Principles of Public Law

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FREEDOM OF EXPRESSION

24.1 Introduction

Freedom of speech and of the press have presented such special constitutional concerns that they were accorded recognition by English courts long before incorporation of the European Convention on Human Rights (ECHR) by the Human Rights Act 1998. Clearly, the freedom to publish critical views of the government is essential to democracy; otherwise, government could grow corrupt and opposition views would not gather the necessary support to defeat the party in power at election time. Protection of political speech is easily justified, on the basis that the right contributes to the free flow of information. An argument may also be made out for the value of broader free speech rights in a democracy since they cultivate free choice of a range of ideas which find expression in society and thereby ensure the independence of electors and legislators in the political sphere.

Free speech is worth valuing in itself, not simply as an instrumental good. As adult members of a community, we have an important moral interest in deciding for ourselves what is good or bad, moral or immoral, within or beyond the pale. If government decides, for example, that because of someone's racist convictions, they are an unworthy participant in the democratic process, it is denying that moral interest to the people over whom it exercises power and, therefore, loses the necessary legitimacy for the exercise of that power:

> It is the central, defining premise of freedom of speech that the offensiveness of ideas, or the challenge they offer to traditional ideas, cannot be a valid reason for censorship; once that premise is abandoned, it is difficult to see what free speech means [Dworkin, R, *Freedom's Law*, 1997, Oxford: OUP, p 206].

Higher priority tends to be accorded to political speech than to other types of speech, particularly in Strasbourg. However, 'speech' or 'expression' is not limited to the disclosure of political information. If we perceive of expression as extending beyond the function of informing the public about the activities of their rulers and informing the rulers about the views of their subjects, we have to find ways of justifying why it covers a range of other forms of expression, such as avant garde films or sculpture, flag burning or advertisements. Joseph Raz described the protection of these forms of expression as the 'validating' role of freedom of expression, which is important since it allows ways of life and experience to be reflected in public culture and thus be accorded public recognition (Raz, J, 'Free expression and personal identification' (1991) 11 OJLS 303). The importance, in a democracy,

of according equal status to the views of citizens is considered in Chapter 26. Guaranteeing freedom of expression in our laws is one way of ensuring that this happens.

Clearly, this wide definition of expression creates problems for itself, illustrated most starkly by the claims to protection, under the free speech banner, of pornography, exhortations to criminal activity, racism and so on. Should this freedom be guaranteed to the authors of race hate speech, tobacco advertising and pornography? How can their rights be described as 'constitutional'?

One answer to this is the utilitarian argument that the publication of opinions and facts, good or bad, true or untrue, should not be restricted, because society benefits in the long term from the process of scrutinising their worth or veracity. In his essay, *On Liberty* (1859), Mill argues that freedom of expression unleashes a certain creativity in society (see above, 1.6.1):

> If all mankind, minus one, were of one opinion and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.

Mill believed that, to lose that one dissenting opinion, would be to lose something of value. If the opinion were right, posterity would be the loser, but, in his view, there was also value in a mistaken opinion, or an assertion of untrue facts, if it forced those who were not mistaken to examine their own case more carefully and understand it better.

As Feldman notes, the modern version of this utilitarian approach to freedom of expression is manifest in the concept of the 'free market of ideas' in the US (see Feldman, D, *Civil Liberties and Human Rights in England and Wales*, 1993, Oxford: OUP, pp 547–58). The idea is that market forces will determine that good, true and valuable expressions of ideas will simply 'crowd out' unmeritorious forms of expression. Unfortunately, this model is not reflected in reality, where the marketplace did not inhibit the development of views such as those expressed by the Ku Klux Klan in 1969 that 'the nigger should be returned to Africa, the Jew returned to Israel' (quoted in Dworkin, *Freedom's Law*, 1997, Oxford: OUP). Distasteful though they were, the Supreme Court extended the protection of free speech rights under the American constitution to these declarations (*Brandenburg v Ohio*), since a line could not be easily drawn between expressions which should attract First Amendment protection and those which should not.

It is clear, then, that freedom of speech demands that any censorship on grounds of content be prohibited; on the other hand, ways of dealing with forms of speech and expression that cause harm need to be discovered. One solution, proposed by Marshall, is that free speech protection should vary according to whether the idea expresses a 'core' value in a democracy, or is merely 'peripheral' to those values, 'so as to permit suppression of those [forms of speech] that fall outside the topmost level or privileged core of the

area protected by the principle of [free speech]' (Marshall, G, 'Press freedom and free speech theory' [1992] PL 40, p 60). Attractive though this solution may be, it does not do away with the problem altogether. It still requires a measure of content based censorship in order to determine where, on the hierarchy, any particular form of expression belongs. Race hate speech or pornography must not be banned because society disapproves of the message; some instrumental justification must be found for suppressing it within the notion of freedom of speech. Such speech leads to harm; words are being used as an instrument against their audience. Therefore, it has been argued that pornography, for example, interferes with women's freedom of speech, because it changes its audience's perception about the status and intelligence of women:

> ... expression is not just talk. Pornography not only teaches the reality of male dominance. It is one way its reality is imposed as well as experienced. It is a way of seeing and using women ... so that when a man looks at a pornographic picture – pornographic meaning that the woman is defined as to be acted upon, a sexual object, a sexual thing – the viewing is an act, an act of male supremacy [MacKinnon, C, *Feminism Unmodified: Discourses on Life and Law*, 1987, Harvard: Harvard UP, p 128].

Whether one agrees with this argument or not, it is certainly more attractive than the justification for banning forms of expression on the basis of protecting people's feelings. It will be seen below that an argument was made out in the English courts that Salman Rushdie should have been prosecuted for the offence caused to Muslims by his novel, *The Satanic Verses*. If the court had upheld this claim, very many forms of expression, literary or otherwise, would have been put in jeopardy.

Having concluded that the protection and regulation of expression should depend on its effects rather than its subject matter, let us return to the issue of free speech rights against public authorities. Our consent to being subject to the coercive power of government is contingent to a certain extent on being aware of what our rulers are up to. This gives the news media an important claim to freedom of expression rights when challenged under any countervailing rights, such as individual's rights to reputation and the interests of national security. But, for this right to information to have any value, we have to be certain that the purveyors of information are giving us the whole picture. This engages the liability of private actors – the press, the independent broadcasting media, publishing corporations – under constitutional free speech rights. As Sir Stephen Sedley commented on this issue:

> For a transnational corporation on which hundreds of millions of people depend for their information about the world, [freedom of speech means another thing]: the power to suppress information, of which we would firmly deny the State control, is a power possessed by the media corporations. Are human rights there for corporations or for people? Are they a form of property

or a constraint on power [Sedley, S, 'Human rights: a twenty-first century agenda' [1995] PL 395]?

Unfortunately, for recipients of news broadcasts, at any rate, there is no mechanism in national or international provisions on the freedom of speech for the right to information (itself part of freedom of expression) to be enforced against private actors such as media corporations. There is, however, an obligation on States to ensure that the media is so regulated as to prevent concentrations of power. The 1966 International Covenant for the Protection of Civil and Political Rights has a similar provision to Art 10 of the ECHR, which includes the rights of individuals to 'receive and impart information and ideas of all kinds' (Art 19) (see above, 19.3). The UK, which is a party to the Covenant, is obliged to submit reports to the Human Rights Committee on its compliance with the provisions of the Covenant. The failure of the State to prevent media concentration is a matter which the Committee would consider as potentially giving rise to issues under Art 19. As part of its general guidelines for reporting obligations, the UN Committee has said that States should provide complete information on the legal regime that regulates the ownership and licensing of the press and broadcast media. The European Commission of Human Rights has also suggested that Art 10 may impose a positive duty on the State to guard against 'excessive press concentrations' (*De Geillustreede Pers v Netherlands* (1976)). Because freedom of expression depends to a certain extent on the prevention of media empires, the EHCR specifically permits the regulation and licensing of the media (see below, 24.7).

