

Article 10: Freedom of expression

Article 10 of the European Convention on Human Rights provides that:

1. 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. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. 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 the judiciary.

Summary

Article 10 is a qualified right protecting the right to receive opinions and information and the right to express them. Freedom of expression is a cornerstone of other democratic rights and freedoms. It enables the public to participate in decision-making through free access to information and ideas. It encourages good governance, as media scrutiny of government and opposition may help to expose corruption or conflicts of interest. The state must not censor artistic, political or commercial expression unnecessarily, and must protect the exercise of the right to freedom of expression by individuals and the media.

Prior to the implementation of the Human Rights Act 1998 there was no general statutory protection of freedom of expression. Since then Article 10 has been instrumental in allowing media and thus public insight into court processes which previously took place behind closed doors. Britain also has a legal framework which protects free speech in education, for example, and which restricts it in criminal law to prevent solicitation to murder. Government has also ratified the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and Article 19 of both treaties protects freedom of expression. The Press Complaints Commission administers self-regulation for the press and complaints about editorial content and journalist conduct.

The key issues we address in this chapter are:

Libel and defamation laws are weighted against writers and commentators

Under Article 10(2), freedom of expression can be restricted ‘for the protection of the reputation or the rights of others’. Defamation law allows the award of compensation if a person’s reputation has been damaged as a result of such statements.

The review shows that:

- The legal defences available to journalists, commentators and other defendants in defamation cases are complex and hard to use. This may create a ‘chilling effect’ and encourage self-censorship.
- Libel laws are out of date and do not address issues arising from publication on the internet.

There has been a lack of rigour in upholding media standards. Greater clarity is needed about how the right to freedom of expression should be balanced against the right to a private and family life

In recent months there has been intense public debate around media standards, and in particular the way in which some media outlets have invaded the privacy of those they report on. The Leveson Inquiry is currently examining the culture, practices and ethics in the media and should provide more clarity on these issues.

The review shows that:

- The current regulatory approach appears to have major flaws and failings. The Press Complaints Commission has been subject to significant criticism following its failure to investigate the phone hacking scandal effectively.
- Article 8 rights to a private life are not always adequately protected against press intrusion by injunctions.
- Improper reporting of criminal investigations by the media may prejudice the right to a fair trial.

The high legal costs in cases related to freedom of expression may have a ‘chilling effect’ on freedom of expression

Defamation, libel and privacy cases are extremely costly. This, together with the very limited availability of legal aid in this area, means that conditional fee agreements (CFAs) play a very important role in funding litigation. CFAs, under which lawyers charge only if they win, normally carry a ‘success fee’ and so inflate the costs of legal cases. They are of limited value to those seeking injunctions to protect their privacy.

The review shows that:

- The high costs of libel cases have a chilling effect on public debate, restricting comment and leading to premature or unnecessary settlements of defamation actions.
- The proposed abolition of CFAs would undermine access to justice for claimants and defendants of limited means, potentially breaching Articles 8 and 10.

Counter-terror laws potentially criminalise free expression

The government has a duty to protect people from terrorist threats but laws introduced in recent years to prevent terrorism may be interpreted in ways which restrict legitimate forms of protest, political expression and other activities such as journalism and photography.

The review suggests that:

- The definition of ‘terrorism’ is too broad and potentially criminalises lawful activity as well as activity which is unlawful, but not properly regarded as terrorism.
- A number of terrorism offences are overly vague and threaten freedom of expression.

The UK's obligations under Article 10

Freedom of expression has been described as the 'lifeblood of democracy'.¹ It is both important in its own right, and fundamental to the enjoyment and realisation of other rights. At an individual level, freedom of expression has been described as 'key to the development, dignity and fulfilment of every person'.² It is important for people both to be able to express views and opinions, and to obtain ideas and information from others, and thus to gain a better understanding of the world around them.

Freedom of expression is also a cornerstone of all other democratic rights and freedoms. It enables the public to participate in decision-making: in order to exercise the right to vote, for example, citizens must have free access to information and ideas. It encourages good governance, as media scrutiny of government and opposition may help to expose corruption or conflicts of interest.

The special role played by journalists and the media in relation to Article 10 has been recognised repeatedly by many courts, including the European Court of Human Rights and the British courts. In one case, the European Court highlighted the media's role in making public information and ideas on matters of public interest:

'...not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.³

Article 10 protects the right to receive opinions and information as well as the right to express them. It encompasses expression in any medium, including words, pictures, images and actions intended to express an idea or to present information (such as public protest, or symbolic acts such as flag-burning).

1 Lord Steyn in *R. v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 126.

2 Description by Article 19, www.article19.org.

3 *Thorgeirson v. Iceland* [1992]. Application No. 13778/88. Para 63.

Among the main categories of expression protected by Article 10 are the following:

- **political expression**, which includes legitimate, robust comment on public figures. Considerable protection is afforded to those who criticise governments, politicians and other public figures, whether their comments are based on fact or on opinion. It also includes political speech by politicians themselves. The significance of ensuring that politicians can speak freely is well-established – the European Court has made it clear that while freedom of expression is important for everybody, it is especially so for an elected representative.⁴
- **artistic expression**, such as creative writing, visual art, music, theatre and dance. These forms of expression contribute ‘to the exchange of ideas and opinions which is essential for a democratic society’.⁵
- **commercial expression** is also protected by Article 10, although the courts have found that it has less significance than political or artistic expression.

The right to freedom of expression is a qualified right and so must be carefully balanced against the rights of others, and other needs of society. Article 10(2) explicitly states that the exercise of freedom of expression carries with it ‘duties and responsibilities’. It can be restricted on several grounds, including national security, the prevention of disorder or crime and the protection of the reputation or rights of others.

Restrictions on freedom of expression may be justified under Article 10(2) and/or Article 17.⁶ In deciding whether a restriction on freedom of speech is lawful under Article 10 the context is all-important. For example, the representation of extreme racist views is likely to be protected if the intention is to expose and explain, rather than to promote, those views.⁷

Article 17 prevents the ‘abuse of rights’. Expression may not be protected if it is incompatible with a society based on tolerance, pluralism, and broadmindedness. For example, Article 10 may not be used to protect Holocaust denial or expression of extremist anti-democratic ideas.⁸

4 *Castells v. Spain* [1992] 14 EHRR 445, at para 42.

5 *Vereinigung Bildender Künstler v. Austria* [2008] 47 EHRR 5. Para 26.

6 See, for example, *Le Pen v. France*. Application No. 18788/09, 20 April 2010; *Féret v. Belgium*. Application No. 15615/07, 16 July 2009. Judgments available in French only.

7 *Jersild v. Denmark* [1994] 19 EHRR 1.

8 *Glimmerveen v. Hagenbeek v. Netherlands*. Application Nos 8348/78 and 8406/78 [1979] 18 DR 187.

Article 10 imposes two different types of obligations on the state:

- **negative obligations**, meaning that the state must itself refrain from unnecessary censorship of artistic, political or commercial expression.
- **positive obligations**, to help individuals and the media in exercise their right to freedom of expression. This includes, for example, providing adequate legal protection for journalists and their sources.

Relationship to other articles

Article 10 overlaps with several other rights, including the right to manifest one's beliefs (Article 9), the right to protest (Article 11), and the right to vote and stand for office (Protocol 1, Article 3). Often, a violation of Article 10 will occur with a violation of another Article, such as Article 11.

Article 10 can also come into conflict with other rights, for example the right to a fair trial (Article 6), the right to privacy (Article 8), and the right to freedom of thought, conscience and religion (Article 9).

The development of Article 10 in Britain

Freedom of expression is often said to have a long history in British common law. Lord Justice Laws, for example, has stated that ‘freedom of expression is as much a sinew of the common law as it is of the European Convention’.⁹ However, many expert academics and practitioners disagree, and consider that freedom of speech had at best an uncertain status in Britain prior to the Human Rights Act (HRA) 1998.¹⁰

Prior to the implementation of the HRA there was no general statutory protection of freedom of expression though such freedom was part of the ‘negative liberty’ enjoyed by everyone, or, as the Master of the Rolls put it in the *Spycatcher* case, ‘the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law ... or by statute’.¹¹ And while there was no general, legally binding standard against which to interpret restrictions upon freedom of expression, there were many examples of its value being recognised in specific contexts.

As early as 1689 the Bill of Rights guaranteed an almost absolute form of free speech to MPs in parliament,¹² recognising the importance of ensuring that politicians were free openly to express their views in parliament, without fear of reprisals. Similarly, today no MP or peer may be brought before the civil or criminal courts for any utterance made during parliamentary proceedings.

9 *R. v. Advertising Standards Authority Ltd, ex parte Vernons Organisation Ltd* [1992] 1 WLR 1289, at 1293A.

10 See, for example, R. Dworkin, 1981. ‘Is there a right to pornography?’ *Oxford Journal of Legal Studies* 177; E. Barendt, 1985. *Freedom of Speech*. Oxford: Clarendon Press; R. Singh, 1988. ‘The indirect regulation of speech: a time and a place for everything’ *Public Law* 212; G. Marshall, 1992. ‘Press Freedom and Free Speech Theory’ *Public Law* 40; P. Wragg, 2009. ‘Critiquing the UK Judiciary’s Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?’ Doctoral thesis. Durham University.

11 *Attorney General v. Guardian Newspapers (No. 2)* [1990] 1 AC 109, at page 178F. The *Spycatcher* case concerned the publication of a book called *Spycatcher: the candid autobiography of a senior intelligence officer* which was co-authored by a former MI5 officer. The book was first published in Australia but the allegations it made were blocked from publication in England.

12 Bill of Rights 1689, clause 9.

A number of other statutes explicitly refer to the importance of free speech. The importance of the right to freedom of expression is recognised in the Education Act 1986, for example, which ensures that freedom of speech within the law is secured for staff, students and visiting speakers at universities. Domestic law also identifies situations in which freedom of expression is restricted for legitimate reasons. *The Offences Against the Person Act 1861*, for example, prohibits solicitation to murder.

The common law has also long recognised that, in defamation cases, the protection of reputation must be weighed against the wider public interest in ensuring that people are able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed.¹³ For example, freedom of expression was protected long before any human rights convention by the defence of fair comment on a matter of public interest, a defence available to everyone but of particular importance to the media. In an 1863 case Mr Justice Crompton observed that ‘it is the right of all the Queen’s subjects to discuss public matters’.¹⁴

The importance of reporting proceedings in parliament and the courts has also long been recognised. In an 1868 case *The Times* was sued for libel after it published extracts from a House of Lords debate which included unflattering comments about someone who had alleged that a Law Lord had lied to parliament. The Court held in favour of *The Times* stating that, just as the public had an interest in learning about what took place in the courts, so it was entitled to know what was said in parliament; and only malice or a distorted report would destroy that privilege.¹⁵

Greater freedom of expression for artistic works has evolved relatively recently. Until 1959, the publisher of a book containing sexual references was liable to imprisonment. At times, books by Henry Miller, Lawrence Durrell, and Radclyffe Hall had been unavailable in England due to the obscenity laws. The 1960 acquittal by an Old Bailey jury of Penguin Books on obscenity charges arising out of the publication of an uncensored edition of D.H. Lawrence’s controversial book, *Lady Chatterley’s Lover*, was a crucial step towards freedom of the written word. Within a few years censorship of the theatre had also come to an end as a result of the Theatre Act (1968). Until then nudity and references to homosexuality on stage were restricted and theatre managers had to submit scripts for scrutiny by the Lord Chamberlain.

