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**CRITIQUING THE UK  
JUDICIARY'S RESPONSE TO  
ARTICLE 10 POST-HRA:  
UNDERVALUING THE RIGHT  
TO FREEDOM OF EXPRESSION?**

---

**PAUL WRAGG**

A thesis submitted to  
Durham University  
for the degree of  
DOCTOR OF PHILOSOPHY

University College,  
Durham University,  
Durham Law School,  
SEPTEMBER 2009.

# TABLE OF CONTENTS

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<b>ABSTRACT</b> .....	5
<b>1. Object of the enquiry</b> .....	5
<b>2. Place of the enquiry within the academic literature</b> .....	8
<b>3. Parameters of the enquiry</b> .....	11
<b>CHAPTER ONE – Introduction</b> .....	14
<b>1. Introduction</b> .....	14
<b>2. Focusing on the judiciary</b> .....	17
<b>3. Backdrop to the UK judiciary’s approach to Article 10: the pre-HRA case law and expectations for human rights development under the HRA</b> .....	24
<i>a) Free speech in the pre-HRA case law</i> .....	24
<i>b) Expectations for the HRA</i> .....	32
<i>c) The Strasbourg approach to Article 10</i> .....	35
<i>d) Conclusion</i> .....	43
<b>4. The domestic judicial response to Article 10</b> .....	45
<b>5. Conclusion</b> .....	50
<b>CHAPTER TWO – Established free speech theories and Article 10</b> .....	53
<b>1. Introduction</b> .....	53
<b>2. The interplay between theory and practice</b> .....	54
<b>3. The argument from democracy</b> .....	58
<b>4. The argument from truth</b> .....	68
<b>5. The arguments from self-fulfilment and autonomy</b> .....	81
<b>6. Conclusion</b> .....	88
<b>CHAPTER THREE – The Strasbourg approach to freedom of expression compared to theory: Examining recent Article 10 decisions in the European Court of Human Rights</b> .....	90
<b>1. Introduction</b> .....	90
<b>2. The Strasbourg approach in outline: mechanics and rationale</b> .....	91
<i>a) Mechanics</i> .....	91
<i>b) Rationale</i> .....	96
<b>3. Recent decisions</b> .....	100
<i>a) Political expression</i> .....	100
<i>b) Non-political expression</i> .....	114
<b>4. Analysis: comparisons between the Strasbourg jurisprudence and established theory</b> .....	118
<b>5. Conclusion</b> .....	127
<b>CHAPTER FOUR – Key issues under the Human Rights Act: Is there scope to diverge from Strasbourg?</b> .....	129
<b>1. Introduction</b> .....	129
<b>2. Section 2, HRA: decisions and debate</b> .....	132
<i>a) Introduction</i> .....	132

b) <i>No departing from Strasbourg without good reason</i> .....	133
c) <i>Qualifications to this apparent rigidity?</i> .....	136
d) <i>The use of section 2 in the UK Article 10 case law</i> .....	144
e) <i>Section 2 is a Gateway to a UK Bill of Rights: Aspiration or Aberration?..</i>	149
f) <i>Conclusion</i> .....	154
<b>4. The Margin of Appreciation doctrine and the <i>Ullah</i> principle</b> .....	155
<b>5. Conclusion</b> .....	166
<b>CHAPTER FIVE – Offensive political expression and the ‘right not to be offended’: Toward a heckler’s veto?</b> .....	168
<b>1. Introduction</b> .....	168
<b>2. The commitment to protect offensive political expression</b> .....	171
a) <i>The terms of the commitment to protect political expression</i> .....	171
b) <i>The inclusion of offensive political expression within the definition</i> .....	175
c) <i>Two recent decisions on the definition of ‘political’ in the context of offensive expression</i> .....	179
i) <i>Sanders v. Kingston</i> .....	179
ii) <i>Livingstone v. the Adjudication Panel for England</i> .....	184
iii) <i>Conclusions</i> .....	188
<b>3. Development of the ‘rights of others’ exception</b> .....	190
<b>4. The threat to free speech</b> .....	195
<b>5. A resolution?</b> .....	203
<b>6. Conclusion</b> .....	214
<b>CHAPTER SIX – Beyond a simple taxonomy of the speech content: Speaker, speech and speech target valuations in determining the Article 10 weight</b> .....	217
<b>1. Introduction</b> .....	217
<b>2. Outlining the ‘speaker, speech, speech target’ pattern</b> .....	218
<b>3. Of greater value: the media and politicians</b> .....	221
a) <i>Journalists</i> .....	221
i) <i>Open justice</i> .....	221
ii) <i>Matters of public interest</i> .....	225
iii) <i>Matters of interest to the public?</i> .....	234
b) <i>Politicians</i> .....	242
<b>4. Of lesser value: from non-journalists to prisoners</b> .....	251
a) <i>Non-journalists</i> .....	252
b) <i>Prisoners</i> .....	261
<b>5. Conclusion</b> .....	262
<b>CHAPTER SEVEN – Identifying the domestic judiciary’s approach to ‘non- political’ speech</b> .....	265
<b>1. Introduction</b> .....	265
<b>2. Artistic expression</b> .....	267
<b>3. Commercial speech</b> .....	276
<b>4. Pornography</b> .....	288
<b>5. Conclusion</b> .....	301
<b>CHAPTER EIGHT – Conclusion</b> .....	304
<b>1. Introduction</b> .....	304
<b>2. Unpacking the UK judiciary’s consequentialist approach to Article 10</b> ....	306

<i>a) Approach to free speech principle</i> .....	306
<i>b) Strategy?</i> .....	316
<i>c) Conclusions</i> .....	321
<b>3. Causes of this approach</b> .....	323
<i>a) Introduction</i> .....	323
<i>b) The Strasbourg dichotomy: principles and limitations</i> .....	324
<i>c) The influence of pre-HRA thinking</i> .....	329
<i>d) Development of other Rights</i> .....	333
<b>4. Consequences of this approach</b> .....	336
<b>5. Towards a remedy?</b> .....	342
<b>6. Conclusion</b> .....	343
<b>BIBLIOGRAPHY</b> .....	345

# ABSTRACT

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## 1. Object of the enquiry

The arrival of the Human Rights Act 1998 (the “HRA”) stimulated much speculation as to the effect that the Act would have on judicial approaches to the relationship between the individual and State.<sup>1</sup> In particular, the Act generated expectations that it would raise rights consciousness within judicial thinking.<sup>2</sup> Consequently, the potential effect this change would have on freedom of speech in the UK was intriguing. It had been said that the common law already recognised a ‘constitutional right to free speech’,<sup>3</sup> although the strongest statements for its protection seemed reserved for freedom to publish, in particular<sup>4</sup> and, furthermore, the common law could not interfere with contrary statutory measures.<sup>5</sup> There had been speculation that the obstacle to the fullest protection for free speech would be removed if a constitutional measure was introduced that allowed the judiciary to protect free speech where the common law would otherwise be impotent.<sup>6</sup> Yet it was

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<sup>1</sup> See Section 3(b) of Chapter One, pages 33 to 35.

