



Marcel Berlins

Law on trial: Free expression

More equal than others

Marcel Berlins takes a closer look at the UK's relationship with freedom of expression, both at government and judicial level and looks at recent high-profile British court cases that concerned freedom of expression versus the right to privacy – or right to fair trial issues. In such cases, which right has to yield?

It goes without saying that the ultimate human right is the right to live. The unjustified taking of a human life by the state or one of its satellite institutions stands alone as an act of ultimate international banditry. It acts as a sure measurement of a nation's wickedness. But if that human right stands alone in terms of its possible brutal finality, the right to freedom of expression stands with it as a mark of a state's civilised behaviour. Or, to put it more crudely, as a gauge that distinguishes democracies from dictatorships and totalitarian regimes. No other in the growing family of human rights possesses such influence and importance.

"Give me liberty to know, to utter, and to argue freely according to conscience, above all liberties", the poet John Milton wrote in 1664, in his *Areopagitica*. Voltaire is believed to have offered to defend to the death a person's right to say something with which he disagreed; there's no evidence he did speak those words, but the sentiment gives freedom of expression its due significance. Over the course of history, many have, indeed, died defending their own, or others', right to speak out.

The writer Junius put the pre-eminence of freedom of expression thus in 1772: "The liberty of the press is the Palladium of all the civil, political and religious rights of an Englishman." Not long afterwards that view was confirmed by a great dictator. "If I were to give liberty to the press, my power would not last three days," Napoleon remarked.

Freedom of expression is a rambling sort of right, imprecise and impossible to define neatly. It includes, most importantly, freedom of the press, but its ambit encompasses also the individual's right to free speech. We tend to think of freedom of expression mainly in terms of the right to criticise authority or reveal iniquity and malpractice, but it includes too – though not unlimitedly – the creation of works of art or literature without censorship, a system of open justice "seen to be done" and the protection of journalists' sources. In Britain, it affects profoundly the laws on defamation, contempt of court, copyright, breach of confidence and privacy.

It's not easy to draw up a balance sheet that tells us, simply, whether this government is sound on freedom of expression or these judges have clearly

upheld the right – or diminished it. But the passing of the watershed Human Rights Act 1998 allows us to assess whether the judges' approach to freedom of expression has changed, whether there is a new judicial spirit abroad making Britain a country in which free speech and freedom of the press flourish with an added enthusiasm.

The problem with the Human Rights Act is that it's been hugely oversold. In one sense, by incorporating the European Convention on Human Rights into our national law, it did little more than change the setting in which Britain's adherence to a human rights regime operated. British citizens, instead of having to take the elaborate, expensive and lengthy (six years was commonplace) path to the European Court of Human Rights in Strasbourg to have the wrongs done to them righted, can now approach the national courts directly and quickly. But the content of the human rights package remains broadly the same.

The UK was not just a signatory of the ECHR in 1952, but one of its principal drafters. Article 10, the freedom of expression provision, has not changed in the half century since it first appeared. For all that time, and not just since the Human Rights Act, judges were supposed to be giving effect to it.

Article 10 starts promisingly:

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.

But what the law giveth, the law taketh away. Here come the exceptions:

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.

Article 10 (2)

Not much that could become a potential exception to the exercise of freedom of expression is omitted. Every part of that sentence opens up the potential clash between freedom of expression and every other right guaranteed by the Convention. Nowhere does Article 10 say that freedom of expression is somehow to be given greater importance than any other rights listed in the Convention. Yet over the years, it stealthily acquired such a status, one that the Human Rights Act has now enhanced.

In practice, in the past, the UK's relationship with freedom of expression, both at government and judicial level, was one of grudging and reluctant acceptance of the European Court of Human Rights' judgements, though some English judges were more dedicated than others in following Strasbourg principles – including the apparent supremacy of freedom of expression over other rights. In 1994, the appeal court judge Lord Justice Hoffmann said: "It cannot be too strongly emphasised that outside the established exceptions, or any new ones

that parliament may enact in accordance with its obligations under the Convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins."

Hoffmann's card-game analogy has resulted in a controversy that still continues and is at the crux of the question: Is freedom of expression a superior right? Enter the home secretary Jack Straw, in charge of piloting the 1998 Human Rights Act through Parliament. Following weeks of pressure from media interests, he announces that freedom of expression is indeed going to get special treatment.

