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Committee Stage

Column 771 -787

Human Rights Bill [H.L.]

4.25 p.m.

House again in Committee on Clause 6.

Lord Wakeham moved Amendment No. 32:

Page 4, line 4, at end insert ("or
(c) where the public authority is a court or tribunal and the parties to the proceedings before it do not include any public authority.").

The noble Lord said: In moving this amendment, I shall also speak to Amendments Nos. 33, 35 and 42.

As the Committee will know, it is right for me to declare an interest as chairman of the Press Complaints Commission. The commission's job is to protect the legitimate expectation of privacy on the part of individuals--but to do so through self-regulation rather than statutory control.

Let me begin by saying that I have no great problem with the principles of the convention. My problem is not with the principle, but with the method. In short, the detail of the Bill and the consequences of that detail seem to do something which I profoundly do not want to happen; nor I believe do the Government. The Bill as drafted would damage the freedom of the press and badly wound the system of tough and effective self-regulation that we have built up to provide quick remedies without cost for ordinary citizens. It would inevitably introduce a privacy law, despite the Government's stated opposition to one.

As will be clear, I speak not as a lawyer but as a layman. From that standpoint, it seems to me that the first problem arises because of the role of the courts as public authorities enforcing the convention and developing the

common law. As I understand it, it will therefore be possible for the courts to use the convention not just in respect of disputes between individuals and public authorities but in disputes between private individuals.

Again, that is contrary, as I understand it, to the Government's previously and clearly stated intentions. Indeed, the White Paper accompanying the publication of the Bill stated that,

> "the time has come to enable people to enforce their Convention rights against the State in the British courts".

No mention was made of private individuals or organisations.

In my view the Government were right first time. Incorporation of the convention should not be used to enlarge the remedies available in private disputes. It

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must be made clear, as the Government have maintained before and since the election, that it is to be used to curb the power of the state.

I have tabled two sets of amendments to clarify that point and to prevent the courts being dragged into disputes which are nothing to do with public authorities. The first set seeks to prevent the courts using the convention to interfere in issues relating to privacy where those are matters between private parties and do not involve the state. I might add that I think the amendment tabled to Clause 9 by the noble and learned Lord, Lord Wilberforce--Amendment No. 60--relates to the same point.

My amendment aims to stop the development of a common law of privacy. Such a law could never be as effective as self-regulation in safeguarding the rights of individuals. And such a law would seriously erode the freedom of the press, which has been a pillar of our democracy since the first Bill of Rights in 1689.

It would also be highly damaging to ordinary people--in other words, the great majority of those who from time to time are affected by media intrusion--leaving them without the protection of self-regulation. For most people, going to law to protect their privacy would be a ruinously expensive business which few could afford. They simply would not do it. Given that, as I know from experience of the Press Complaints Commission, very few cases of invasion of privacy are clear-cut, I do not believe that the plan of the noble and learned Lord the Lord Chancellor for a "no-win, no-fee" system of costs will work in these kinds of cases.

If there is a law of privacy, fashioned by the courts, I fear that the newspapers will simply say to complainants, "Use it". That will be fine for the rich and the powerful, but it will be a remedy out of the reach of ordinary people. Indeed, where there is a problem with intrusion into the privacy of ordinary citizens, a law will simply make it worse than under tough self-regulation, not better.

I fully expect that the noble and learned Lord the Lord Chancellor will tell me--indeed, he has never sought to make any bones about it--that a judge-made law of privacy is on its way and that it may happen in a year or two anyway as the courts seek to advance, without Parliament's express approval or scrutiny, the law of confidence. With great respect, if I may say so as one who believes in the sovereignty of Parliament and has been Leader of both its Houses, that is no justification. If Parliament wants a law of privacy--which would be a fundamental change in our constitutional balance, to which I am, of course, opposed--it should pass one, not just acquiesce in the courts' creating one without its approval or scrutiny.

My second set of amendments seek to protect the work of the Press Complaints Commission and the system of self-regulation, which could be fatally undermined by this legislation if the PCC were held to be a "public authority" under the terms of the Bill. We need to ensure that the PCC is held not to be a public authority, not just for abstruse points of legal nicety, but because the future of self-regulation depends upon it.