<sup>2</sup> Lord Irvine, Third Reading, February 5, 1998, H.L. Debates, vol. 585, col. 840.; Francesca Klug, ‘The Human Rights Act 1998, *Pepper v. Hart* and All That’ (1999) Public Law 246

<sup>3</sup> *Broome v. Cassell & Co Ltd* [1972] AC 1027, 1133, *per* Lord Kilbrandon

<sup>4</sup> *Silkin v. Beaverbrook Newspapers Ltd* [1958] 1 WLR 743; *X (A Minor) (Wardship: Restrictions on publication)* (1975) Fam 47; *R. v. Central Independent Television plc* (1994) Fam 192. Although see discussion of *R. v. Secretary of State for the Home Department, ex parte Simms* (2000) 2 AC 115, at pages 29-35, decided on the cusp of the HRA’s inception, in which freedom to publish is not the primary focus of the free speech claim. As will be shown, this claim contains important common law free speech principles.

<sup>5</sup> Although the decision in *ex parte Simms, ibid.*, demonstrates that liberal approaches to statutory interpretation so as to secure a pro-free speech reading of the statute was possible pre-HRA

<sup>6</sup> Eric Barendt, *Freedom of Speech*, (OUP, 1985, 1<sup>st</sup> edn.), 304.

also argued, pre-HRA, that, in addition, judicial attitudes toward freedom of speech required addressing. It was argued that the judicial approach to freedom of speech was inconsistent: the judiciary did not seem to treat free speech claims equally and so certain speakers seemed better placed than others.<sup>7</sup> Certainly, uncompromisingly pro-free speech judgments were rare where the freedom to publish was not implicated.<sup>8</sup> Thus, it was argued that the common law approach to free speech had developed incoherently and that there seemed to be a judicial readiness to allow restrictions on flimsy grounds.<sup>9</sup> These criticisms implicated the UK judiciary's conceptual understanding of free speech, suggesting failings in the court's engagement with the moral and philosophical arguments underpinning the nature of the right.<sup>10</sup> However, there was an expectation amongst some commentators that greater consistency of free speech protection would occur as a result of the provisions in section 2 of the HRA.<sup>11</sup>

It has now been almost nine years since the substantive provisions of the HRA came into force<sup>12</sup> (not counting the further two years of judicial preparation). By surveying the post-HRA landscape, the object of this enquiry is to ascertain whether the judiciary has realised protection for freedom of speech in its fullest terms. Prior to the HRA, Barendt, for example, had argued that in order to maximise protection, the judiciary ought to engage with the theoretical arguments for the free speech

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<sup>7</sup> See Phillipson and Fenwick, 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression,' [2000] *Public Law* 625

<sup>8</sup> In this sense, *Brutus v. Cozens* (1973) AC 854 is a notable exception.

<sup>9</sup> Helen Fenwick, *Civil Liberties*, (Cavendish Publishing Ltd., 1998, 2<sup>nd</sup> edn.), 144.

<sup>10</sup> See *ex parte Simms*, fn. 4, 126, *per* Lord Steyn.

<sup>11</sup> See, in particular, Fenwick and Phillipson, fn. 7. See, further, the discussion on s. 2 in Chapter Four.

<sup>12</sup> These provisions came fully into force on October 2, 2000.



protection.<sup>13</sup> This thesis seeks to understand what the judiciary's approach to Article 10 is and how this compares to both established theory and the rationale underpinning the Strasbourg Article 10 jurisprudence. Thus, it will examine whether the judiciary has become acclimatised to the language of 'rights' in a free speech context and, furthermore, whether it has recognised the significance of underlying theories of free speech in this regard. As is well-established in the academic literature, there are several dominant theories which seek to explain and justify the concept of free speech as a right.<sup>14</sup> Each of these offers different perspectives on the scope of free speech and approaches to protecting it. In raising free speech from a liberty to a right in all circumstances, has the judiciary demonstrably engaged with those theories and, if so, to what extent? In other words, what value or values has the judiciary identified as being served by freedom of expression? Does the jurisprudence suggest the judiciary is simply absorbing Strasbourg jurisprudence and, if so, how does this affect the UK judiciary's engagement with theory? In other words, even if minded to do so, what obstacles stand in the judiciary's way toward a more principled approach to Article 10 to fit theoretical understandings of the right?

By virtue of this critique, it will be argued that the UK judiciary has not developed the Article 10 jurisprudence in a principled manner, *i.e.*, one that fully engages with the established theoretical approaches to freedom of expression. Instead, due to, amongst other things, its limited approach to the obligations contained within s. 2 of the HRA,<sup>15</sup> the UK Article 10 jurisprudence demonstrates a particularly narrow approach to the consequentialist rationale for protecting

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<sup>13</sup> Barendt, fn. 6, 1-8.

<sup>14</sup> See discussion in Chapter Two, pages 54-90.

<sup>15</sup> see Chapter Four, pages 132-169.

expression that, consequently, neglects other rationales based on broader instrumentalist grounds or, indeed, protection based on the intrinsic value of free speech. Thus, it will be argued that in the UK, the Article 10 lens has been focussed too sharply on narrow forms of political expression.<sup>16</sup> This is disappointing from a free speech advocate's perspective not just because the concept of free speech is stunted in this environment but also because it suggests the promised 'rights culture'<sup>17</sup> has not fully taken nor the constitutional significance of free speech fully secured.

## 2. Place of the enquiry within the academic literature

There are many commentators within the field who have produced notable research on legal approaches to freedom of speech. The leading general work on theoretical and practical approaches to free speech is Eric Barendt's second edition of *Freedom of Speech*.<sup>18</sup> Other academics have also written extensively on the subject in particular contexts. Helen Fenwick has written on the judicial treatment of public protest<sup>19</sup> and both she and Gavin Phillipson, separately and in collaboration, have written on the limits of media freedom;<sup>20</sup> Eric Heinze<sup>21</sup> and Ivan Hare<sup>22</sup> have written

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<sup>16</sup> In particular, see discussion in Chapter Five, pages 172-218

<sup>17</sup> Fn. 2.

<sup>18</sup> OUP, 2005.

