

Mass media and media policy in Western Europe

Peter J. Humphreys

Manchester University Press
Manchester and New York

distributed exclusively in the USA and Canada by St Martin's Press

1996

Press freedom and its limits: the state, the law and the private individual

How much political freedom has the post-war press enjoyed in Western Europe? This might at first strike the reader as a rather surprising question. After all, had not censorship and state licensing, the hallmarks of a pre-democratic press system, been abolished? Following the experience of Nazi dictatorship and occupation, there occurred a powerful reaffirmation of the principle of the free press (Franco's Spain and Salazar's Portugal aside). This invigorated post-war commitment to press freedom was symbolised, as seen, by the freeing of state-controlled news agencies. Where there continued to exist a press registration requirement (eg. France and the UK), it was now merely a formality; registration was no longer a mechanism for censorship (Lorimer, 1994, p. 57; Article 19, 1993, p. 262). While there certainly was an expectation that comment would be clearly distinguished from information, in editorial matters the press was free to practise self-regulation. It was universally accepted that the press was a very different medium to broadcasting. There was no 'scarcity of frequencies' that called for public allocation of licences or that necessitated strict regulation of the medium. Whereas broadcasters were subject to requirements of balance and impartiality, the journalists of the press were expected to give free voice to their opinions (Lorimer, 1994, p. 58). Above all, the principle of media freedom was now enshrined in the Council of Europe's *European Convention on Human Rights*. Its article 10 stated explicitly:

everyone has the right to freedom of expression. This freedom shall include the right to hold opinions and to receive and impart information and ideas without interference by public authority.

This key provision gave concrete expression, in international law, to the principle of the inviolability of press freedom.

State censorship

In fact, John Keane (1991, pp. 94–114) has suggested that we are entering a 'new era of political censorship'. In his view, the modern state, a 'democratic Leviathan', continues to hinder the free flow of information through five 'interlocking types of political censorship'. Firstly, the state still resorts to 'emergency powers' of censorship. These are typically exercised during times of war or national crisis; the French state's 'muzzling' of the media during the Algerian war of independence (1954–62) was a prime example. Secondly, he points to the 'armed secrecy' of modern states by which he is referring to the classification of information as secret, the covering up of 'dirty tricks', the 'weeding' of public documents, and so forth. He cites as a good example the British 'D-notice' system for the official vetting of newspaper articles that bear on national security. Thirdly, Keane suggests, political 'lying' is a common feature of the official public relations process; it is conducted through practices such as the selective priming of the media through the issue of government statements, the official accreditation of certain reporters, the exercise of subtle pressures on journalists, and the like. Fourthly, Keane points to how 'state advertising' is used by governments for self-promotion; again he cites Britain where the state is the second largest individual advertiser and deploys an annual budget of nearly £200 million to advance 'any conceivable policy matter' (the French case, too, might have been adduced – see below). In Keane's words, the use of advertising budgets gives government 'enormous powers of blackmail'. Finally, Keane refers to the 'corporatistic' performance, in modern states, by private sector organisations of governmental functions. In Keane's negative view, corporatism blurs the boundaries between the state and civil society, incorporating important parts of the latter into the web of the state apparatus at the cost of 'openness'. By all these means, the media's investigative and watchdog powers are circumscribed. Press freedom is reduced.

Keane's perspective is a radical one. He presents a picture of enduring and overweening state interventionism in the press sector. In so doing, he overestimates the bureaucratic unity of the state and

underplays its essential 'leakiness'. He also ignores the way that investigative media – including the 'alternative' press, a radical press that re-appeared in the post-1960s decades – can influence the modern news agenda. Once a secret is leaked, whether by an investigative news journal like Germany's *Spiegel*, an 'alternative' paper like the *taz*, a satirical news magazine like France's *Le Canard enchaîné*, or a mainstream quality paper like the *Guardian*, then it is invariably picked up by the rest of the media. In the competitive world of selling copy and attracting audiences, investigative media exert a crucial influence on the agenda of the rest of the media (see Mathes and Pfetsch, 1991). Also, in the media agenda-building process, the modern state is but one player among many. Yet, handled with care, Keane's perspective is still very instructive.

Surprisingly, there has been little empirical study of media censorship in Western Europe by political scientists. A major problem has been a shortage of systematic data, particularly of comparative data. A cross-national study has made an important contribution towards redressing this state of affairs. By researching *Index of Censorship* – a publication of an independent body based in London – Newton and Artingstall (1994), examined the incidence of censorship in nine liberal democracies, six of which were West European. They covered two decades – 1970–1990 – and discovered significant cross-national variation. They found Britain's censorship record to be the worst over the whole period, which seemed to confirm the country's reputation as a 'secret state'. The study showed, too, that British media censorship had increased markedly during the 1980s, the period of Thatcherism. In searching for an explanation, Newton and Artingstall concluded that the British system created 'the opportunity to censor'. This, they suggested, resulted from its 'rather special constitutional and political features'. Among these features, they noted especially the absence of a written constitution with a bill of rights, and the country's 'majoritarian' political system. Other obvious factors were its 'weak' freedom of information legislation and the 'draconian' nature of official secrets legislation. Thatcher's leadership style, they suggested, was an important factor; she was evidently more willing than her predecessors to use the powers of censorship that this system placed at her disposal. The increase in censorship was evident in the increased the use of D-notices (Britain's name for official secrecy restraints), restrictions on news reporting on Northern Ireland and a revision of the Official Secrets

Act that actually increased the state's powers of censorship (Newton and Artingstall, 1994. For a study of the methods, see Franklin, 1994, Chapter 4).

