

The Balancing of Rights in a Democratic Society – Are the Media Too Free?

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Abstract

England and Wales thrive on being a democratic society, promoting the need for equal rights amongst all. Although, within this, freedom of expression is a fundamental right, this is ultimately weighed against the crucial right of privacy and the right not to be defamed. However, with the advance of technology and in particular the rise of the internet, the media are less restricted with their publishing, leading to an increase of infringement on an individual's rights. Despite attempts to control this through the reform of defamation laws, it is argued that the law is inadequate with guarding against conflicts between the media and individuals, resulting in the media experiencing greater freedom than before. With suggestions that this has become unmanageable, equal rights seem to be something of the past and despite recent attempts to resolve this, the law is essentially not equipped to do so.

Keywords

Media, Freedom, Internet, Privacy, Defamation

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I. Introduction

Freedom of expression is an essential human right acknowledged universally.¹ This is particularly recognised within the concept of media freedom, understood as the right for information to be communicated liberally within media formats.² However, the right to express freely and media freedom have a complex relationship.³ This is because, this freedom, in particular, is subject to a number of restraints leading to judiciaries attempting to strike a balance between the two.⁴

This article will examine how the rights of the media to publish freely are balanced against an individual's rights in a modern democratic society. First, it will consider what is meant by freedom of expression and how this is applied to both media and entertainment, introducing the impact of the introduction of the internet. Secondly, it will evaluate the limitations provided by the law. However, as there are a number of these, focus will be restricted to the constraints given by privacy and defamation laws. Thirdly, the position of the freedom experienced in the modern era of the internet will be evaluated, with consideration placed on whether the restrictions are still sufficient. This discussion will conclude by summarising whether within media and entertainment, freedom of expression is achieved.

II. Freedom of Expression: Meaning and Application

The right to freely express information is controlled by both regional and international laws⁵, and each constitution regulates their position on this freedom based on its own back-ground⁶. However, ultimately, the implementation of measures to protect freedom of expression is governed by the *European Convention on Human Rights*⁷(hereinafter *ECHR 1950*), in particular Article 10⁸. For purposes of English law, this is introduced through *the Human Rights Act 1998*⁹ (hereinafter *HRA 1998*). This right includes freedom to both communicate and receive information and this occurs, primarily, through the media. Therefore, in a modern

¹ Daniel Joyce, 'Internet Freedom and Human Rights' (2015) 269(2) *EUR J Int Law* 493, 498

² Ursula Smartt, *Media & Entertainment Law* (2nd edn, Routledge 2014) 11

³ Jacob Rowbottom, 'Media Freedom and Political Debate in the Digital Era' (2006) 69 *MLR* 489, 491

⁴ Smartt (n 2) 11

⁵ Patricia Akester, 'The Impact of Digital Rights Management on Freedom of Expression – the First Empirical Assessment' (2010) 41(1) *IJC* 31, 31

⁶ Smartt (n 2) 11

⁷ *European Convention on Human Rights and Fundamental Freedoms 1950* (hereinafter *ECHR 1950*)

⁸ *ECHR 1950*, Article 10

⁹ *Human Rights Act 1998* (hereinafter *HRA 1998*)

democratic society bodies of media must be free, as expressed in *McCartan*¹⁰. Although this is not specifically outlined in Article 10, media law cannot be recognised without reference to it¹¹, and as outlined in *Jerslid*¹² the media enjoy greater protections than individuals¹³. This is particularly proved through the introduction of *the HRA 1998* Section 12¹⁴, essentially giving freedom a higher right. Although, this is not unanimously applied as it only protects the press.¹⁵ Therefore, claims to right of freedom are understood to be insubstantial.¹⁶

Originally, freedom of expression was insufficiently experienced due to the lack of access to methods of communication.¹⁷ However, the introduction of the internet is thought of as resolving this inadequacy as it has become a vital source of both media and entertainment for individuals¹⁸. Therefore, information portrayed on the internet has given new depths to freedom of expression since it is now a community in which expression of opinions and access to information is easier to achieve.¹⁹

III. The Legal Limitations on Freedom of Expression

Although modern day society enjoy more freedom, this must still be exercised in harmony with the obligation to protect the rights of others, as set out in Article 10.2²⁰. It is almost a certainty that elements of the media will experience conflict between their freedom of expression and the rights of individuals who feel they have been ill-treated.²¹ In order to ensure one right is not favoured over the other, there is a requirement for mutual respect, in which one right ends where another begins.²² Therefore, it is up to the courts to determine when one right is to outweigh the other.

