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LADY JUSTICE ARDEN

MEDIA INTRUSION AND HUMAN RIGHTS: STRIKING THE BALANCE - PUBLIC LECTURE

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The problem stated

1. There is considerable public debate at the present time about the conduct of the press and in particular about the conduct of investigative journalism. The press is said to behave badly. People's lives can be ruined by the disclosure by the press of matters about their private lives. The purpose of this lecture is to explain the contribution that human rights jurisprudence can make to solving some of these problems. It cannot solve them all, but it can, as I shall show, certainly solve some of them.
2. As everyone knows, human rights jurisprudence is the jurisprudence of the European Court of Human Rights in Strasbourg ("the Strasbourg court"). The Strasbourg court is a supranational court. It lays down jurisprudence for the populations of the countries of the Council of Europe, which total about 800m people. Its task is to interpret the European Convention on Human Rights. By so doing it is establishing a set of fundamental rights for all of the European nations.
3. The area which my title covers is broad, in fact far too broad to cover in a single lecture. So there are a large number of subjects within it that I will not cover. In particular, I shall not be talking about the current phone hacking allegations or about the relationship between the police and the press. Nor will I be talking about the

recent problems with “super injunctions” as they are called, that is, interim injunctions which restrain a person from publishing information which concerns the applicant and which is said to be confidential or private and which also restrains a person from publicising or informing others of the existence of the order and the proceedings. Nor will I be talking about the proposed changes to the law of defamation in the draft Defamation Bill or the possibility that the criminal law might be changed so as to provide greater protection to journalists. Nor will I be talking about the privacy issues surrounding Google. [1] In addition, I am not going to comment on any case where it is suggested that there has been some criminal offence. The presumption of innocence applies. No one is to be taken to have acted unlawfully until that is proved.

4. The subject of media intrusion is extremely topical in this country and elsewhere in the world. The Leveson Inquiry, led by Lord Justice Leveson, was set up in late August 2011 in response to the now well-known accusations of telephone hacking by journalists at the News of the World and subsequent, related revelations. The Inquiry's terms of reference, announced by the Prime Minister on 20 July 2011, are far-reaching. They are divided into two parts.[2] Part 1, on which an initial report is to be delivered within a year, covers the culture, practice and ethics of the press. This Part of the inquiry is also due to consider cross-media ownership. Part 2 deals explicitly with the unlawful or improper conduct of News International and others, and is to review the actions of the police and prosecuting authorities in relation thereto. It was made clear, both by the Prime Minister, when he announced the terms of reference, and by Lord Justice Leveson in his opening remarks following his appointment, that the Inquiry should extend beyond the print press and include "an

[1] Issues have arisen as to whether Google’s privacy policies are in breach of EU data protection rules.

[2] The Leveson Inquiry's terms of reference are accessible at: http://www.levesoninquiry.org.uk/about/terms-of-reference/, accessed on 12 March 2012.

appropriate cross section of the entire profession (including those from the broadcast media)".[3] It is envisaged that Part 1 of the Inquiry will lead to recommendations for a new, more effective policy and regulatory regime designed to encourage the highest ethical and professional standards, without stifling the independence or plurality of the media. It will also make recommendations on how future concerns about press behaviour, media policy, regulation and cross media ownership should be dealt with and by which authorities; in particular, whether statutory intervention is either warranted or desirable.

5. Part 1 of the Leveson Inquiry has been subdivided into four modules. The evidence-taking process in relation to Module 1, looking at phone-hacking and other potentially illegal activity, has now been completed and Module 2, which deals with relations between the press and the police, is well underway. Evidence on Modules 3 and 4, relations between the press and politicians, and recommendations for regulation, respectively, will follow.

6. The regulation of the press is currently carried out by a voluntary, industry-led body, the Press Complaints Commission ("the PCC"), which is often said to lack independence and to be unable to act to deal with complaints with sufficient speed. Last week, the PCC announced that it was moving "into a transitional phase, transferring its assets, liabilities and staff to a new regulatory body".[4] The transitional body, yet to be named, will be run by a team of three directors and has confirmed that it will continue to process existing, and to accept new, complaints during this interim period. No permanent body to replace the PCC is expected to be in place for at least a year. Lord Justice Leveson has made it clear that he is not to be taken as necessarily approving the successor body.

7. There is considerable activity in other parts of the world as well in relation to media intrusion. The European Commission has established a high level group on media

[3] See Leveson LJ's opening remarks on 28 July 2011, accessible at: http://www.levesoninquiry.org.uk/about/opening-remarks/, accessed 12 March 2012.

[4] See PCC press release, *PCC transition to a new regulatory body*, 9 March 2012, accessible at: http://www.pcc.org.uk/news/index.html?article=NzcyNA, accessed 12 March 2012.

freedom and pluralism. This will be making recommendations for the protection of the media in the autumn.[5] In Australia, the Finkelstein inquiry published earlier this month has recommended the establishment of a government-funded "News Media Council" to set and enforce journalistic standards. The investigation was launched after News Corporation closed the *News of the World* last year over illegal phone-hacking allegations. News Corporation owns 70 percent of Australia's newspapers.