¹³ *Reynolds v. Times Newspapers* [2001] 2 AC 127, per Lord Nicholls.

¹⁴ *Campbell v. Spottiswoode* [1863] 3 B. and S. 769, at page 779.

¹⁵ *Wason v. Walter* [1868] LR 4 QB 73.

In the decades preceding the introduction of the HRA, the domestic courts increasingly made reference to Strasbourg case law when deciding cases involving defamation, censorship and protest. In some cases the European Convention and European Court of Human Rights offered stronger protection for free speech than domestic courts.

In the *Sunday Times* case the domestic courts prohibited publication by the newspaper of information about the damaging effects on fetuses of thalidomide (a drug given to pregnant women for morning sickness). The domestic courts held that publication would constitute a contempt of court while negotiations for settlement of an action for damages were ongoing between parents and the company marketing the drug. The European Court ruled that the injunction had breached the newspaper's Article 10 rights,¹⁶ because, given the public interest in publication, the interference was disproportionate to the pursuit of the legitimate aim of maintaining the authority of the judiciary. (The offence of contempt of court exists to maintain the authority of the judiciary.)

Spycatcher was an exposé of Britain's security and intelligence services written by a senior intelligence official, and published in 1985. For several years, it was banned in England, but available in Scotland and internationally, and English newspapers could not report on it. The author was bound by the Official Secrets Act, which he had breached by publishing the book, but the question was whether the material still remained 'confidential' given it was readily available. The House of Lords ruled that injunctions on the use of material published in *Spycatcher*, in breach of the Official Secrets Act, should be maintained long after the book was published internationally and even though the book was circulating in the UK.¹⁷ But the European Court of Human Rights ruled that maintaining the injunctions in this context was disproportionate and therefore violated Article 10.¹⁸

A number of commentators felt that the attitude of the domestic court to freedom of expression was out of line with the views of the European Court. Professor Eric Barendt noted in 1985 that the domestic judiciary's record in this area was 'far from impressive; too often ... free speech arguments are either ignored or belittled'.¹⁹ And in 1998 Professor Helen Fenwick complained that too often the courts restricted free expression 'on uncertain or flimsy grounds'.²⁰

16 *Sunday Times v. the United Kingdom* [1979] 2 EHRR 245.

17 *Attorney General v. Guardian Newspapers (No. 2)* [1990] 1 AC 109.

18 *Observer and Guardian v. the United Kingdom* [1991] 14 EHRR 153 and, similarly, *Sunday Times Ltd v. the United Kingdom* (No. 2) [1991] 14 EHRR 229.

19 E. Barendt, 1985. *Freedom of Speech*. Oxford: Clarendon Press. Page 306.

20 H. Fenwick, 1998. *Civil Liberties*. Cavendish Publishing. Page 144.

Even after the implementation of the HRA, the domestic court sometimes disagreed with the European Court about the application of Article 10. In *Goodwin v. the United Kingdom* [1996], for example, the House of Lords had required disclosure of a journalist's source believing that the source could pose a serious economic risk to the company whose information had been disclosed. But the European Court ruled that the requirement to disclose breached the journalist's article 10 rights.²¹ Nevertheless, the introduction of the HRA, and the 'domestication' of Article 10, has had a significant impact across a wide variety of areas. In the past two years, for example, Article 10 has been instrumental in relation to 'open justice', i.e. allowing media and thus public glimpses into court processes which previously took place behind closed doors. It has resulted in the High Court being persuaded to release part of a judgment detailing findings of torture by the CIA, for example.²²

Article 10 has also resulted in the national media being granted access to private hearings before the Court of Protection.²³ That Court, which is a branch of the family courts, is empowered to make 'best interests' decisions about the property, affairs, healthcare and personal welfare of adults who lack capacity. It operates with a high degree of secrecy. In March 2011 the *Independent* newspaper and other national media organisations successfully won the right to attend the court and report on cases of public interest, albeit with appropriate guarantees of confidentiality for the individuals involved.

Britain is generally a state in which freedom of expression is respected. However, we have identified a number of barriers to the full enjoyment of this right, and difficulties relating, in particular, to the balance to be struck between the enjoyment of this Article and the protection of the right to a private and family life guaranteed by Article 8 of the Convention.

21 *Goodwin v. the United Kingdom* [1996] 22 EHRR 123.

22 *R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin).

23 *Independent News and Media v. A.* [2009] EWHC 2858 (Fam), upheld by the Court of Appeal: [2010] EWCA Civ 343.

Libel and defamation laws are weighted against writers and commentators

How freedom of expression is balanced against the laws which protect people from unjustified reputational damage

Defamation law exists to protect individuals' reputations from unfair and untrue attacks. It protects people from being discredited in the estimation of others due to false allegations. There are two types of defamation: libel and slander. The difference between them lies in the form that the allegation takes: libel is defamation by communication in permanent or lasting form (such as publication in a book or film), and slander is defamation by communication in transient form (such as a gesture or unrecorded comment).

An individual's desire to maintain a good reputation must be balanced against the right of his or her critics to freedom of expression. If defamation law is too narrow, people who have suffered harm to their reputations may be denied adequate access to justice; if it is too wide, it can prevent matters of public interest reaching the public domain.²⁴ Under Article 10(2), freedom of expression can be restricted 'for the protection of the reputation or the rights of others'. Defamation law allows the award of compensation if a person's reputation has been damaged as a result of libellous or slanderous statements.

Over the last two years there has been substantial publicity about the need to reform defamation law.²⁵ This has included campaigns by non-governmental organisations and media organisations, parliamentary reviews and inquiries on the subject. The Libel Reform Campaign, run by English PEN, Index on

²⁴ English PEN and Index on Censorship. *Free Speech is not for sale: The Impact of English Libel Law on Freedom of Expression* (10 November 2009: The Libel Reform Campaign). Available at: <http://libelreform.org/the-report>. Accessed 13/02/2012.

²⁵ See Heather Rogers QC, *Defamation: Problem? What Problem?* (20 November 2010). Available at: <http://inform.wordpress.com>. Accessed 13/02/2012.

Censorship and Sense about Science, claims that libel laws are restricting discussions and publications not only by journalists, but also by ‘scientists, campaigners, writers, academics and patients’. The campaign asserts that ‘critical and open debates are vital in medicine and the public are badly missing out without them’.²⁶

Before the 2010 general election, Jack Straw MP announced that libel reforms would be taken forward in the next parliament.²⁷ The coalition government’s ‘programme for government’ includes a promise to review libel laws to protect freedom of speech. Liberal Democrat peer Lord Lester introduced a Private Members’ Defamation Bill into the House of Lords in 2010.²⁸ In response to Lord Lester’s Bill, the new coalition government brought forward its draft Defamation Bill which was published on 15 March 2011.²⁹ In October 2011, Parliament’s Joint Committee on the draft Defamation Bill welcomed the government’s proposed reforms, but urged it to go further in a number of respects in order to better protect freedom of expression.³⁰

There have already been some welcome recent developments in relation to libel laws which recognise the importance of Article 10 rights. For example, in a number of recent cases the courts have taken a robust approach to trivial defamation claims. They have either declined to find that the relevant statements are defamatory at all, or they have made clear that there is a minimum ‘threshold of seriousness’ which must be passed for a defamation claim to succeed; or they have struck out claims as an abuse where there is no ‘real and substantial tort’.³¹

26 Tracey Brown, Managing Director, Sense about Science, describing the campaign for libel reform. Available at: www.libelreform.org. Accessed 13/02/2012.

27 Ministry of Justice, March 23 2010. Reform of libel laws will protect freedom of expression. Available at: <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/news/newsrelease230310b.htm>. Accessed 13/02/2012.

28 A. Lester, 2010. *A Bill to amend the law of defamation; and for connected purposes*. London: The Stationery Office.

29 Ministry of Justice, 2011. *Draft Defamation Bill Consultation*. Available at: <http://www.justice.gov.uk/consultations/docs/draft-defamation-bill-consultation.pdf>. Accessed 13/02/2012.

30 Joint Committee on the draft Defamation Bill, 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office.

31 For example, in *Ecclestone v. Telegraph Media Group* [2009] EWHC 2779 (QB).

Key issues

1. The legal defences available to journalists, commentators and other defendants in defamation cases are complex and hard to use. This may create a ‘chilling effect’ and encourage self-censorship

There are various established defences available to those accused of defamation, none of which are particularly straightforward to use. These include the ‘justification defence’ (proving the statements in question were true, and therefore not defamatory); the ‘fair comment defence’ (which covers the expression of honest opinion, as distinct from alleged fact) and the *Reynolds/Jameel* defence, which is the nearest to a public interest defence.

A defendant who wishes to use the ‘justification defence’ will need to prove that the statements in question were true. This essentially protects statements of fact rather than comment or opinion. Lord Lester’s recent bill proposed that this defence should be renamed as ‘truth’ (rather than the more technical ‘justification’) and proposed some amendments to address technical difficulties which have arisen with this defence in practice.³²

Defendants can also argue that their statements were ‘fair comment’. The defence of fair comment is often relied upon by those expressing opinions, such as restaurant critics, or commentators on the scientific work of others. But it has been notoriously hard to rely on, in particular because of a requirement, imposed until December 2010, that the comment had to be made in circumstances which allowed the reader to judge the extent to which it was well-founded.³³

A now notorious example of how difficult it is to draw the line between ‘fact’ and ‘comment’ is to be found in the case of *British Chiropractic Association v. Singh*.³⁴

³² Clauses 4 and 5 of Lord Lester’s Defamation Bill, above.

³³ See *Joseph v. Spiller* [2011] 1 AC 852. The Draft Defamation Bill attempts to address these concerns, by introducing a defence of honest opinion. A defendant will be able to rely on this defence where the statement is one of opinion and on a matter of public interest that an honest person could have held on the basis of a fact that existed at the time the statement complained of was published.

³⁴ *British Chiropractic Association v. Singh* [2010] EWCA Civ 350.