Section 12 of the Act suddenly creates an Orwellian concept. All rights are equal but freedom of expression is more equal than others: "The court must have particular regard to the importance of the Convention right to freedom of expression." The section lays down the tests a judge must apply before granting an injunction stopping publication in the press or transmission on television or radio. In theory, the exhortation to judges applies only when they're thinking about a ban; in practice it's seen as a general invitation to give free speech some sort of priority.

But what did having "particular regard" mean? A mere reminder that judges should be careful to make sure that they took freedom of expression into account? Or did it go further, in effect stating a presumption – which could be rebutted – that freedom of expression was more important than other rights? Or stronger still, that only in exceptional cases could freedom of expression be knocked off its lofty pedestal? Judges have been arguing the point ever since section 12 came into being.

So how, on freedom of expression issues, has the judiciary behaved since the Human Rights Act actually came into force on 2 October 2000? It's been easy enough for the judges to come up with the right words. All have drawn attention to the importance of freedom of expression/the press, and then gone on to balance against it the competing rights being claimed. But has there been a real change? Apart from issuing the usual lawyerly warning that it's far too soon to tell, the signs are on the whole positive. The new generation of judges now sitting on our higher courts are not looking for excuses and exceptions to justify weaseling out of applying freedom of expression principles.

The change in judicial attitude and confidence became obvious even before the Human Rights Act became law. In 1998 the law lords, in the name of freedom of expression, took a dramatic step towards giving the press a new defence when sued for libel by a political figure. The former Irish prime minister Albert Reynolds had sued the *Sunday Times* over a story alleging political impropriety; he eventually won his case, but the House of Lords laid down principles allowing the media, when publishing stories of public interest, to make mistakes without being punished for them in the libel courts – provided they weren't acting out of malice and had taken care in assembling the story.

Most freedom of expression cases coming before the courts, though, have lacked the serious significance of the Reynolds case. Many have been about the rights of minor celebrities to keep their names or activities out of the newspapers. Freedom of the press deserves a more elegant platform: it should be mainly about the right to criticise governments, express unpopular opinions, or expose iniquitous deeds – people have given their lives to uphold those principles – not whether or not the sexual antics of footballers or television "personalities" should be revealed to a wider public.

But the judges cannot choose the cases that come up before them. It is not their fault that they've had to decide largely trivial disputes. But have they, in the way they've dealt with those, given any clues to how they might stand up to important challenges to freedom of expression in the future, of the kind that determines the democratic landscape of a nation?

Here, for instance, is Lord Woolf, the Lord Chief Justice, in the appeal by the *People* newspaper against a high court judge's injunction banning it from publicly revealing the identity of an adulterous footballer, Gary Flitcroft, captain of Blackburn Rovers:

The fact that if the injunction is granted, it will interfere with the freedom of expression of others and in particular the freedom of the press is a matter of particular importance ... Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest...The existence of a free press is itself desirable and so any interference with it has to be justified.

Flitcroft, married and with children, had conducted short-lived but intense affairs with two women both of whom, when dumped, sold their stories to the newspaper. His attempt to keep his identity out of the story at first succeeded, the high court judge granting him an injunction on the basis that publication of his name would be a breach of confidence – even a short adulterous relationship, the judge ruled, was confidential enough to get the protection of the law. The appeal court had no hesitation in ruling that the judge was wrong; any right Flitcroft might in theory have to keep his sexual adventures secret was easily beaten by freedom of expression – not just the newspaper's but also the right of the two women to have their tales publicised.

It was expected, following the Human Rights Act, that freedom of expression would come under greatest legal threat from the newly acquired so-called right to privacy, as set out in Article 8 of the European Convention on Human Rights: "Everyone has the right to respect for his private and family life, his home and his correspondence."

This was to be the clash of the rights titans. How would the judges behave when faced with, on the one hand, the right of people – not just celebrities but in practice usually so – to keep their private lives private and on the other, with the media insisting on its right to tell its public about celebrities who misbehave, who are ill, who are in love, or who may just be displaying too much of their bodies? And on the outcome to that struggle would emerge the answer to the crucial question: is there really such a thing as a right to privacy?