Many argue that its newspaper holdings are too large and are biased against the ruling party. In New Zealand, the Law Commission has issued a consultation paper seeking views on the extension of media regulation and the reform of civil wrongs.[6]

8. One of the reasons for the present public debate over media intrusion in the UK is that there is widespread concern about the way certain members of the press behave. I take two examples. My first example concerns Chris Jefferies. In December 2010 a young woman, Joanna Yates, was murdered in Bristol. Chris Jefferies was her landlord at the time of the murder. He briefly fell under suspicion. He was arrested, and detained for questioning for two days. He was then released. Another man, Vincent Tabak, was later arrested and charged. He ultimately confessed to the murder. During Mr Jefferies' detention, however, certain newspapers published stories heavily critical of him, linking him positively with the murder, as well as making comment on his chosen solitary lifestyle and linking him to previous crimes with which he had never even been charged, much less convicted of. In proceedings brought against the newspapers by the Attorney General for contempt of court, Lord Judge CJ, giving the judgment of the court, described the newspaper articles as having "vilified" Mr Jefferies. This was capable of constituting contempt even though he was only a suspect under arrest and was never charged. The vilification of him

5 Terms of reference, September 2011.

6 Law Commission of New Zealand, *The News Media meets 'New media': Rights, responsibilities and Regulation in the Digital Age*, December 2011.

might prevent witnesses coming forward with information which might clear him of suspicion. [7]

9. In that case there was a remedy, namely contempt of court. Contrast my second example. This is taken from evidence given by a former News of the World journalist about a story he wrote in 1995 concerning a young woman who was the daughter of a famous, recently deceased actor. He was asked to confirm that she was begging and working part-time as a prostitute:

> "She wasn't doing the second bit, but yes: although I -- yeah, anyway. No, I mean it's one of a couple of stories that I regret ..... I think, as well, and [she] went on to overdose after an article that absolutely humiliated her and it was unnecessary and I really regret it because I got to know her fairly well and I quite liked her and she was in a very vulnerable position. Her father had just died of AIDS and she had taken two - - she was on a methadone script, which I knew about, and she also -- there were heroin needles in her bin-- God knows how I knew that -- and also there were notes with the phone numbers of her drug dealers in the bin.....
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> So I knew exactly where she was at, and the fact that she was begging outside [the Tube] station came to our crime reporter from a police officer, ... [Her father] had been a millionaire and, indeed his daughter lived in a really nice flat, but she actually didn't have any money to get a £10 bag or whatever it was she needed and, yeah, I went too far on that story.
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> ... a police officer had come across her and possibly should have helped her as well instead of ringing up the News of the World and getting paid for that. And then, when - - she did briefly beat drugs, but then when I heard a few years later that she'd killed herself, I did think, yeah, that was one I really regret.."

10. If the press intrudes into someone's private life and publishes things that the public are not entitled to know, there is a huge problem of containing damage. The material can be republished on the internet and Twitter, and it may thus not be able to recall all the material. This can lead to untold damage to an individual whose privacy is wrongly breached.

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[7] *Attorney General v MGN Ltd and News Group International Ltd* [2011] EWHC 2074 (Admin), [2012] 1 Cr. App. R. 1. On 7 March 2012 the Supreme Court of the United Kingdom refused permission to appeal in this case, saying the case did not raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time, bearing in mind that the case had already been the subject of judicial decision and reviewed on appeal, and that this was a very clear case of contempt of court.

11. There is also the problem that many newspapers are today published online as well as in print. The online version may have video clips. When they are published in this media there is little difference between them and, for example, television. There is no real reason why online newspaper video clips should not be regulated while television is subject to regulation by Ofcom. The presence of a regulator for television does not appear to be overly controversial.

12. In the age of the internet and Twitter, it is becoming more difficult to define the role of the print newspapers. The suggestion in some quarters is that it is there to give the public what they want to read. The court of public opinion is then the judge of what ought to be published. That it is not what the courts say. Indeed, Baroness Hale said that what is in the public interest is not necessarily what interests the public.

13. One might ask: is the role of the print newspapers simply to produce facts? If so, is there any rule applying to the choice of those facts? Is the function of the print newspapers purely to comment or in some way to add value to facts coming from elsewhere, for instance by verifying them? These questions are among those raised by the current debate on media intrusion.

14. There is another aspect to be considered too. Many people today obtain their news not by reading newspapers in hard copy but from Twitter, online newspapers, TV channels and other websites. Those media are also taking away the income of the print newspaper industry. The newspaper industry is thus vulnerable to decline. With the exception of free newspapers handed out at underground stations (which tend not to be controversial), many newspapers may simply cease to exist altogether as a result of financial pressure. If that happens, the problem of the conduct of journalists might recede in terms of its practical importance.

Position of journalists under domestic law

15. Journalists have a number of privileges under our domestic law.[8] No court may order a journalist to reveal his sources, nor will any journalist be held in contempt of court for refusing such disclosure, unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice, national security or for the prevention of disorder or crime.[9] That principle has also been given a very broad interpretation in the jurisprudence of the Strasbourg court. In *The Financial Times v UK*[10], a number of newspapers had been subjected to a *Norwich Pharmacal* order,[11] following the publication by them of a leaked document relating to a possible takeover bid by one company for another. The Strasbourg court found a violation of article 10. It held that:

> "While...the applicants in the present case were not required to disclose documents which would directly result in the identification of the source but only to disclose documents which might, upon examination, lead to such identification, the Court does not consider this distinction to be crucial. In this regard, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources."[12]

16. Nonetheless, concerns remain as to the levels of protection which journalists can offer their sources. The House of Lords Select Committee on Communications in a report published on 16 February 2012 indicated that "there have been recent cases in the NHS, for example, which have shown existing legal protection for whistleblowers to be inadequate."[13]

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8 There is no formal qualification for journalists. The expression includes anyone who engages in any relevant publication.

9 See section 10 of the Contempt of Court Act 1981.

10 *The Financial Times and Ors v United Kingdom* (2010) 50 E.H.R.R. 46.

11 The *Norwich Pharmacal* principle states that, where there has been wrongdoing by one party, the injured party can apply to the Court for an order against an innocent third party, requiring it to disclose information which may assist in proving the wrongdoing (see *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133 (HL).