Simon Singh, a science writer, published an article in the *Guardian* in April 2008 which discussed chiropractic treatment, with reference to the British Chiropractic Association (BCA). He described the BCA's claims about the treatment of childhood ailments and stated that 'even though there is not a jot of evidence' to support such practices the BCA 'happily promotes bogus treatments'. Singh was sued personally for libel by the BCA (although the article had been published in the *Guardian*). A key issue was whether what was published was 'fact' or 'comment' – if 'comment' the defence of fair comment could apply, but if they were statements of verifiable fact Singh would have to prove they were true and could not rely on the 'comment' defence. The High Court judge and the Court of Appeal reached opposite conclusions: the judge thought it was plainly fact, but the Court of Appeal found it was plainly comment.

Dr Singh eventually won his case, but only after having appealed against the initial decision of the judge.³⁵ The appeal Court's judgment recognises a multiplicity of problems in this area of law, and demonstrates the 'chilling effect' of these anomalies in the law, that is, how they create an opportunity for individuals and organisations to stifle criticism:

'It is now nearly two years since the publication of the offending article. It seems unlikely that anyone would dare repeat the opinions expressed by Dr Singh for fear of a writ. Accordingly this litigation has almost certainly had a chilling effect on public debate which might otherwise have assisted potential patients to make informed choices about the possible use of chiropractic. If so, quite apart from any public interest in issues of legal principle which arise in the present proceedings, the questions raised by Dr Singh, which have a direct resonance for patients, are unresolved. This would be a surprising consequence of laws designed to protect reputation.'³⁶

The Court also noted that the BCA had proceeded against Dr Singh, not the *Guardian*, and had rejected an offer by the *Guardian* to publish an article refuting Dr Singh's contentions. This was said to have created 'the unhappy impression ... that this is an endeavour by the BCA to silence one of its critics.'³⁷

³⁵ The British Chiropractic Association subsequently filed a 'notice of discontinuance' (withdrawing their claim) on 14 April 2010: 'BCA discontinue Singh claim' (15 April 2010: 5 Raymond Buildings press release). Available at: <http://www.5rb.com/newsitem/BCA-discontinue-Singh-claim>. Accessed 13/02/2012.

³⁶ Lord Justices Judge, Neuberger and Sedley, in *British Chiropractic Association v. Singh* [2010] EWCA Civ 350. Para 11.

³⁷ *British Chiropractic Association v. Singh* [2010] EWCA Civ 350. Para 12.

The Supreme Court, too, has said that there are ‘difficult questions’ concerning the ‘fair comment defence’ which should be considered by the Law Commission or an ‘expert committee’.³⁸ The Court proposed renaming the defence ‘honest comment’ and set out five essential elements of it, including that the comment must be on a matter of public interest, and that it must be recognisable as comment, rather than an imputation of fact. This does not, however, resolve the difficulty around distinguishing between fact and comment.

It remains the case that reform is sorely needed to make this defence fully effective. The government now proposes placing the defence of ‘honest opinion’ on a statutory footing as part of the draft Defamation Bill, but the Joint Committee has expressed concern that the draft does not make the law ‘clearer, simpler or fairer to the ordinary person than it is at present’.³⁹

Another important defence for commentators is the *Reynolds/Jameel* defence. This is the closest available defence to a general public interest defence, but there remain uncertainties about its application in practice. The Reynolds defence was derived from a 1999 judgment in a case brought by the Irish Taoiseach Albert Reynolds against the *Sunday Times*.⁴⁰ In their judgment, the Lords ruled that under certain circumstances the media could mount a ‘public interest’ defence in the case of published allegations that turned out to be false.

Lord Nicholls listed 10 points for the courts to consider if this defence is raised, one of which was that the story must ‘contain the gist’ of the claimant’s story (in this particular case the *Sunday Times* had failed to ask Reynolds for his side of the story). This list of 10 issues was intended to be a non-exhaustive, illustrative indication of the types of matters which might be relevant.

Over the next seven years this defence was interpreted restrictively and failed to provide meaningful protection for responsible reporting on public interest issues. This failure was recognised by the House of Lords in the 2006 case of *Jameel v. Wall Street Journal Europe*⁴¹ in which the Law Lords held that, where the topic of a media investigation was of public importance, relevant allegations that could not subsequently be proved to be true should not generally attract libel damages if they had been published responsibly.

38 *Joseph v. Spiller* [2011] 1 AC 852. Para 117.

39 Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 43.

40 *Reynolds v. Times Newspapers* [2001] 2 AC 127.

41 *Jameel and others v. Wall Street Journal Europe* [2007] 1 AC 359.

The government's draft Defamation Bill includes a 'public interest' defence, but this has already attracted criticism. For example, the Bill provides a list of relevant factors to be taken into account in considering whether publication was responsible, but it does not refer specifically to the resources of the publisher. Lord Lester, JUSTICE and Index on Censorship have been critical of this,⁴² and the Joint Committee has recommended that a new factor be added, referring to resources, 'since it is not appropriate to expect the same level of pre-publication investigation from a local newspaper, non-governmental organisation or ordinary person as we should expect from a major national newspaper'.

2. Libel laws are out of date and do not address issues arising from publication on the internet

The development of new forms of mass communication, in particular the internet, has left defamation law lagging behind. In October 2011 the Joint Committee on the draft Defamation Bill noted that a common theme running through the evidence they had received was 'the need for the law to keep pace with developments in society'.⁴³ Many witnesses before the Committee had, 'questioned the suitability of a law designed for the written and spoken word in an age of a rapidly changing communication culture'.

The internet raises new problems and challenges for claimants in libel cases. Allegations published on the internet may result in far more permanent, lasting and wide damage to an individual's reputation than was previously the case, when publication was restricted to a hard copy of a daily newspaper which was subsequently thrown away.⁴⁴ Further, technologies such as tweeting and anonymous online message boards allow for 'instant, global, anonymous, very damaging' communications, 'potentially outside the reach of the courts'.⁴⁵

42 Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 65a.

43 Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 15.

44 Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 15.

45 Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 16.

The internet has also allowed both professional writers, and also non-professional bloggers and commentators, to have instant access to an international audience. This makes the balance between freedom of expression (Article 10(1)) and the protection of the rights and reputations of others, as required, respectively, by Article 10(2) and Article 8, more precarious as false allegations can be circulated very widely, very quickly, by anyone with access to the internet.

A further issue raised by the internet concerns the ‘multiple publication’ rule, the effect of which is that there is a fresh act of publication each time someone clicks on a website. Also, because each ‘download’ constitutes a new publication, it also carries a fresh limitation period, thus extending the possible risk of being sued for libel far beyond the time when the material was placed on the internet by the publisher. Internet providers and websites, which reprint or link to an article, will also be liable for defamation.

The draft Defamation Bill proposes a ‘single publication’ rule, under which the one-year limitation period (time within which an action must be brought) runs from the date of original publication and does not restart each time the material is viewed, sold or otherwise republished. The Joint Committee has given its strong support to this proposal and praises it for strengthening freedom of speech by providing far greater protection to publishers, although the Committee and others have been critical of the fact that the proposed ‘single publication’ rule protects only the individual who originally published the material once the one-year period has expired, and does not apply to anyone else who republishes the same material in a similar manner.⁴⁶

⁴⁶ Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 59.

There has been a lack of rigour in upholding media standards. Greater clarity is needed about how the right to freedom of expression should be balanced against the right to a private and family life

The balance between the right to press freedom and personal privacy

The last year has seen some significant and potentially far-reaching changes in the media landscape in Britain, among them the *News of the World* ‘phone hacking affair’ and the resulting Leveson inquiry, and public debates about the use of injunctions to protect privacy. The working practices of the media, its links to institutions including the government and the police, and the regulatory regime are under scrutiny as never before.

Many of these issues concern the balance to be struck between freedom of expression, as protected by Article 10, and the Article 8 rights of individuals to private and family life. This chapter looks at the balance between press freedom and personal privacy, while the chapter on Article 8 looks at the legal and regulatory framework covering surveillance and personal information.

The media attracts special protection under human rights law because of its role as a public watchdog,⁴⁷ and restrictions on freedom of expression are subjected to very close scrutiny. The right to freedom of expression is not unlimited, however. And while there is a natural tension between the Article 10 interest in openness and transparency and the Article 8 interest in privacy, the structure of these provisions is such as to permit a proportionality-based approach to be taken to the reconciliation of these rights.

⁴⁷ *Barthold v. Germany* [1985] 7 EHRR 383. Para 58.

The standard of protection provided by Article 10 varies according to the content of the expression, with political and public interest speech at the top of the hierarchy of protection and the reporting of matters of largely prurient interest towards the bottom. In addition, and controversially, the European Court of Human Rights has in recent years paid increasing attention to the extent to which journalists have complied with professional ethics in determining the parameters of Article 10, particularly in cases in which serious issues of reputation and/or privacy are at stake.

Where the values protected by the provisions are in conflict, ‘intense focus’ must be brought to bear on the comparative importance of the specific rights being claimed in the individual case.⁴⁸ The justifications for interfering with or restricting each right must be taken into account, with the proportionality test being applied to each.

The case law suggests that, in addition to questions relating to the type of expression at stake, among the factors which impact on the balance to be struck between the requirements of Article 8 and Article 10 are the following:

- **The public stature of the individual:** the European Court has ruled that the limits of acceptable criticism are wider for politicians than for ordinary citizens,⁴⁹ and that politicians have to display a greater degree of tolerance of criticism than private persons.⁵⁰ There may be a justifiable public interest in the disclosure of personal information about public figures, such as leaders of major businesses, even if they do not seek publicity, where the disclosures are relevant to public debate.⁵¹

48 *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593. Para 17, per Lord Steyn.

49 *Lingens v. Austria* [1986] 8 EHRR 407, ECtHR. See also *Oberschlick v. Austria* (No. 2) [1997] 25 EHRR 357.

50 See, similarly, *Gorelishvili v. Georgia* [2009] 48 EHRR 36, paras 32-33.

51 *Verlagsgruppe News GMBH v. Austria* (No. 2) [2007] EMLR 413. See also *Tønssbergs Blad as and Haukom v. Norway* [2008] 46 EHRR 40. Para 87.

- **The degree of interference with privacy:** the European Court has found that public disclosure of personal information received in context of an intimate relationship may breach the right to a private and family life.⁵² The surveillance of individuals in their home,⁵³ the disclosure of information related to the home,⁵⁴ and surveillance in public spaces⁵⁵ may all amount to interferences with privacy requiring justification under Article 8(2). The way in which private information has been obtained is relevant to the degree of interference recognised and the balance to be struck between the public interest in dissemination of information and the individual's privacy interests.⁵⁶
- **Any breach of the law or of professional ethics by a reporter:** the European Court of Human rights has ruled that Article 10 does not protect reporters making false allegations against public figures who disregard the duties of responsible journalism by failing to make reasonable efforts to verify the allegations before publication.⁵⁷

Two examples demonstrate how these principles have informed court judgments in Britain that require balancing the right to a private life with the right to freedom of expression.