France's censorship rate, which Newton and Artingstall found to be much lower than Britain's, was still high compared to the other West European countries, whose record appeared to be rather good. Both Italy's and West Germany's censorship rate was a fraction of that pertaining in Britain and France. One obvious explanation for this was the possibility that Italian and German governments were restricted in their exercise of censorship by the folk memory of a recent experience of dictatorship, censorship and propaganda; as a result of history, their populations were more wary of government. Above all, Newton and Artingstall's empirical survey found that the two Scandinavian countries studied testified to a remarkable respect for freedom of information. Both Sweden and Denmark had truly derisory censorship rates during the 1970s and 1980s. Of course, it deserves pointing out that Britain and France were nuclear powers with large military-industrial complexes; the Nordic states were either neutral (Sweden) or a minor partner (Denmark) in NATO. In fairness, as Newton and Artingstall point out, a country's place in the international system and its geopolitical importance are factors that help to account for the patterns of incidence of media censorship. Indeed their study found that the United States, normally viewed as an 'open' society, also had a censorship rate that approached Britain's. More might have been made of this line of enquiry: it would have been interesting to know just how much of the comparatively high levels of censorship in Britain and the USA, and indeed France, could be put down to Keane's 'armed secrecy' of leading (nuclear-armed) states in the international system. Moreover, quite unlike the states with which they were being compared, these three had all experienced significant military conflicts during the post-war period. Much of Britain's censorship could be accounted for by the Northern Ireland conflict; much of France's could be put down to the Algerian war. All the same, Newton and Artingstall's point that Thatcher was presented – by the configuration of Britain's political and legal system – with the 'opportunity to censor', must also carry some of the burden of explanation. The same might have been observed of de Gaulle's France.

It is important to note, however, that there is a great difference between coercive censorship and the weakness of freedom of infor-

mation. Moreover, to simply look at censorship rates may be very misleading. They may actually be – in part – an indicator of the health of a country's investigative media. Seymour-Ure (1991, p. 224) points out that in the heyday of British investigative journalism, in his view the period between 1967 and 1979, there was a rash of attempts both by officialdom using the Official Secrets Act and by well resourced corporate actors with clever lawyers, to prevent publication. Moreover, Seymour-Ure (1991, pp. 230–236) tells how British censorship has actually declined in its *effectiveness* since the 1960s, leaving the libel laws as the main inhibitor of the British press's freedom. Indeed, Britain is often held up as a paradigm both of governmental secrecy and of independent and investigative quality media.

The point about the quality of the censorship is an important one. If the British state was renowned for its secrecy, the French state had a reputation for coercive interference. Despite the experience of Vichy, the post-war period did not get off to an altogether auspicious start when the Socialist Minister of Information exploited the *purification* of collaborationist publishers to try to re-balance the press towards the Left (Williams, 1972, p. 392). Later, during the Algerian war, papers providing a forum for Left-wing critics of the war were subject to repeated censorship and seizure (Keane, 1991, p. 97; Kuhn, 1995, pp. 62–63). This practice was continued by the Gaullists. Hayward (1983, p. 160) notes that, as the new Gaullist Fifth Republic was consolidating, selected fringe papers were subjected repeatedly to seizures. The aim was 'simply to drive them out of existence'. He notes the contrast between the Third Republic, 'amazingly tolerant' towards the anti-system extreme-Right press, and the Fifth Republic and the Gaullists' treatment of the extreme-Left press. Satrian, too, (1985, p. 240) points to the Gaullists' 'revival' of that part of the 1881 law on press freedom making it a felony to publish statements damaging to the President of the Republic and the public authorities in general (see Chapter 1). Since the President was not just Head of State, but also the head of the executive in the French Fifth Republic, this was a potentially powerful limitation on the press's watchdog function. Eisdendath (1982, p. 69–70) suggests that this law was invoked by President de Gaulle 350 times! (Satrian suggests it was applied about 100 times). Eisdendath goes so far as to suggest that in France 'all reporting on Watergate would [have constitute[d]] "outrage" to the chief of state'. However, if this might

have been the case under de Gaulle, it is important to note that the law practically fell into desuetude under Presidents Giscard d'Estaing and Mitterrand (Cayrol, 1991, p. 128). Even so, on one famous occasion, the politically moderate quality paper, *Le Monde*, found itself the object of criminal proceedings, during the last days of the Giscard d'Estaing presidency, for alleged defamation of the judiciary. The paper had committed the crime of criticising a court decision concerning President Giscard d'Estaing's acceptance of the 'Bokassa diamonds'. This lawsuit 'silenced *Le Monde* on a sensitive subject and, with it, the rest of the French press' (Eisendath, 1982, pp. 63-64; also see Hayward, 1983, p. 161; Safran, 1985, pp. 240-241). As suggested, direct state interference was associated with the Fifth Republic consolidation phase. Nonetheless, during the presidency of Georges Pompidou (a Gaullist), in 1970, the Maoist journal *La Cause du Peuple* was seized and its editor arrested. This was followed, in 1974, by a state raid and the wiretapping of the offices of *Le Canard enchaîné*, a popular journal of political satire. *Le Canard enchaîné* had been (and still is) an uncensored critic of the government and the political establishment (Safran, 1985, pp. 240-241).