¹⁰ *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 LRC 308 (HL), 309: ‘The proper functioning of modern participatory democracy requires that the media be free’

¹¹ Eric Barendt and others, *Media Law: Text, Cases and Materials* (1st edn, Pearson Education Limited 2014) 5

¹² *Jerslid v Denmark* [1994] 19 EHRR 1

¹³ *Ibid.*

¹⁴ *HRA 1998*, s12

¹⁵ Michael Arnheim, ‘The Human Right to Press Freedom?’ (2004) 154 *NLJ* 96, 96

¹⁶ Thomas Gibbons, ‘“Fair Play to All Sides of the Truth”: Controlling Media Distortions’ (2009) 62(1) *CLP* 286, 297

¹⁷ Arnheim (n 15) 97

¹⁸ Barendt and others (n 11) 1

¹⁹ Anna Vamialis, ‘Online Defamation: Confronting Anonymity’ (2013) 21(1) *Int J Law Infor Tech* 31, 31

²⁰ *ECHR 1950*, Article 10.2

²¹ Smartt (n 2) 27

²² Vamialis (n 19) 41

A. Privacy

One particular right which causes a large amount of conflict for freedom of expression, is that of privacy, as it is understood as setting a limit into how far the media can intrude into an individual's life.²³ Similar to that of freedom, privacy is also seen as being an essential right within a liberal democratic society,²⁴ introducing the idea that these rights are oxymoronic²⁵. However, as illustrated in *Kaye*²⁶ there are no English statutes that entail the right to privacy as it is currently developed within the law of confidentiality²⁷. Nevertheless, as recognised in *Wainwright*²⁸ privacy is enshrined within Article 8 of the *ECHR 1950*,²⁹ thus action can be brought through the use of the *HRA 1998*³⁰. Consequently, the crucial concept in any case of privacy is how the rights protected by both Articles should be balanced, as presented in the seminal case of *Campbell*³¹, and supported in *Re S (A Child)*³² which states that neither has precedence over the other³³. However, this is especially problematic within the media when the case concerns a public figure, as shown in *Weller*³⁴. Therefore, the key difficulty when balancing these rights is the public interest test, in which intrusion into private life is justified as it is in the public's interest to be informed.³⁵ Nonetheless, this process is difficult as different people may come to different conclusions, as presented in *Campbell*^{36, 37}. This case introduced the concept that public figures are to enjoy less protection from privacy, despite criticism that too little weight was given to freedom.³⁸ This was supported in *Von Hannover*³⁹ where the media's right under Article 10 prevailed against the Princess's right to privacy under Article 8.⁴⁰ Both cases support the view that the defence of public interest allows the media to experience a higher right than an individual's privacy. However, certain media in England are

²³ Smartt (n 2) 41

²⁴ Ammar Oozeer, 'Internet and Social Networks: Freedom of Expression in Digital Age' (2014) 40(2) *CLB* 341, 349

²⁵ Althaf Marsof, 'Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression' (2011) 19(2) *Int J Law Tech* 110, 111

²⁶ *Kaye v Robertson* [1991] FSR 62 (CA), 66

²⁷ Frances Quinn, *Law for Journalists* (5th edn, Pearson Education Limited 2015) 58

²⁸ *Wainwright v Home Office* [2003] 4 All ER 969 (HL), 982

²⁹ *ECHR 1950*, Article 8

³⁰ *HRA 1998*

³¹ *Campbell v MGN Ltd* [2004] 2 All ER 995 (HL), 1007

³² *Re S (A Child) (Identification: Restriction on Publication)* [2004] 4 All ER 683 (HL)

³³ *Ibid* 692 (Lord Steyn)

³⁴ *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) [23]

³⁵ Smartt (n 2) 47

³⁶ *Campbell* (n 31) 1012

³⁷ Barendt (n 11) 504

³⁸ Steve Foster, 'Press Freedom and the Private Lives of Public Figures' (2004) 168 *JPN* 531, 531

³⁹ *Von Hannover v Germany (No 2)* (2012) 32 BHRC 527, 528

⁴⁰ Smartt (n 2) 16

also governed by the Editor's Code of Practice⁴¹, particularly Clause 2⁴² dealing with privacy. As seen in recent reports involving the royal family, explicitly Princess Beatrice⁴³ and Prince Harry⁴⁴, these rules are taken extremely seriously in England, allowing privacy to appear to outweigh freedom in specific situations. Nevertheless, despite the courts interpreting privacy more widely and English media appearing to value this, the defence of public interest still causes uncertainty.