In *Mosley v. News Group Newspapers*, Max Mosley, former Formula 1 boss and son of a 1930s fascist leader, took legal action against *News of the World* following its publication, in 2008, of a story and clandestinely filmed video relating to his allegedly Nazi themed sado-masochistic activities with a number of prostitutes. The High Court found that the newspaper had breached Mosley's right to a private life as he 'had a reasonable expectation of privacy in relation to sexual activities (albeit unconventional) carried on between consenting adults on private property'. The judgment considered whether the intrusion into Mosley's privacy was proportionate to the public interest supposedly served by it. It found that 'the only possible element of public interest here, in the different context of privacy, would be if the Nazi role-play and mockery of Holocaust

52 *McKennitt v. Ash* [2005] EWHC (QB) 3003, [2006] EMLR 10, upheld [2008] QB 73.

53 See, for example, *P.G. and J.H. v. the United Kingdom* [2008] 34 EHRR 1272.

54 See *McKennitt v. Ash* [2005] EWHC (QB) 3003, [2006] EMLR 10, upheld [2008] QB 73.

55 *Niemietz v. Germany* [1992] 16 EHRR 97, *Peck v. the United Kingdom* [2003] 36 EHRR 719.

56 *Radio Twist As v. Slovakia* [2006] 22 BHRC 396 [62]. See also *McKennitt v. Ash* [2005] EWHC (QB) 3003, [2006] EMLR 10, upheld [2008] QB 73, *Prince of Wales v. Associated Newspapers* [2006] EWCA Civ 1176, [2008] Ch 57, para 68.

57 *Alithia Publishing Company v. Cyprus* [2008] ECHR 17550/03 [65]. See, similarly, *Flux v. Moldova* (No. 6) [2008] ECHR 22824/04 and, perhaps more surprising, *Ivanova v. Bulgaria* [2008] ECHR 36207/03.

victims were true. I have held that they were not'.⁵⁸ That being the case, the balance was in favour of privacy and Mosley was awarded £60,000 in damages.

In *Ferdinand v. Mirror Group Newspapers*, the balance lay with freedom of expression and MGN.⁵⁹ Rio Ferdinand, captain of the England national football team, took legal action against the *Sunday Mirror* for infringing his right to a private life and misusing his personal information. In 2010 the newspaper paid a woman for her story and published the details of their 'on and off' sexual relationship which had extended over a period of 13 years. Ferdinand had made public statements during this time about having left his 'wild man' past behind him to settle down with the mother of his children. The judge found that the newspaper story contained information about Ferdinand that was protected by Article 8, but, in determining the balance to be struck between Articles 8 and 10, he assessed whether the publication was in the public interest given Ferdinand's high profile public position. Relevant factors were Ferdinand's 'family man' image, his appointment as England team captain following the dismissal of his predecessor because of an extra-marital affair, and the expectation of the team manager and many commentators that the England captain was expected to be a role model for young fans both on and off the pitch. In this case Ferdinand's public image and role model status meant there was a public interest in the newspaper's disclosure sufficient to justify the publication and Ferdinand lost his case.

The balance between the right to a private life and freedom of expression lies at the heart of the Leveson inquiry into the culture and ethics of the media. The inquiry was established as a response to the phone hacking scandal at News International, in particular at the now defunct *News of the World*. Employees of the newspaper were accused of unlawful covert surveillance and bribery of police. The matter had been in the public eye for some time; the subjects of the alleged improper activities thought to include celebrities, politicians and members of the royal family. The paper's royal editor, Clive Gooding, had been jailed in 2007 together with a private investigator, Glenn Mulcaire, who had provided services to the newspaper.

In July 2011 it became apparent that the problem of hacking was widespread. Public uproar followed the disclosure that the phones of the family of Milly Dowler, a schoolgirl murdered in 2002, and other victims of criminal and terrorist activities had been hacked. In the same month Lord Justice Leveson was appointed as Chairman of a two-part inquiry into the role of the press and police in the phone-hacking scandal.

⁵⁸ *Mosley v. News Group Newspapers Ltd* (No. 3) [2008] EWHC 1777 (QB), [2008] EMLR 20, paras 135-136.

⁵⁹ *Rio Ferdinand v. Mirror Group Newspapers Ltd* [2011] EWHC 2454 (QB).

Part one of the inquiry will address ‘the culture, practices and ethics of the press, including contacts between the press and politicians and the press and the police ... to consider the extent to which the current regulatory regime has failed and whether there has been a failure to act upon any previous warnings about media misconduct’.⁶⁰ Part two will address ‘the specific claims about phone hacking at the News of the World, the initial police inquiry and allegations of illicit payments to police by the press’ and ‘the extent of unlawful or improper conduct within News International, other media organisations or other organisations’. This section seeks to highlight some of the main issues which arise in balancing freedom of expression and other rights in the media context, while taking care not to pre-empt the findings of the Leveson inquiry.

Key issues

1. The current regulatory approach appears to have major flaws and failings

The Press Complaints Commission (PCC) is funded by the newspaper and magazine industry and administers a system of self-regulation for the media. Its role is to serve the public by holding editors to account and to protect the rights of privacy of individuals, while at the same time preserving appropriate freedom of expression for the press. It does so primarily by dealing with complaints, framed within the terms of the Editors’ Code of Practice, about the editorial content of newspapers, magazines and their websites and the conduct of journalists. It does not have the legal power to prevent publication of material in breach of the Code.

The Editors’ Code commits editors to accuracy; the provision of opportunities to reply; respect for privacy and the avoidance of harassment; respect for the rights of children; the bereaved; hospital patients; and those affected by crime. It prohibits the use of covert surveillance, misrepresentation and subterfuge and interception of communications except where this can be demonstrated to be in the public interest.⁶¹ The PCC adjudicates on complaints made about alleged breaches of the Code by any British newspaper or magazine or their website. In the event of a finding of breach, the PCC will make a public ruling which must be published in full by the offending newspaper or magazine.

⁶⁰ The *Observer*, November 13 2011. BBC constrained by need to avoid political bias, admits Lord Patten. Available at: <http://www.guardian.co.uk/media/2011/nov/13/bbc-political-bias-lord-patten>. Accessed 21/02/2012.

⁶¹ Press Complaints Commission. *Editors’ Code of Conduct*. Available at: <http://www.pcc.org.uk/cop/practice.html>. Accessed 13/02/2012.

The PCC was established in 1991 on the recommendation of David Calcutt QC to replace the Press Council,⁶² which had come to be seen by the late 1980s as failing to curb the excesses of some sections of the press. Assessing its role, the House of Commons Culture, Media and Sport Select Committee concluded in 2003 that ‘overall, standards of press behaviour, the Code and the performance of the Press Complaints Commission have improved over the last decade’,⁶³ and in 2007 that the system of self-regulation should be maintained.⁶⁴ Similar conclusions were drawn in 2009.⁶⁵

However, the PCC has been subject to significant criticism following the phone hacking scandal. The PCC had concluded in 2007 that there was no culture of illegal interception at the News of the World.⁶⁶ In July 2009 the *Guardian* had published a series of reports claiming that News Group Newspapers had paid in excess of £1 million to settle legal actions which threatened to expose the use of private investigators by journalists to engage in phone hacking. A subsequent PCC investigation defended its 2007 finding, concluding that it had not been misled by the *News of the World* and that there was no evidence to suggest the practice of phone message hacking was ongoing.⁶⁷

The *Guardian* suggested in November 2009 that the ‘complacent report shows that the PCC does not have the ability, the budget or the procedures to conduct its own investigations’, commenting that ‘[t]he report ... has not produced any independent evidence of its own to contradict a single fact in our coverage’.⁶⁸ The Media Standards Trust criticised PCC’s system of self-regulation, as opaque, ineffective and in need of reform.⁶⁹

62 D. Calcutt, 1990. *Report of the committee on privacy and related matters*. London: HMSO.

63 Culture, Media and Sport Committee, 1990. *Privacy and media intrusion – Fifth report of Session 2002-03, volume 1*. London: The Stationery Office.

64 Culture, Media and Sport Committee, 2007. *Self Regulation of the Press – Seventh report of session 2006-07*. London: The Stationery Office. Para 54.

65 Culture, Media and Sport Committee, 2010. *Press Standards, Privacy and Libel – Second report of session 2009-10, volume 1*. London: The Stationery Office. Para 79.

66 Press Complaints Commission, 2009. *PCC Report on Subterfuge and Phone Tapping*. Available at: http://www.pcc.org.uk/assets/218/PCC_subterfuge_report.pdf. Accessed 31/01/12.

67 Press Complaints Commission, 2009. *PCC report on phone message tapping allegations*. Available at: http://www.pcc.org.uk/assets/111/Phone_Hacking_report_2009.pdf. Accessed 31/01/12.

68 The *Guardian*, November 9 2009. The *Guardian*’s statement in response to the ‘PCC report on phone message tapping allegations’. Available at: <http://www.guardian.co.uk/media/2009/nov/09/guardian-statement-pcc-report>. Accessed 13/02/2012.

69 See Media Standards Trust, 2009. *A More Accountable Press* and its recommendations for reform of the current system, *Can independent self-regulation keep standards high and preserve press freedom?*

Not all newspapers have been so critical of the PCC. In October 2011, former editor of the *Sun*, Kelvin MacKenzie, suggested that the Leveson inquiry was unnecessary⁷⁰ and Paul Dacre, editor of the *Daily Mail*, suggested that ‘although the PCC was “naïve” in its investigation of phone hacking, it was unfair to suggest the scandal proved the PCC did not work’. ‘The truth is that the police should have investigated this crime properly and prosecuted the perpetrators’. Dacre suggested that ‘beefed-up’ self-regulation was the ‘only way of preserving the freedom of the press’, and suggested that the appointment of a newspaper ombudsman might be a way forward.⁷¹

These criticisms about the role of the PCC call into question whether it can act as an effective watchdog of the press as it is currently funded and operated. To the extent that there are shortcomings in any system of self-regulation, the positive obligations imposed on the state by Article 8 of the Convention will require that the courts are capable of filling the gap. This is particularly so in cases where a party seeks prior restraint of publication such as by way of an injunction. The PCC in its current form does not have any legal powers to prevent publication which may breach, for example, the Article 8 rights of an individual. But there are also real difficulties for some individuals seeking injunctive relief in the courts, due to the high cost of such actions as discussed below. The Leveson inquiry will assess the effectiveness of the current regulatory system.

2. Article 8 rights to a private life are not always adequately protected against press intrusion by injunctions

The failures of self-regulation have meant that people wishing to protect their Article 8 rights from breach by the media have had to take legal action to do so. If it is to be effective, legal action has to be taken prior to publication by means of an application for an injunction. Suing after publication cannot undo the damage done to a person’s private life by unwarranted publication.