In Britain, by contrast, government may have been 'shrouded in secrecy' but its censorship activity was far more discreet. 'Despite the breadth of the language of the Official Secrets Acts, prosecutions are rare' and 'it is rarer still for the media to be charged' (Nicol and Bowman, 1993, p. 179). From the 1960s onwards journalists became 'more reluctant to keep the government's secrets' and by the 1980s the legislation's 'inhibiting effect' had greatly diminished (Seymour-Ure, 1991, pp. 230-235). Nevertheless, the Thatcher government's 1984 Police and Criminal Evidence Act did grant the police new powers of seizure. By obtaining a court order, the police were now empowered to compel newspapers, freelance photographers and broadcasters alike, to hand over confidential material, both published and unpublished. Subsequently, these powers were exercised on occasion, most notably in the 'Zircon affair' though here the BBC Radio Scotland offices were raided and the press was not the target. Moreover, during the Thatcher era Britain's Contempt of Court legislation was employed, on one occasion to identify a 'whistleblower' in the public service (on the Sarah Tisdall case - see below). Even Germany - inhibited by its Nazi past - had its own great post-war scandal: namely the 'Spiegel affair' of 1962. Because of an article highly critical of government defence policy, the investigative maga-

zine's offices were raided, its press embargoed and its owner-editor and the responsible journalist arrested by the security services. These acts were widely seen as a naked attack on press freedom and the West German press rallied to the *Spiegel's* defence and loaned the magazine printing facilities allowing it to continue to publish. As a result of the public outcry the government's actions had caused, the prisoners were released and the minister responsible felt it necessary to resign. Several years later, the journalists were exonerated by the West German Federal Constitutional Court. In fact, the whole affair acted as an early kind of constitutional 'Magna Carta' for safeguarding the press freedom enshrined in the country's written constitution and in its various press laws (Humphreys, 1994, pp. 72-74; also Schoenbaum, 1968). Interestingly, the court upheld the legality of the police raid on the *Spiegel's* offices. However, the affair led to an amendment to the law of disclosure to provide a limited public interest defence for the disclosure of secrets (Karpen, 1993, p. 93). It is also noteworthy that, exceptionally, in its campaign against terrorism, the German state has resorted to raids and confiscation of material and equipment (Humphreys, 1994, pp. 120-121).

Official news management

What about Keane's reservations about the political management of news more generally? Keane actually refers specifically to the developed public relations activities of American government, the accreditation of certain reporters, the provision of special services to the media, and so on. In Britain, the 'lobby' system has amounted to an effective instrument of official news management. Introduced as long ago as 1884, the 'lobby' is a shorthand description of a system of political journalism whereby a special coterie of selected journalists have been granted privileged access to government; today they number around two hundred and two hundred and fifty. These journalists are granted special access to non-attributable governmental news briefings going up to the highest level (the PM's Office). Understandably, the lobby system has long provoked the criticism that the relationship between the British press and government is an excessively manipulative one. There is an obvious danger of bias towards the 'reproduction of ready-made political statements disguised as fact'. It has been suggested that it amounts to an 'endemically secre-

tive system', reform of which would require no less than 'changes in the "nanny state" philosophy that runs through most of Britain's administrative machinery' (Negrine, 1994, pp. 134-138). In the 1980s, the *Independent* and the *Guardian* both briefly withdrew from the lobby to protest how this had become precisely so, at the height of Thatcherism. Against this, it should be added, the fact that they soon returned seemed to testify to the fact that journalists still felt that the system allowed 'much sensitive information to flow out of government' (Negrine, 1994, p. 138). It deserves mention, in this context, that there was considerable evidence of a general increase in government news management during the Thatcher period; the key role of the Prime Minister's press secretary, Bernard Ingham, is usually highlighted (Harris, 1990; Franklin, 1994, Chapter 4). Moreover, a pronounced feature of the Thatcher era was a marked increase in the government's use of official advertising to promote its policies (Jones, 1991, p. 206).

The lobby system might be characteristically 'British' in its character and style, but it is by no means unique in its function. All governments have operated systems of official news management: France, for example, had a special ministry performing this function; no doubt for the sake of public relations France's sinister-sounding Minister of Information was renamed in 1971 *secrétaire d'état de la fonction publique et des services de l'information*. Kuhn (1995, p. 122) notes how, especially with broadcast journalists, this ministry 'came to be associated ... with the authoritarian face of Gaullism' (see Chapter 4). In fact, Kuhn's (1995) study shows that the French state was much more directly interventionist than the British state. He speaks about the French state having an 'authoritative status as a primary definer of issues on the media agenda'. In some contrast to the British case, the French state's role was 'institutionalised' in the shape of its historically heavy, and to some extent enduring, influence on the national news agency, a prime source of news for the media (see Chapter 1). Eisendrath (1982, p. 70) notes that the French state also 'shows benefits on those ... who play by the rules'. This is a reference to the very generous state assistance granted to the French press in the shape of indirect and even direct subsidies to newspapers. Further, Eisendrath (1982, pp. 76-77) points out that French publishers could not afford to forget that the state determined the allocation of advertising by the country's nationalised companies, these 'ranking among the nation's largest ... accounts'.