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If the PCC's adjudications on matters of privacy could be subject to subsequent action by the courts, my task of seeking to resolve differences, to obtain a public apology where appropriate or, if necessary, to deliver a reprimand to an erring editor would no longer be a practical proposition because the courts would be able to intervene after our work had finished. That would ensure that from day one the newspapers' approach to a complaint of invasion of privacy would be highly cautious and legalistic. The courts may also be able to award monetary compensation. My chances of making self-regulation work for the benefit of ordinary people, and without cost to them, would be minimal.

I had intended to pose a rhetorical question about whether the PCC was a public authority in terms of the Bill in order to demonstrate that uncertainty existed on this point. As the noble and learned Lord the Lord Chancellor knows, there was until recently legal opinion from a most distinguished quarter that the PCC was not within the terms of the Bill. However, an article in The Times last week by David Pannick QC asserted, in stark contrast, that the PCC is caught by the definition. In addition, during the Second Reading debate the noble Lord, Lord Williams of Mostyn, suggested that this was a matter for the courts to determine.

It would have been unusual to proceed with such uncertainty because it left open an ambiguity which might have the effect of bringing disputes between newspapers and individuals within the scope of the Bill only by virtue of the fact that the PCC was declared a public authority. However, I can now answer my own question--and I am most grateful to the noble and learned Lord the Lord Chancellor for assisting me in this. He wrote to me this morning to confirm that, in his view, the PCC is a public authority within the terms of the Bill. He also confirmed the point that in privacy matters newspapers would be subject to interim as well as final injunctions under its terms. His letter confirms that, despite what had been said to the contrary, newspapers and magazines are within the terms of the legislation. In other words, we have a de facto privacy law on our hands.

In the courteous way that I would expect of him, the noble and learned Lord the Lord Chancellor seeks to reassure me that a newspaper will not go down to an injunction where there are "solid" public interest grounds, just as when in libel cases a newspaper says it will justify a story. However, the point is that in privacy cases the courts would inevitably err on the side of caution and would not refuse an injunction, despite the fact that a newspaper said that there was a public interest defence. The result would be that all newspapers would be bound by that injunction and it could be years before a full hearing took place. That, in my view, would be an end to investigative journalism.

It may be that these are merely unintended consequences and the Government have not yet had a chance to think through all the implications of what the noble and learned Lord the Lord Chancellor said in his letter to me. It may be that they should look very carefully at my amendments, which would have the effect of taking the PCC out of the terms of the

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legislation and of preventing direct action against newspapers. These amendments, after all, simply help the Government to do what they always said they wanted to do: introduce legislation that applies only to public authorities and not to newspapers.

The noble and learned Lord the Lord Chancellor is an old friend for whom I have the highest regard and who, as he said at Second Reading, until May played an important role in establishing and nurturing the work of the Press Complaints Commission as a member of its Appointments Commission. I know that he feels neither that my fears are justified nor that there will be established a convenient law for the rich to avoid publicity or the corrupt to escape the spotlight of investigation. I know he thinks that a free press will be safe in the hands of the judiciary.

I am sure that he will tell us that the courts will interpret these matters in a sensible and reasonable way by giving due weight to Article 10 of the

convention on freedom of expression. We may be told--as David Pannick set out in the article I mentioned earlier--that the courts may seek to leave delicate judgments on privacy matters to specialist bodies such as the PCC. All so well and good. But, if the Government agree with those points, they ought not to leave them to the discretion of the courts; and they should not leave the Bill unamended. These are matters too important to be left to chance. After all, we are tampering with the freedom of the press and with self-regulation not just for this moment but for all time to come.

I am grateful, as I said earlier, to the noble and learned Lord the Lord Chancellor for writing to me to clarify these matters and for doing so in a way that convinces me that there is a very serious problem with the Bill. Self-regulation has come on in leaps and bounds in recent years but, as I have often said, it is not perfect. I do not rule out further improvements over time, but that will be much more difficult to negotiate with a press subject for the first time ever to statutory controls and a privacy law.

In my view, judicial interference in matters such as this and the freedom of the press do not mix. I believe that the freedom of a responsible press can only really be safe in the hands of Parliament. The Bill, as the noble and learned Lord's letter to me confirms, takes the matter out of the hands of Parliament and in doing so introduces a back-door privacy law. I do not want that to happen because I believe that the practical effect for the ordinary people of this country who cannot afford the expense of going to law will be less protection, not more. I therefore strongly urge the noble and learned Lord the Lord Chancellor to look at these matters again before it is too late.