The media is generally entitled to publicise the existence of an injunction, although in privacy cases one or all of the parties’ names will often be anonymised. ‘Super injunctions’ prohibit not only the publication of the identity of the parties to whom a story relates, but also the publication of the fact that an injunction has even been granted.

⁷⁰ The *Guardian*, October 13 2011. Kelvin MacKenzie’s speech at the Leveson inquiry – full text. Available at: <http://www.guardian.co.uk/media/2011/oct/13/kelvin-mackenzie-leveson-inquiry>. Accessed 31/01/12.

⁷¹ BBC, October 12 2011. Phone hacking: *Daily Mail*’s Paul Dacre defends PCC. Available at <http://www.bbc.co.uk/news/uk-15271533>. Accessed 13/02/2012.

Super injunctions have the potential to undermine the principle of open justice⁷² but their use appears to have been rare with the first recorded use having been in 2009 and Lord Neuberger's Committee on Super-Injunctions, which reported in May 2011,⁷³ suggesting that only two super-injunctions had been issued since January 2010. Lord Neuberger recommended that super and anonymised injunctions should have a 'return' date and be kept under review by the court, and that the government consider the feasibility of collecting data on these matters so it is clear how frequently injunctions are granted.

The vast majority of injunctions are of the 'anonymised' variety. The legal principles balancing Article 8 and 10 are relatively clear. The courts can issue injunctions to protect the privacy rights of individuals, and the media is generally entitled to publicise the existence of an injunction, though not necessarily all the names of the parties' involved. However, such injunctions should not prevent the publication of material which is genuinely in the public interest. For example, the public may have a legitimate interest in information disclosing criminal activity, or wrong-doing due to the status of the individual involved and/or his or her public statements on a related issue.

Access to injunctions, however, can depend very much on the resources of a potential claimant. Many of those who would wish to prevent publication of material on grounds of privacy are celebrities and it is the fact of their celebrity status that makes the press so interested in publishing material about them. Such celebrities are likely to be wealthy and therefore in a position to consider applying for injunctive relief. Less wealthy people can, however, also find themselves in situations in which their private lives become the subject of press interest. Such people face particular difficulties in seeking injunctive relief.

One of the difficulties with the practical operation of injunctions is the costs of obtaining and challenging them. (This is also discussed below in relation to defamation and privacy.) Injunctions have to be sought at very short notice if they are to be effective, and costs effectively prevent all but the very rich from having access to them. Pre-publication injunctions are also generally granted *ex parte*, that is, without any other parties being present or represented. An injunction may be granted under these circumstances which would not have been granted after full argument about the law and the facts. In theory such

⁷² See Culture, Media and Sport Committee, 2010. *Press standards, privacy and libel Second Report of Session 2009–10*. London: The Stationery Office. Paras 94–97.

⁷³ Master of the Rolls, 2011. *Report of the Committee on Super-Injunctions: Superinjunctions, Anonymised Injunctions and Open Justice*. Available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>. Accessed 11/02/2012.

injunctions are granted on an interim basis only and may be lifted after a full hearing, but the costs associated with such hearings may mean that the interim injunction effectively settles the matter for ever.

The combination of cost and court procedure can have very damaging effects on third parties affected by injunctions. Ryan Giggs, a married footballer, was granted an injunction to prevent details of an affair being made public.⁷⁴ Neither the newspaper nor the woman with whom he had had the affair were present at the hearing. Imogen Thomas was assumed at the time to be, but was not in fact, the source of the story, and the published judgment at the first instance hearing named her and suggested that she may have blackmailed the unnamed footballer. This suggestion was then widely reported, and the media interest in the story (and, therefore, the intrusion into Ms Thomas' privacy) was prolonged by the fact of Giggs' anonymity.

Ms Thomas sought police protection in May 2011 as a result of death threats following the exposure of the relationship when Giggs was finally named.⁷⁵ In December 2011 she was vindicated when she was permitted to read an agreed statement in open court in which it was accepted that she had neither publicised the relationship nor threatened to do so. According to a report in the *Guardian*, Thomas 'claimed that she had initially been "thrown to the lions" because, unlike the soccer star, she did not have the money to pay for her name to be kept private'.⁷⁶

The Giggs case was one in which the source of the story was not the other party to the affair, as is the case with 'kiss and tells'. And while there may be reason to protect public figures from exposure by those who target them in order to sell stories to the press, there are difficulties with 'gagging' people who may have an interest in exposing wrong-doing. In May 2011, for example, *Private Eye* reported that injunctions had been granted to prevent publication of '[t]he name of the entertainment company which sacked a female employee after an executive ended an extramarital affair with her and told bosses that "he would prefer in an ideal world not to have to see her at all and that one or the other should leave"'.⁷⁷ The individual in such a case is unlikely to have the legal or financial resources to challenge the injunction imposed on her.

⁷⁴ *CTB v. News Group Newspapers* [2011] EWHC 3099 (QB).

⁷⁵ The *Daily Telegraph*, May 26 2011. Imogen Thomas receives Twitter death threats over Ryan Giggs affair. Available at: <http://www.telegraph.co.uk/news/celebritynews/8537145/Imogen-Thomas-receives-Twitter-death-threats-over-Ryan-Giggs-affair.html>. Accessed 13/02/2012.

⁷⁶ The *Guardian*, May 16 2011. Imogen Thomas claims reputation 'trashed' by gagging order. Available at: www.guardian.co.uk/media/2011/may/16/imogen-thomas-gagging-order. Accessed 13/02/2012.

⁷⁷ *Private Eye*, May 5 2011, Not So Super Injunctions. Available at: http://www.private-eye.co.uk/sections.php?section_link=street_of_shame&article=361. Accessed 13/02/2012.

The development of the internet and emergence of new ways of sharing information very rapidly, has posed particular problems with enforcing injunctions. Details of injunctions, like that awarded to Ryan Giggs, were posted on the social networking site Twitter, and in October 2011 Jeremy Clarkson voluntarily lifted an anonymised injunction, which had prevented his ex-wife from writing about their relationship, declaring that injunctions were rendered pointless by the 'legal-free world on Twitter and the internet'.⁷⁸ In November 2011, the Master of the Rolls suggested that an action for contempt of court could 'in principle' have been brought on Gigg's behalf against anyone who mentioned the injunction and who could be shown to have 'either been served with the order or clearly knew of it'.⁷⁹ But the practical difficulties associated with bringing multiple contempt proceedings against individuals, however, are significantly greater than those associated with acting against a single newspaper.

In July 2011, a new Joint Committee of the House of Commons and the House of Lords was established to consider privacy and injunctions. It will consider the statutory and common law on privacy, the balance between privacy and freedom of expression and how best to determine the public interest, the enforcement of privacy injunctions and the role of media regulation. It is due to report in March 2012.⁸⁰

⁷⁸ *The Guardian*, October 27 2011. Jeremy Clarkson lifts 'pointless' injunction against ex-wife. Available at: <http://www.guardian.co.uk/media/2011/oct/27/jeremy-clarkson-lifts-injunction>. Accessed 21/02/2012.

⁷⁹ Joint Committee on Privacy and Injunctions, 2011. *Oral Evidence – Taken before the Joint Committee on Privacy and Injunctions on Monday 21 November 2011*. Response to question 527. Available at: http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/ucJCPI211111ev6.pdf. Accessed 21/02/2012.

⁸⁰ <http://www.parliament.uk/business/committees/committees-a-z/joint-select/privacy-and-superinjunctions/role/>. Accessed 13/02/2012.

3. Improper reporting of criminal investigations by the media may prejudice the right to a fair trial

There is undoubtedly a public interest in the reporting of criminal investigations and trials, and this interest is likely to outweigh some Article 8 rights of those charged or convicted of crimes, and their families.⁸¹ Article 10 rights to impart and receive information are not generally in conflict with the fair trial rights protected by Article 6 of the Convention, but will have to be limited if press coverage would otherwise prejudice the chances of a person receiving a fair trial.⁸² Such prejudice is unlikely to flow from reporting the fact that someone has been questioned, arrested and/or charged. Contempt of court proceedings may be brought where a person or organisation publishes material likely to jeopardise a fair trial.

There have been occasions on which the press has overstepped the mark very seriously, most recently in the reportage of Christopher Jeffries who was arrested on suspicion of the murder of Joanna Yeates in December 2010. He was later released without charge and Vincent Tabak was convicted of the murder in October 2011. Such was the prejudicial nature of the coverage of Mr Jeffries that in July 2011 the *Daily Mirror* was fined £50,000 and the *Sun* £18,000 for contempt of court. Jeffries also settled libel actions against eight newspapers including the *Daily Mirror* and the *Sun*. The Court described the *Daily Mirror* articles as ‘extreme’ and ‘substantial risks to the course of justice’ and stated the *Sun* had created a ‘very serious risk’ that any future court defence would be damaged.⁸³

The fact that Christopher Jeffries was released without charge meant that the articles published about him caused no harm in the end to the criminal trial process (as distinct from to his reputation). Had he been charged, however, the tone of the coverage created a real danger that a fair trial would have been impossible. In other cases such reporting could lead to the collapse of trials and the acquittal of the guilty. Other examples of contempt cases include the reporting by the *Daily Mail* and the *Sun* of the murder trial of Ryan Ward which

81 See, for example, *R. v. Croydon Crown Court, ex parte Trinity Mirror* [2008] 3 WLR 51.

82 See for example *News Verlags GmbH v. Austria* [2000] 9 BHRC 625, *News Verlags GmbH and Cokg v. Austria* [2001] 31 EHRR 8.

83 *The Guardian*, July 29 2011. *Sun* and *Mirror* fined for contempt of court in Christopher Jefferies articles. Available at: <http://www.guardian.co.uk/media/2011/jul/29/sun-daily-mirror-guilty-contempt>. Accessed 13/02/2012.

resulted in fines of £15,000 each in July 2011 as a result of their accidental publication online of photographs of the defendant holding a pistol,⁸⁴ and the initiation of contempt of court proceedings against the *Daily Mail* and the *Daily Mirror* for their reporting of the trial of Levi Bellfield, convicted of the murder of Millie Dowling.⁸⁵ The trial judge in the Ryan case refused to discharge the jury but Bellfield's trial for kidnapping was halted as a result of the press reporting of his conviction of Dowling's murder.

In the fact of the contempt of court reportage and the phone hacking scandal it is tempting to call for 'something to be done'. What that may be, however, and in particular whether there is a role for more substantial curbs to be placed on publication (as distinct from newspapers being fined or sued after the fact for contempt of court and/or breaches of Article 8), is a very difficult question. In May 2011 Max Mosley failed to convince the European Court that the press should be required to give advance notice of publication to the subjects of press coverage – a requirement designed to allow applications for injunctions and a *priori* balancing by the courts of the interests involved. It is hard to conceive any non-judicial body being in a position to vet stories in advance. The PCC's Editors' Code is intended to provide exactly the type of guidance which should avoid the kind of journalistic excesses exemplified by the Christopher Jeffries and the phone hacking scandal. Whether Leveson concludes that such self-regulation, or an alternative to it, is sufficient remains to be seen.