But the expected battle hasn't really been fought, though a few skirmishes have taken place. Judges have sought and found ways of avoiding the issue. Cases involving the newsreader Anna Ford (photographed in the *Daily Mail* on holiday on a secluded beach in Majorca), the super-model Naomi Campbell, (shown in the *Mirror* leaving a drug-rehabilitation clinic, when she'd always denied being a drug addict) and Gary Flitcroft were expected to raise the privacy versus freedom of the press debate, but didn't – although in all those cases the publications were, in effect, ruled justified.

Catherine Zeta Jones and Michael Douglas came to the English courts complaining that their privacy had been invaded when *Hello!* magazine managed to publish unauthorised snaps of the couple's wedding when the picture rights to the event had been sold to the competing *OK!* magazine. The judge decided the case on a legal point of commercial confidentiality, refusing to make it a privacy or a freedom to publish issue.

One case has pitted freedom of expression against Articles 2 and 3 of the Convention – the right to life and the prohibition of torture. Free speech was beaten convincingly. Jon Venables and Robert Thompson, the two boys – now young adults – who had killed James Bulger, were shortly to be released from detention, with changed names and new personal histories. They applied to the court for a perpetual injunction prohibiting the media from ever publishing any information about them that could lead to their new identities or whereabouts being revealed publicly. If the general public were to know where to find them, they argued, they would be in danger of being subjected to extreme violence; indeed, they would be at risk of their lives. Timidly, lawyers for the press argued for freedom of expression: the press could be trusted not to reveal anything that could endanger the young men's lives. But it was a losing battle. The judge, Dame Elizabeth Butler-Sloss, had no trouble granting Venables and Thompson the life-long injunctions for which they'd asked.

Freedom of expression versus the right to a fair trial is a battle still to come. The Contempt of Court Act 1981, contains, in principle at least, stringent restrictions on the press's freedom to inform the public of what it really wants to know – all about the accused in a high profile criminal trial. Nothing can be reported that creates a "substantial risk" of "serious prejudice" to a forthcoming trial – telling the jury something prejudicial about a defendant which they would not hear about in court and which might affect their verdict. Contrast that with the position in many US states, where almost nothing is banned; the absurd OJ Simpson trial is an example.

For some years, the English media, the tabloids in particular, have been pushing at the frontiers of contempt of court, giving the public more and more information about an accused, daring the attorney general of the day to take them to court. But none has, recently, not even in the case of Barry George, convicted (on sparse evidence) of the murder of television presenter Jill Dando and the subject of a torrent of prejudicial pre-trial publicity. In the absence of any concern by successive attorneys general to curb such excessive coverage, it may be that freedom of expression has already won a victory over the right to a fair trial, without even going to court. Even if the attorney general stirs, believing newspaper coverage to have been prejudicially excessive (over Soham, perhaps, or some alleged terrorists) any attempt to bring culprit newspapers to book will be resisted by a media armed with the special status of freedom of expression. Which way will the judges rule? A fair trial is a cornerstone of English justice. It will not easily yield to another right.

The courts, then, have been treating freedom of expression and freedom of the press with respect and even occasional enthusiasm. That, at least, is a positive trend. Our senior judges today are manifestly more mindful of free speech than their colleagues were even 15 years ago. I cannot imagine that today's law lords would, if faced with a modern-day *Spycatcher*, written by a retired member of MI5, continue to ban publication of a book, containing no secrets or implications for national security, which was on open sale in the rest of the world and its contents widely known in Britain. Nor can I envisage a judge today doing what one did only four years ago: ordering the presses of the

Sunday Telegraph to be stopped to prevent publication of a story revealing the conclusions of the inquiry into the death of Stephen Lawrence – even though the official report was to be published four days later. Not would the reporter Bill Goodwin be ordered by a judge, as he was in the early 1990s, to reveal his journalistic sources for a story he was writing on the financial plight of an engineering company. The list goes on. It is as much what one can no longer envisage happening in our courts as what judges have actually said and done that gives hope for the future of freedom of expression in this country – at least as far as the courts are concerned. Government is another matter.

Published 2003-10-15
Original in English
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