In fact, exactly the same point is made by Kuhn (1995, p. 11) and Dunnett (1988, p. 148), both of whom also point to the state's role in the banking sector as yet another potent source of indirect state influence on the press. Hayward (1983, p. 161), too, has commented upon what he describes as the 'occult influence' of the state banks on press concerns that have relied on them 'to finance their takeover bids or help them through periods of financial difficulty'. According to Eisendrath, this feather bed of state aid discouraged any challenging of the system. An essentially similar picture is painted by Dunnett (1988, pp. 147-150).

Finally, as Kuhn (p. 67) notes, 'to help ensure that the official version of events dominates press coverage the political executive is assisted by a range of support staff and official bodies, including public relations personnel and media advisers, presidential and government spokespersons, press offices and governmental information agencies'. In fact, this latter situation is common to all liberal democracies. Britain had a Central Office of Information and West Germany established a special governmental press and information office. As seen, in contrast to France, in Germany's case state influence on the national news agency was quickly abolished after the Nazi dictatorship. All the same, one empirical study (Baerns, 1987 - reported in McQuail, 1992, pp. 128-129) examined political affairs coverage in one German *Land* (state - in the sense of sub-federal unit). The study found that approximately two-thirds of the items covered by the media, with little variation between press, radio and television, came from public relations sources - in other words from official handouts, press releases or news conferences - rather than from journalistic activity (investigation, etc.). It is also important to note that press services were provided by many departments and branches of government. The parties had their press services, so too did numerous public and semi-public organisations. Indeed, the unions, employers' organisations, the churches, and many social and political minority groups, making up the 'pluralistic fabric of German society', all provided the media with information services (Humphreys, 1994, p. 57). It is as well to remember that in all liberal democracies the state is neither monolithic nor is it the only news-manager.

Pluralism and the press

Qualification is now required lest the reader be tempted to conclude, unreservedly, from the foregoing discussion that the state has indeed exercised the powers *vis-à-vis* the press of Keane's Leviathan. In the first place, it should be stressed that direct state interference with the press has been the exception rather than the norm. Largely, infringement on media freedom in France under de Gaulle (also see p. 147) could be explained by reference to the peculiar circumstances surrounding the Algerian war and his ending of it. As mentioned the press controls actually pre-dated his arrival in power. Further, the period surrounding the regime change from Fourth to Fifth Republic, was a dangerously unstable period in French political history. In de Gaulle's view, any activity that undermined the initially insecure legitimacy of the new regime had to be discouraged (it might be recalled that Winston Churchill wanted to take over the BBC during the 1926 General Strike). Moreover, in France, as elsewhere in post-World War II Western Europe, infringements of the principle of political independence of the press typically provoked fierce public opprobrium and political controversy. Indeed, they have usually had the effect, unintended by their instigators, of confirming the power of the Fourth Estate. Germany's 'Spiegel affair' was a classic example of how direct interference could backfire on government. Yet the targeting of *Canard enchaîné* produced a similarly counterproductive public furore in France. Right across post-war Western Europe publics have positively expected the press to be critical of their governments. Attacks on press freedom were a very dangerous expedient for those wishing to remain in office.

Secondly, important though official powers of news management were, the state was not a unified entity. Again, this was true even in *étatiste* France, where presidentialism during the Fifth Republic endowed the central executive with concentrated powers. As Kuhn (1995, pp. 68–69) comments, in a pluralist society, the media's agenda is determined by competing interests. A 'primary definer' it may have been, but the state was not the only definer of the agenda, nor was it a monolithic entity. In France, the media exploited internal divisions within the executive 'in the interest of public information'. Moreover, especially the quality press – reinforced by those with an 'alternative' status, like the *Canard enchaîné* – managed to rely on 'non-primary' news sources. Kuhn concludes that 'even with

the odds stacked in its favour, the state cannot always rely on the official perspective dominating press coverage all the time'. He mentions the Bokassa diamonds and the *Rainbow Warrior* affairs. Equally, the press attention to scandals over HIV-infected blood and alleged financial wrong-doing by politicians shows that, the French press has generally performed its watchdog function seriously and kept the citizenry informed about important matters of public interest (Errera, 1993, p. 76).

Thirdly, in post-war Western Europe the media have enjoyed protections and prerogatives granted by the law. These have varied among countries but they might include: laws prescribing free access to information; laws granting to journalists and to their sources the right, and even the duty, to maintain confidentiality; laws granting protection against seizure of journalistic material; and laws prohibiting, or at least seriously circumscribing, the state's ability to arrest, harass or otherwise control, journalists. Here France might be seen as exemplary. It has a law granting its journalists a *clause de conscience*, a 'freedom of conscience' clause, which assures them very generous compensation if they feel compelled to leave a paper's employ because of a change in its orientation likely to compromise their integrity (Albert, 1990, pp. 54–57). Across Western Europe, the press has been allowed considerable scope for professional self-regulation. As the following survey illustrates, the extent to which the law prescribes freedom of information varies considerably; some states have been far more open with official information than others. Similarly, some states have gone further than others in granting journalistic confidentiality. Instances of seizure and/or arrest by the state have, in practice, been rare. An important reason for their rarity has been the existence of legal safeguards.