12 at [70].

13 Report on the Future of Investigative Journalism, accessible at: http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/256.pdf, accessed on 21 February 2012.

17. Journalists may also benefit from a so-called "qualified privilege" in defamation claims – the *Reynolds* defence.[14] This domestic defence has been developed in the light of Strasbourg case law.[15] If the journalist establishes that the publication dealt with a matter in the public interest and that he behaved responsibly and fairly in gathering and publishing the information, strict liability for defamation ceases to apply. The claimant must then prove that the defendant was actuated by express malice to establish defamation. The standard for assessing the duty is that of "responsible journalism".[16]

18. Journalists are, however, subject to the ordinary criminal law, except where special defences or exceptions exist. Accordingly they can be liable for harassing members of the public pursuant to the Protection from Harassment Act 1997. Section 1(3) provides that a course of conduct will not amount to harassment if it is shown that: (a) it was pursued for the purpose of preventing or detecting crime, (b) it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable. As Blackstone's Guide to the Act observes, however, it is notable "that there is no defence of being engaged in a lawful occupation such as a journalist ... [who] will have to prove that their actions were reasonable".[17] Journalists may also be held liable for hate speech.[18]

Strasbourg's contribution

19. The key points that I want to make here are as follows. We owe much to the way in which the law has been developed by the Strasbourg court. The latest developments –

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[14] The defence arose out of the case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL)).

[15] *Flood v Times Newspapers Ltd* [2011] UKSC 11 at [138] per Lord Mance.

[16] See *Loutchansky v Times Newspapers Ltd and others (No 2)* [2001] EWCA Civ 1805 at [40] and [41].

[17] See *Blackstone's Guide to the Protection from Harassment Act 1997* at 2.31.

[18] For example, under sections 18 and 21 of the Public Order Act 1986.

I propose to consider the recent decisions of the Strasbourg court in *Von Hannover (no 2)* case and the *Springer* case - also helpfully show that the Strasbourg court recognises the differences between Convention states with respect to their attitudes to privacy. More specifically, in the context of public interest the Strasbourg court has interpreted the requirement for the publication to be in the public interest quite generously. The breadth of the concept may, however, be different where the public interest has to be considered in other contexts

20. From a legal perspective, media intrusion into private life of course entails consideration of two Convention articles in particular, namely articles 8[19] and 10[20]. An individual must be given respect for his private and family life under article 8 but, at the same time, others, including the media, have a right to freedom of expression under article 10. The Strasbourg court has recently reiterated that the concept of 'private life' is a broad one, not susceptible of exhaustive definition but extends to the protection of one's reputation,[21] as well to more obvious aspects relating to personal identity, such as a person's name, photograph, or physical and moral integrity.[22]

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[19] Article 8 guarantees the right to respect for private and family life. It provides as follows: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[20] Article 10 guarantees the right to freedom of expression. It provides as follows: "(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."

[21] *Axel Springer AG v Germany* (Application no. 39954/08) at [83].

[22] *Von Hannover v Germany (No. 2)* (Application nos 40660/08 and 60641/08) at [95].

21. The right to freedom of expression guaranteed by article 10 has a slightly different connotation in the present press context than when one considers it in relation to an individual. Traditionally, however, the Strasbourg court has characterised an individual's right under article 8 as, ultimately, being about self-realisation, whereas the article 10 right exercised by the media is the right to contribute to debate on matters of public interest in a democratic society.

22. It is also important to note that, under the Convention system, there is no hierarchy among the rights protected. They are all fundamental rights and, as such, it cannot be said that article 8 has priority over article 10, nor vice versa. It is also important to note that articles 8 and 10 are qualified rights. That is to say that the Convention recognises that these rights must have boundaries in a democratic and plural society. The obligation of the state to respect private life, for instance, can be outweighed by the considerations in article 8(2), particularly the public interest.

23. Thus where the two rights are in genuine conflict, as they so often are in cases where the media, purporting to exercise its article 10 right to freedom of expression, is alleged to have intruded on someone's private life, protected by article 8, there is a need for a balancing exercise to find the proper weight to be accorded to each right in the circumstances.[23] Because the rights have equal standing and importance, however, the Strasbourg court has stressed that the "outcome of [an] application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention, by the person who was the subject of the article, or under Article 10 by the publisher."[24]

24. The UK has a well-established media industry, and that industry is seen as essential to democracy. History shows that restrictions on rights to free expression often accompany or precede attacks on democratic principles. The Strasbourg court has

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23 See, for example, *In re S (FC) (a child)* [2004] UKHL 47, per Lord Steyn at [17].

24 *Von Hannover v Germany (No. 2)*, supra, at [106].

regularly affirmed the importance of a free press and its 'vital role' as a public watchdog.[25]

No culture of privacy rights in the United Kingdom

25. The United Kingdom likewise does not, at least historically, have a culture of privacy rights. The names of parties who have been charged with criminal offences, and those who have been convicted, are usually published in full unless that publication would involve the identification of a child.

26. Public figures are expected to put up with a certain amount of intrusion into their private lives over and above that which a member of the ordinary public would be expected to tolerate and this is in line with Strasbourg jurisprudence. The position is different, for example, in Germany where the full name of an individual convicted of an offence is not published but only his first name and an initial. Equally, in Germany, judgments in civil proceedings are not intituled with the parties' names (as is generally the case in the UK) but with a number.

