

Through the keyhole

All summer in France and England tussles have been running between the competing interests of privacy and freedom of expression. [Fabrice Lorvo](#) assesses whether the two can ever co-exist peacefully on either side of the channel

A cornerstone of democracy is the state's recognition and protection of the fundamental rights of privacy and of freedom of expression. While that co-existence is easy to support in the abstract, the difficulty lies in the inherent competition that underlies these two values.

In France, freedom of the press is guaranteed under the country's constitution. Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen (DRMC) states: 'The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by law.'

This freedom is further delineated in the law of July 1881, article 1 of which declares that 'printing and bookselling are free' while the rest of the law describes the limits of said freedom.

Privacy breaches

Privacy rights are elucidated under article 9 of the French Civil Code, which states that 'everyone has the right to respect for his private life'. French courts may, among other types of compensation, provide such measures as sequestration and seizure to end an invasion of personal privacy. Furthermore, in cases of emergency, such measures may be granted by interim order.

Sanctions against intrusions into and violations of privacy are stipulated by article 226-1 of the French Penal Code. It holds that a penalty of one year's imprisonment and a fine of €45,000 are incurred for any wilful violation of the intimacy

of the private life of other persons by resorting to any means of:

- intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker;
- taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned.

Therefore, in France the rights of freedom of expression and those of privacy are, particularly as a result of their specific citation in the constitution, fundamental under French law.

On the other hand, Britain is a common law country and does not have a written constitution. Nonetheless, stemming from landmark legislation such as the Magna Carta of 1215, the Habeas Corpus Act 1679, and the Act of Supremacy 1534, freedom of expression in England – and to a greater extent the wider UK – has become enshrined and

subsequently developed through a long line of court cases.

Furthermore, the Human Rights Act 1998 incorporates into domestic law the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (ECHR), which specifically defines and protects freedom of expression. In addition, the UK media is a self-regulated profession and its ethics, guidelines and rules are constructed and published by such regulatory bodies as the Press Complaints Commission and Ofcom, which cover print and broadcast media respectively.

Limited protection

English common law has neither recognised a general right of privacy nor a tort based on its invasion or violation. A limited protection is offered primarily through the tort of breach of confidence. In the absence of common law protection of privacy, that right is primarily



defined by the statutory incorporation of article 8 of the ECHR.

In addition to laws or precedent, in France as well as in England, article 10 of the Convention applies, recognising:

‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’

‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of

Yesterday’s papers: the News of the World folded after the ‘phone hacking scandal broke

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the judiciary.’

If the concept of freedom of expression is recognised in both countries, such concept has some limits.

For example, article 8 stipulates the right to respect for private and family life, which states that ‘everyone has the right to respect for his private and family life, his home and his correspondence’.

Freedom of expression and the right to privacy are in constant friction. Since they are ostensibly of equal value, neither is absolute and neither is supposed to take precedence over the other. It is therefore necessary to find a way of balancing the exercise of these two fundamental rights.

According to the European Court of Human Rights (ECtHR), it is legitimate sometimes that the freedom of expression infringes an individual’s privacy. Such infringement is justified by the public interest, when information is already in the public domain, in cases of consent, and when immunity and lawful authority have been granted.

Public interest

Issues around public interest defences have been most relevant recently. In France, public interest is invoked when there is a public event, when an event is considered generally informative and newsworthy, or when there is a debate, discussion or issue of general interest. Moreover, there must be a direct link between the event or debate and the person whose privacy is being infringed.

Pursuant to the 2011 UK Editors’ Code of Practice, public interest includes, but is not confined to, detecting or exposing crime or serious impropriety, protecting public health and safety and preventing the public from being misled by an action or statement of



an individual or organisation. According to English case law (*Reynolds v Times Newspapers*): 'Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or others, then it is a matter of public interest on which everyone is entitled to make fair comment.'

However, as indicated in the 2007 case of *Jameel v Wall Street Journal*: 'What engages the interest of the public may not be material which engages the public interest.'

Curiosity

The question of when a legitimate public interest justifies the disclosure of certain information and the violation of an individual's privacy is a difficult one. The frontier between a genuine matter of public interest and what is simply something that is interesting to the public is small – in other words, public interest versus public curiosity. The former is arguably defined as information that society as a whole should have the opportunity to know and evaluate for the public good.

The assessment is different when a public figure is involved, when disclosure in the public interest is more freely invoked. Resolution 1165 of the Parliamentary Assembly of the Council of Europe states that 'certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts'.

Two recent cases from France and England – both involving the object of media scrutiny being splashed across global headlines – have highlighted various privacy issues that have potential lessons for the rest of Europe.

The Dominique Strauss-Kahn case involves the allegations brought against the then

Managing Director of the International Monetary Fund, including charges of sexually assaulting a hotel maid in New York. All charges were subsequently and dramatically dropped, but as a man of international power and prestige was involved, the French media has reported extensively and exhaustively on developments. No doubt the disclosure of such information was justified by the public interest. However, such qualification does not grant a *carte blanche* to the press.

The case triggered a rush by segments of the French media to open an effective inquest into the details of Mr Strauss-Kahn's life. The debate was no longer about whether he had assaulted the maid in New York, but instead it focused on whether he had committed similar acts in the past; his sexual history was disclosed and publically dissected.

So the question arises: can a person's sexual history and predilections be considered a matter of public interest? Even if a public man is involved?

In England, generally speaking, the courts have ruled that an individual's sexual behaviour is the most intimate aspect of private life and that it is not in the public interest (see *Mosley v MGN*).

Bedroom door

Likewise, in France, until now, freedom of expression stopped at the bedroom door. Therefore, it could be argued that the public inquest into Mr Strauss-Kahn's sexual history and predilections was not justified by the public interest. It infringed the privacy of the person and disregards – if not negates – the presumption of innocence inherent in both the French and UK legal systems. Such public inquest in fact evolved into a trial by the media, which should not be the role of the media while there exists an independent and impartial judiciary.

Even if the disclosure of information may be justified at a

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given time by the public interest, such justification is not absolute – journalistic reporting must also be subject to the balancing test of freedom of expression versus privacy rights.

The significant recent case in England concerns journalistic practices at News Corp's now-defunct newspaper, *News of the World*. It has been alleged that for years the newspaper had been garnering information through the 'hacking' – interception – of mobile telephone messages as well as paying police for information. Both tactics are illegal.

As opposed to the Strauss-Kahn case, the relevant issue arguably is not whether the information published by the *News of the World* was in the public interest, but rather, the methodology practised by the journalists for obtaining information.

Growing revulsion

It is obvious that the English public has been very interested in stories resulting from the information obtained via 'phone hacking' – the *News of the World* was the biggest selling English language newspaper in the world, with weekly sales averaging nearly three million copies. But in the wake of the scandal, there is a mood afoot in the UK suggesting a growing revulsion towards information obtained by the press unfairly, unethically and illegally.

Freedom of expression and the right to privacy are both pillars of democracy. Finding a fair balance between them is difficult, but imperative. One of the ways of determining and achieving this delicate balance is the use of the public interest test properly to define the limits of both freedoms.

The balancing test between these two values must be applied at each stage of the journalist's work – when obtaining, disclosing and commenting on the information.

Fabrice Lorvo is a partner at Paris-based law firm FTPA