B. Defamation

Similarly, one right that has an effect on the activities of the media, is that of defamation,⁴⁵ protecting the reputation of individuals. As presented in *Jameel*⁴⁶ the right under Article 10 was 'never intended to allow defamatory statements'⁴⁷ and the major criticism of this right is that it is favoured over freedom of expression⁴⁸. However, despite defamation being a fundamental human right, especially in modern society⁴⁹, the common law attempts to balance this with freedom. In *Steel & Morris*⁵⁰, one of the first seminal cases, it was established that, similar to privacy, there is weight given to information in the public interest and that this should be balanced with the law of defamation. However, in *Reynolds*⁵¹, another pivotal case, it was established that this should not be done to the extent that protection of reputation is given lesser value.⁵² The confusion brought about by common law was unravelled by the introduction of the *Defamation Act 2013* (hereinafter *DA 2013*)⁵³, the aim of which was to ensure a fair balance

⁴¹ Independent Press Standards Organisation, 'Editors' Code of Practice' (January 2016) <<https://www.ipso.co.uk/editors-code-of-practice/>> accessed September 2017

⁴² *Ibid*, Clause 2

⁴³ Mail Online Reporter, 'IPSO Adjudication Upheld: Princess Beatrice' *Mail Online* (London, 18 November 2016) <<http://www.dailymail.co.uk/news/article-3949340/IPSO-adjudication-upheld-Princess-Beatrice.html>> accessed September 2017

⁴⁴ Sam Greenhill and Rebecca English, 'Harry Confirms his Romance with Meghan then goes on the Warpath with Unprecedented Statement Attacking 'Sexist and Racist' Abuse of his 'Girlfriend'' *Mail Online* (London, 9 November 2016) <<http://www.dailymail.co.uk/news/article-3918730/Harry-confirms-romance-Meghan-goes-warpath-unprecedented-statement-attacking-sexist-racist-abuse-girlfriend.html>> accessed September 2017

⁴⁵ Barendt (n 11) 361

⁴⁶ *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359 (HL)

⁴⁷ *Ibid* 400

⁴⁸ Barendt (n 11) 361

⁴⁹ David Howarth, 'Libel: its Purpose and Reform' (2011) 74(6) *MLR* 845, 864

⁵⁰ *McDonald's Corporation v Steel* [1995] EMLR 527 (CA) 533

⁵¹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL)

⁵² *Ibid* 201 'Protection of reputation of public figures should not be debased falsely'

⁵³ *Defamation Act 2013* (hereinafter *DA 2013*)

was attained.⁵⁴ This was mainly achieved through the defence of honest opinion, described as the most important area of defamation which protects free speech.⁵⁵

However, this Act still limits this right as it offers more protection for statements made on the internet.⁵⁶ This is because, the internet gave new dimensions to freedom⁵⁷ and defamatory statements were inevitably going to be a large part of this.⁵⁸ This was evident in recent cases such as *Tamiz*⁵⁹ and *McAlpine*⁶⁰, which verified that content carried by internet platforms can seriously harm an individual's reputation.⁶¹ However, this Act only allows individuals to be protected when a defamatory statement is made online by requesting it be taken down,⁶² therefore the protection is not absolute. Similarly, this act has also caused difficulty to claim under defamation through its introduction of the serious harm requirement⁶³, in Section 1⁶⁴. Therefore, it could be argued that freedom is still greatly awarded despite the limitations provided by defamation laws.

IV. Freedom of Expression in the Digital Era

The predominant limit on the restrictions of freedom experienced today, is the rise of the internet, stimulating the question of whether protection laws are adequate.⁶⁵ Forms of digital media are ever-growing systems of communication and with these introductions, individuals are able to enjoy more freedom. This has caused increased debates with regard to the need for internet media regulations being introduced, in order to ensure this freedom is not absolute.⁶⁶

The internet is a form of media in which filters are non-apparent and thus individual's rights are more susceptible to being breached, especially on platforms such as social media. This especially arises in the form of libel comments, as previously identified, leading to information

⁵⁴ Laura Scaife and Hill Dickinson, 'The Defamation Act 2013: The Impact on the Legal Risks of Using Social Media' (2013) 4 *CRJ* 13, 13

⁵⁵ Jason Bosland, 'Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion' (2015) 74 *CLJ* 234, 234

⁵⁶ Scaife and Dickinson (n 54) 13

⁵⁷ Vamialis (n 19) 31

⁵⁸ Yuval Karniel, 'A New Proposal for the Definition of Defamation in Cyberspace' (2008) 2 *CL* 38, 38

⁵⁹ *Tamiz v Google Inc* [2012] EWHC 449 (QB)

⁶⁰ *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB)

⁶¹ *Ibid*

⁶² *DA 2013*, s5

⁶³ Sarah Webb, 'In Practice: Defamation: Libel Stats Don't Tell the Whole Story' (2015) *LS Gaz* 29, 29: 'This was always intended to be a deterrent to all but the most aggrieved claimants, and it appears it is proving so.'