27. France also takes a very stringent position on privacy. Protection of privacy in France will cover not only the publication of details of an individual's private life, but also the taking and reproduction of an individual's image without prior consent. With respect to interviews, an accompanying photograph "may not be published for a purpose or in a manner which differs from the one which was originally agreed or in order to distort the manner in which the interviewee has elected to project their image or express their opinion". French law also imposes criminal sanctions, including imprisonment, for some breaches of privacy.[26]

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25 See, for example, *The Sunday Times v UK* (1992) 14 E.H.R.R. 229 at 241.

26 Index on Censorship's submission to the Leveson Inquiry, January 2012, page 16. Accessible at: http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Submission-by-Index-of-Censorship.pdf, accessed on 17 February 2012.

28. It may also be that the UK press writes in a more vivid way than the press in other parts of Europe and that it would use words, pictures, sound bites or metaphors for emphasis that would not be used, nor considered acceptable, in some other states.

29. It is precisely because Contracting States to the Convention vary in their societal contexts and attitudes that the principle of subsidiarity as applied by the Strasbourg court is so important.

Responsible journalism

30. Strasbourg jurisprudence proceeds on the basis that freedom of expression for the media carries with it responsibilities. The Strasbourg court has laid down guidelines for responsible journalism. It has drawn a distinction between fact and opinion, as well as between facts derived from the journalist's own sources and facts from an official source. Thus, when reporting matters of fact, journalists must take steps to check that the information is correct. When they express value judgments, they must have a sufficient substratum of fact to enable the value judgment to be made.

31. In *Pedersen v Denmark*[27] two television journalists made allegations that a named Chief Superintendent of Police had intentionally suppressed evidence in the context of a murder trial. The Strasbourg court held that whilst public servants, such as policemen, are subject to wider limits of acceptable criticism than private individuals, they are not to be considered as on a plane with politicians. The allegations in *Pedersen* in any event exceeded criticism and amounted to an accusation of a serious crime. Moreover, given the nature and seriousness of the allegations made, it held that it was not open to the journalists to rely on the statement of only one witness to justify the conclusions they had drawn.[28] Thus, where there is a risk of damage to a

[27] (2006) 42 E.H.R.R. 24.

[28] See at [78]-[80] and [84]-[89].

person's reputation caused by the inferences made and allegations published, the press are expected to be particularly careful in checking their facts.

32. Journalists may, however, use information contained in an official report without checking its accuracy. In the case of *Bladet Tromsø v Norway*[29] a newspaper had published a series of articles covering the seal hunting trade. These articles had included a number of statements to which the seal hunters took exception because they suggested that (i) seal hunting regulations were breached, (ii) the hunters were guilty of animal cruelty – the paper reported "Seals skinned alive" – and (iii) the hunters had, in one instance, assaulted the hunting inspector.

33. These allegations did not, however, emanate from the paper but were rather taken directly from a report prepared in an official capacity by the government inspector, appointed by the Norwegian Ministry of Fisheries, to monitor a seal hunt. The Court considered that "the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined."[30]

34. When it comes to expressions of opinion, journalists are not necessarily required to counterbalance the view which they put forward with a statement of the opposite point of view. In *Jersild* a television journalist had a prepared a short piece about a group of extremists in Denmark known as the Greenjackets, who promoted racism and ideas of racial superiority. The Strasbourg court held that, although he had not presented any counterbalancing or opposing points of view, the journalist had clearly disassociated himself from the racist comments of the interviewees, had challenged some of the statements made and had made it clear that the racist statements were part of an anti-social trend in Denmark. The court considered it important to determine whether the piece had as its object the *propagation* of racist statements

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29 (2000) 22 E.H.R.R. 125.

30 (2000) 29 E.H.R.R. 125 at [68].

and ideas, or was merely aimed at *reporting* on those matters to contribute to a wider debate.[31]

35. It is clear from the discussion so far that the Strasbourg court's assessment, and hence the assessment to be carried out under the Convention by domestic courts, is process driven: Did the journalist make proper enquiries? Did he have a sufficient sub-stratum of fact on which to base an opinion or allegation? These questions have nothing to do with the *content* of a story. The article 10 right to freedom of expression is "applicable not only to 'information' and 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[32]

Public or private sphere?

36. In the balancing of articles 8 and 10, the Strasbourg court draws an important distinction between the public and the private sphere. In *Princess Caroline von Hannover v Germany*,[33] (which will be referred to as *von Hannover (No. 1)*, to distinguish it from the second *von Hannover* case, which I shall discuss also) the Strasbourg court drew a:

> "63. ... fundamental distinction ... between reporting facts — even controversial ones — capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest' ... it does not do so in the latter case.
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> 64. Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned ... this is not the case here. The situation here does not come within the sphere of any political or public debate because the

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31 *Jersild v Denmark* (1995) 19 E.H.R.R. 1 at [34]-[35].

32 *Von Hannover v Germany (No. 2)*, supra, at [101].

33 (2005) 40 E.H.R.R. 1.

published photos and accompanying commentaries relate exclusively to details of the applicant's private life."

37. The determination of whether a matter is in the public interest depends on a careful consideration of all the circumstances. To qualify as being in the public interest, the publication of information about a person's private life must contribute to the debate in a democratic society. According to the Court's well-established case-law the limits of acceptable criticism are wider as regards a politician than as regards a private individual.

38. In *Lingens v Austria*[34] the applicant journalist had been convicted in the domestic courts of criminal defamation in relation to two articles he published accusing the Austrian Chancellor of protecting former Nazi SS members for political reasons and facilitating their involvement in Austrian politics. The Strasbourg court held that the margin for acceptable criticism of politicians is significantly wider than for private individuals, since it is media reports on politicians that inform the public and enable it to form views on politicians. The court expressly rejected the idea expressed in the Austrian courts that the function of the media was to impart information but leave the interpretation of such information to the public. A politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance". Of course article 8 still extends to politicians, even when they are acting in their public capacity, but "in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues".[35]

39. Another illustration of the Strasbourg court affording a greater degree of latitude to journalists in their coverage of public figures is the *Edition Plon* case.[36] There the Strasbourg court upheld the right of a French publisher to put out a book containing

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34 (1986) 8 E.H.R.R. 407.