24.2 Protection of freedom of expression

In *British Steel Corporation v Granada Television Ltd* (1982), Lord Wilberforce said that: 'Freedom of the press imports, generally, freedom to publish subject always to the laws relating to libel, official secrets, sedition and other recognised inhibitions.' This is a very English approach, which left the residual liberty to speak one's mind vulnerable to incursions by the law. Outside the ECHR, as incorporated by the Human Rights Act 1998, there are fragments of English law which provide a positive right to freedom of expression. Under the Bill of Rights 1689, Members of Parliament have the freedom to say what they like within the precincts of Parliament without running the risk of being sued for libel or questioned in any other way in a court of law (see above, 6.6). If they wish to sue for libel, however, a defendant is entitled to adduce evidence of what they said in Parliament by way of justification. In the same way, judges, advocates, jurors and witnesses can speak freely in court without risk of a defamation action. In addition, the Education (No 2) Act 1986 provides that higher education institutions should ensure free speech on their premises, a provision designed to protect lecturers and visiting speakers with controversial views against the 'no platform' policies of student unions.

These are patchy and extremely limited legal protections for freedom of expression. However, even before Art 10 became part of national law, freedom of expression as a residual right was accorded more respect than other rights in the common law. As the cases discussed below demonstrate, the judicial approach pre-incorporation was to acknowledge in positive terms the public interest in freedom of expression, which was then weighed against the countervailing public interests, such as the administration of justice or the protection of confidentiality and privacy.

This approach is consistent with the judicial balancing exercised required by Art 10 of the ECHR:

> 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.

There are a number of permissible exceptions set out in this Article. The scope of freedom of expression will be be evaluated below, as against the breadth of some of these exceptions.

24.3 National security and the impartiality of the judiciary

In order to ensure but justice is done in the hearing of individual cases, civil or criminal, it is clearly necessary to ensure that the tribunal, whether it consists of judge or jury, is not biased by prejudicial publicity. States also impose rules to maintain the secrecy of sensitive information. Both categories of rules involve limitations on freedom of expression.

24.3.1 Confidentiality and national security

The Official Secrets Act 1989 (discussed in more detail below) criminalises the release of certain types of classified information. However, a prosecution under this Act and its far wider ranging predecessor (the Official Secrets Act 1911) is less useful to the government than a court order preventing the information from coming into the private domain in the first place. So the English common law of confidentiality was brought into the public arena to protect sensitive information. In 1975 the plaintiff government claimed that

publication of an ex-Cabinet minister's memoirs would breach the duty of confidentiality owed by the Minister to the Crown: *Attorney General v Jonathan Cape Ltd* (1976). The court upheld this novel use of the hitherto private law of confidentiality but insisted that the Government should establish that the public interest in confidentiality prevail against the countervailing public interest in disseminating the information.

When Peter Wright published his memoirs in Australia about his career in the secret services (*Spycatcher*), the Government applied for a permanent injunction to prevent publication in this country, on the basis of confidence in national security matters. Before the main trial of the action, the Attorney General also sought interlocutory injunctions to prevent newspapers serialising extracts from the foreign publication. The House of Lords granted these on the basis that they were necessary to preserve the Attorney General's case at trial (*Attorney General v Guardian Newspapers Ltd* (1987)). Since the ECHR was not then part of national law, the newspapers challenged this decision in the European Court of Human Rights (*Observer and Guardian v UK* (1991)). The Government argued that the injunction was a legitimate measure in the interests both of national security and of maintaining confidence in the judiciary. The Court agreed that the need to maintain the confidence in the judiciary and safeguard the operation of the security services were both legitimate aims under Art 10(2). However, it considered that the imposition of injunctions from the date that the extracts entered the public domain (that is, when they were published in the US) represented a disproportionate interference with press freedom.

At the hearing of the application for the permanent injunction in the national court, the Government failed to obtain its injunction against the newspapers on similar grounds, since confidentiality cannot inhere in information once it is in the public domain. During the course of the litigation, various newspapers were fined for contempt of court when they published extracts from the book, even though they themselves were not party to the interim injunctions (*Attorney General v Newspaper Publishing plc* (1990)). It was held that a newspaper which knew that proceedings were in progress against another newspaper owed a duty to preserve the rights of confidentiality in respect of the material, since this would otherwise prejudice the administration of justice. Thus, the law on confidentiality combined with common law contempt of court imposes considerable restrictions on the publication of certain types of information.

24.3.2 Contempt of court

We can see from the *Spycatcher* litigation that the law on contempt of court may, therefore, be a legitimate way of preserving the impartiality of the judiciary under Art 10(2). Again, the law on contempt of court developed in this country before freedom of expression was accorded formal protection in

national law. Before the Contempt of Court Act 1981 was passed, all contempts, whether intentional or unintentional, were caught by the common law offence of contempt of court. In the *Thalidomide* case (*Attorney General v Times Newspapers Ltd* (1974)), the House of Lords upheld a finding of contempt against a newspaper for publishing an article laying out the evidence in a pending negligence action against manufacturers of a pregnancy drug which had led to deformities in thousands of children. The Lords said that the article, by pre-judging the negligence issue, was designed to put pressure on the company to come up with a generous settlement before a court of law had ruled in the main proceedings. The line between informed comment and pre-judgment, however, is hard to draw. The 'pressure' and 'pre-judgment' criteria established by the House of Lords were so extensive that it might have been a contempt to publish anything from a fair and balanced assessment of the issues in a broadsheet newspaper to a discussion of the legal issues in an academic journal.

In the Court of Human Rights, the newspaper alleged a breach of Art 10. The Court was given its first opportunity to weigh the interests of justice (impartiality of the judiciary) against freedom of expression and determine what measures to achieve this end could be said to be necessary in a free and democratic society. In *Sunday Times Ltd v UK* (1979), the Court accepted the Government's argument that contempt proceedings were a permissible restriction on Art 10 rights, but that the particular interpretation of contempt by the House of Lords went further than was necessary in a democratic society for maintaining the authority of the judiciary. The Court of Human Rights upheld the applicant's claim that the common law on contempt was an over-broad and disproportionate interference with its freedom under Art 10 of the ECHR.

The Contempt of Court Act 1981 was passed in response to this ruling, restricting the circumstances in which the publication of material concerning the issues in proceedings can amount to an offence. There must be a 'substantial risk' of serious prejudice (s 2(2)), although this has been broadly defined (*Attorney General v English* (1983)) and s 5 of the Act provides a defence of public interest; if the prejudice element is merely incidental to the publication, and the discussion is in good faith and concerns matters of public affairs, the publication will not come within the Act.