84 *Daily Mail*, July 19 2011. Two national newspaper websites fined for contempt of court. Available at: <http://www.dailymail.co.uk/news/article-2016505/Two-national-newspaper-websites-fined-contempt-court.html>. Accessed 13/02/2012.

85 Media Ethics, November 23 2011. UK Newspapers Accused of Contempt of Court. Available at: http://www.imediaethics.org/index.php?option=com_news&task=detail&id=2363. Accessed 13/02/2012.

The high legal costs in cases related to freedom of expression may have a ‘chilling effect’ on freedom of expression

The costs of Article 10 cases

Claimants in defamation and other Article 10 proceedings have to pay their own costs and also risk ‘adverse costs orders’ – in other words, having to pay the other party’s costs in the event of losing the case. For media outlets, writers and commentators, costs can have a ‘chilling effect’, which means either that they avoid making potentially risky comments in the first place, or settle claims at an early stage simply to avoid the financial risk. And the costs of obtaining an injunction (as discussed above) can leave all but the most wealthy without access to the courts to prevent publication in breach of their Article 8 rights.

The costs of litigation in the UK are higher than in many other jurisdictions. An Oxford University report published in 2008, for example, found that libel court costs were 140 times higher in Britain than in the rest of Europe.⁸⁶ When contested, defamation cases are decided by a full trial, before a jury, involving complicated procedures and legal arguments which involve heavy legal costs. All but the most straightforward preliminary issues require a jury decision, unless there is agreement between the parties, and so this impedes active case management and adds to the costs.⁸⁷

86 Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, 2008. *A Comparative Study in Defamation Proceedings Across Europe*. University of Oxford, December 2008. Available at: <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf>. Accessed 13/02/2012.

87 H. Rogers, November 20 2010. Defamation: Problem – What Problem? Available at: <http://inform.wordpress.com>. Accessed 13/02/2012.

Costs in Article 10 and other cases are further raised by the practice of using conditional fee agreements (CFAs). CFAs allow lawyers to accept a case on a 'no win, no fee' basis. If a CFA is used by a successful claimant the lawyers may charge not only the normal fee for their services, but also an additional 'success fee', which may be as high as 100 per cent of the original fees. Both fees are recoverable from the defendant. CFAs are often used in combination with After the Event (ATE) insurance which guarantees that, if the claimant loses, the insurance company will pay the defendant's legal costs and expenses. If the claimant wins, the defendant must pay the insurance premium as well as the claimant's legal fees and the success fee.

Without the availability of CFA agreements, individuals may not be able to access the courts at all. But critics of CFAs say that, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel.⁸⁸

The costs of litigation, in particular in defamation cases, have caused critics to argue that 'libel law has been used to protect the rich and powerful from criticism and has come to be associated with money rather than justice'.⁸⁹ For example, in November 2011 Citizens Advice told MPs that they had spent an entire year's research and campaign contingency budget to libel-proof a report on the use of civil recovery schemes by high street stores. These are schemes under which external agencies are employed to send letters demanding payment to individuals who are alleged to have shoplifted. Citizens Advice wanted to warn consumers who received such letters that the demand might breach consumer protection regulations, but the threat of libel action from the agencies involved prevented them from doing so. The CAB report has still not been published in full.⁹⁰

88 There will however be an incentive for the lawyers to limit costs in case they are unsuccessful.

89 The Libel Reform Campaign. The Report – Balancing free speech and reputation. Available at: <http://www.libelreform.org/the-report?start=3>. Accessed 21/02/2012.

90 Libel Reform Campaign, November 9 2011. Libel threats gag Citizens Advice, Nature and others. Available at: <http://www.libelreform.org/news/512-libel-threats-gag-citizens-advice-nature-and-others>. Accessed 13/02/2012.

Key issues

1. The high costs of libel cases have a chilling effect on public debate, restricting comment and leading to premature or unnecessary settlements of defamation actions

In February 2010 the Commons Culture, Media and Sport Select Committee published its report on Press Standards, Privacy and Libel. The Report considered the operation of libel law in England and Wales and its impact on press reporting, including important developments since the 1996 Act. Among the recommendations of the Select Committee were concerns about the cost of libel proceedings.⁹¹

An indication of the possible extent of the problem can be found in the case of *Naomi Campbell v. MGN*. This was a breach of confidence case in which the claimant used a CFA.⁹² The costs for the two-day hearing in the House of Lords amounted to £594,470, including a 100 per cent success fee of £279,981.35. The costs borne by the defendant MGN were totally out of proportion to the extent of damages awarded to Campbell, which were just £3,500.

In 2011, the European Court considered the case and held that the requirement that MGN pay a 100 per cent success fee was disproportionate and violated Article 10.⁹³ On this important practical issue, therefore, the domestic courts have proven to be out of kilter with Strasbourg.

Libel reformists argue that the uncertainty of libel litigation, together with the prospect of paying the opponent's astronomical legal fees, leads writers either to avoid the risk of facing legal proceedings by censoring what they write or, once proceedings are launched, to settle matters rather than run complicated

91 Culture, Media and Studies Committee, 2010. *Press standards, privacy and libel – Second Report of Session 2009-10, volume 1*. London: The Stationery Office; Culture, Media and Studies Committee, 2010. *Press standards, privacy and libel – Second Report of Session 2009-10, volume 2*. London: The Stationery Office.

92 *Campbell v. Mirror Group Newspapers Limited* [2005] UKHL 61.

93 *Mirror Group Newspapers Limited v. the United Kingdom* [2011] ECHR 66.

defences. The issue of costs was raised by the UN Human Rights Committee as a matter of concern. It urged the UK to consider,

‘limiting the requirement that defendants reimburse a plaintiff’s lawyers fees and costs regardless of scale, including Conditional Fee Agreements and so-called “Success Fees”, especially insofar as these may have forced defendant publications to settle without airing valid defences’.⁹⁴

There are indications that defendants may feel pressurised to settle claims unnecessarily because of the financial implications of proceeding. For example, in *Dee v. Telegraph Media Group* the claimant, Robert Dee, took action over an article that described him as the ‘worst professional tennis player in the world’.⁹⁵ He had suffered 54 consecutive defeats in tennis tournaments. The court accepted that the newspaper article may well have been ‘having a laugh’ at Dee’s expense, but unequivocally concluded that the undisputed facts were sufficient to justify the statement, and ordered summary judgment in the *Telegraph’s* favour. By this time, however, Dee had reportedly recovered damages and secured apologies from a number of other media organisations. They had all conceded what turned out to be a hopeless claim, probably due to the ‘chilling effect’ of the prospect of an adverse costs order.⁹⁶

The Ministry of Justice has promised to crack down on rising legal fees. In particular, a recommendation that lawyers’ success fees and ATE insurance premiums should cease to be recoverable for all types of civil litigation now appears in the Legal Aid, Sentencing and Punishment of Offenders Bill. If adopted, this may help to ensure that unsuccessful defendants in such proceedings are not faced with a disproportionate costs liability.

On the other hand, CFAs are not only for claimants. Many defendants in defamation actions rely on CFAs to obtain legal advice and representation. Prohibiting these agreements would be likely to reduce access to justice for claimants of limited means.⁹⁷ This is discussed further on the following page.

⁹⁴ Human Rights Committee, 2008. *Consideration of Reports Submitted by States Parties Under Article 40 of The Covenant. Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, para 25. Available at: <http://www.5rb.com/docs/UN%20Human%20Rights%20Committee%20Report%202008.pdf>. Accessed 13/02/2012.

⁹⁵ *Robert Dee v. Telegraph Media Group Limited* [2010] EWHC 924 (QB).

⁹⁶ H. Rogers, November 20 2010. *Defamation: Problem – What Problem?* Available at: <http://inform.wordpress.com>. Accessed 13/02/2012.

⁹⁷ Right Honourable Lord Justice Jackson, 2009. *Review of Civil Litigation Costs: Final Report*. London: The Stationery Office.

One way of reducing costs in Article 10 cases may emerge from a pilot scheme underway in Manchester until September 2012. It suspends the usual procedural rules and allows for active costs management by the court, based on the submission of detailed estimates of future costs. The objective is described as being, ‘to manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing’.⁹⁸

2. The proposed abolition of conditional fee agreements (CFAs) would undermine access to justice for claimants and defendants of limited means, potentially breaching Articles 8 and 10

As noted above, the government wishes to stop the use of CFAs, or ‘no win no fee’ agreements. Under the Legal Aid, Sentencing and Punishment of Offenders Bill, any costs will have to be paid out of the final award for damages. Some commentators have suggested that this will protect or enhance freedom of expression, as defendants will not be faced with a disproportionate costs liability if they lose.

However, the picture is far more complex than this. Groups such as Hacked Off, which are opposed to the changes, warn that this will mean that the cost of seeking redress through the courts will no longer be financially viable for most individuals, restricting their access to justice. As above, many defendants in defamation actions rely on CFAs to obtain legal advice and representation. Without the possibility of success fees they would struggle to find lawyers to represent them. Similarly, claimants of limited means often rely on CFAs to take claims.

In October 2011, a wide range of claimants and defendants joined together to oppose the plan to end such funding arrangements, arguing that this reform would deny justice to people ‘of ordinary means’, preventing them from either taking action to vindicate their rights, or defending themselves in court.⁹⁹ This group includes Christopher Jefferies, the retired Bristol teacher defamed by the

98 Ministry of Justice. Practice Direction 51D: Defamation Proceedings Costs Management Scheme. Available at: http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part51d.htm. Accessed 13/02/2012.

99 The *Guardian*, October 31 2011. Milly Dowler parents join Yeates’s landlord to oppose end to no win-no fee agreements. Available at: <http://www.guardian.co.uk/uk/2011/oct/31/milly-dowler-legal-aid-cuts>. Accessed 21/02/2012.

tabloids during the Yeates murder inquiry; the parents of murdered schoolgirl Milly Dowler; Peter Wilmshurst, a cardiologist sued for criticising research at a US medical conference; and Robert Murat, who lived near the scene of Madeleine McCann's disappearance in Portugal and who sued British TV stations and newspapers for libel. The group stated that:

'We are all ordinary citizens who found ourselves in a position of needing to obtain justice by taking or defending civil claims against powerful corporations or wealthy individuals. We would not have been in a position to do this without recourse to a "no win, no fee" agreement with a lawyer willing to represent us on that basis. As was made clear to each of us at the beginning of 35 our cases, we were liable for tens if not hundreds of thousands of pounds if we lost. Without access to a conditional fee agreement (CFA), which protected us from this risk, we would not have been able even to embark on the legal journey.'