<sup>19</sup> *Civil Liberties and Human Rights*, (4<sup>th</sup> ed Routledge-Cavendish, 2007), 659-802; 'The Right to Protest, the Human Rights Act and the Margin of Appreciation' (1999) 62(4) *MLR* 491; see also Phillipson and Fenwick, 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression,' fn. 7; Fenwick and Phillipson, "Direct action, Convention values and the Human Rights Act", (2001) 21 *Legal Studies* 535

<sup>20</sup> *Media Freedom under the Human Rights Act*, (OUP, 2006); 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) *MLR* 660; Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66(5)

about ‘hate speech’ from a UK perspective whilst James Weinstein<sup>23</sup> has also written about the topic (predominantly) from a US perspective; Ian Leigh has written about freedom of speech from a religious perspective;<sup>24</sup> Roger Shiner has written specifically about commercial speech;<sup>25</sup> Ronald Dworkin<sup>26</sup> and, amongst others, Catherine McKinnon<sup>27</sup> have written (and duelled) on legal approaches to pornographic expression, whilst Ian Cram,<sup>28</sup> Andrew Geddis,<sup>29</sup> and Merris Amos,<sup>30</sup> amongst others, have also made notable contributions. A common theme in these

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*MLR* 726; Phillipson, ‘Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously’ (2003) *EHRLR* 53; Fenwick, ‘Clashing Rights, the Welfare of the Child and the HRA’ (2004) 67(6) *MLR* 889

<sup>21</sup> ‘Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age and Obesity’ in *Extreme Speech and Democracy*, Ivan Hare and James Weinstein, eds., (OUP, 2009); ‘Viewpoint Absolutism and Hate Speech’ (2006) 69 *MLR* 543;

<sup>22</sup> ‘Inflammatory Speech: Cross Burning and the First Amendment,’ [2003] *Public Law* 408; ‘Crosses, crescents and sacred cows: criminalising incitement to religious hatred,’ [2006] *Public Law* 521; see also, *Extreme Speech and Democracy*, above, fn. 21 and ‘Debating abortion – the right to offend gratuitously’ (2003) 62(3) *Cambridge Law Journal* 525

<sup>23</sup> ‘An Overview of American Free Speech Doctrine and its Application to Extreme Speech’ in *Extreme Speech and Democracy*, above, fn. 21; *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, (Westview Press, 1999); ‘An American’s View of the Canadian Hate Speech Decisions’ in *Free Expression: Essays in Law and Philosophy*, W. Waluchow, ed., (Clarendon Press, 1994); ‘Hate Crime and Punishment’ (1994) 73 *Oregon Law Review* 345; ‘First Amendment Challenges to Hate Crime Legislation: Where’s the Speech?’ (1992) 11(2) *Criminal Justice Ethics* 6;

<sup>24</sup> ‘Homophobic Speech, Equality Denial and Religious Expression,’ in *Extreme Speech and Democracy* (above, fn. 23); see also ‘Hatred, Sexual Orientation, Free Speech and Religious Liberty’ (2008) 10(3) *Ecclesiastical Law Journal* 337.

<sup>25</sup> *Freedom of Commercial Expression* (Oxford: Clarendon Press, 2003)

<sup>26</sup> ‘Is there a right to pornography?’ (1981) 1 *Oxford J. Legal Stud.* 177; ‘Pornography and Hate,’ in *Freedom’s Law* (Oxford University Press, 1996);

<sup>27</sup> *Only Words*, (Harvard University Press, 1993);

<sup>28</sup> ‘The Danish Cartoons, Offensive Expression, and Democratic Legitimacy’ in *Extreme Speech and Democracy*, above, fn. 21; *Contested Words – Legal Restrictions on Freedom of Expression in Liberal Democracies* (Ashgate, 2006); ‘Regulating the media: some neglected freedom of expression issues in the United Kingdom’s counter-terrorism strategy’ (2006) 18 *Terrorism and Political Violence* 335; ‘Political Expression, Qualified Privilege and Investigative Journalism – An Analysis of Developments in English Defamation Law post *Reynolds v. Times Newspapers*’ (2005) 11 *Canterbury Law Review* 143; *A Virtue Less Cloistered – Courts, Speech and Constitutions*, (Hart Publishing, 2002); ‘Beyond Madison? The US Supreme Court and the regulation of sexually explicit expression’ [2002] *Public Law* 743.

<sup>29</sup> ‘Free Speech Martyrs or Unreasonable Threats to Social Peace? – ‘Insulting’ Expression and s. 5 of the Public Order Act 1986,’ [2004] *PL* 853; ‘If thy right eye offend thee, pluck it out: *R v. BBC (ex p. ProLife Alliance)*’ (2003) 66 *MLR* 885; ‘What future for political advertising on the UK’s television screens?’ (2002) *Public Law* 615;

<sup>30</sup> ‘Can we speak freely now? Freedom of Expression under the Human Rights Act’ (2002) 6 *EHRLR* 750;

contributions is the focus on the judicial treatment of Article 10, supported, to varying degrees, by discussion of the theoretical justifications for free speech. Meanwhile, other commentators (typically, though not exclusively, from the United States) have written more exclusively about underlying theories of freedom of speech with some consideration of their application in practice. Arguably Frederick Schauer's book, *Free speech: a philosophical enquiry*<sup>31</sup> remains the leading work on philosophical approaches to the subject. His book also includes his argument for protecting free speech based on distrust of government. Other notable theoretical works include the contributions of Alexander Meiklejohn<sup>32</sup> to the argument from democracy; Thomas Scanlon<sup>33</sup> to the argument from autonomy; John Stuart Mill<sup>34</sup> to the argument from truth; Thomas Emerson,<sup>35</sup> C. Edwin Baker<sup>36</sup> and Martin Redish<sup>37</sup> to the argument from self-realisation (or variations of it); and Lee Bollinger<sup>38</sup> to the argument based on tolerance. It is worth mentioning Kent Greenawalt and Larry Alexander who have also written from a theoretical perspective. Greenawalt has made a number of significant contributions on the interaction between free speech arguments and the criminalisation of speech.<sup>39</sup> Alexander, meanwhile, building on an

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<sup>31</sup> Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, 1981)

<sup>32</sup> Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper, 1948); "The First Amendment is an absolute," [1961] *Supreme Court Review* 245

<sup>33</sup> Thomas Scanlon, "A Theory of Freedom of Expression," in *The Philosophy of Law*, R. M. Dworkin, ed., (OUP, 1977); "Freedom of Expression and Categories of Expression," (1979) *University of Pittsburgh Law Review* 519

<sup>34</sup> J. S. Mill, *On Liberty*, (London: Routledge, 1991), (1<sup>st</sup>. ed., 1859)

<sup>35</sup> Thomas Emerson, *The System of Freedom of Expression*, (New York: Random House, 1970)

<sup>36</sup> C. Edwin Baker, *Human Liberty and Freedom of Speech*, (OUP, 1989)

<sup>37</sup> Martin Redish, "The Value of Free Speech", (1982) 130 *University of Pennsylvania Law Review* 591

<sup>38</sup> *The Tolerant Society*, (OUP, 1986); see also Lee Bollinger and Geoffrey Stone, eds., *Eternally Vigilant*, (University of Chicago Press, 2002)

<sup>39</sup> *Speech, Crime and the Uses of Language*, (Oxford University Press, 1989); *Fighting Words*, (Princeton University Press, 1995); "'Clear and Present Danger' and Criminal Speech" in Bollinger and Stone, eds., *Eternally Vigilant*, (University of Chicago Press, 2002), 96-119.

earlier piece of collaborative research with Paul Horton,<sup>40</sup> has questioned whether a coherent right to freedom of expression is possible in any event.<sup>41</sup>

This thesis is set apart from those enquiries in the following ways. Rather than concentrating on freedom of expression in a specific context, this thesis offers a thematic exposition, which seeks to chart judicial responses to Article 10 post-HRA. In this way, it builds on the enquiry by Barendt but differs by concentrating on the UK position (rather than being comparative, as Barendt's work is) and is more up to date (Barendt's second edition covers the law as at 31 December 2004). None of this is to say that it is unique in considering free speech cases in the context of underlying justificatory theories (it is difficult to imagine how free speech could be considered without such).