The common law offence of contempt survives the passing of the 1981 Act (s 6(c)), but it can only be made out where the contempt is intentional. The offence has proved useful where the 'contempt' has taken place in a context where proceedings are not 'pending' under the act. In 1989, successful common law contempt proceedings were brought against News Group Newspapers, on the basis that proceedings were 'imminent'. In *Attorney General v News Group Newspapers* (1989), a newspaper had decided to press for the private prosecution of a doctor who was suspected of having raped a girl aged eight. Public prosecution proceedings were not taken as there was

insufficient evidence. The newspaper published the doctor's name along with incriminating statements from potential witnesses. Seven weeks later, private prosecution proceedings were initiated; the doctor was eventually acquitted. When the Attorney General took this action for contempt it was argued that proceedings, although not active or even pending, had been 'imminent' because a private prosecution had been intended by the newspaper. The Divisional Court upheld this conclusion and they also accepted the Attorney General's argument that there was no authority precluding liability for contempt even before proceedings were imminent. The administration of justice, therefore, was the paramount concern. Although the judgments indicate that the newspaper or publisher must be aware of the likelihood of proceedings to follow, nevertheless, this case suggests that any controversial subject which may lead to proceedings is fair game for a contempt order, even though no litigation is under way.

24.3.3 Protection of sources

The Contempt of Court Act 1981 provides additional protection for free speech rights by specifying that no one may be subject to contempt proceedings for failing to disclose the source of their information, provided that refusal to disclose does not interfere with 'the interests of justice or national security or for the prevention of disorder or crime' (s 10).

Promising though that provision seemed for the free flow of information when the Contempt of Court Act was passed, s 10 has not fared well at the hands of the judiciary. In the Sarah Tisdall case (*Secretary of State for Defence v Guardian Newspapers Ltd* (1985)), the national security exception was upheld on the basis that a civil servant who leaked a sensitive Ministry of Defence document to the press might attempt to do so again and, therefore, presented an ongoing threat. In *X v Morgan Grampian* (1991), the House of Lords ruled that the protection of journalists' sources under s 10 could be outweighed by the 'interests of justice' to the employer of the source of the leaked document. Factors which will weigh in the balance include the interest the claimant is seeking to protect in wishing to have the source disclosed and whether the source had (as in this case) stolen the information or breached a strong duty of confidence. The journalist in *X v Morgan Grampian* took his case to the Court of Human rights where he succeeded in his argument that this breached his rights under Art 10 and the Government had to pay him compensation and costs of £37,595 (*Goodwin v UK* (1996)). With this precedent in mind, one might have thought that national courts would be hesitant to remove the protection for sources offered by the Contempt of Court Act. But, in *Camelot Group plc v Centaur Communications Ltd* (1998), the permitted exceptions under that provision were given even wider scope. Here, an unknown person sent the draft accounts of C to a journalist, who published them in an article. When C sought the return of the documents to identify the source, the paper relied on

s 10. The Court of Appeal ruled, however, that the interests of C in ensuring the continuing loyalty of its employees and ex-employees should outweigh the public importance attached to the protection of sources. Lest this judgment was seen to be in defiance of the ruling in Goodwin, the court observed that it was applying the same test as the Court of Human Rights and any apparent difference between *X v Morgan Grampian* and *Goodwin v UK* was attributable to the different view taken of the facts. This illustrates that the broad principles to be interpreted and judicial balancing exercises undertaken under the ECHR will not always lead national courts and the Court of Human Rights along the same path.

24.3.4 Whistleblowers

Whistleblowers – people who speak out in the public interest against wrongdoing or malpractice in the workplace – such as Goodwin's source in *X v Morgan Grampian* need to be protected from victimisation by their employers. The Public Interest Disclosure Act 1998, a Private Member's Bill, has recently added a number of rights to employment legislation by preventing employees from being dismissed or made subject to other sanctions for drawing attention to malpractice. The disclosure, however, must be 'reasonable' in the view of the Employment Tribunal (the adjudicative body which deals with employment disputes); and, if the disclosure was in breach of an obligation of confidentiality owed to a third party, the whistleblower is unlikely to be protected under the Act.

In these kinds of cases, it is sometimes difficult to distinguish whether the 'expression' for which protection is sought under Art 10 of the ECHR is the information which is originally leaked or the subsequent publication by the newspaper. As far as European Court of Human Rights case law is concerned, it seems that it is the publication which attracts the protection of Art 10. In *Fressoz and Roire v France* (1999), the applicants were journalist and editor of a newspaper who were convicted of the offence of handling the fruits of a breach of professional confidence. They had published a tax assessment which had been leaked to them by an anonymous source. The details of the assessment were available to the public, although the document itself was not. In ruling that the conviction for handling was a breach of Art 10, the Court observed that 'the purely technical offence of handling photocopies disguised what was really a desire to penalise [the applicant journalists] for publishing the information, although publication in itself was quite lawful'. Therefore, there was no overriding requirement for the information to be protected as confidential and, thus, the convictions could not be justified.

24.3.5 Official Secrets Acts

Another way of protecting sensitive information is by criminalising its disclosure. The main offence of leaking official secrets is contained in the

Official Secrets Act 1989. Whereas its predecessor, the Official Secrets Act 1911, made it an offence to be the recipient of unsolicited information, the 1989 Act only covers the publication by present or former servants of the Crown of information which has come into their possession by virtue of their position, and it is a defence that the informer was under the impression that he or she had lawful authority to pass on that information. Disclosure of material by intelligence officials will be an offence if the disclosure causes 'damage' or is likely to cause damage to the security services – a very broad test. The disclosing civil servant will escape liability if he or she did not know that the material came into any of the forbidden categories, honestly and reasonably believed either that disclosure would not be damaging or that disclosure had been authorised. Any third party who receives and then discloses material covered by the 1989 Act will only be liable if he or she is conscious of the damaging effects of publication, both actual and potential. This 'damage' test does not apply to the disclosure of information relating to the investigation of crime; so the leak by an M15 officer of the contents of a telephone conversation obtained as a result of tapping, to a journalist, will result in criminal liability for them both under the Act even if no harm was intended. The most important shortcoming of the Act is that it provides no public interest defence; any civil servant whistleblowing about what he or she believes to be corruption in high places will not be protected from prosecution.

The Official Secrets Act 1989 is only one of a raft of laws which criminalise the disclosure of information: the White Paper, *Open Government* (Cmd 2290, 1998), noted that some 200 other pieces of legislation restrict the publication of certain types of information. The Official Secrets Act may be combined with other legislation, such as the Security Services Act 1989 or the Interception of Communications Act 1985, to create a zone of secrecy over large tracts of information by making any disclosure a statutory offence.

Although it was noted above that the prosecution of 'leaked' information may be of little use to a government anxious to prevent the information getting out in the first place, an effective measure for stifling information has been found in the combination of criminal liability of members of the security services under s 1 of the 1989 Act and the civil law duty of confidence, explored in another ex-Security Service case, *Attorney General v Blake (Jonathan Cape Ltd)* (1998). The Attorney General applied for an injunction to prevent the defendant, a former spy, from profiting from his memoirs concerning his activities as a double agent. The publication of information obtained in the course of his duties as an SIS officer was a crime under the Official Secrets Act, but, of course, no prosecution could be brought against Blake who was in Moscow when the book was published. The House of Lords upheld the grant of the injunction, even though there had been no continuing duty of confidentiality (the information being already in the public domain). Lord Woolf was at pains to point out that this was not a matter of private law, since

no compensatory or restitutionary remedy would be available to the Crown. This was a matter of legislative policy, that 'a criminal should not be allowed to retain the benefits derived from his crime'. Since the motivation behind many publications is profit related, this decision may cast a chilling an effect on many similar publications.

