUSSION

11:15 Coffee

11:30 **2. The journalist's perspective**

Introduced by David Leigh and M. Bruno Frappat

When are the private lives of prominent people legitimate targets for investigative journalism? How do we define legitimate interest? Is any interference with journalistic freedom acceptable in a free society? If it is, does a voluntary code of practice work, or is legislation needed?

DISCUSSION

13:00 Buffet Lunch

14:00 **3. Ethical questions**

Introduced by Me. Georges Kiejman and Mike Jempson

Should the press be concerned about its impact and influence on society? It has been argued that the press, and the tabloid press in particular has contributed to a coarsening of social discourse and a decline in moral values. Or should we resist the criticisms and 'preaching' of politicians and take the view that it is not the job of the press to maintain the moral health of society?

DISCUSSION

15.30 Tea

15:45 **4. The future: in which direction does the Human Rights Convention take us?**

Introduced by Patrick Milmo QC and M. Christian Charruault

How will the European Court of Human Rights develop the relationship between Articles 8 & 10 of the Convention? What effect will the incorporation of the Convention into British law have in practice? In difficult cases where a balance has to be struck between the right of privacy and the right to free expression, will the Courts recognise the importance of a free press?

DISCUSSION

17:15 Chairmens' recommendations and conclusions

17:30 Meeting closes

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2 December 1998

French participants

S.E. Daniel Bernard

Ambassadeur de France

Mlle Sylvie Blumenkrantz

Attachée de direction de la section
française du Conseil franco-britannique

Me. Luc Brossollet

Avocat à la Cour

M. Christian Charruault

Président de Chambre à la cour
d'Appel de Paris

M. François Cordier

Premier substitut au Tribunal de Grande
Instance de Paris

Mme Michèle Cotta

Journaliste

Mme Myriam Ezratty

Coprésident française de l'Association
des juristes franco-britanniques

M Jacques Fauvet

Président de la commission nationale
de l'informatique et des libertés

Me. Georges Kiejman

Ancien Ministre

M. Alain Lacabarats

Vice-Président au Tribunal de Grande
Instance de Paris

M. Jean-Marie Le Breton

Directeur de la Section française du
Conseil franco-britannique

M. Claude Moisy

Journalist
Ancien Président Directeur général de
l'AFP

Mme Simone Rozès

Premier Président honoraire de la Cour
de Cassation

M. Jacques Viot

Président de la Section française de
conseil franco-britannique

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British participants

Charles Anson

Head of Communications,
European Broadcasting Union
Former Press Secretary to the Queen

Guy Black

Director, Press Complaints Commission

Sir Louis Blom-Cooper QC

Former Head of the Press Complaints
Commission

Ian Davidson

Freelance Journalist
Former Paris correspondent, FT

Ian Hunter QC

Chairman of the Franco-British Lawyers Society

Mike Jempson

Executive Director, Presswise

Professor Douglas Johnson

Emeritus Professor of French History
University of London

Ann Kenrick

Secretary-General, Franco-British Council

Ruth Kitching

Assistant, Franco-British Council

Sir Thomas Legg QC

Franco-British Lawyers Society;
Former Permanent Secretary to the Lord
Chancellor

Gerard Mansell

Former MD External Services and Deputy
Director General of the BBC

Mark Stephens

Senior Partner
Stephens, Innocent, Solicitors

Patrick Milmo QC

Head of Media Law Chambers
5 Raymond Buildings

Andrew Nicol QC

Doughty Street Chambers

Sir Peter Petrie

Chairman, Franco-British Council

David Leigh

The Guardian

Michael Tugendhat QC

Media Law Queens Counsel
5, Raymond Buildings

John Tusa (Chairman)

Managing Director, Barbican Centre

Lord Wakeham

Chairman, Press Complaints Commission

Professor Michael Zander

Professor of Law, London School of Economics