35 At [41]-[43].

36 *Editions Plon v France* (2006) 42 E.H.R.R. 36. It is to be noted that the Court did not find a breach of article 10 in the granting of an interim injunction prohibiting publication of the book in the short term. It was the continuation of that ban that was held to violate article 10.

details of the cancer suffered by the former French President, François Mitterand, shortly after his death. The details of President Mitterand's illness had not been made public during his lifetime (indeed the late President had released regular health bulletins but had never mentioned his illness). The Strasbourg court considered, however, that the book's publication fell within a widespread debate of general interest relating to the right of citizens to be informed of any serious ailments from which the head of state was suffering and to the suitability for highest office of someone who knew that he was seriously ill.

40. By contrast, the Strasbourg court held that there was no violation of article 10 where an Austrian daily newspaper was censured by the domestic courts for publishing rumours about the intentions of the wife of the then Austrian president to bring divorce proceeding and about her extra-marital affairs. There is, held the court, a:

> "distinction between information concerning the health of a politician which may in certain circumstances be a[n] issue of public concern ... and idle gossip about the state of his or her marriage or alleged extra-marital relationships ... the latter does not contribute to any public debate in respect of which the press has to fulfil its role of 'public watchdog', but merely serves to satisfy the curiosity of a certain readership".[37]

41. A more borderline case is the recent decision of the Grand Chamber in *von Hannover (No 2)* where the issue was whether photographs taken of the Princess during a skiing holiday could be published without violating article 8. The media claimed that there was an issue of public interest because the princess had chosen to take this holiday while her father, the late Prince Rainier III, was seriously ill. The photographs had not been taken surreptitiously or in embarrassing circumstances.

42. The three photographs in question were as follows. One photograph showed the Princess and her husband, Prince Ernst August, walking through St Moritz whilst on a skiing holiday, and accompanied an article about that holiday. Notwithstanding that they were on a busy street at the time, the photograph and article contributed nothing to public opinion and debate, and were, in essence, published for pure

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[37] *Standard Verlags GmbH v Austria* (No.2) (Application no. 21277/05), at [52].

entertainment's sake. Holidays, even for high-profile public figures, fall within the core of an individual's private sphere.

43. Equally, the next photograph, which accompanied an article about the annual "Rose Ball" in Monaco could not be considered to be an image of contemporary society. Whilst the Rose Ball itself might conceivably qualify as an event of contemporary society, the photograph depicted the Princess on a ski-lift and had no connection whatsoever to the article or the Rose Ball. Given the low information value of the photograph, the public's curiosity must give way to the protection of the private sphere.

44. The final photograph, however, was different. Whilst it also showed the Princess and her husband walking along a street on holiday, it accompanied an article dealing with the ailing health of her father, Prince Rainier III of Monaco. Given that Prince Rainier was the then reigning monarch, the story itself dealt with an event of contemporary society. Whilst, the photograph, in and of itself, had no information value and contributed nothing to public opinion, it had to be considered taking account of the article that it accompanied. The German Federal Court of Justice decided that a legitimate aspect of the story was the question of how Prince Rainier's family was conducting itself during his illness. In that context, a photograph of the Princess on holiday both supported and illustrated the story. The quality and presentation of the article was not relevant to this consideration, since taking those into account (barring something like offensive language) would interfere unduly with the wide margin of appreciation to be accorded to editorial decision making. Nor was there any suggestion that the photograph had been taken illicitly.

45. The Grand Chamber did not interfere with the decision of the German Federal Court of Justice that certain of these photographs could be published without violating the Princess's Convention rights. It held that "the characterisation of Prince Rainier's illness as an event of contemporary society ... having regard to the reasons advanced

by the German courts ... cannot be considered unreasonable".[38] As such, the press was entitled to report on "how the Prince's children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday."[39] The Strasbourg court reiterated that it was not only a question of the press having the right to impart information and ideas on all matters of public interest, but also of the public's right to receive them.

46. Speaking for myself, I regard this as a borderline decision. The way people react to the stress of illness of a close relative is bound to differ, and tells you very little about them. Moreover, Princess Caroline was not a public figure and was not in line to inherit if her father died.

47. On the positive side, the decision clearly demonstrates that the Strasbourg court will give a generous margin to the national court's judgment on these matters.

Distinction between words and images?

48. It is clear then that, as the Strasbourg court put it in *von Hannover (No. 1)*, the "decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution ... to a debate of general interest."[40] But does the law draw any distinctions among the forms in which information can be published: simply text (see *Lingens v Austria* for example), photographs (for instance *von Hannover (No. 1)*) or even video footage on a website (see *Mosley v News Group Newspapers*[41], which is discussed below)?

49. It is trite law that freedom of expression includes, in principle, the right to publish pictures and photographs. However, as the Strasbourg court observed, again in *von Hannover (No. 1)*:

> "this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the

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38 *Von Hannover v Germany (No.2)*, supra, at [118].
39 At [117].
40 *Von Hannover v Germany (No.1)* (Application no. 59320/00), at [76].
41 [2008] EWHC 1177 (QB).

> dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution."[42]

50. Equally, in *von Hannover (No. 2*), the Strasbourg court recalled that for a "private individual, unknown to the public, the publication of a photo may amount to a more substantial interference than a written article".[43] Indeed, the "publication of a photograph must, in the Court's view, in general be considered a more substantial interference with the right to respect for private life than the mere communication of the person's name."[44]

51. Moreover, the circumstances in which a photograph is taken may well be relevant. Where, as in *von Hannover (No. 1)*, the photographs are taken secretly, with a telephoto lens, at a time when the subject of the photograph was in a private club to which journalistic access was strictly regulated, the Court will take this into account as a factor, albeit not a decisive one, counting against publication.[45]

The criteria of responsible journalism

52. The Strasbourg court has now sought to bring together its jurisprudence on when the media can intrude into a person's private life in the recent detailed judgment of the Grand Chamber of the Strasbourg court in *Axel Springer AG v Germany*.[46] This case concerned the arrest of a well-known German actor at a beer festival on drugs charges "of medium seriousness". The Grand Chamber observed that:

> "96. ... the articles in question concern the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence ... That interest will vary in degree, however, as it may evolve during the course of the proceedings – from the time of the arrest – according to a number of different

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42 At [59].
43 At [113].
44 *Eerikäinen and Ors v. Finland* (Application no. 3514/02), at [70].
45 See *von Hannover* (No. 1), at [68]; see also *von Hannover (No. 2)*, at [113] and [122].
46 Supra.

> factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings."

53. The Grand Chamber held that there was no violation of article 10 where a newspaper had acted responsibly in publishing details of the arrest. The newspaper's reporter had witnessed the arrest, and had had the fact and nature of the arrest confirmed by the press officer at public prosecutor's office.[47] The newspaper did not pass any comment on the information; it merely published it. The Strasbourg court held that the fact that one article "contained certain expressions which, to all intents and purposes, were designed to attract the public's attention cannot in itself raise an issue under the Court's case-law" [48]. The actor had previously discussed his private life in interviews, though the court noted this does not deprive a person of all protection.[49] The information was capable of contributing to the debate in a democratic society. As the actor was well known, he could be regarded as a public figure. [50]

54. It is perhaps remarkable in the *Springer* case that the public prosecutor was prepared to make the information public. The information was not given exclusively to the German newspaper in question but to all the media. Most importantly the national court considered, even in the German environment, that the disclosure was acceptable. The Strasbourg court held that if the national courts appeared to have carried out the balancing exercise in accordance with the criteria laid down in its case law, the Strasbourg court would require strong reasons to substitute its view for that of the national court.[51]

55. The Strasbourg court usefully collected the criteria in its case law which it was necessary for national courts to take into account when balancing the right of an individual under article 8 and that of the press under article 10. These criteria are:

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47 Paragraphs [102] to [107].
48 Paragraph [108].
49 Paragraph [101].
50 Paragraphs [97] to [100].
51 Paragraph [88].

i. Contribution to a debate on a matter of public interest. This was an essential pre-condition to any violation of article 8(1).

ii. How well known the person concerned was and the subject of the report. The Strasbourg court instanced that it would for instance be a relevant consideration whether the person concerned was a private person. In addition, the Strasbourg court warned against the use of photographs purely to satisfy the reader's curiosity.

iii. The prior conduct of the person concerned.

iv. Method of obtaining the information and its veracity. It may not therefore be enough simply to have seen it on Twitter. It may also be a factor against publication that it is based on confidential material removed from someone's dustbin, or known to have been obtained from a public official who was induced to act improperly in disclosing it.

v. Content, form and consequences of publication. Did it, for instance, appear in a local or national newspaper?

vi. Severity of the sanction imposed (where a sanction is imposed by some other body.

56. This is a very structured approach to determining whether an intrusive report about a person should be published in pursuance of the press's freedom of expression. The criteria set out above are the new lines in the sand. Importantly, the Strasbourg court held that if the national court went through all the relevant criteria, it would require a strong case for the Strasbourg court to come to a different conclusion.

The Strasbourg jurisprudence - drawing the threads together

57. The approach of the Strasbourg court is to be welcomed. In the area of balancing rights under article 8 and article 10, which has to be done when there is an allegation of press intrusion in a person's private life, the Strasbourg court has recognised a wide margin of appreciation. This means that it has recognised that there are different cultural approaches to press freedom and privacy throughout member states. The German courts' focus in their judgments, for instance, on privacy rights in *Axel Springer* would strike us as quite surprising. Surely we would say the public are entitled to know who committed a criminal offence. The message from Strasbourg – and it is a very welcome message – is that provided that the national courts address at the least all the specified criteria when they balance articles 8 and 10, all will be well in Strasbourg. There has been a quantum leap here in what we call subsidiarity.

58. The principal propositions appear to be these. The first is about the nature of the media's freedom of expression. Media freedom is not the same kind of right as an individual's freedom of expression, which is ultimately about self- realisation. The Strasbourg court has in fact reached a very sensible rationale for media freedom. Media freedom is about the freedom to contribute to the debate in a democratic society. Media freedom is therefore not limited to seeking the truth, nor is it always limited by the ability to do harm. Rather it is about the communication needs of the audience. But this is to state the rationale in very abstract terms, and the scope of the press's freedom needs need to be concretised by examination in specific cases.

59. How are the courts to monitor media freedom? If an individual's privacy right is involved, then the two rights have to be balanced and that is one way of monitoring the press. Human rights jurisprudence is mindful of the role of press freedom in a democratic society. The press may not, however, violate article 8, which is a right of equal standing with that of the press.

60. The second principal proposition is that, with one crucial exception, Strasbourg jurisprudence is process-driven: Has the journalist relied on a public report? Has the journalist made appropriate enquiries? Has the journalist a proper factual basis of

fact for his opinion? These questions have nothing to do with content. As soon as the law starts interfering with content, there is a risk of a "chilling" effect.