24.3.6 Broadcasting controls

If a proposed programme is likely to prejudice national security, the Defence and Broadcasting Committee, a joint board of the Ministry of Defence and broadcasters, may issue a 'Defence Advisory Notice' (the so called 'D' notice), requesting the voluntary compliance of the broadcaster to refrain from publishing certain matters which may threaten certain elements of national defence. Ultimate authority rests with the Home Secretary, who has the power under the Broadcasting Act 1990 to issue a notice ordering the holder of a broadcasting licence to broadcast a specific announcement or to refrain from broadcasting something if he considers it is expedient to do so in connection with his offices as Secretary of State. The House of Lords considered the scope of this power and its relationship to Art 10 of the European Convention in *R v Home Secretary ex p Brind* (1991), and rejected the applicants' claim that the Home Secretary had acted unlawfully (see above, 15.5). Although the arguments based on the protection of free expression afforded by the Convention were rejected by the majority, it is unlikely that the applicants would have succeeded even if the Convention had then been part of national law. It must be remembered that the ban did not prevent the broadcasting of the message from members of proscribed organisations; it only prohibited the broadcasting of their voices. The fact that these speeches could be voiced by BBC actors considerably reduced the impact of the ban on freedom of expression. In 1994, the Commission rejected the journalists' complaint that their Art 10 rights had been violated, holding the ban to be proportionate to the aim of combating terrorism (*Brind v UK* (1994)).

24.4 The reputation of others

Article 10 permits restrictions on freedom of expression 'for the protection of the reputation or the rights of others'. This category, therefore, legitimises, to a certain extent, the law of defamation, which, in this country, is designed to protect the reputations of individuals and companies from unjustified allegations which tend to 'lower them in the estimation of right thinking members of society'.

Civil libel

In English law, the defamatory statement in question may be one of fact or opinion. Once this is established, the burden then shifts to the defendant, who

may seek to justify the statement he has made, in other words, prove the truth of the allegation. If the report was a fair and accurate coverage of court or parliamentary proceedings, it would be covered by absolute privilege. If the statement was of an opinion only, the defence of 'fair comment' may be available, provided the defendant is able to establish that the views could honestly have been held by a fair minded person on facts known at the time. It is not always easy to distinguish between fact and opinion: the test is one for ordinary readers. The question is whether they, on reading or hearing the words complained of, say to themselves, 'this is an opinion' or 'so that is the fact of the matter'? Such a conclusion may be inferred from a piece of writing which contains words like 'it seems to me' or 'in my judgment'. The difficulty of distinguishing between assertions of fact and opinion and the consequences, in terms of the available defences, makes the law of libel particularly hazardous to those wishing to air information that cannot readily be justified.

Another defence is available under statute (Defamation Act 1952), which allows the defendant to plead that the statement was 'fair comment' in the public interest. The defendant may also argue that the statement is covered by 'qualified privilege', which only applies where the publisher has a specific duty in communicating the words to another party who has a specific interest in receiving them, such as the communication of a public grievance to the proper authorities. There is a long established rule of the English common law that 'qualified privilege' does not extend to press reports of matters in the public interest (*Adam v Ward* (1917)), although it has been argued that the public's legitimate interest in the functions and powers vested in public representatives should bring the communication of this kind of information under the protection of qualified privilege (see Loveland, I, 'Political libels and qualified privilege – a British solution to a British problem' [1997] PL 428). It has been contended recently, in the Court of Appeal, that New Zealand and Australian precedents in this area should be persuasive authority for the adoption by the courts in this country of a defence of qualified privilege for all reports concerning the activities of an elected politician, when the words complained about related to his conduct in his public role *(Reynolds v Times Newspapers and Others* (1998)). The court, however, refused to follow the New Zealand and Australian precedents, observing that the conduct of those engaged in public life should not be the subject of factually untrue defamatory statements 'unless the circumstances of the publication were such as to make it proper, in the public interest, to afford the publisher immunity from liability in the absence of malice'.

The reasonableness of the defendant's conduct will thus be scrutinised before the defence of qualified privilege will be allowed and, therefore, no newspaper editor can be sure that his publication will be protected. It is debatable whether the continued 'chilling effect' caused by the uncertainty in the law of qualified privilege breaches Art 10. We have seen that the European

Court of Human Rights affords considerable protection to those who criticise politicians and other public figures, and it is increasingly the case that justifications, such as preserving the impartiality of the judiciary, that used to prevail (*Barfod v Denmark* (1991)) no longer legitimise the imposition of sanctions for criticisms of public figures, no matter how gratuitous or personal (*De Haes and Gijsels v Belgium* (1998)). However, the *Reynolds* case involves a conflict between freedom of expression and an important countervailing right – the right of the claimant to a fair trial in defamation proceedings. If qualified privilege were to apply to all political speech, this would impose an effective bar to defamation actions taken by all political claimants. This would present an impermissible restriction on those individuals' rights of access to court guaranteed by Art 6 of the ECHR. It is unlikely, therefore, that the incorporation of Art 10 in national law and the influence of European Court of Human Rights case law in this area will make any significant changes to the current limitations on qualified privilege.

In any event, not all criticism of figures in public life attracts the overriding protection of Art 10. In *Janowski v Poland* (1999), the court considered a challenge under Art 10 to a provision of national law which made it an offence to insult civil servants whilst acting in the execution of their duty. In considering whether the penalty offended the requirement of proportionality, the court held that the applicant's remarks to the civil servants in question, calling them 'oafs' and 'dumb', did not constitute criticism that should be protected by Art 10, since they did not form part of an open discussion of matters of public concern. The court also rejected the Commission's finding that civil servants acting in an official capacity should be subject to wider limits of acceptable criticism.

Whatever the outcome of the current litigation on qualified privilege, it remains the case that the low threshold for liability for libel and the limited nature of the defences available has given the UK a certain notoriety for its draconian libel laws. In most actions for damages in tort, the claimant has the burden not only of proving that he suffered the injury but that it was caused by the fault of the defendant; in other words, that his action was unreasonable. Libel claimants – if they can afford it, since there is no legal aid for defamation – can launch a court case against a defendant on the simple allegation that what the defendant said was damaging to them. There has been one important decision limiting the threat that libel actions pose to political speech: in *Derbyshire County Council v Times Newspapers Ltd* (1993), the House of Lords held that local authorities and government departments could not sue for defamation, although individual ministers can and do frequently. Despite the fact that the *Derbyshire* principle is being extended by judges to non-statutory entities – in G*oldsmith v Bhoyrul* (1998), a political party was prevented from bringing a libel action - there has not yet been an attempt to apply the principle to individual politicians. This contrasts with the position in the US, where politicians may only sue for libel if they can prove that the

defendant has acted maliciously or recklessly (*New York Times v Sullivan* (1964)) (for further comment on this issue, see Loveland, I, 'Defamation of government: taking lessons from America?' (1994) LS 206).