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Lord Wakeham: I am grateful to the noble and learned Lord the Lord Chancellor for his substantial reply. It must be studied carefully, and that I shall certainly do. In a debate of this kind one tends to clutch at contributions from non-lawyers. I very much agreed with the remarks of the noble Lord, Lord Callaghan, although he did not intend to speak in support of my amendment. I am not here to speak for the press. I am independent of the press. I am concerned to secure an effective remedy for all the people who complain to me, 95 per cent of whom are ordinary citizens of this country, not celebrities or famous people with large resources. I am concerned about the invasion of their privacy. Further, I am concerned that the remedies which may be inadequate at the moment under self-regulation will disappear and will be replaced by legal remedies which these people will be in no position

to invoke because of the thousands of pounds it will cost to take newspapers to court.

However, the noble and learned Lord has made a number of substantial points and I should like to study them carefully. I very much appreciate his kind offer not necessarily to visit him again but to leave open the door. In the circumstances, I beg leave to withdraw the amendment.

Amendment, by leave, withdrawn.

[Amendment No. 33 not moved.]

HUMAN RIGHTS BILL

THIRD READING, 5th FEBRUARY 1998

§ *Lord Wakeham*

My Lords, I am the chairman of the Press Complaints Commission and therefore it is right that I should declare an interest. Having had a long day sitting here without saying a word, I feel that I now have to say something about the position of the press. Let me say at the outset that I welcome the fact that the Government have this morning made it clear that the issues I have raised surrounding this Bill, which include questions of prior constraint and financial compensation, remain under active consideration. Discussions continue, and no decisions have been reached.

831 These are matters of fundamental importance in a free society. For that reason, I wrote today to the noble and learned Lord the Lord Chancellor and his right honourable friend the Secretary of State for Culture, Media and Sport, setting out in detail my concerns, especially on the subject of prior restraints. I have also published the letter in view of the public interest involved.

I have always made it clear that I support incorporation, but I have made no bones of the serious concerns I have about the way in which it is being done. Those concerns may be misplaced. The noble and learned Lord the Lord Chancellor has done his level best to reassure me. On the other hand, I may be right—and, if I am, the Bill will have enormous repercussions for the system of self-regulation that we have built up.

I do not say that as a threat, still less some form of blackmail. I say it because of what I see as the logical consequences of the Bill which grafts a statutory superstructure on to our system of self-regulation. As a result the system will no longer be a self-regulatory one. It will for the first time have a basis in statute.

The PCC was set up in 1991, principally to assist ordinary people in resolving their disputes with newspapers. It centres on a code which covers a number of areas in which the public are right to expect high ethical standards of journalism. It was also set up as a system which was designed to be independent: independent of the press; independent of government; and independent of the direction of the courts. It is that independence that both safeguards the interests of the public and upholds the freedom of the press.

Self-regulation is not perfect—and it probably never will be—but it has achieved far more than any of those who set it up in the first place probably ever expected. It has provided a swift dispute resolution procedure which works only because of the voluntary commitment of editors and the amicable way in which the commission's work is

conducted. And its code—the first ever set of rules for all journalists—has also gradually raised standards among all newspapers. They are standards of accuracy and speed of correction; respect for individual privacy; safeguards for the vulnerable, such as children or those in hospital; and protection from harassment. At the heart of my concerns is the fear that the way in which the Government are incorporating the convention will change the nature of the system—and not for the better.

This Bill will almost certainly make the PCC a public authority and part of a statutory system. That is bound to have implications, and it will do so because it will put the courts in the driving seat. It is they who will be able to compel the PCC to change its structure and its powers if they deem that it is not acting compatibly with the convention. That possibility is quite simply inconsistent with the principle of self-regulation.

My main worry is what a statutory basis will do to the processes by which self-regulation operates. Those processes, which are voluntary and based on common sense, are in many ways the antithesis of statute and legal supervision.