61. There is a third principal proposition. Strasbourg jurisprudence does interfere with content in requiring a matter to be one which contributes to debate in a democratic society, if potentially privacy rights are involved. But who is going to assess this? The tabloid press here say that the arbiter should be the newspaper-buying public as the court of public opinion. If there is statutory regulation, it may be Parliament and politicians saying that it should be they who assess whether or not something contributes to public debate.

62. If the assessment of public interest is left to the judge, what does he or she have to go on? In the *Von Hannover (No 2)* case, the Strasbourg court relied on the margin of appreciation. I do not think that is the whole story. What it seems to me the Strasbourg court was saying is that a pretty wide margin must be given to the press to judge whether something contributes to public debate or not. On the other hand, I do not consider that this is anywhere near as wide as the tabloid press would like it. It is not enough for them to say that if the matter appeals to the court of public opinion, it is something which it is in the public interest to publish.

63. Finally I would just mention the pressures on both privacy and media freedom posed by the social media. There are two aspects to this which I want to mention. First, if someone is quite happy to have thousands of friends on Facebook, should they necessarily have the same right to the protection of their privacy in the press? The second aspect is this: How can the print media keep up with the dissemination of news by Twitter? Twitter users are subject to the same law but they are rarely caught.

Privacy in English law

64. English law does not recognise and protect image rights in the way that many continental systems do. However, as discussed above, there are remedies in damages for defamation or for breach of confidence where private information is obtained and

published without authority. The development of the tort of breach of confidence has been informed by the Strasbourg jurisprudence.

65. English law now firmly accepts the need to accommodate and apply the rights to privacy and freedom of expression guaranteed by the Convention. This can be seen from the manner in which a claim can now be brought for breach of article 8 in English law. Prior to 1 October 2000 there was no cause of action at English law, which provided a remedy for the invasion of an individual's privacy.[52] The Human Rights Act 1998, which entered into force on that date, was the turning point, however. As Sedley LJ recognised in *Douglas v Hello!* "[w]e [had] reached a point where it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy."[53]

66. The House of Lords, in *Wainwright v Home Office*, however, emphatically rejected the notion that there is a freestanding cause of action for invasion of privacy.[54] As Lord Hoffmann said, giving the leading speech in the House, there is a "great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself."[55] Lord Hoffmann indicated, without deciding whether or not this was appropriate, that he understood Sedley LJ's remarks in *Douglas* to have been no more and no less than "a plea for the extension and possibly renaming of the old action for breach of confidence".[56] It was not suggested that "freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases", anymore than there was anything to indicate that the effective protection of article 8 rights required the adoption of some high level principle of privacy.[57]

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52 See *Kaye v Robertson* [1991] FSR 62 (CA).
53 [2001] QB 967 at 997.
54 [2004] 2 AC 406.
55 At 423.
56 At 422.
57 At 423.

67. The subsequent case law has adopted the approach which Sedley LJ advocated in relation to the tort of breach of confidence. In *A v B plc*, Lord Woolf CJ, as he then was, recalled the duty on the courts under section 6 of the Human Rights Act to act compatibly with the Convention, and then held that articles 8 and 10 are:

> "the new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified."[58]

68. The House of Lords confirmed this approach in *Campbell v Mirror Group Newspapers Limited*[59]. There the well-known fashion model Naomi Campbell complained of the publication by the Mirror newspaper of an article about her drug addiction and attendance at Narcotics Anonymous meetings. This was accompanied by photographs of Ms Campbell arriving at, and departing from, the meetings. She was, therefore, on a public street at the time the photographs were taken but they were taken surreptitiously with a telephoto lens. The House of Lords, allowing Ms Campbell's appeal by a majority of 3:2, was agreed that the invasion of her privacy was unjustified.

69. Lord Hope of Craighead said that:

> "Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that *the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public.* And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life."[60] [emphasis added]

70. The approach of the English courts to balancing whether the right to privacy under article 8 must give way to freedom of expression under article 10 has been to apply a two stage test. First, does the person whose privacy would be affected by publicity have a reasonable expectation of privacy. If, and only if, there is such an expectation

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58 *A v B Plc* [2003] QB 195 at [4].

59 [2004] 2 AC 457.

60 Supra at 486.

is consideration given to whether or not, in all the circumstances, the interests of privacy must yield to the article 10 right.[61]

71. Several members of the Appellate Committee noted that 'a picture is worth a thousand words'.[62] Lord Hoffmann, although in the minority, made several important observations in this context with which the majority did not disagree:

> "72. In my opinion a photograph is in principle information no different from any other information. It may be a more vivid form of information than the written word ("a picture is worth a thousand words"). That has to be taken into account in deciding whether its publication infringes the right to privacy of personal information. The publication of a photograph cannot necessarily be justified by saying that one would be entitled to publish a verbal description of the scene ...
>
> 75. ... the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information. Likewise, the publication of a photograph *taken by intrusion into a private place* (for example, by a long distance lens) may in itself by such an infringement, even if there is nothing embarrassing about the picture itself ..." [emphasis added]

72. Baroness Hale of Richmond, in the majority, agreed:

> "154. Unlike France and Quebec, in this country we do not recognise a right to one's own image ... We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. *The activity photographed must be private*. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing ...
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> 155. But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting ... A picture is "worth a thousand words" because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again." [emphasis added]

73. Likewise, Lord Hope of Craighead opined at [121] that:

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61 See *Murray v Express Newspapers plc* [2009] Ch 481, per Sir Anthony Clarke MR, as he then was, at [27] and [35]-[36].