Remedies for libel also pose a threat to freedom of expression. Interim remedies are not a problem. The courts, in this country, do not generally grant interim injunctions to prevent allegedly libellous articles from being published if the defendant intends to justify the content of the article at trial. Such remedies would impose too chilling an effect on the defendant's right of free speech to be justified by the interests of the administration of justice. The real issue arises out of the damages awards made at the end of successful actions. These are designed not only to compensate the claimant for the injury to his or her reputation but also to deter others from publishing similarly unjustified allegations. The jury decides the amount of the award, but, fortunately for libel defendants and free speech in general, the figure reached by the jury is now subject to assessment by the Court of Appeal. The power of the Court of Appeal to set aside jury awards on the grounds that they are excessive (or inadequate) was introduced by legislation passed in response to an appeal against a jury award of £250,000 in *Rantzen v Mirror Group Newspapers* (1993). The magnitude of jury awards in this country was held to be a violation of Art 10 by the Court of Human Rights in *Tolstoy Miloslavsky v UK* (1995).

The restrictive effect of libel laws in this country has been demonstrated recently by the epic '*McLibel*' trial, in which two indigent defendants spent three years defending a defamation action taken against them by a fast food multinational in respect of a series of allegations they had made – ranging from environmental degradation to cruelty to animals (*McDonald's Corporation v Steel and Morris* (1997)). The corporation had nothing to gain financially from the action since no damages would have been forthcoming, but they were determined that the two could not take advantage of the court case as an inquiry into allegedly iniquitous practices by multinationals. The claimants persuaded the judge that the issues involved in the justification defence would be too complex for a jury to comprehend and, therefore, the defendants were deprived of their chance of convincing a jury of the truth of their allegations. It was noted, during the course of the case, that juries in the Old Bailey were hearing cases of infinitely greater complexity in fraud trials. The claimant corporation ultimately won its action against the defendants, the judge finding, on balance, that the truth of the allegations had not been established. In general, the case demonstrated that the trap of litigation lies open for the unwary campaigner. Whilst it is commendable that libel laws force one to check one's facts before opening one's mouth, it does also mean that most small publishers will simply not consider it worth pursuing speculative claims of wrongdoing and will drop the controversial issue in order to publish some safe story instead. Aspects of the *McLibel* case are currently under consideration by the Strasbourg authorities – a challenge which brings the most important features of civil libel law under scrutiny.

Whatever the outcome, this litigation has, in David Pannick QC's words 'achieved what many lawyers thought impossible: to lower further the reputation of our law of defamation in the minds of all right thinking people' ((1999) *The Times*, 20 April).

Criminal libel

Although the offence of criminal libel is very rarely invoked in England and Wales, it still forms an important part of the national laws of other States which are parties to the ECHR. The Court of Human Rights has, on a number of occasions, considered the conformity of criminal libel with Art 10. In *Lingens v Austria* (1986), the applicant was prosecuted under a section of the Austrian Code which made it a criminal offence, punishable by imprisonment, to defame someone. The applicant had allegedly committed this offence by accusing the Austrian Chancellor of minimising Nazi atrocities in the Second World War. The only way the applicant could escape criminal liability was by justifying his statement. The Court of Human Rights ruled that the relevant Article in the Austrian Criminal Code, which was no doubt legitimate within Art 10(2), since it sought to protect the reputation of others, was not a necessary measure in a democratic society for achieving that purpose. The Court was of the view that is unacceptable to impose criminal proceedings for value judgments, the truth of which cannot be proved without a great deal of difficulty.

24.5 The rights of others

This exception to free speech rights in Art 10 has been relied upon to support measures criminalising certain forms of expression that cause offence to others. The common law offence of blasphemy is an example of this. In England and Wales, the common law prohibits forms of expression that cause offence to practising Christians. In *Chief Metropolitan Stipendiary Magistrate ex p Choudhury* (1991), Muslim critics of Salman Rushdie's novel, *The Satanic Verses*, applied for judicial review of the magistrates' decision not to prosecute the author. The court ruled that the law on blasphemy did not extend to the protection of other religions. It has been argued that this is anomalous in a multicultural society and that the law on blasphemy should either be extended to all religions or abolished altogether. The applicants in *Choudhury* complained that the English common law on blasphemy breached the rights of Muslims to freedom of religious thought under Art 9, but the Commission rejected their claim because the publication posed no threat to the applicants' religious freedom (*Choudhury v UK* (1990)). The Court of Human Rights has taken the approach that a wide margin of discretion operates in the area of blasphemy law and it therefore tends not to interfere with signatory Sates' laws protecting religious sensibilities (see *Otto Preminger Institut v Austria* (1995), where forfeiture of a film containing material offensive to Roman

Catholics was held to be justified on the basis of the high proportion of Roman Catholics living in the area of its distribution). In *Wingrove v UK* (1995), the applicant, the director of an 18 minute video depicting a 16th century nun engaged in erotic activity with the crucified figure of Christ, complained that the refusal by the British authorities to classify his work on the ground that the video infringed the criminal law of blasphemy was a breach of her Art 10 rights. However, the court held that the interference was 'prescribed by law' under Art 10(2) and that it pursued the legitimate aim of protecting the 'rights of others'. Some commentators have expressed disappointment that the court was prepared to find that the notoriously vague and ill defined common law offence of blasphemy has been considered to meet the standards set by the 'prescribed by law' requirement in the ECHR.

There is considerable uncertainty over whether the protection of the rights of others may also protect provisions outlawing race hate speech from attack under Art 10. In the UK, there are certain restrictions on this category of expression, although their compatability with Art 10 has not yet been tested. Under the Public Order Act 1986 (ss 17–19), speech which is likely to incite racial hatred is prohibited, not merely when it is likely to lead to violence, but where the defendant is aware that the words are abusive, threatening or insulting. The offence of inciting racial hatred may also be committed by the transmission of television or radio programmes (s 164 of the Broadcasting Act 1990).The rationale for this legislative curtailment of free speech is that ethnic minority groups should be protected from racial insults. It is not necessary to prove, in establishing the offence under any of these acts, the intent to stir up racial hatred, merely the 'likelihood' of such a thing happening. Although, in theory, the law represents a serious threat to freedom of speech, in practice, very few prosecutions for this offence are followed through.

The laws on race hate speech may be contrasted, on the one hand, with those in the US, which permits no restrictions of freedom of expression unless there is some compelling necessity, not just official or majority disapproval, for imposing those restrictions; and Germany and France, on the other, where laws have been passed criminalising Holocaust denial. The United Nations Human Rights Committee has considered and rejected a complaint that such a law interfered with the right to freedom of expression protected by Art 19 of the International Covenant on Civil and Political Rights (*Faurisson v France* (1997)). Whilst there are ample policy reasons for prohibiting race hate speech, such a prohibition is much more difficult to justify in principle. Once a government legislates to prevent expression on the basis of its content, however offensive, there is no reason in logic or law why all types of expression should not be censored.

This is a notoriously difficult area of free speech jurisprudence and, until recently, there has been very little case law from the European Court of Human Rights to provide guidance for the national courts. Two recent developments, however, illustrate the approach of the Court to this issue. In

Lehideux and Isorni v France (1998), the applicants were prosecuted for writing and publishing an article in a national newspaper in support of the memory of Marshal Petain, convicted and executed for collaboration in 1945. They were convicted of making a public defence of the crimes of collaboration. The applicants claimed that they had been denied their rights of freedom of expression under Art 10. In response to this, the French Government argued that the publication in issue infringed the very spirit of the Convention and the essential values of democracy enshrined in it and, therefore, that the applicants were debarred from relying on the ECHR. They relied, further, on Art 17 of the ECHR which provides that the ECHR could not called in aid to support any activity 'aimed at the destruction of any of the rights and freedoms' that it sets forth. The Court rejected the State's argument, since it found nothing in the applicants' advertisement that was specifically directed against the Convention's underlying values; they were praising a man, not a policy. The convictions were, therefore, held to be a disproportionate interference with Art 10.