⁶⁴ *DA 2013*, s1

⁶⁵ Joyce (n 1) 493

⁶⁶ *Ibid* 495

being easily shared amongst others but resulting in difficulties in controlling and limiting the number of these statements being constructed.⁶⁷ This occurred in *Loutchansky*⁶⁸, in which it was held that due to the accessibility of the internet, individuals would be able to retrieve information more liberally, thus the law would need to evolve in order to reflect these changes. Along with this, the ability to anonymise comments formed on the internet creates difficulty in the formulation of a potential claim, especially in cases where the claim is to be brought against the operator of a website. These types of comments also form a problem for website operators as it creates potential liability.

Although, these are arguments that developments in the internet allow for expression to be experienced more freely, the law has begun to develop its position, in order to attempt to restrain from these experiences. In particular, the crucial changes brought about by the *DA 2013*⁶⁹ have allowed for protections to be presumed in certain circumstances where libellous comments are formed on an online platform. Both Sections 5 and 10 of this Act create defences for operators of websites by focusing on user responsibility and straying away from operator blame. It is argued that these defences allow for more successful claims as it is easier to bring an action against an individual user of a website. However, Section 5 also allows for actions to be brought against website operators, as the defence is defeated if the operator is given a notice of complaint and they fail to remove any statement within this complaint. This was shown in the successful claim brought against Google in the case of *Tamiz*⁷⁰.

Similarly, in recent cases it can be seen that comments made on the social media platform Twitter have resulted in successful defamation claims, despite only being 140 characters long. In the case of *McAlpine*⁷¹, as identified earlier, Lord McAlpine was awarded damages for a tweet which insinuated he had committed an offence of child abuse, as the tweet had reached a substantial number of people. Whereas, in *Cairns*⁷², damages were awarded in the sum of £90,000 for a tweet that suggested the Claimant was match fixing, despite only reaching 65 individuals. These cases illustrate that although the internet allows individuals to freely construct comments, they can be rectified through a claim in defamation, even in minor cases.

⁶⁷ Olivia Whitcroft, 'Social Media – Challenges in the Control of Information' (2013) 6 (4) *DPI* 7

⁶⁸ *Loutchansky v Times Newspapers Ltd and others* [2001] EWCA Civ 1805 (QB)

⁶⁹ *DA 2013*

⁷⁰ *Tamiz* (n 59)

⁷¹ *Lord McAlpine* (n 60)

⁷² *Cairns v Modi* [2012] EWHC 756 (QB)

However, there are still apparent difficulties with controlling the balance of defamation and freedom in the modern era,⁷³ as it has been argued that the internet cannot, and should not, be regulated through national laws⁷⁴ and therefore needing to be achieved internationally, which is difficult. Thus, media laws are currently still being improved in order to tackle the difficulties with restricting freedom on the online world.⁷⁵

V. Conclusion

In conclusion, it is evident that freedom of expression is at the basis of a democratic society when it is balanced against the specific rights of others.⁷⁶ Although, when doing so, elements of the law set restrictions on this freedom, advancements on technologies have transformed how information is communicated, modernising freedom of expression⁷⁷. Thus, the restrictions, and therefore specific individual rights, have become difficult to apply. As a result, it is suggested that this has become uncontrollable,⁷⁸ raising concern that if freedom of expression online continues to be unregulated, it will not be consistent with a democratic society⁷⁹. Therefore, suggesting that the rights of others provided by the law are not currently sufficient enough to limit freedom to the extent required. Consequently, the media currently experience too much freedom.

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⁷³ Whitcroft (n 67) 7

⁷⁴ Barendt (n 11) 23

⁷⁵ Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *CLJ* 355, 358

⁷⁶ Corinna Coors, 'Opinion of Defamation? Limits of Free Speech in Online Customer Reviews in the Digital Era' (2015) 3 *CL* 72, 72

⁷⁷ Oozeer (n 24) 341

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