### **3. Parameters of the enquiry**

Given that the significant aspects of the enquiry (set out above) are interlinked they are not examined sequentially but, instead, as they arise in relation to each of the areas to be explored. These findings are set out in full in the conclusion where they are critiqued. The parameters of this enquiry are set by its focal point, which, as stated, relates to judicial responses to the Article 10 right in the UK post-HRA. In order to properly frame this enquiry, some discussion of the broader issues surrounding the nature and operation of freedom of speech, in theory and practice, is

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<sup>40</sup> Paul Horton and Larry Alexander, "the Impossibility of a Free Speech Principle", (1983) 78 *Northwestern University Law Review* 1319

<sup>41</sup> *Is There a Right of Freedom of Expression?*, (Cambridge University Press, 2005); see similarly Stanley Fish, *There's No Such Thing As Free Speech And It's a Good Thing Too*, (OUP, 1994) and 'The Dance of Theory' in Bollinger and Stone, eds., *Eternally Vigilant*, above, fn. 38

necessary. Consequently, there will be some discussion of the debate surrounding the development and application of the HRA and section 2 in particular (albeit in a free speech context); there will also be discussion of the Strasbourg approach to Article 10; and, where relevant to the argument advanced, the dominant justificatory arguments for free speech will be considered.

In overview, the first four chapters lay the foundations for the substantive discussion of judicial attitudes toward Article 10 in the UK in the later chapters. Chapter One establishes the object of the enquiry in more detail, including an exploration of the backdrop to the introduction of the HRA in which it will be argued that both the pre-HRA common law and Strasbourg jurisprudence generally tends to minimise (rather than maximise) the protection of free speech for varying reasons. Chapter Two discusses the justifications for the protection of free speech. As noted above, these theories are well-established in the academic literature. This chapter does not offer fresh insights into these theories but rather explores the use of them in the Article 10 jurisprudence (at both UK and Strasbourg level). Following on from this discussion, Chapter Three pinpoints those established theories apparent in Strasbourg jurisprudence and, furthermore, argues that the limitations of the ECtHR as a court impairs those rationales from being fully realised in the outcomes of the ECtHR's decisions.<sup>42</sup> Finally in this first part, Chapter Four discusses the key issues concerning the HRA which impact on the UK courts' approach to securing the right to freedom of expression under Article 10 domestically.

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<sup>42</sup> Fenwick and Phillipson, *Media Freedom*, fn. 20, make a similar argument, as discussed in Chapter Three, pages 92-129.

Chapters Five to Seven explore the judiciary's approach to freedom of speech based on the type of expression at stake. Thus, Chapters Five and Six consider the approach to political expression whereas Chapter Seven explores the judicial treatment of 'non-political' speech. In particular, Chapter Five explores the judicial commitment to protect political expression that shocks, offends and disturbs in order to understand what type of expression is included within this commitment and whether recent developments in the case law of a 'right not to be offended' jeopardises the realisation of this commitment. Developing this argument, Chapter Six argues that the strongest form of protection does not depend entirely on determining the content of the speech in question but also the identity of the speaker and speech target. Chapter Eight concludes by analysing the findings in previous chapters in order to argue that the UK judiciary has adopted a consequentialist approach to Article 10 that is arguably narrower in scope than both the discernible approach to Article 10 at Strasbourg and established theoretical approaches to freedom of expression. The structure of the enquiry is set out more fully in Chapter One.

# CHAPTER ONE

## Introduction

---

### 1. Introduction

The chief concern of this thesis is to evaluate the impact of the Human Rights Act 1998 (the “HRA”) – and, through it, the freedom of expression guarantee under Article 10 of the European Convention on Human Rights (the “Convention”) – on the judicial approach to freedom of speech in the United Kingdom.<sup>1</sup> In particular, it seeks to understand whether, as a result, the UK judiciary more readily engages with the established philosophical arguments for freedom of speech (evident in the extensive academic literature on the subject)<sup>2</sup> in its attempts to secure the Article 10 right as against competing societal interests and other Convention rights. Thus, this thesis critiques the UK judiciary’s approach to what Fenwick and Phillipson term ‘the domestic Article 10 endeavour’<sup>3</sup> and asks whether, as a result of this endeavour, the UK judiciary have adopted a more theorised approach to freedom of speech. Thus, it

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<sup>1</sup> In this thesis no distinction is made between ‘freedom of speech’ and ‘freedom of expression’ so that the two are used interchangeably. See Eric Barendt, *Freedom of Speech*, (Oxford University Press, 2005), 75, who notes that if there were some difference, ‘one would expect courts such as those in Germany or the European Human Rights Court to give coverage to a wider range of expressive conduct than, say, US courts [on the basis that] the former are required to apply “freedom of expression” provisions, the latter the “freedom of speech” limb of the First Amendment [yet] there is no evidence that courts draw any distinction between the two concepts’.

<sup>2</sup> As set out in Chapter Two, pages 54-90.

<sup>3</sup> Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act*, (Oxford University Press, 2006), 1-33.



is not the object of this thesis to provide an exposition of the law of free speech in the UK through systematic enquiry of every context in which freedom of expression arises as, say, Barendt<sup>4</sup> or Fenwick and Phillipson (in the context of media freedom)<sup>5</sup> do. Instead, this thesis is a thematic enquiry which principally explores the case law in order to discern themes in judicial reasoning on the topic of freedom of expression under Article 10 and how such compares to established free speech theory. This thesis therefore covers a narrow specialised topic by limiting itself to considering domestic judicial responses to Article 10 under the HRA.

Due to the nature of this enquiry, there are a number of issues that this thesis does not seek to engage with. In particular, since this thesis focuses on judicial attitudes towards free speech rather than legislative or executive attitudes, this thesis does not specifically explore in any real depth the statutory provisions affecting freedom of expression in the UK except to the extent that it is argued the judiciary could interpret such measures more compatibility with free speech principles.<sup>6</sup> So, for example, the recent Racial and Religious Hatred Act 2006 is not covered on the basis that there have been no major decisions involving this legislation.<sup>7</sup> Likewise, this thesis does not extensively tackle the various public order measures which also impinge upon freedom of speech in practice, primarily because the discussion of public order implicates other broader socio-legal issues, such as the allocation of

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<sup>4</sup> Fn. 1

<sup>5</sup> Fn. 3

<sup>6</sup> See discussion in Chapters Five and Six.