In *Jersild v Denmark* (1995), the Court distinguished between the making of racist statements and reports and debates about them. In this case, a journalist had made a documentary for broadcast which included racist remarks by youths. He was convicted by the Danish authorities for assisting in the dissemination of race hate. The Court held that the conviction infringed Art 10 because it was disproportionate to the aim of protecting the rights and freedoms of others. It was significant that the Court stressed the news value of the information in the contested programme; bare racist statements do not, by themselves, attract the protection of Art 10 (*X v FRG* (1982)) in which a complaint that suppression of Nazi pamphlets infringed the freedom of speech provision was declared manifestly ill founded by the Commission).

Finally, the 'rights of others' have been given a generous interpretation by the Court of Human Rights in the area of commercial speech. While the highest degree of protection under Art 10 is generally accorded to political speech, the court has, on several occasions, considered the right to freedom of commercial expression and has held that it comes within Art 10 (*Marktintern v Germany* (1990)). Here, the injunctions issued under unfair competition regulations in Germany prevented a small traders' magazine from publishing articles making critical comments about a competing company. These were held by the court to pursue the legitimate aim of protecting the 'rights of others' under Art 10(2). It can be seen from this ruling that the court takes a very different approach to the 'rights of others' when the expression in issue is commercial speech rather than political discussion; respondent States' reliance on the 'rights of others' by way of justifying their defamation laws is very rarely successful in the Court of Human Rights (*Lingens v Austria* (1986)). This difference in approach may be justified by the central democratic role of political speech; nevertheless, in respect to the *Marktintern* decision, it is debatable whether the permissible restriction on the freedom under Art 10 for

measures aimed at protecting the 'rights and reputation of others' was really designed to protect business interests.

The European Court of Human Rights does not always defer to the complexities of unfair competition, as was demonstrated in the case of *Hertel v Switzerland* (1998). The applicant, who had written and published articles suggesting that the use of microwave ovens was hazardous to human health, submitted that a ban subsequently imposed upon him by the Swiss courts under the unfair competition rules, at the behest of an association of oven manufacturers, infringed Art 10. The provisions of the Unfair Competition Act covered the activities, not only of economic agents, but of non-market players such as the applicant, whose activities affected relations between competitors. While acknowledging that there was a considerable margin of appreciation involved in determining the compatibility of competition rules with the ECHR, given the fluctuating nature of the market, the Court of Human Rights took special note of the importance of the contribution by the applicant to the continuing public debate on the safety of microwave ovens. In the light of this, his articles attracted a higher level of protection than the purely commercial expression at issue in *Marktintern*. The injunction was, therefore, considered a disproportionate interference with his rights under Art 10.

24.6 Protection of health or morals

This is another area in which the Court of Human Rights allows signatory States a wide margin of discretion. This exception has usually been considered in relation to signatory States' laws on obscenity. The main provisions in this area in the UK are to be found in the Obscene Publications Act 1959, which makes it a criminal offence to publish, sell or keep materials which may 'deprave or corrupt'. This test extends beyond sexual activity to other conduct generally disapproved of in society, such as drug taking. The applicability of the test depends upon the likely audience for the publication; habitual customers of pornography are less likely to be depraved and corrupted than young children. The Act provides a defence of 'artistic merit' or 'public good', evidence of which can be balanced against the depraving effect of the material. This test has been criticised as putting the jury in the impossible position of weighing up these incompatible and disparate concepts (Robertson, G, *Obscenity*, 1979, London: Weidenfeld & Nicolson, p 164).

A number of statutes criminalise the use of 'indecent' language or material, ranging from the prohibition on indecent photographs of children under the Children Act 1978, to the power of customs officials to seize indecent literature in luggage under the Customs and Excise Management Act. It is also possible for prosecutions to be brought for indecency under the common law and conspiracy to corrupt morals also provides a wide ground for punishing immoral conduct. There is no defence of public good or artistic merit to these common law offences, so the artist who displayed a human

head wearing freeze dried embryos as earrings was convicted (*R v Gibson* (1990)). These offences, like many features of the common law, have ancient and rather enlightening origins:

> The crime of corrupting public morals had been created by the King's judges in 1663 to punish the drunken poet Sir Charles Sedley for urinating from a Covent Garden balcony over a crowd below. The law reports, the last to be written in Norman French, are not unanimous on the nature of Sir Charles's momentous act. One contemporary translation has him 'inflamed by strong liquors, throwing down bottles, piss'd in', whilst another avers that 'pulling down his breeches, he excrementaliz'd into the street' [Robertson, G, *The Justice Game*, 1998, London: Chatto & Windus, p 14].

Sedley did not claim any artistic merit in his performance and was heavily fined for his conduct.

Approach of the European Court of Human Rights

Although national obscenity laws have been challenged under Art 10, the Court of Human Rights has been prepared to accept the legitimacy of signatory States' measures in this area since it accords a wide margin of appreciation to signatory States to determine the best measures for protecting morality (*Handyside v UK* (1979)). This cautious approach by the court has been explained in the case of *Muller and Others v Switzerland* (1991). The applicants claimed that the forfeiture of several sexually explicit paintings and the fines that had been imposed on them for exhibiting obscene material violated their rights under Art 10. The Court upheld the State's argument that the measures were justified in the interests of protecting morals, observing that:

> By reason of their direct and continuous contact with the vital forces of these countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the 'necessity' of a restriction or 'penalty' intended to meet them.

This decision appears to impose a heavy burden on artists to observe the 'duties' and 'responsibilities' (which condition the enjoyment of freedom of expression) by avoiding gratuitous offence to the public. Since this is a highly subjective matter, it is debatable whether the national authorities' view is always going to be justifiable; indeed, in the *Otto Preminger* blasphemy case, which also addressed the issue of gratuitous offence, the Commission and the Court of Human Rights reached directly opposing views (see above, 24.5).

In any event, signatory States must ensure that any restrictions on Art 10 rights are clear and accessible. In the *Open Door Counselling* case (see 20.7), concerning a complaint by the applicants that their prosecution under the Irish Constitutional provision on the sanctity of life, for providing 'non-directional abortion counselling', breached their Art 10 rights, the Court of

Human Rights did not consider this to be a justifiable interference under Art 10(2). Whilst the interference was, on the *Handyside* principle, in pursuit of a legitimate aim – the protection of morals – it failed the certainty test. Given that travel abroad was not illegal in Ireland, the counsellors could not have foreseen that they were committing a constitutional tort and, therefore, the interference with their freedom of expression did not properly fulfil the requirements of Art 10(2) that it should be 'prescribed by law'.