The group have called on MPs to support an amendment tabled by the Liberal Democrat MP Tom Brake, which would exclude privacy and defamation cases from the reform of CFAs. In privacy cases, there is a particular issue as damages awards are often small and would rarely cover the cost of what might be a protracted legal case. Hacked Off claim that if the changes go ahead in their current form they will 'be making justice impossible for all but the rich'.¹⁰⁰

¹⁰⁰ The *Guardian*, October 31 2011. Milly Dowler parents join Yeates's landlord to oppose end to no win-no fee agreements. Available at: <http://www.guardian.co.uk/uk/2011/oct/31/milly-dowler-legal-aid-cuts>. Accessed 21/02/2012.

Counter-terror laws potentially criminalise free expression

How counter-terror laws impact upon freedom of expression

Article 10(2) permits interferences with freedom of expression which are prescribed by law and which are necessary in a democratic state¹⁰¹ and proportionate to the pursuit of one or more of the legitimate aims set out in Article 10(2). These aims include „national security, territorial integrity or public safety’, ‘the prevention of disorder or crime’ and ‘the rights of others’. As Lester, Pannick and Herberg point out:

“Necessary” has been strongly interpreted: it is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”.¹⁰² One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under art 10(2).¹⁰³

As pointed out above, restrictions on freedom of expression may also be justified under Article 17 which prevents the ‘abuse of rights’.¹⁰⁴ Article 17 does not prevent those who are regarded as ‘criminals’ or ‘terrorists’ from relying on their Convention rights in general.¹⁰⁵ Rather, it prevents the attempt to rely on those very Convention rights to deny the rights of others. An example of this would

101 See, for example, the dicta of Lord Bingham in *R. v. Shayler* [2003] 1 AC 247. Para 23.

102 Lester, Pannick, and Herberg, 2009. *Human Rights Law and Practice*. Para 4.10.28, citing *Handyside v. the United Kingdom* [1976] 1 EHRR 737. Para 48.

103 Above, citing *Sunday Times v. the United Kingdom* [1979] 2 EHRR 245. Para 62.

104 See, for example, *Le Pen v. France* [2010] ECHR. Application No. 18788/09, 20 April 2010; *Féret v. Belgium* [2009] ECHR. Application No. 15615/07, 16 July 2009. Judgments available in French only.

105 *Lawless v. Ireland* (No. 3) [1961] 1 EHRR 15.

arise if those campaigning to deny the rights of others to freedom of expression, or equality under the law, sought to use Article 10 against restrictions imposed by the state.¹⁰⁶

The government has a duty to protect people from terrorist threats and freedom of expression may be restricted to protect public order and national security. However, campaign groups including Article 19 and Liberty, have argued that counter-terrorism powers have been used to restrict legitimate forms of protest, political expression and other activities such as journalism and photography.¹⁰⁷ Article 19 has argued that the unnecessarily broad reach of several statutory measures and absence of adequate safeguards, has a chilling effect on debate on matters of public interest.¹⁰⁸

The right to protest is separately considered in the chapter on Article 11. This chapter looks at the potential impact of counter-terrorism legislation on freedom of speech.

Over the past decade parliament has introduced several pieces of legislation to put in place a permanent approach to counter-terrorism.¹⁰⁹ The three key pieces of legislation relevant to this chapter are the Terrorism Act 2000, the Terrorism Act 2006 and the Counter-Terrorism Act 2008. The 2000 Act consolidated existing anti-terror measures, but proved controversial for a number of reasons, including its broad definition of terrorism. The Terrorism Act 2006, passed in the aftermath of the London bombings of 7 July 2005, introduced a number of new criminal offences, including the encouragement of terrorism (for example, through making or publishing statements that glorify terrorism) and the sale, loan, distribution or transmission of terrorist publications.

¹⁰⁶ *Glimmerveen and Hagenbeek v. Netherlands* [1982] 4 EHRR 260.

¹⁰⁷ See, for example, Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression: Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, April 2006. Available at: <http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>. Accessed 13/02/2012. See also: <http://www.liberty-human-rights.org.uk/human-rights/free-speech/index.php>. Accessed 13/02/2012.

¹⁰⁸ See, for example, Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression: Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, April 2006. Available at: <http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>. Accessed 13/02/2012.

¹⁰⁹ The current counter-terror laws replaced temporary legislation which was first introduced in the 1970s and aimed at terrorism in Northern Ireland. This temporary regime was renewed annually, and expanded on two occasions (1984 and 1989) to include international terrorism.

As with any limitations on human rights, restrictions of the right to freedom of expression based on counter-terrorism concerns must comply with the general requirements of the law. Further, the European Court has repeatedly made it clear that, while states can and must act to protect their citizens from terrorist threats, their actions must be necessary and proportionate.¹¹⁰

The UK government signed the Council of Europe Convention on the Prevention of Terrorism in 2005, although it has yet to ratify the Convention.¹¹¹ The Convention includes a requirement that states introduce adequate ‘national prevention policies’ ‘with a view to preventing terrorist offences and their negative effects while respecting human rights obligations’ and details a number of criminal offences which are required to deal with terrorism. It also recognises that anti-terrorism laws are required to respect the rights to freedom of expression and the right to protest; and be necessary, proportionate and non-discriminatory.

Key issues

1. The definition of ‘terrorism’ is too broad and potentially criminalises lawful activity as well as activity which is unlawful, but not properly regarded as terrorism

Terrorism is defined in the Terrorism Act 2000, as subsequently amended by the 2006¹¹² and 2008¹¹³ Acts.¹¹⁴ According to this definition, terrorism is the use or threat of action where the intention is to ‘influence the government or an international governmental organisation or to intimidate the public’, and ‘the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause’. The action used or threatened is not confined to serious violence against the person/damage to property, endangerment to life or serious health and safety risk but includes, controversially, that ‘designed seriously to interfere with or seriously to disrupt an electronic system’.¹¹⁵

110 See, for example, *Incal v. Turkey* [2000] 29 EHRR 449.

111 Joint Committee on Human Rights, 2006 *The Council of Europe Convention on the Prevention of Terrorism, First Report of 2006-2007*. Para 1. Available at: <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/26/2602.htm>. Accessed 13/02/2012.

112 The Terrorism Act 2006 added ‘international governmental organisations’ to the list of targets whom the action is designed to influence (s.1(1)(b)).

113 The Counter-Terrorism Act 2008 added ‘racial’ to the causes being advanced (s.1(1)(c)).

114 This is the main definition. A different definition is contained in the Reinsurance (Acts of Terrorism) Act 1993, s.2(2).

115 S.1(2) Terrorism Act 2000.

The definition has been criticised as ‘both vague and excessively broad in its reach’, with free speech campaigning organisation, Article 19, pointing out that ‘it criminalises not only acts that are widely understood to be ‘terrorist’ in nature, but also lawful gatherings and demonstrations as well as many forms of behaviour that, while unlawful, cannot be regarded as “terrorism”.’¹¹⁶

Liberty has repeatedly submitted that the definition of terrorism should be drawn as tightly as possible, given the important consequences which flow from the question whether or not an action amounts to ‘terrorism’.¹¹⁷ Actions which would normally fall within the realm of the ordinary criminal law will constitute more serious offences, with graver punishments, if they are defined as ‘terrorism’; and the threat of terrorist acts triggers broad and sweeping powers under other legislation, such as the Civil Contingencies Act 2004.

In response to the criticisms regarding the scope of the definition of terrorism in the 2000 Act,¹¹⁸ in 2005 the then government asked Lord Carlile to review the definition. Lord Carlile completed this task in March 2007.¹¹⁹ He raised particular concerns regarding the definition’s reference to the intention to ‘influence’ the government or an international governmental organisation. Lord Carlile agreed with many submissions to his review that the use of the word ‘influence’ sets the bar too low in the definition.¹²⁰ Rather, he recommended that, ‘the existing law should be amended so that actions cease to fall within the definition of terrorism if intended only to *influence* the target audience; for terrorism to arise there should be the intention to *intimidate* the target audience’.¹²¹

116 Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression: Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, April 2006. Available at: <http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>. Accessed 13/02/2012.

117 For example, Liberty’s response to Lord Carlile’s review of the definition of terrorism, June 2006. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy06/response-to-carlile-review-of-terrorism-definition.pdf>. Accessed 13/02/2012.

118 See, for example, Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression*, above. See also: <http://www.liberty-human-rights.org.uk/human-rights/free-speech/index.php>.

119 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office.

120 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 59.

121 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 86(11).

Lord Carlile's recommendation in this respect was in keeping with the practice elsewhere which emerged from his international comparative review. This review revealed that anti-terrorism laws generally required intentions or motivations to 'intimidate', 'coerce', 'compel', or 'subvert'.¹²² In June 2007 the then Home Secretary, John Reid MP, responded to Lord Carlile's report on behalf of the government, stating that:¹²³

'We do not consider that the bar is set too low by the use of the word *influence*. We consider that there may be problems in terms of using the word intimidate in relation to governments and inter-governmental organisations.'

The term 'influence' remains in the Act.

A second concern with the definition of terrorism in the 2000 Act is the geographical reach: it is sufficient to amount to 'terrorism' that the action used or threatened is intended to influence *any* government across the world and regardless of context. This reach is particularly problematic given the absence of any 'reasonable excuse' defence for particular offences based upon the definition. This could lead to the stifling of legitimate debate, and the criminalisation of those supporting and encouraging reform in anti-democratic states.

The Court of Appeal examined this issue in the case of *R. v. F*.¹²⁴ 'F', the appellant, was opposed to the Gaddafi regime in Libya. He had fled from Libya to the UK and had been granted asylum. F was subsequently charged with contravening the 2000 Act, as it was alleged that he was in possession of documents that gave details of how explosive devices could be made and terrorist cells set up. F wished to argue that he had a 'reasonable excuse' for possessing the documents as they 'originated as part of an effort to change an illegal or undemocratic regime'. At a preliminary hearing on the interpretation of the 2000 Act (sections 1 and 58), the Crown Court judge forbade him from advancing such a defence. The Judge held that all governments, including, for example, a dictatorship, or a military junta, or a usurping or invading power, were included within the protective structure of the Act.

¹²² Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 58.

¹²³ HM Government, 2007. *The Government Reply to the Report by Lord Carlile of Berriew QC Independent Reviewer of Terrorism Legislation – The Definition of Terrorism*. London: The Stationery Office. Government states that influence is suitable for government, where the intention is get it to act in a particular way, and intimidation is more appropriate for the public where there is the intention to scare (communication with the Commission, 16 January 2012).

¹²⁴ *R. v. F*. [2007] EWCA Crim 243.