<sup>7</sup> For a critical discussion of this legislation, see Kay Goodall, 'Incitement to Racial Hatred: All Talk and No Substance?' (2007) 70(1) *Modern Law Review* 89-113. See further, Ian Leigh, 'Homophobic Speech, Equality Denial and Religious Expression' in James Weinstein and Ivan Hare, ed., *Extreme Speech and Democracy*, (Oxford University Press, 2009); Ivan Hare 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred' [2006] *Public Law* 521; and Ian Cram, 'The Danish Cartoons, Offensive Expression and Democratic Legitimacy' in *Extreme Speech and Democracy* (Oxford University Press, 2009).

public resources, which are outside the scope of this enquiry.<sup>8</sup> Moreover, since this thesis is solely concerned with judicial influences on the development of Article 10, the discussion is limited to those areas of development that the judiciary can actively decide upon. So, for example, there is no real discussion of the lack of protection for hate speech under Article 10. Although there is extensive academic literature on the topic, including criticism of the European approach to it,<sup>9</sup> both Parliament and the European Court of Human Rights (the “ECtHR”) strictly prohibit the protection of such expression. Consequently, the judiciary is bound by this position: there is little, if any, scope for the judiciary to find, for example, that the Race Relations Act 1976 is incompatible with Article 10 because the ECtHR clearly endorses interference with racially motivated invective.<sup>10</sup> Whilst these areas are excluded on the basis of the scope of the enquiry, it is also worth noting the pragmatic grounds for limiting the discussion in this way: freedom of speech is a mammoth topic that has been

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<sup>8</sup> These issues are discussed extensively, for example, in the following: Helen Fenwick, ‘The Right to Protest, the Human Rights Act and the Margin of Appreciation’ (1999) 62(4) *Modern Law Review* 491; Gavin Phillipson and Helen Fenwick, ‘Public protest, the Human Rights Act and judicial responses to political expression,’ [2000] *Public Law* 627; Helen Fenwick and Gavin Phillipson, ‘Direct action, Convention values and the Human Rights Act,’ (2001) 21 *Legal Studies* 535; Andrew Geddis, ‘Free Speech Martyrs or Unreasonable Threats to Social Peace? – ‘Insulting’ Expression and s. 5 of the Public Order Act 1986,” [2004] *PL* 853; Ivan Hare, “Crosses, crescents and sacred cows: criminalising incitement to religious hatred,” [2006] *Public Law* 521;

<sup>9</sup> For critical discussion of the European approach to hate speech see, for example, Ian Cram, *Contested Words – Legal Restrictions on Freedom of Expression in Liberal Democracies* (Ashgate, 2006); Eric Heinze, ‘Viewpoint Absolutism and Hate Speech’ (2006) 69 *MLR* 543. For comparative analysis see Ian Cram, *Contested Words*; Ivan Hare, ‘Inflammatory Speech: Cross Burning and the First Amendment,’ [2003] *Public Law* 408; ‘Crosses, crescents and sacred cows: criminalising incitement to religious hatred,’ [2006] *Public Law* 521; James Weinstein, ‘An Overview of American Free Speech Doctrine and its Application to Extreme Speech’ in *Extreme Speech and Democracy, and Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, (Westview Press, 1999); Barendt, *Freedom of Speech*, fn. 1. See further, Hare and Weinstein, eds., *Extreme Speech and Democracy*, Ivan Hare and James Weinstein, eds., (OUP, 2009).

<sup>10</sup> See e.g., *Norwood v. UK* (2005) 40 EHRR SE 11; *Refah Partisi v. Turkey* (2002) 35 EHRR 3. The limited exception to this principle is where the expression is reporting such speech as a matter of public interest, e.g., *Jersild v. Denmark* (1995) 19 EHRR 1. See further discussion on this point in Chapter Three and Chapter Five.

extensively written about and, therefore, the discussion of all aspects of it is beyond the scope of a thesis in any event.

The purpose of this introductory chapter is to set out the parameters of the enquiry in more detail, and so defend its confines, rather than to introduce the key theoretical issues (these are discussed in Chapter Two). In particular, the discussion begins by defending the focus on the judiciary within this thesis to the exclusion of the other branches of government. The discussion moves on to explore the UK judiciary's pre-HRA attitudes toward freedom of speech followed by exploration of the expectations envisaged by the introduction of the HRA (since this, to some extent, contextualises the judiciary's attitudes toward freedom of expression under Article 10) before the final section introduces the key arguments of this thesis.

## **2. Focusing on the judiciary**

Whilst the protection of human rights is provided for by the terms of the HRA, the extent of protection is ultimately reliant upon the judiciary's interpretation and application of those measures.<sup>11</sup> The level of engagement by the judiciary to this process is therefore significant since, in the absence of further legislative measures, the UK courts are the gateway to the maximisation of protection afforded to human

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<sup>11</sup> See, *e.g.*, Fenwick and Phillipson, 'Public Protest, the Human Rights Act and judicial responses to political expression', fn. 8, who argued that the impact of the HRA on public protest would be determined not by the mechanics of the HRA nor the Strasbourg jurisprudence but by the extent to which the judiciary would be prepared to move away from established judicial attitudes by giving practical effect to the core values underlying the Convention.

rights under the HRA.<sup>12</sup> This is clearly anticipated by both the provisions of the HRA and the rhetoric preceding its introduction. Sections 2, 3, 4 and 6 of the HRA are particularly significant in this respect. Section 6 obliges public authorities – which is defined as including the courts – to act compatibly with those Convention rights recognised by the HRA, which includes Article 10. Section 3 requires the judiciary to interpret legislation compatibly with the Convention rights and, where unable to do so, section 4 empowers the higher courts to make a declaration of incompatibility.<sup>13</sup> Section 2 requires the judiciary to take the Strasbourg jurisprudence into account when determining cases brought under the HRA.<sup>14</sup> Thus the judiciary’s interpretation and application of Article 10 is particularly significant. Furthermore, as will be shown below, public statements on the HRA emanating from the executive stated that it would be the UK judiciary’s responsibility to ensure citizen’s rights under the Convention were secured since they would be the ‘front line’;<sup>15</sup> that the HRA would create a human rights culture in which the judiciary would play a central and pivotal role.<sup>16</sup> This aspect of the HRA raised concerns prior to its inception about the effect upon the judiciary’s constitutional role.<sup>17</sup> Thus, whilst the role of Parliament and the executive in securing freedom of expression is important, it is the judiciary’s response to those expectations, presented by the HRA, which will be discussed. In

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<sup>12</sup> See, e.g., Roger Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a “municipal law of human rights” under the Human Rights Act’ (2005) *International & Comparative Law Quarterly* 907. See discussion in Chapter Four.

<sup>13</sup> See, e.g., Conor Gearty, ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 *Law Quarterly Review* 248; Gavin Phillipson, ‘(Mis)-Reading Section 3 of the Human Rights Act’ (2003) 119 *Law Quarterly Review* 183; Conor Gearty, ‘Revisiting Section 3 of the Human Rights Act’ (2003) 119 *Law Quarterly Review* 551; D. Nicol, ‘Statutory Interpretation and Human Rights after *Anderson*’ (2004) *Public Law* 274.

<sup>14</sup> Section 2 is discussed in greater detail in Chapter Four.