832 If the PCC's adjudications on matters of privacy were subject to subsequent action by the courts, my task of seeking to resolve differences, get a public apology where appropriate or if necessary deliver a reprimand to an erring editor would no longer be a practical proposition. This is because voluntary co-operation by editors would open them up to subsequent action in the courts. Material freely volunteered would become part of a legal action. From day one, therefore, the newspapers' approach to any complaint of invasion of privacy would be highly cautious and legalistic—if, indeed they chose to co-operate at all.

There are other problems arising from the legal supervision of the PCC by the courts. First, the PCC has no powers of prior restraint—rightly, in my view. Such powers of prior restraint, exercised by the PCC or by the courts, would have serious implications for the role of a free press in a free society. However, the courts could force it upon us.

There is another problem. It has been suggested that the courts will seek to satisfy themselves that the PCC has "effective remedies" at its disposal, including the power to award compensation. But, again rightly in my view, the PCC has no such power and seeks none. If therefore the courts say, "Yes, the PCC should award fines", we will have to change, but that change will make a mockery of the principle of self-regulation. It is no longer the newspaper industry regulating itself; it is being given direction by the courts.

In those circumstances, the process by which we resolve 90 per cent. of the thousands of complaints we receive will be put into jeopardy. Newspapers and complainants will know that we are the first round in an expensive legal battle that could end up in the High Court with damages and costs. Newspapers will find it impossible to co-operate with us in a friendly fashion and will deal with all complaints through lawyers.

That is not the way it is meant to be. The newspaper industry set up the PCC as an independent body to resolve disputes and gave it a powerful sanction: to demand an

editor print a critical adjudication in his newspaper. It set it up to provide what the Master of the Rolls described recently as a robust, common sense system of dealing with complaints. It was never intended to be a legal system.

But if the courts are able to interfere in the way that I have just described, and they will be under a duty to do so, newspapers will have an entirely different system on their hands. The PCC will not be able to resolve disputes because it will no longer work on an amicable and friendly basis. Indeed, how could it when many, particularly the rich and those set on gold-digging, would use it as a first stop on the route to court?

My concern in those circumstances is this: why should the newspaper industry continue to support the PCC? It will be part of a legal system only because the PCC exists. And in turn, the PCC will be unable to carry out the function that it was originally intended to do: to administer a code and to resolve disputes in a non-legalistic way. Therefore, we shall be of no use to ordinary people, for whom we were set up, and no use 833 to the newspaper industry which would simply be opened up to new types of legal action because of our existence.

I hope that a way will be found to continue the system, despite the changes. But it may be simply too difficult to unscramble self-regulation from law. In my view, the two do not mix. In those circumstances, the choice is not as simple as the one put forward by the noble and learned Lord the Lord Chancellor that the Bill will make a good system even better. The choice is not necessarily between the PCC and a better PCC. It may be a choice between the PCC and no PCC, or at least a seriously diminished one. That would put at risk all aspects of our work, by far the bulk of it, which does not relate to privacy.

My proposal at an earlier stage of the Bill was to exclude the PCC and its activities from the supervision of the courts so that ordinary citizens could continue to complain to us without the necessity and cost of legal representation, which will be the inevitable consequence of newspapers using lawyers as part of a legal system. Nothing in the scheme of things that I propose would stop the rich, the powerful, the corrupt and those with something to hide going over our heads directly to the courts if the courts, encouraged by the Bill, develop the common law in the way that has been suggested. So be it. But at least the vast majority of ordinary citizens will still be able to use our services to resolve complaints without the cost of using the law.

As your Lordships may recall, I had also put forward proposals to deal with the problems which will arise if the rich and powerful are able to take out interlocutory injunctions against newspapers on the grounds of intrusion into privacy. Those problems are acute and the Government have still not indicated to me how they intend to deal with those points, although I suspect that Ministers are indeed aware of the issue. I do not intend to go into great detail about those matters. My views are on the record and the issue continues to give me great anxiety.

I conclude by saying that it may be that I am wrong on some of this. Certainly the full effects of this Bill will not be swiftly felt, probably not until the final years of this

Parliament, but I fear—and I repeat that this is not a threat but merely the logical consequence of this legislation—that the PCC will be undermined; the vast majority of ordinary people who do not have large financial resources to take on a newspaper but who do so now through the PCC will be left with nothing but the courts and the very real risks that go with them. I really do not want that to happen.