On F's appeal the Court of Appeal concluded that the judge had been correct to hold that the terrorism legislation applied equally to democracies and to countries that were governed by tyrants or dictators. Lord Carlile reviewed this issue in his 2007 report. He did not consider a specific statutory defence of 'support for a just cause' to be practicable¹²⁵ but he did recommend that there be a new statutory obligation requiring the exercise of discretion to use counter-terrorism laws in extra-territorial matters to be subject to the approval of the Attorney General, having regard to (a) the nature of the action or threat of action under investigation, (b) the target of the action or threat, and (c) international legal obligations.¹²⁶

In its response, the government indicated that this matter was under review, but again, the scope of the definition remains as it was when Lord Carlile criticised it and recommended change. Four years later, nothing has changed.

2. A number of terrorism offences are overly vague and threaten freedom of expression

The Terrorism Act 2006 introduced two offences which went further than merely prohibiting direct acts of terrorism or incitement to commit such acts. One criminalised the 'encouragement of terrorism' (section 1) and the other the 'dissemination of terrorist publications' (section 2).¹²⁷ These offences are overly broad in their drafting, and have attracted widespread criticism. Liberty complained that the (then proposed) offences 'do not require any intention to incite others to commit criminal acts'; that '[t]he Terrorism Act 2000 (TA) and existing common law means there is already very broad criminal law' and that '[a]ny difficulty in bringing prosecutions can be largely attributed to factors such as the self imposed ban on the admissibility of intercept evidence'.¹²⁸ And prominent criminal jurist Alex Conte has criticised the provisions on the basis that they are 'linked to existing definitions of terrorist acts ... which go beyond the proper characterisation of terrorism'.¹²⁹ And freedom of expression expert

125 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 86(14).

126 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 86(15).

127 Terrorism Act 2006, section 20(2).

128 See <http://www.liberty-human-rights.org.uk/media/press/2005/alarm-as-terrorism-bill-rushed-through-parliament.php>. Accessed 27/02/2012.

129 A. Conte, 2010. *Human Rights in the Prevention and Punishment of Terrorism*. Springer. Page 643.

Professor Eric Barendt has drawn attention to the fact that, under section 1 of the Act, a person can be convicted on the basis of a statement which, though not intended to encourage the commission of offences, was made *recklessly* with regard to this effect.¹³⁰

The CPS website lists all successful prosecutions since 2007 under sections 1 and 2 of the 2006 Act.¹³¹ A number of convictions under section 2 have been of people also convicted of the preparation of (violent) terrorist acts¹³² and/or collecting information likely to be of use to a person preparing such acts.¹³³ Others concerned distribution of material calling on readers to join the ranks of Osama bin Laden;¹³⁴ or praising bin Laden and stating that ‘you are right to kill infidels’ and suggesting targets to bomb;¹³⁵ or selling material which was found to have been intended to induce young British Muslims to be recruited to terrorism.¹³⁶ Only one section 1 conviction is reported which was of someone also convicted of fundraising for terrorist purposes and inciting acts of terrorism overseas. The defendant came to police attention following speeches made at Regents Park Mosque. He had been involved in attempts to raise money to be sent to Iraq to support the insurgents, and inciting others to join the jihad in Iraq.¹³⁷

The cases reported above do not appear to indicate that the application of sections 1 or 2 by the Courts has resulted in breaches of Article 10 to date. But it is impossible to determine the extent to which section 1 and 2 of the 2006 Act have exercised a ‘chilling effect’ on expression falling outside the type of conduct which has resulted in conviction. These provisions certainly have the capacity to criminalise conduct which does not consist of or include incitement to violence.

130 E. Barendt, 2009. ‘Incitement to, and Glorification of, Terrorism’ in I. Hare and J. Weinstein, *Extreme Speech and Democracy*. Oxford: Oxford University Press. Page 447.

131 The Counter-Terrorism Division of the Crown Prosecution Service (CPS). Available at: <http://www.cps.gov.uk/publications/prosecution/ctd.html>. Accessed 13/02/2012.

132 Abdul Rahman, www.cps.gov.uk/publications/prosecution/ctd_2007.html. Accessed 13/02/2012; Abbas Iqbal, www.cps.gov.uk/publications/prosecution/ctd_2010.html. Accessed 13/02/2012.

133 Michael Heaton, www.cps.gov.uk/publications/prosecution/ctd_2010.html. Accessed 13/02/2012. Heaton, a member of the Aryan Strike Force, was also convicted in respect of stirring up racial hatred contrary to s.18 Public Order Act 1986.

134 Shella Roma, www.cps.gov.uk/publications/prosecution/ctd_2009.html. Accessed 13/02/2012.

135 Hodges, www.cps.gov.uk/publications/prosecution/ctd_2008.html. Accessed 13/02/2012.

136 Bilal Mohammed, www.cps.gov.uk/publications/prosecution/ctd_2008.html. Accessed 13/02/2012.

137 Brooks (Saleem and Others), www.cps.gov.uk/publications/prosecution/ctd_2008.html. Accessed 13/02/2012.

The European Court of Human Rights has repeatedly made clear that Article 10 not only protects the expression of views and ideas which are favourably received or populist; it also protects the expression of controversial, shocking or offensive views and ideas. Individuals, the media and other organisations have a right to air such views and ideas, and the public has a right to hear them.

The offences created by sections 1 and 2 of the 2006 Act do not appear to be compatible with these rights.¹³⁸ Section 1, for example, prohibits any statements which encourage ‘acts of terrorism’, with ‘terrorism’ having the same meaning in this context as the very broad definition given in the Terrorism Act 2000. Verbally indicating support for the Libyan rebels against Gaddafi could amount to ‘encouraging terrorism’ under this definition, as could the indication of support for a campaign of civil disobedience whose impact is likely to create a serious health and safety risk.

The Joint Committee on Human Rights (JCHR) was sharply critical of the offence created by section 1 of the 2006 Act, suggesting that ‘by using the definition of terrorism contained in the Terrorism Act 2000, the offence of encouragement of terrorism ... is much wider than the offence which is required to be criminalised by Article 5 of the Convention [on the Prevention of Terrorism]. We remain of the view ... that the definition of terrorism used in the 2006 Act is too broad and therefore carries with it a considerable risk of incompatibility with the right to freedom of expression in Article 10 ECHR, particularly when taken in combination with the other respects in which the UK offence is wider than what is required by Article 5 of the Convention.’¹³⁹ It noted that all bodies and individuals who had submitted evidence to them shared this concern, with the single exception of the Home Office.¹⁴⁰ Among these critics were the Mayor of London, Boris Johnson, who argued that the broad definition is fundamentally flawed in a number of respects,

‘It is expansive and indiscriminate, it does not reflect commonly held notions of terrorism, it undermines basic human rights, it makes no allowance for legitimate protest and struggles and therefore criminalises people who cannot properly be regarded as terrorists.’¹⁴¹

138 See, for example, the approach taken by the European Court of Human Rights in *Zana v. Turkey* [1997] 4 BHRC 241, paras 58-60; *Kilic & Anor v. Turkey*. Application No. 43807/07. [2011] ECHR 43807/07; *Sürek and another v. Turkey* [1999] 7 BHRC 339.

139 Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Para 29.

140 Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office.

141 Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Para 27.

The broad drafting also criminalises the inherently vague concept of ‘glorification’. The JCHR concluded that this was particularly problematic, and that there would be ‘genuine difficulty’ in distinguishing between expressions of understanding, explanation or commemoration on the one hand, and encouragement on the other.¹⁴² The JCHR expressed concern about the likely ‘chilling effect’ that the ‘glorification’ provision would have on freedom of expression, and specifically the impact on minority communities critical of government foreign policy.¹⁴³ In their submissions to the JCHR, Liberty and the Muslim Council of Britain believed that people would fear the new offence of encouragement of terrorism and prefer to keep quiet rather than risk prosecution for the new offence.¹⁴⁴

There has recently been a welcome development in relation to the dissemination offence. In May 2011 an important legal ruling was handed down by the Crown Court at Kingston.¹⁴⁵ The Judge ruled that, in order to be compatible with Article 10, the ‘dissemination’ offence must be read in a particular and narrow way. This reasoning is likely to apply equally to the ‘encouragement’ offence.

142 Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Para 39.

143 Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office.

144 Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Appendix 3: Memorandum from Liberty. The Muslim Council of Britain held an informal meeting with JCHR on 23 November 2006 with Dr Muhammad Abdul Bari, Secretary General, and Mr Khalid Sofia, Chair of its Legal Affairs Committee.

145 *R v. Faraz*, unreported, 27 May 2011, Kingston Crown Court, summarised in Archbold: Criminal Pleading, Evidence and Practice 2012. Sweet and Maxwell. Paras 25-186.

Case study:**Freedom of expression*****Financial Times Ltd & Ors v. the United Kingdom*
(Application No. 821/03 - 15.12.2009)**

In 2001, a journalist at the *Financial Times* (FT) received a copy of a leaked document about a possible company takeover of South African Breweries by a Belgian brewer called Interbrew. The FT subsequently published a story and three other newspapers – the *Times*, the *Independent* and the *Guardian* – as well as the news agency Reuters, also reported on the issue, each referring to the leaked papers.

Following these reports, Interbrew brought proceedings against the news groups, seeking to obtain the leaked document in order to identify who gave it to the *Financial Times*. Ruling in favour of Interbrew, judges at the High Court, and later at the Court of Appeal, ordered the newspapers to disclose the document which would, in turn, reveal the journalist's source.

In response, Financial Times Ltd, Independent News & Media Ltd, Guardian Newspapers Ltd, Times Newspapers Ltd and Reuters Group plc applied to the European Court of Human Rights. They alleged violations of Article 10 and Article 8, as disclosing the documents would result in the identification of journalistic sources.

The European Court found that there had been a violation of Article 10 and said that protection of journalists' sources is one of the basic conditions of press freedom in a democratic society.

The Court said that the interest of Interbrew in preventing threat of damage through future dissemination of confidential information had been insufficient to outweigh the public interest in protecting journalists' sources. Any order for disclosure of a source cannot be compatible with Article 10 unless it is seen as an overriding requirement in the public interest. In its ruling, the Court commented on "the chilling effect of journalists being seen to assist in the identification of anonymous sources".

“In its ruling, the Court commented on the ‘chilling effect of journalists being seen to assist in the identification of anonymous sources.’”

At one point during the legal case, Interbrew threatened to seize the *Guardian*'s assets in contempt of court proceedings in a move that was condemned by MPs and international press organisations as a serious threat to freedom of the press. An early day motion was tabled in the House of Commons at the time which said: “that this house believes a free and fair press is vital to democratic life; and considers journalists to be under moral and professional obligations to protect their sources.” The motion, extolling the value of a free and fair press to democracy and stating that journalists are under a moral and professional obligation to protect their sources, was endorsed by parties across the political spectrum.

“We were delighted to have finally been vindicated by the European Court of Human Rights, as it is fundamental in a democracy that journalists can go out and obtain information free from the threat of being forced to reveal their sources,” says Gill Phillips, Director of Editorial Legal Services, Guardian News & Media. “The Interbrew case represented a serious threat to freedom of the press.”