<sup>15</sup> See discussion at pages 33 to 35 below.

<sup>16</sup> See, e.g., Lord Irvine’s statements on the HRA, which are discussed below at page 19.

<sup>17</sup> See, e.g., A. Bradley, ‘Judicial Independence Under Attack’ (2003) *Public Law* 397.

this regard, the attitude of the judiciary toward freedom of speech prior to the implementation of the HRA is also significant.

Yet, prior to exploring both the pre-HRA free speech case law and expectations for the HRA, the general approach of this thesis to gauging the judiciary's response to Article 10 should be clarified. It is acknowledged that to speak of the 'judiciary' as if it were some autonomous entity always moving in harmony, rather like a flock of birds in flight, may tinge the enquiry with a sense of unrealism before it has even commenced. Since the judges are a divergent group of legal minds it is hardly surprising they may hold differing opinions on the protection to be afforded individual rights, particularly one as contentious as freedom of speech. Indeed, there is an extensive range of academic commentary which recognises that the attitudes of individual judges toward rights protection produces various approaches to decision-making in theoretical terms, particularly where the 'separation of powers' doctrine is implicated. Some judges demonstrably cherish the opportunity to uphold and protect fundamental rights ('activism'),<sup>18</sup> whereas as some are more noticeably subdued about the requirements of the HRA to do so ('restraint');<sup>19</sup> some may react differently depending on whether it is a public or private law issue at stake, in the former deferring to the primary decision-maker's superior knowledge, *etc.*, ('deference')<sup>20</sup> whereas some react differently depending on the right at stake

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<sup>18</sup> Sir John Laws, 'Is the High Court the guardian of fundamental constitutional rights?' (1993) *Public Law* 59; M. Cohn, 'Judicial activism in the House of Lords: a composite constitutionalist approach,' (2007) *PL* 95.

<sup>19</sup> Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *MLR* 159, 161.

<sup>20</sup> R. Clayton, 'Judicial Deference and "Democratic Dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' (2004) *PL* 33; T.R.S. Allan, 'Human rights and judicial review: a critique of "due deference"' (2006) *Cambridge Law Journal* 671.

(‘traditionalism’).<sup>21</sup> Indeed, judges themselves have acknowledged both in case law<sup>22</sup> and extra-judicially<sup>23</sup> that these attitudes exist.

These differing attitudes might manifest in a number of ways. As Lord Irvine explained prior to the main provisions of the HRA becoming operative, an activist judge would view themselves as ‘guardians of fundamental rights who serve a central role in ensuring accountable government’<sup>24</sup> whereas a more restrained judge ‘less readily perceives that it is part of a constitutional machinery which secures individuals’ rights against legislative encroachment and executive abuse.’<sup>25</sup> Deferential judges recognise differences in institutional competence whereas restrained judges recognise the importance of maintaining the constitutional divide.<sup>26</sup> Thus ‘restraint’ is the difference between securing legality and deciding policy.<sup>27</sup> ‘Deference’, meanwhile, Rivers argues, ‘incorporates other non-judicial bodies in determining the content of definitive Convention rights. It does not necessarily imply a subordination of courts to those bodies; rather it is grounded in institutional competence’.<sup>28</sup> It should not be assumed that judges falling within these two brackets have less or no interest in human rights protection. Rather, it might be said that they are cautious not to overstep the mark beyond conceptions of their role in the separation of powers. Thus Lord Hoffman has remarked: ‘I do not relish the role of a

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<sup>21</sup> Phillipson and Fenwick, ‘Public protest, the Human Rights Act and judicial responses to political expression,’ fn. 8, 644

<sup>22</sup> *E.g. R. (ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23; *R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15.

<sup>23</sup> Lord Irvine, ‘Activism and Restraint: Human Rights and the Interpretative Process’ (1999) *EHRLR* 350, 354

<sup>24</sup> Lord Irvine, fn. 23, 354

<sup>25</sup> *Ibid.*

<sup>26</sup> J. Rivers, ‘Proportionality and variable intensity of review’ (2006) *CLJ* 174.

<sup>27</sup> See discussion in Rivers, *ibid.*, 191-195.

<sup>28</sup> *Ibid.*, 192

Platonic guardian and I am pleased to live in a society that does not thrust it upon me'.<sup>29</sup> The general concern, though, is that deference may lead judges to assume that certain subject-matter is outside judicial questioning.<sup>30</sup> Yet deference need not, necessarily, deprive the HRA of force. As Rivers argues, 'to defer is not simply to accept another person's assessment, it is to accept that the other person's assessment is sufficiently reliable'.<sup>31</sup> Principles of deference and restraint may also be applied to legislation or common law principles and so are not necessarily confined to cases involving government.<sup>32</sup>

Judges may be more or less deferential or restrained according to the right in question and, more specifically, the context of desired application. Fenwick and Phillipson term such judges: 'traditionalists'.<sup>33</sup> These judges may, for example, exhibit less restraint or deference when considering applications involving speech traditionally receiving higher protection than other 'lesser' forms of expression. In *A v. B plc*,<sup>34</sup> Dyson LJ, for example, upheld the media freedom claim (to report on a footballer's extra-marital affairs), agreeing with Lord Woolf's analysis, which placed great emphasis on the ideal of public interest in media freedom, yet showed scant regard to those free speech principles, premised on the public interest in speech, where an anti-abortion campaigner who targeted local pharmacies in order to

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<sup>29</sup> Lord Hoffmann, fn. 19, 161.

<sup>30</sup> Rivers, fn. 26, 194

<sup>31</sup> *Ibid.*, 204

<sup>32</sup> A deferential approach is particularly apparent in *Animal Defenders International* and *ProLife Alliance* (fn. 22) in particular. These cases are discussed further in Chapters Five and Six.

<sup>33</sup> Phillipson and Fenwick, 'Public protest, the Human Rights Act and judicial responses to political expression,' fn. 8, 644

<sup>34</sup> *A v. B plc* (2003) QB 195.

protest.<sup>35</sup> As noted above, traditionally, media freedom has enjoyed a high level of protection whereas individual protest has not.<sup>36</sup> Likewise, Lord Hoffmann and Baroness Hale, in *Miss Behavin' Ltd* (which involved a failed sex establishment licence) afforded a high level of deference to the local authority.<sup>37</sup> Both demonstrated a dim view of the Article 10 right engaged in vending pornography (which is also traditionally consistent). Yet both have been significantly more vocal in protecting media freedom to report on matters of genuine public interest.<sup>38</sup>

Definitions of activism, as with deference and restraint, may vary. Activism may, for example, connote judicial intention to prioritise human rights but within the confines of legality<sup>39</sup> or it may suggest the politicising of judges.<sup>40</sup> Yet one critical caveat must be entered: whilst an 'activist' embraces the rights-based culture,<sup>41</sup> a judge is not being 'active' simply by protecting those rights. The HRA compels judges to do so; 'rather, activism would occur when a court shirks this assigned function'.<sup>42</sup> An active judge may view the HRA as representing 'a decisive break

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<sup>35</sup> *Connolly v. DPP* (2007) EWHC 237. Dyson LJ saw no contribution to be made to public debate by this action; the contribution to public debate made by detailing the affairs of a Premiership footballer, conversely, was a different matter, it seems. See further discussion of this case in Chapters Five, Six and Eight.