Freedom of information and protection of rights of disclosure

In all countries government has the right to withhold official information that is sensitive for national security and defence. This has undoubtedly been the pretext for much of the censorship that has been mentioned. In addition, normally laws have existed to limit the free flow of information in order to protect individual privacy, commercial secrecy and law enforcement. Beyond such restrictions, there is a fairly wide commitment to freedom of information in Europe

(see Table 2.1). In fact, Britain is exceptional in not having produced general freedom of information legislation. Coliver (1993, p. 275) notes pointedly that in Britain 'there is a presumption in favour of government secrecy'. There is, of course, a difference between having freedom of information legislation and practising it. Even in Sweden, commonly regarded as a model of open government, Axberger (1993, p. 161) notes that 'as in every other country, efforts are made to bury sensitive matters to prevent public scrutiny'. Axberger cites the infamous 1980s 'Bofors affair' as a case where the Swedish government attempted to withhold extracts of an official report into a controversial deal made by the country's largest arms manufacturer. Under pressure, though, the full report was released, this outcome actually serving to underscore Sweden's good overall record. In Sweden, freedom of information is supervised by a Justice Ombudsman appointed by parliament who has often taken up arms in defence of the principle.

In Germany and the Netherlands the matter is normally dealt with by general administrative review. In most countries, appeal against refusal to disclose information can be made to the courts. In *étatiste* France there even exists a special commission, the *Commission d'accès aux documents administratifs* (CADA), whose purpose is to safeguard public access to official information (Errera, 1993, p. 69).

As regards disclosure of restricted information, Sweden ranks alongside the United States in providing the press with protection against prosecution – unless national security is at stake. In Sweden journalists cannot be compelled to name 'whistleblowers'. In a number of other countries, including Germany and Norway, a public interest defence can be mounted in such cases. In Norway there is no law saying that the government is owed confidentiality (Coliver, 1993, pp. 275–276). In Britain, civil servants are bound by a duty of confidentiality and 'whistleblowers' enjoy no legal protection (Nicol and Bowman, 1993, p. 179). The media could be required by the courts to disclose their sources when national security was deemed at stake, as the notable case of Sarah Tisdall illustrated in 1985. (However, arguably Tisdall's crime had been to embarrass the government rather than imperil national security – Curran and Seaton, 1991, p. 362.) Further, in Britain national security was just one of several grounds on which journalists could be required to disclose their sources. In fact, Britain's protection of journalistic confidentiality has been judged to be wanting by a 1994 opinion of the

Table 2.1 Freedom of information in a number of West European states

Country	
Austria	Express constitutional right. All documents are public unless deemed otherwise by statute. There is a public interest defence for disclosure (unless related to national security).
France	A 1978 Act provided for general access to public documents but enumerated certain exceptions.
Germany	Right of access to government information is prescribed in <i>Land</i> press laws. This right is protected by Article 5 of the constitution. Public authorities have a 'duty to inform'. There is a public interest defence for disclosure (though not for top secret information).
Netherlands	Express constitutional right.
Norway	All administrative documents are in principle public unless deemed otherwise by statute.
Spain	Access to government documents is implicitly recognised as a right in the constitution. Classified matters are defined by statute.
Sweden	Express constitutional right. All documents are public unless deemed otherwise by statute. There is a public interest defence for disclosure (unless national security is at risk). Journalists can protect confidentiality of 'whistleblowers' in public service.
UK	No freedom of information. Disclosure requires official authorisation. There exists a 'presumption in favour of government secrecy'.

Note:

In all countries, national security and defence are grounds for secrecy. Other common grounds for exception are personal privacy, commercial secrecy, law enforcement and public safety.

Source: Article 19, *Press Law and Practice*, 1993, especially pp. 274–276.

European Commission of Human Rights at Strasbourg (now pending a definitive Court ruling). The case in question was a private sector dispute touching 'interests of justice' rather than national security. However, the important point is that the Commission argued that Britain's laws on contempt of court (the instrument requiring journalists to disclose their sources) failed to meet the requirements of Article 10 of the European Convention on Human

Rights, which stipulates the requirement of freedom of expression. The Commission argued that protection of journalists' sources was vital if the press was to perform its function as a public watchdog in a democratic society (*Guardian*, 26 May 1994, p. 5).

Protection of sources

Nevertheless, aside from issues of national security and extreme criminality, legal protection of confidentiality of sources is regarded as a norm of journalistic conduct. It is respected, usually. Without it, investigative journalism would be ineffective and the press's watchdog function would be harmed. However, the legal situation varies across Europe (see Table 2.2).

Table 2.2 Protection of confidentiality of sources in a number of West European states

Country	
Austria	Media Act provides for confidentiality of sources.
France	The 1993 Criminal Code has been amended to grant journalists right not to disclose sources.
Germany	<i>Land</i> press laws contain right to refuse testimony. Moreover, there is protection against search and seizure except under very limited circumstances.
Netherlands	Confidentiality is not legally underpinned but is defended by the Dutch Press Council.
Norway	The courts can order disclosure, but such cases are rare. In 1992 the Norwegian Supreme Court defended the principle of confidentiality.
Spain	Confidentiality is not legally underpinned.
Sweden	Freedom of Press Act prohibits either the investigation (by public authority) or the disclosure (by journalists) of sources.
UK	The 1981 Contempt of Court Act gives several grounds for compelling disclosure; these include national security and the 'interests of justice'.

Source: Article 19, *Press Law and Practice*, 1993.