Approach of the European Court of Justice

The European Court of Human Rights decided this case after the European Court of Justice had rejected a similar claim in Case C-159/90 *SPUC v Grogan* (1991). This decision provides an illustration of the unreliability of Community law as a vehicle for the protection of fundamental human rights (rather than economic rights) (see above, 19.4). Here, the applicants were student groups against whom an injunction had been issued to stop them disseminating information about abortion clinics in England. They brought a claim in respect of their Community rights to provide services which, they claimed, had been breached by the Irish authorities. In his opinion preceding the court's decision, the Advocate General concluded that the prohibition on the provision of information in Ireland about abortion facilities in other Member States could be tested for compliance with the ECHR right to freedom of information and expression. However, the Court of Justice held that the provision of information and the abortion clinics themselves were not sufficiently connected to come within the freedom of services provisions of the EC Treaty and, therefore, they failed on the merits. By deciding against the applicants on the facts, the Court avoided what could have been a very controversial judgment upholding a fundamental Treaty provision over an Irish constitutional provision of fundamental importance. Had British abortion clinics sought to advertise in Ireland in contravention of Irish law, it would have been less easy for the Court of Justice to avoid this difficult decision on the basis of 'insufficient link'.

In considering the approach of the Court of Justice to Art 10 issues, it has to be remembered that EC law is aimed primarily at protecting commercial interests, not the incidental rights that arise from commercial freedoms. As long as the principle of freedom of expression is part of one of the 'four freedoms' protected by the EC Treaty (see above, 7.2.1), it is likely to win the day, as illustrated by the ruling on the ability of Member States to derogate from the free movement provisions in Case C-121/85 *Conegate Ltd v Customs and Excise Comrs* (1987). In 1986, English customs officials had the power to seize items which they deemed to be 'indecent or obscene' under the Obscene Publications Act. This prejudiced the right of producers of pornographic material abroad, where there were fewer restrictions, to sell their goods across boundaries. When the actions of the customs officials were challenged under Art 30 (now 28) of the EC Treaty, the Court of Justice found the UK to be in

breach of the EC Treaty, and required that customs officials only had the power to seize 'obscene' items.

24.7 Media regulation

This is an interference with freedom of expression permitted by the first part of Art 10(1) . States may licence broadcasting, television or cinema enterprises without falling foul of the main right protected by the Article. Such measures have been scrutinised by the European Court of Human Rights in the same way as it approaches the permitted interferences in Art 10(2). In *Informationsverein Lentia v Austria* (1994), a network of local broadcasters and advertisers who had been refused a licence challenged the State's monopoly over broadcasting licences. Austria argued that this was a justifiable limitation under Art 10, since it enabled it to control the quality and balance of programming. But the Court ruled that total State monopoly over broadcasting could not be justified, given the co-existence in many signatory States of private and public broadcasters.

The licensing of media outlets has also come up for consideration by the European Court of Justice in relation to Art 10 of the ECHR; indeed, one of the most important statements by the Court of Justice on the role of Convention rights in the interpretation of Community law was made in the context of a freedom of expression case, Case C-260/89 *ERT v DEP*, which concerned the establishment by the Greek Government of a monopoly broadcaster. The Court of Justice held that this was contrary to Art 59 (now 49: freedom to provide services) and the Greek Government's reliance on the derogation provisions in the EC Treaty had to be interpreted in the light of the freedom of expression protected by Art 10 of the ECHR. In this case, the right under Art 10 was said to outweigh the Greek Government's interests in regulating broadcasting.

At a national level in the UK, regulation of film and the broadcast media is much stricter than that governing the printed press, which is self-regulating. The Press Complaints Commission adjudicates on the compliance by newspapers with their own Code of Practice laying down standards of taste and decency. It has no powers of enforcement or sanction and cannot require a newspaper to publish a reply by an individual aggrieved by an article it has published. Although, in principle, an individual may apply for judicial review of the Commission's decision not to take action in respect of a particular publication, the courts have signalled their reluctance to interfere in the exercise of the Commission's discretion in this area (*R v Press Complaints Commission ex p Stewart-Brady* (1997)).

The broadcast media is governed by the standards laid down in the BBC Charter and ss 6 and 152 of the Broadcasting Act 1990 (which applies to the independent sector). The Broadcasting Complaints Council, set up under the

Broadcasting Act, hears complaints on programmes and publishes its adjudications, and the Broadcasting Standards Council considers complaints relating to taste and decency, level of violence or sexual activity in the programmes broadcast. The Independent Television Commission and the Broadcasting Complaints Commission consider complaints by people and parties who allege unfair treatment or invasions of privacy by radio or television broadcasters.

The system of licensing exercised by the Government over the BBC and the Independent Television Commission over broadcasters other than the BBC has been set up to ensure that no broadcast will be permitted that will 'offend against good taste and decency' (s 6(1)(a) of the Broadcasting Act 1990). Codes on decency have been drawn up which are monitored by the Broadcasting Complaints Commission and the ITC. Difficult problems arise in relation to the regulation of non-terrestrial broadcasting, such as satellite television, particularly from other European Union Member States, since Community law requires that television services should be freely received across borders. Similar concerns have been expressed in relation to pornography published on the Internet, because, although it is covered by the Obscene Publications Act, it is, in practice, impossible to impose sanctions on remote service providers

Films and videos are regulated by the powers of the British Board of Film Classification (BBFC), which grants certificates to films and videos. The BBFC is a non-statutory organisation and, even if it does decide to issue a certificate, a local authority has the power under the Cinemas Act 1985 to refuse to issue a licence. This happened in the case of the controversial film *Crash* by David Cronenberg, which was refused a licence in 1997 by Westminster City Council despite having been certified by the BBFC.

24.8 Access to information

The right of individuals to receive information is a corollary to their right to impart it. However, the dissemination of information, statistics and ideas requires positive steps to be taken by States, a requirement which international law does not readily impose.

24.8.1 Access to information under the ECHR

The right to freedom of expression under Art 10 includes the freedom to 'receive ... information without interference by public authority'. Whether this right extends to an obligation on governments to provide information has not been settled in Strasbourg. In *Guerra v Italy* (1998), the European Court of Human Rights indicated that Art 10(2) may prevent a government from restricting the dissemination of otherwise open information, but does not extend so far as to require the State to make positive steps to collate and disseminate information.

Apart from the rather limited provisions of Art 10, there is, as yet, no general right to information in English law. There is, instead, a haphazard collection of statutory provisions dealing with limited categories of information and providing a right of access or a duty to publicise. The Citizen's Charter grants individuals a limited right of access to records and imposes an obligation on public service providers to publish full and accurate information on how they are run. The 1997 Code of Practice on Access to Government Information places a non-binding obligation on government departments to release certain types of information relating to their policies. There is also a limited right to environmental information in certain regulations implementing European Directives on environmental matters.

In 1999, the Labour Government published a draft Freedom of Information Bill, giving individuals a legally enforceable right to information held by most public authorities in England and Wales. An independent Information Commissioner, answerable to the courts, will be appointed to monitor compliance with the Act and handle appeals against refusals to disclose information. The Act will cover some private organisations carrying out duties on behalf of the Government and privatised utilities. However, the proposed Act limits access to certain types of information, such as sensitive security or intelligence matters, or information which would undermine crime prevention or prosecution. In addition, information can be withheld if disclosure would cause substantial harm to a range of protected interests, such as national security, safety of individuals and the environment, trade secrets and law enforcement. This broad range of exceptions raises the question of whether the public's access to information will, in fact, be enhanced in any real fashion if the Bill becomes law. After all, most of the major cases over information have been fought and lost on the battlegrounds of national security and trade secrets already. At least, however, there will be a presumption in favour of information, rather than the present patchwork of limited legislation and non-binding codes.