<sup>36</sup> See Fenwick, 'The Right to Protest, the Human Rights Act and the Margin of Appreciation', fn. 8. See further discussion in Chapter Six.

<sup>37</sup> *Belfast City Council v. Miss Behavin' Ltd* (2007) UKHL 19; see discussion in Chapter Two and Five about this case.

<sup>38</sup> Lord Hoffman in *R. v. Central Independent Television plc* (1994) Fam 192 protecting the media freedom and both Lord Hoffman and Baroness Hale media freedom to report on matters of genuine public interest in *Jameel v. Wall Street Europe Sprl* (2007) 1 AC 359. See further discussion in Chapter Six.

<sup>39</sup> Laws, fn. 18; Lord Lester of Herne Hill, 'Developing constitutional principles of public law' (2001) *Public Law* 684.

<sup>40</sup> Beloff and Mountfield, 'Unconventional Behaviour: Judicial uses of European Convention in England and Wales' (1996) *EHRLR* 467; C. Gearty 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *LQR* 248; A. Bradley, fn. 17.

<sup>41</sup> E.g. Laws and Lester have long campaigned for greater protection of human rights. See fn. 39

<sup>42</sup> Cohn, fn. 18, 97.



from the past<sup>43</sup> and so, for example, may attach little or no weight to pre-HRA decisions. Alternatively, the activist judge may seek to develop other Convention rights which conflict with free speech protection and so (potentially) limit the Article 10 right. For example, Eady J. has been particularly vociferous in developing privacy rights under Article 8, and, in doing so, has tended to find against the Article 10 claim in cases before him.<sup>44</sup>

Thus to speak of the judiciary acting in an apparently unified manner may appear simplistic given that these competing attitudes exist. Yet constant recognition of these models of judicial attitudes would only serve to cloud the issues to be discussed although all the time it is recognised that they exist. Moreover, it will be argued that it is meaningful to discuss UK judges in this way because, at the risk of grossly oversimplifying the analysis, there is a sense, as will be shown, that the judiciary are not pulling in wildly different directions on freedom of speech issues but similar ones so that general themes are detectable. It is speculated that the reason for this pattern is due to the growing maturity of the HRA and the Convention rights in the UK: that since a number of significant cases have now been decided by the Court of Appeal and House of Lords, the principles which govern the HRA generally and

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<sup>43</sup> Phillipson and Fenwick, 'Public protest, the Human Rights Act and judicial responses to political expression', fn. 8, 645

<sup>44</sup> *Mosley v. News Group Newspapers Ltd* (2008) EWHC 1777 (held, no genuine public interest in clandestine sensationalist reporting of FIA chief's sexual proclivity); *P v. Quigley* (2008) EWHC 1051 (held, no conceivable public interest in allowing M, an individual, to write a 'fictional' account detailing sexual antics of P & Q, two other individuals); *Prince Radu of Hohenzollern v. Houston* (2007) EWHC 2735 (held, free speech claim failed because journalist had not written a balanced account and had made serious allegations without the opportunity to respond being given); *CC v. AB* (2006) EWHC 3083 (an injunction granted to prevent disclosure of an adulterous affair; there was not necessarily any genuine public interest in the story and it was relevant that wife was acting out of spite or in revenge) *cf. A v. B plc* (2003), fn. 34; *X v. Persons Unknown* (2006) EWHC 2783 (injunctive relief granted to a couple in public eye going through marriage difficulties). Incidentally, Eady J decided against Wall Street Europe Sprl in the first instance decision of *Jameel* (2004) EWHC 37 (see fn. 38).

Article 10 specifically are becoming settled. Consequently, it is submitted, there is less scope for ‘maverick’ judges to depart from the orthodoxy and so reach radical decisions in the lower courts which might conflict with these principles. In that sense, to examine the actions of the ‘judiciary’ is actually to comment on the *actions* of a select number of judges in deciding the key principles (*i.e.*, in the Court of Appeal and House of Lords) and the *reactions* of those judges in the courts below who are bound to apply them. Furthermore, given this growing maturity it is further possible to start mapping out the impression of the Article 10 landscape in the UK that these decisions have generated and in that sense critique its development.

### **3. Backdrop to the UK judiciary’s approach to Article 10: the pre-HRA case law and expectations for human rights development under the HRA**

#### *a) Free speech in the pre-HRA case law*

It is well-established in the academic literature that freedom of speech had an uncertain status pre-HRA.<sup>45</sup> Since it was not protected by any particular constitutional measure, it was characterised by the judiciary as belonging to the

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<sup>45</sup> See, for example, Rabinder Singh, ‘The indirect regulation of speech: a time and a place for everything’ (1988) *Public Law* 212; Geoffrey Marshall, ‘Press Freedom and Free Speech Theory’ (1992) *Public Law* 40; Ronald Dworkin, ‘Is there a right to pornography?’ (1981) 1 *Oxford Journal of Legal Studies* 177; Eric Barendt, *Freedom of Speech*, (OUP, 1985, 1<sup>st</sup> edn.); Helen Fenwick, *Civil Liberties*, (Cavendish Publishing Ltd., 1998, 2<sup>nd</sup> edn.).

‘universal basic freedom of action’,<sup>46</sup> occupying the realm untouched by conflicting statutory or common law measures. As Donaldson MR observed in *Spycatcher*, ‘the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law...or by statute’.<sup>47</sup> Consequently, since the realm free speech belonged to could be removed entirely (in theory at least), the attitude of the judiciary toward it was pivotal in determining the level of protection afforded to it. However, as Barendt noted in 1985, the judiciary’s record in this area was ‘far from impressive; too often...free speech arguments are either ignored or belittled’.<sup>48</sup> For instance, in *Home Office v. Harman*,<sup>49</sup> which concerned disclosure of documents relating to prison facilities by a solicitor to a journalist, Lord Diplock was insistent – for reasons left unspoken – that the subsequent prosecution for contempt of court against the solicitor involved had nothing to do with freedom of speech or matters of public interest.<sup>50</sup>

The context in which the speech arose was clearly significant. For example, one Divisional Court judge declared that ‘the freedom to publish is one of the most important freedoms and the courts are jealous to preserve it’.<sup>51</sup> Indeed, the desire to protect media freedom is a discernible theme in the common law jurisprudence.<sup>52</sup> The court tended toward protecting the press on the basis of its important contribution, for example, in ensuring open justice through the reporting of criminal

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<sup>46</sup> *AG v. Guardian Newspapers (No. 2)* (1990) 1 AC 109.

<sup>47</sup> *Ibid.*

<sup>48</sup> Barendt, *Freedom of Speech*, 1st edn., fn. 45, 306.