In Sweden, journalists are even positively required to observe professional secrecy. Austria, Germany and since 1993 also France, all provide strong legal protection of confidentiality of sources. In Norway, too, confidentiality would appear to have been widely practised though it is not legally prescribed. Norway's Supreme Court has ruled that the right to confidentiality increases in line with the public interest value of the information revealed. By contrast, in Britain the courts have actually compelled journalists to reveal sources in matters beyond those relating to national security (Coliver, 1993, pp. 282–283). Sweden is once again a very special case. As Axberger (1993, pp. 164–165) describes, 'the protection of news sources under the Swedish Constitution is very strong'. The country's 1949 Freedom of the Press Act prohibits official investigation as well as the disclosure of sources. The government is not allowed even to try to trace the sources of journalists' information; and for their part, journalists are legally required to protect the identity of their sources (also see Stenholm, 1993, pp. 63–64; Gustafsson, 1992, p. 211; Allau, 1988, p. 79). In Germany, too, journalists enjoy a special Right to Refuse Testimony and journalistic premises are protected from search and seizure. These protections can only be waived under the most exceptional circumstances (Karpen, 1993, p. 93).

Privacy and the right of reply

Within the distinct bounds set by the law, the post-war West European press generally has had large discretion to publish what it has wanted to. Journalistic freedom to hold politicians, public officials and other powerful interests to account, has been highly valued by the public. After the continental experience of Fascism, elite attitudes altered profoundly; no longer did politicians expect to be able to control the information flow as they had in past. News management required a new professionalism; the old-style crude approach was simply not viable in a more open market situation. The main trend has been away from state dominance towards political marketing, the 'packaging' of politics (Franklin, 1994). Further, as noted already, an important post-war development, evident right across Europe, was a *de-politicisation* of the commercial press. Albeit to varying degrees according to the *genre* of publication and the country in question's press traditions, newspapers now embraced

an entertainment function. Certainly, information had become a commodity and, increasingly, the information market demanded unfettered freedom of expression. Indeed, since the 1960s the frontiers of freedom of expression have been pushed back a very long way. In these matters the European press has been liable to all the normal legal disciplines regarding decency, incitement to violence and criminal acts, and so forth. But what has bounded the press's behaviour *vis-à-vis* social mores and respect for the private individual? After all, freedom also brought new responsibilities.

One of the most important issues of all regarding the regulation of the press, has been the safeguarding of respect for the individual's privacy against unwarranted incursions. All countries have provided a defence for individuals against press intrusion through having routine defamation and libel laws. In theory at least, the free press has been constrained by a dense thicket of such laws. For ordinary individuals, however, the legal costs normally involved in taking action of this kind have amounted to a real deterrent against actually doing so. Therefore a number of European countries have adopted special legislation providing for privacy and the right of reply specifically with a view to constraining the media. France's 1881 press law, granting freedom of the press, long ago introduced a right of reply. Privacy legislation came much later. During the 1960s it was developed through case law and later adopted under Article 9 of the Civil Code. The law allowed for seizure of publications that offended in this regard. French privacy law, it has been suggested, has even 'acquired constitutional status' (Errera, 1993, p. 67). France's privacy legislation helps to explain the comparative weakness of French investigative journalism. Very much on the credit side, it should also be emphasised, is the marked absence of a French 'gutter press'.

As Table 2.3 shows, France is by no means alone in having such laws. Sweden, however, is an interesting exception; both privacy infractions and right of reply are matters left to the Swedish Press Council to regulate according to its Code of Ethics. A Press Ombudsman also provides some protection (see below). This voluntary system has been judged to have worked well (Axberger, 1993, pp. 158-159). In Britain, by contrast, self-regulation has appeared to have had many shortcomings. By 1990 the Conservative government had become so concerned about tabloid excesses that it established the Calcutt inquiry into the matter. Following the 1990 Calcutt report's recommendation, a Press Complaints Commission (PCC)

was established (replacing the Press Council - see below) which incorporated respect for privacy into its new Code of Practice. However, the PCC had no sanctions. When a second Calcutt report (1993) found the PCC to have been an ineffective regulator and recommended statutory intervention the National Heritage Secretary (the minister responsible for the media) set about preparing a white paper on the press. Nevertheless, in 1995 (at the time of writing) there were indications that privacy legislation was unlikely to result although there would be recommendations to improve self-regulation and provision for compensation to be made to victims of unwarranted press intrusion (*Guardian*, 15 March 1995, p. 1). The rather free-and-easy situation in Britain contrasts sharply with those countries where privacy infractions are matters of criminal law. In France, privacy law, unlike defamation, is a tort only. This is also the case in the Netherlands and generally in Austria. In Germany, though, protection is offered by several criminal laws. Norway, too, protects privacy under its Penal Code. Privacy infractions can be punished by imprisonment, fines and the confiscation of publications. In Norway, the right of reply is similarly enforceable in criminal law under the threat of unlimited fines, though recourse to this sanction has not been made since the 1950s (Wolland, 1993, pp. 122-123; generally, see Article 19, 1993).

Table 2.3 Privacy laws and right of reply

Country	Privacy laws	Legal right of Reply
Austria	+	+
France	+	+
Germany	+	+
Netherlands	+	+
Norway	+	+
Spain	+	+
Sweden	-	-
UK	-	-

Source: Article 19, *Press Law and Practice*, 1993.

Self-regulation by Press Councils

Professional self-regulation has been a general privilege of the Euro-

pean press. A number of West European countries have operated a system of voluntary self-regulation in the shape of national press councils. These were originally established precisely with a view to promoting press freedom, usually by the joint initiative of publishers and journalists. They were financed by the national press associations. They commonly elaborated press codes that dealt with press standards; these codes typically included commitments to honesty and fairness, objectivity, a duty to distinguish between facts and opinion, respect for privacy, general standards of decency and taste, confidentiality of sources and so forth. They also handled complaints about press conduct. Those of the Netherlands, Norway and Sweden have been judged to have been the most effective (Coliver, 1993, pp. 263–266; Lorimer, 1994, p. 120).