62 Supra, see Lord Nicholls of Birkenhead at [31]; Lord Hoffmann at [72]; and Baroness Hale of Richmond at [155].

> "[h]ad it not been for the publication of the photographs, and looking to the text only, I would have been inclined to regard the balance between these rights as about even. Such is the effect of the margin of appreciation that must, in a doubtful case, be given to the journalist ... But the text cannot be separated from the photographs ... The reasonable person of ordinary sensibilities would also regard publication of the covertly taken photographs, and the fact that they were linked with the text in this way [i.e. with captions telling the reader that the photo was of Ms Campbell leaving a Narcotics Anonymous meeting], as adding greatly overall to the intrusion which the article as a whole made into her private life."

74. It is also right to note that section 12 of the Human Rights Act makes special provision for cases where the Convention right to freedom of expression is under consideration. The effect is to raise the threshold for the granting of an interim injunction restraining publication from that generally applied under the well-known *American Cyanamid* principles.[63]

Regulation

75. In *Mosley v News Group Newspapers*[64], Mr Mosley sued the newspaper for damages for what was ruled to be the publication of information about his private life in which there was no public interest. He recovered damages but obtained no injunction. It was a Pyrrhic victory because the information was already in the public domain.

76. He then took his case to the Strasbourg court where he argued that the state had failed to require a newspaper which was about to disclose private information to notify him in advance. He would then have a chance of getting an injunction preventing disclosure. He said that this was the only way of giving him an effective remedy for breach of his article 8 right.

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63 Compare section 12(3) of the Human Rights Act to the statement by Lord Diplock in *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] AC 396 at p. 406. See also the discussion of this point by Tugendhat J in *Ryan Joseph Giggs (previously known as "CTB") v (1) News Group Newspapers Ltd and (2) Imogen Thomas* [2012] EWHC 431 (QB) at [97]-[102].

64 Supra.

77. However, in *Mosley v UK*[65] the Strasbourg court concluded that article 8 does not require any binding pre-notification requirement. It considered that the limited circumstances in which a state may restrict the freedom of the press had to be borne in mind in carrying out the balancing exercise between articles 8 and 10. It also considered that the potential efficacy of any such pre-notification requirement was open to serious doubt. The requirement would clearly have to be subject to a public interest exception so that the press could publish a story, without pre-notifying, where it considered it could defend itself on a public interest basis. To avoid a 'chilling effect' on the freedom of the press, the exception could only require a reasonable belief that publication was in the public interest. Furthermore, the efficacy of a system of pre-notification could only be ensured by setting damages for breach at a punitively high level. That could only be justified in the criminal context, which would risk breaching article 10. Taking those factors into account, as well as the wide margin of appreciation afforded to states, the Court held that a pre-notification requirement was not required to ensure compliance with article 8.[66]

78. It is not beyond the realms of imagination to see that in years to come the Strasbourg court will regard it as a necessary step by a state to have some procedures in place to monitor the activities of the media. In that case, however, a state should be able to choose how far to go beyond the basics of a regulatory scheme.

79. There are many different forms of statutory scheme for Parliament to choose from if it decides to have statutory regulation. It could for instance provide that there should be no statutory regime in force so long as there was a suitable voluntary scheme. Criteria for the suitability of a voluntary scheme could be laid down in the legislation.

80. In a paper published on 13 February 2012, the Media Regulation Roundtable put forward an interesting outline proposal, drafted by Hugh Tomlinson QC, for the creation, by statute, of a Media Standards Authority (MSA) to replace the Press

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65 Application no. 48009/08.

66 At [122]-[132].

Complaints Commission (PCC).[67] The proposed MSA would, under the statute creating it, be independent of both Government and the media industry, although retired editors and journalists would comprise a substantial minority of its governing body.

Conclusions

81. What we have seen in the cases discussed in this lecture is that the Strasbourg court has made an enormous contribution in the field of freedom of expression by the press. It has worked out detailed principles of responsible journalism. The Strasbourg judges have brought to their jurisprudence their wide knowledge, and their experience from many parts of Europe. As an international court the Strasbourg court has the perspective not only of a developed Western democracy but also of a new democracy which has seen the problems for society where the press is controlled by the government. The rulings of the Strasbourg court in this area display great sensitivity and wisdom.

82. We have also seen that there are shortcomings in the conduct of the press. Accordingly, there may now be considered to be less reason than in the past as to why there should not be some form of regulation of their activities. Regulation in the professions, for instance, is now the norm.

83. There is clearly an option for Parliament to introduce a new system of regulation. But regulation of the press is extremely difficult as it may result in a "chilling" of the press. If there was a system of statutory regulation, it would have to be carefully crafted. The nature of the issues to which press conduct gives rise requires considerable judgment. Moreover, there would have to be an independent regulator appointed by some totally independent process to administer such a system of regulation. On the other hand, an independent regulator could build up a code of

[67] http://inforrm.files.wordpress.com/2012/02/proposal-for-msa-final.pdf.

practice which could help remove some of the present uncertainty and difference of opinion about what journalists can or cannot properly do.

84. Whether there should be any system of regulation at all is a question on which Lord Justice Leveson will have to make recommendations and which ultimately Parliament will have to decide. However, whether or not Parliament decides to have a statutory regulator, there will always be a very considerable role to be played by the courts in regulating the press. The situations where problems are likely to arise are bound to be fact-sensitive. The law will also have to develop in line with developments in technology and changes in social attitudes. It is difficult for a system of regulation to be sufficiently flexible. It is, therefore, the courts who in the future are likely, by deciding privacy cases on a case by case basis, to be doing much of the work of providing an up-to-date definition of proper journalistic standards. Our national courts will look to the Strasbourg court in this task. We should assume that the Strasbourg court will continue to develop its case law in this area wisely, as it has done in the past.