24.8.2 Access to information in the European Community

Because of the increasing impact of Community law on domestic legislation, freedom of information about the deliberations of Community institutions that lead to the formulation of Community laws is, or should be, a central condition of Brussels legitimacy. The Council has issued a declaration on access to information which states that 'The Conference considers that the openness of the decision making process strengthens the democratic nature of the institutions and the public's confidence in the administration' and, in Case C-58/94 *Netherlands v Council* (1996). Advocate General Teaser said in his Opinion that 'the right of access to information is increasingly clearly a fundamental civil right'. There has been much criticism of the 'closed door'

nature of Council deliberations and the lack of transparency in the comitology system (see above, 8.2.6) has also come under attack. It has been observed by critics that even the European Parliament does not know how many Management Committees there are, and the recent report by the Committee of Experts on the mismanagement of Commission business revealed practices that have diverted some of the Commission's £65 million a year budget into the pockets of corrupt officials (see above, 7.5.1). The new Commission will, no doubt, be under heavier obligations of transparency and accountability. As far as the Community as a whole is concerned, the EC Treaty, after the Amsterdam revisions, now contains a right of access to European Parliament, Council and Commission documents (Art 255). Freedom of information at a Community level is, however, not going to be solved by the promulgation of more rules; it is primarily a political, rather than a legal matter.

24.9 Assessment

The area of law most in need of amendment – and one least likely to be affected by the incorporation of the ECHR protection of free speech into national law – is defamation. As Geoffrey Robertson observes:

> Today, London is the libel capital of the world. Foreign claimants prefer to sue in this country, because the law favours them more than anywhere else. Tax-free damages awarded in cases which actually come to court are just the tip of a legal iceberg which deep freezes large chunks of interesting news and comment, especially about wealthy people and companies which have a reputation for issuing writs [Robertson, G, *Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin, p 317].

A number of committees have recommended, over the years, that libel laws in this country be reformed by incorporating the defence of innocent publication and providing a level of reporting and broadcasting privilege to the media (see, for example, the Faulkes Report, Cmnd 5909, 1975). However, these recommendations have never been taken up by the legislature. There is another solution to this problem – a judicial one. The ECHR, although primarily enforceable only against public authorities, may have a horizontal effect that would influence the common law on defamation (see above, 19.9). Under s 3 of the Human Rights Act 1998, judges are required to read primary legislation 'in a way which is compatible with the Convention rights'. Section 6 makes it 'unlawful' for a public authority to act in a way which is incompatible with Convention rights, and 'public authority' includes a court. It is suggested that the combination of these two provisions may oblige a court to interpret the common law liability for defamation more restrictively to comply with Art 10. We have seen above, 24.4, that the *Derbyshire* case provides a precedent for this approach: public bodies, such as local authorities, should not be able to bring defamation proceedings, since such a

power would impose too great a restriction on press debates on matters of legitimate public interest. The same approach should be possible even in proceedings where the parties themselves are private and the only 'public authority' involved is the court itself. This would open the way to the judicial application of Court of Human Rights case law under s 2(1)(a) of the Human Rights Act to the law of defamation, in particular, the pronouncement by the European Court of Human Rights in *Thorgierson v Iceland* (1992) that publishers are protected by Art 10 so long as their claims are based on public opinion, do not disparage specific named individuals and are primarily intended to promote a positive aim, such as institutional reform.

Another area of the law which still presents a threat to freedom of expression is the common law offence of contempt of court. As described above (see above, 24.3.2), this has been interpreted to cover contempts where no litigation is pending or even imminent. The time is ripe for a definitive ruling that liability in these cases should only arise when proceedings are about to take place, in circumstances where protection is truly necessary.

FREEDOM OF EXPRESSION

Freedom of expression is a fundamental right in a democracy; it keeps clear the channels of dissent and allows individuals freedom of choice to decide for themselves what is offensive and inoffensive. Freedom of speech was accorded special status in English law even before incorporation of the ECHR, with some judges referring to it as a 'constitutional right'.

Article 10 of the ECHR protects the right to freedom of expression, which includes the right to receive and impart information, subject to a number of restrictions.

At a Community level, any interference with the free movement of goods will be a breach of the EC Treaty; the protection afforded to this freedom sometimes has the incidental effect of protecting certain types of expression. In addition, freedom of expression, like all the other rights in the ECHR, is included in the Court of Justice's general principles of law which are to be applied in assessing the legality of Member States' actions.

National security and the impartiality of the judiciary

The common law of confidence has been combined with the criminal laws on official secrets to prevent the disclosure of certain types of information relating to national security. It is also possible to restrain publication of information in the course of litigation in order to preserve the impartiality of the judiciary. The law of contempt of court covers any publication that is likely to prejudice proceedings, subject to the defence of public interest. The Contempt of Court Act only covers active proceedings, but the common law offence of contempt of court may be made out where the contempt is intentional and proceedings are not actually active or even pending, provided they are imminent. The Contempt of Court Act prevents contempt proceedings being taken against anyone who refuses to disclose the source of their information, subject to certain exceptions, such as the prevention of crime and national security.

The broadcasting of information relating to national security is subject to voluntary compliance by the media with 'D' notices issued by the Defence and Broadcasting Committee. In addition, The Home Secretary has the power under the Broadcasting Act to prohibit the broadcasting of 'any matter'. The use of this power to prevent the direct broadcast of the voices of members of prohibited organisations in Northern Ireland was upheld in a judicial review challenge in 1991 (*R v Home Secretary ex p Brind* (1991)); such a decision might not survive attack today under the incorporated Art 10 of the ECHR.

The reputation of others

Defamation laws which restrict freedom of expression are permitted by Art 10. However, England has some of the most oppressive libel laws in the world. Defendants have the burden of proving that they are not at fault, instead of the claimant proving fault or unreasonableness (as with all other tort actions). Cases are heard by juries who, until recently, have had unlimited power to award astronomical damages. Although local authorities and government departments may not sue in defamation, a range of other public officers, such as the police and government ministers, may stifle criticism through the libel courts. On the other side of the equation, a number of defences are available to defendants and the Court of Appeal now has the power to limit the jury award to reasonable levels.

Although Art 10 permits defamation laws in order to protect the rights and reputations of others, these measures must not be disproportionate; in other words, Art 10(2) does not extend to criminal sanctions for the expression of defamatory opinions.

The rights of others

Certain statutes prohibit the use of speech inciting race hatred and likely to lead to violence, although very few prosecutions are brought under these provisions. European Court of Human Rights case law indicates that such laws will survive challenge under Art 10. The law on blasphemy criminalises any forms of expression which cause offence to practising Christians; this has also been justified successfully under Art 10.

Protection of health or morals

Censorship of printed material is governed by the Obscene Publications Act 1959, for which there is a defence of artistic merit and public good. A number of common law offences of indecency and conspiracy to commit indecency also restrict certain types of expression and, here, no such defences are available. Films, broadcasting and videos are subject to stricter censorship, in the form of licensing which allows for prior restraint. The Court of Human Rights has accorded Member States a wide margin of discretion in the area of morality, since there is relatively little consensus on these issues amongst Member States.

There are a number of statutory agencies which regulate the content and balance of the programmes put out by the broadcast media. The press is governed by a less powerful self-regulating body, the Press Complaints Commission.

Access to information

This is a negative right under Art 10; in other words, governments are required not to put obstacles in the way of access to information already available. However, in the UK, there are proposals to bring in a Freedom of Information Act, which will create a presumption in favour of information from most public authorities, subject to a number of limited exceptions.