Britain's Press Council was among the less effective. It was established in 1947 on the recommendation of the first Royal Commission on the press (the Ross Commission). The main reason was rising public and parliamentary concern about declining standards and also about press concentration. It was, however, a weak and lop-sided regulatory body: 'deriving its authority from the press itself and not from statute' (Calcutt, 1990, p. 58). Its membership was entirely drawn from the press, and it had no weapons beyond publicity and wounding criticism' (Seymour-Ure, 1991, p. 236). The second Royal Commission on the press (the Shawcross Commission) criticised the Council's lack of any lay representatives (ie. from the public) and as a result the body's membership was extended. Still, the Council was 'publicly perceived more as a champion of the press than as a watchdog for the public' (Calcutt, 1990, p. 59). Following a third Royal Commission in 1974 (the McGregor Commission), lay representation was increased to half its membership. Yet it continued to lack authority. One reason was that these lay representatives were actually chosen by an Appointments Commission made up of the Council's members: unsurprisingly, therefore, the Press Council never came to be regarded as independent from the press. Another reason was its non-statutory status and its complete lack of effective sanctions. Yet another was its self-limitation to dealing with individual complaints; it did not see its role as being widely to monitor press behaviour (unlike the regulators of broadcasting – see Chapter 4). In 1980 the National Union of Journalists, which had helped call the council into existence in 1947, withdrew from it pronouncing it 'incapable of reform' (Calcutt, 1990, p. 60).

In the 1980s the tabloid press in Britain plumbed new depths of intrusion into citizens' privacy. The third Royal Commission on the press had expressed concern about this issue in particular. By the end of the decade the issue was taken up by a private members' Bill in parliament (politicians being especially sensitive to press intrusions into their own privacy). Under rising public pressure as well, the government established the Calcutt committee to look into the matter. However, the Calcutt committee's report (1990) recommended improving self-regulation. The tabloid press was given a last chance to mend its ways. As seen, the Press Council was replaced by the Press Complaints Commission, colloquially described by the government as the press's 'last chance saloon'. Failure to perform, would result in legislation to establish a statutory complaints body. The new commission's composition was, however, illustrative of the strength of the enduring British commitment to 'hands-off self-regulation': it was composed of newspaper editors and 'Establishment' figures. In the view of the second Calcutt report (1993, p. xi) the PCC 'was a body set up by the industry, financed by the industry, dominated by the industry, and operating a code of practice devised by the industry and which [was] over-favourable to the industry'. The report criticised the PCC for not being 'truly independent body which it should be' and recommended a statutory regime.

Modelled originally on the British Press Council Germany's Press Council was introduced in 1956 at a time when the publishers feared that, in the absence of such an initiative, the federal government might introduce stricter measures. The composition of the council reflected Germany's traditions of corporatism and *Proporz* (proportionality). That is, it gave representation to both sides of the industry – publishers and journalists – in equal numbers. It worked through providing a code of ethics and following up complaints against the press. It issues reprimands which it may require newspapers to publish. The German Press Council relies entirely on moral pressure and evaluations of its effectiveness vary (Sandford, 1976, p. 59; Humphreys, 1994, p. 60; Karpen, 1993, p. 84). Austria's Press Council, too, reflected that country's political tradition of corporatism. Founded in 1961, by the joint initiative of the Association of Austrian Newspaper Publishers and the Austrian Journalists Union, it consisted of ten representatives of each organisation. As well as practising self-regulation, it represented the interests of the press before parliament, the administration and the public. However, it had no

legal sanctions. Moreover, its authority was seriously weakened by the fact that the country's most powerful newspaper, the *Neue Kronen-Zeitung*, consistently refused to recognise the many negative judgements levelled at it. The Council has also been criticised for not giving representation to impartial experts or members of the public. With little public support, it has been widely viewed as lacking authority (Berka, 1993, pp. 28–29).

By contrast, Sweden's Press Council has been publicly respected and, by all accounts, very effective. It was established as early as 1916, the first in Europe. Its code of ethics was adopted in 1923. Reflective of the country's 'group orientated' corporatist political culture the Swedish Press Council was originally instituted by the Association of Newspaper Publishers, the Union of Journalists and the Publicists' Club; the latter was a professional organisation committed to press freedom. In the 1960s membership of the council was opened up to lay representation and a Press Ombudsman was instituted to ensure even more public accountability. The first three holders of the post of Press Ombudsman were judges, the fourth a journalist. Since 1969 the Swedish Press Council has consisted of one representative of each of the three named press organisations, plus three representatives of the general public (these being respected public figures), and a chairperson who is a judge (usually a member of the country's Supreme Court). The representatives of the public interest, therefore, have formed a majority in it; by themselves, the publishers are a minority. Thus the more representative corporatist Swedish Press Council stands in stark contrast to the comparatively weak British model in which the publishers and editors effectively have held sway. It also contrasts with the more 'closed' German and Austrian variants of the corporatist model in which representation has been restricted to publishers and journalists. The Swedish Press Council also has teeth: it has the power to fine newspapers and magazines that offend against its code; further, member newspapers are bound to respond to its criticisms. Between them the Press Council and the Ombudsman have acted as an important channel for holding the press accountable to the public. They have offered opportunity for the redress of complaints, enforced the press's code of conduct, and provided the public with a preferable alternative to the courts. By all accounts, these two institutions have provided for an effective and publicly accountable system of self-regulation (Axberger, 1993, pp. 155–156; Stenholm, 1993, pp. 65–67; Curran and Seaton, 1991, p. 363).

Different Press Traditions

Britain, clearly, has not been notable for the enactment of specific press legislation. As Seymour-Ure (1991, p. 205) has put it, governments 'seemed to have had ... a traditional policy of no policy'. This, he makes clear, was not literally the case; the press were subject to all sorts of indirect policies, for instance, affecting their finance (eg. VAT exemption – see Chapter 3) or trade union rights (Thatcher's ban on 'secondary picketing' – see Chapter 1). Moreover, British governments have been as concerned as they have anywhere else to manage news, and arguably more concerned than most to guard the privilege of state secrecy. But Britain's tradition of *laissez-faire* was certainly reflected in the absence of specific press laws. Also absent was general freedom of information legislation. Censorship in Britain was usually discreet and security related, symptomatic of a 'secretive' rather than a *divulgate* state. The British press was, in fact, largely free in its private sector operations. During the 1970s, the quality press developed a reputation for incisive investigative journalism. By the same token, the tabloid press was unconstrained by right of reply and privacy laws – and deference to authority – to indulge in its own characteristic brand of human interest journalism and muck-raking.

France, by contrast, has had a body of press law dating back to the famous law of 1881 originally granting press freedom. The Third Republic was a period of relative *laissez-faire*, but in post-war France the boundaries of press freedom have clearly been circumscribed more closely. This reflects France's strong civil law and *étatiste* traditions. It contrasts with the British preference for 'hands-off' self-regulation. French press regulation has invited some negative comment particularly with regard to the constraints it has placed in the way of investigative journalism which is poorly implanted in the professional journalistic culture (Kuhn, 1995, p. 69). Also, the French state has been – on occasion – very interventionist *vis-à-vis* the press. Yet, much of the coercion directed at the press in the post-war period could be explained by the siege mentality that prevailed in government during the early years of the Fifth Republic. Against this, French law has provided for some notable positive rights and freedoms: the principle of right of access to official information, a right of reply, strict privacy laws protecting individuals against unwarranted press intrusion, and, not least, the recent protections afforded

to journalists and their sources.

In between Britain's *laissez-faire* approach and France's interventionist *étatisme*, stands the *decentralised* German model. Like the French model, it was rule-bound. Germany like France had a long established civil law tradition. On the other hand, German statism had been dealt a blow by the experience of the Third Reich. Media freedom was immediately enshrined in the constitution (Basic Law) of 1949. Article 5 of the Basic Law made very explicit indeed the fundamental guarantee of freedom of the press and the banning of censorship. Evidence suggests that overt state censorship has indeed been minimal. The press system was also decentralised, though the numerous *Land* press laws were all fairly similar in their content. Like the French model, the *decentralised* German one subjected the press to some comparatively strict laws and obligations. However, unlike in France, or in pre-war Germany itself, the central state's role in the post-war German press sector was conspicuously weak.

Plainly, Sweden's *corporatist* model provided yet another highly distinctive approach. Sweden offers the best example of a self-regulated system that actually does regulate. This system laid great stress on freedom of information and journalistic freedom of inquiry. At the same time, it provided accountability through the balanced representation within its regulatory institutions of both sides of the press industry and also lay representatives. The existence of a Press Ombudsman was an additional safeguard of the public interest. The Swedish version of self-regulation, it has been suggested, has a certain model character. It would appear to have safeguarded generally high journalistic standards and provided for a very open system of access to information. The other Scandinavian countries share some attributes of the Swedish model; in particular, they would appear to have been comparatively open in the provision of freedom of information.

All cases, however, share one overriding characteristic: the publishers have been empowered to determine the ideological, philosophical, social and political orientations of the publications they own or control; and they have been granted a conspicuous degree of freedom from restrictive regulation of the markets in which they operate. In fact, German law went so far as to rule explicitly in favour of the positive right of proprietors of newspapers and magazines to prescribe the general political, economic and cultural line of their publications. Accordingly, journalists can be legally bound to

observe this line in their contracts of employment. The legal specification of this 'protection of the (publishers') right to determine editorial orientation' (the *Tendenzschutz*) reflected the strong position of the publishers' lobby, and the weakness of the journalists' associations, during the immediate post-war period (Humphreys, 1994, p. 67). However, German law merely confirmed what had long been an essential part of the universal understanding of press freedom in Europe as in the United States. In matters of ownership and control of newspapers and magazines, the West European press was virtually entirely free from regulation.

Guide to further reading

Especially

Article 19, *Press Law and Practice*, London: Article 19, 1993.

But also

- P. Albert, *La Presse Française*, Paris: Documentation Française, 1990.
- P. Humphreys, *Media and Media Policy in Germany*, Oxford/Providence, RI: Berg, 1994.
- R. Kuhn, *The Media in France*, London/New York: Routledge, 1995.
- R. Negine, *Politics and the Mass Media in Britain*, London/New York: Routledge, 1989.
- C. Seymour-Ure, *The British Press and Broadcasting since 1945*, Oxford: Basil Blackwell, 1991.