<sup>49</sup> (1983) 1 AC 280

<sup>50</sup> ‘I start by saying what the case is *not* about. It is *not* about freedom of speech, freedom of the press, openness of justice...what this case is about is an aspect of the law of discovery of documents’, *ibid.*, 294.

<sup>51</sup> Lately J, at first instance, reported in *In Re X (A Minor)(Wardship: Jurisdiction)* (1975) Fam 47, 53.

<sup>52</sup> See discussion in Chapter Six, pages 225-247.

trials<sup>53</sup> or to the public interest through scrutinising the affairs of government<sup>54</sup> and so adopted a limited approach to interfering with that valuable contribution<sup>55</sup> unless statutory provisions prevented it from doing such.<sup>56</sup> This attitude is also generally evident in the case law concerning wardships,<sup>57</sup> and, particularly, *Derbyshire County Council v. Times Newspapers Ltd*, which concerned a failed defamation claim by a public authority.<sup>58</sup> Thus, in general terms, the Williams Committee found ‘the presumption in favour of freedom of expression is strong, but it is a presumption, and it can be overruled by considerations of harms which the speech or publication in question may cause’.<sup>59</sup> This is evident from the case law, particularly where it involved breach of the peace,<sup>60</sup> breach of confidence,<sup>61</sup> commercial disputes,<sup>62</sup> blasphemy,<sup>63</sup> and obscenity/outraging public decency.<sup>64</sup> Even in wardship cases, the

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<sup>53</sup> A principle commonly attributed to *Scott v. Scott* (1913) AC 417 in which reliance is placed on Jeremy Bentham’s argument that ‘publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial’, 477.

<sup>54</sup> *Derbyshire County Council v. Times Newspapers Ltd.* (1993) AC 534

<sup>55</sup> *R. v. Beck ex parte Daily Telegraph Plc* (1992) 94 Cr. App. R. 376, 381, ‘as a matter of principle it is clear that the press and the other organs of the media should always be allowed to exercise their right to report criminal trials, unless, under the provisions of a particular statute, it is necessary for them to be excluded’ *per* Farquharson LJ.

<sup>56</sup> *Attorney General v. Times Newspapers* (1974) AC 273. See also, *ex parte Simms*, fn. 90, discussed at page 31, below, which evidences a liberal approach to statutory interpretation in the name of free speech.

<sup>57</sup> *R. v. Central Criminal Court ex parte Crook* (1995) 1 WLR 139; *W (A Minor) (Wardship: Restrictions on publication)* (1992) 1 WLR 100; *Re X*, fn. 51.

<sup>58</sup> *Derbyshire County Council*, fn. 54.

<sup>59</sup> Williams Committee Report on Obscenity (1979), Cmnd. 7772, [5.26].

<sup>60</sup> *Brutus v. Cozens* (1973) AC 854

<sup>61</sup> *Kaye v. Robertson* (1991) FSR 62; *Guardian Newspapers* fn. 46; *AG v. Jonathan Cape Ltd.* (1976) QB 752; *Duchess of Argyll v. Duke of Argyll* (1967) Ch. 302;

<sup>62</sup> *Schering Chemicals Ltd v. Falkman Ltd* (1982) QB 1; *Crest Homes Ltd. v. Ascott* (1980) FSR 396; *Glyn v. Weston Feature Film Co.* (1916) 1 Ch 261

<sup>63</sup> *Chief Metropolitan Magistrate ex p. Choudhury* (1991) 1 QB 429; *R. v. Lemon* (1979) AC 617

<sup>64</sup> *R. v. Gibson & Sylveire* (1990) 2 QB 619 (the public display of earrings made from freeze dried foetuses); *Wiggins v. Field* (1968) Crim L.R. 503 (failed prosecution against poet reciting line “Go fuck yourself with your atom bomb” during public recital); *R. v. Penguin Books Ltd.* (1961) Crim. L.R. 176 (failed prosecution concerning D.H Lawrence’s *Lady Chatterley’s Lover*)

court could be persuaded that the harm to the child outweighed publication in the public interest.<sup>65</sup>

Of course, even before the inception of the HRA, the UK courts had international obligations toward freedom of speech, having ratified the European Convention on Human Rights in 1951. Although Article 10 was not directly enforceable in the UK prior to the HRA, the judiciary could have regard to it where there was ‘any ambiguity in our statutes or uncertainty in our law’<sup>66</sup> and so used the Convention ‘as an aid to clear up the ambiguity and uncertainty’.<sup>67</sup> Likewise, complaints could be taken to the ECtHR. Indeed, it required both the ECtHR<sup>68</sup> and Parliament<sup>69</sup> to ensure the UK judiciary’s approach to contempt of court did not violate Article 10.<sup>70</sup> It was later stated in the *Spycatcher* case<sup>71</sup> and repeated in the *Derbyshire* case<sup>72</sup> that there was ‘no inconsistency’ between English law and Article 10 on freedom of speech. In *Spycatcher*, Lord Goff said further that the lack of inconsistency was ‘scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world’.<sup>73</sup> His Lordship noted that:

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<sup>65</sup> *ex parte Crook*, fn. 57, where the first instance judge was ‘persuaded that the likely harm to the children outweighed the restriction of freedom to publish’; a decision which appellant court agreed with (145).

<sup>66</sup> *Per* Lord Denning, *R. v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* (1976) 1 WLR 979, 984.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Sunday Times v. UK* (1979) 2 EHRR 245.

<sup>69</sup> Contempt of Court Act 1981.

<sup>70</sup> *AG v. Sunday Times Newspapers Ltd.* (1974) AC 273.

<sup>71</sup> *Guardian Newspapers (No. 2)*, fn. 46, *per* Sir John Donaldson MR, 181, and *per* Lord Goff, 283.

<sup>72</sup> *Derbyshire County Council*, fn. 54, 551.

<sup>73</sup> *Guardian Newspapers*, fn. 46, 283.

‘the only difference is that, whereas Article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it’.<sup>74</sup>

Lord Goff’s analysis strongly echoes Winston Churchill’s assessment that ‘in England there is absolute freedom of speech as long as the speech does not violate the law’;<sup>75</sup> an assessment that Schauer tersely dismissed as a ‘profoundly silly statement’.<sup>76</sup>

The principal difficulty with this approach to freedom of speech – aside from the scant regard it shows for established theory<sup>77</sup> – is that it seemingly provided opportunity for either bold, principled – almost irascible – defences of freedom of speech *or* timid surrender of it to occur (on the basis that ‘the law’ provided for the interference), and the pre-HRA case law attests to this assessment. The decision in *Re X* is certainly an example of the former. The case concerned the publication of revelations about a well known figure that, it was feared, might cause harm to the daughter. Lord Denning’s speech, in particular, is uncompromising in its defence of free speech. In rejecting the notion that freedom of speech could be decided ‘simply [by employing] a balancing function’ (there seemed to be no public interest in publication), His Lordship stated: ‘but this is where freedom of speech comes in. It means freedom, not only for statement of opinion of which we approve, but also for

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<sup>74</sup> *Ibid.*

<sup>75</sup> Noted in Frederick Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1981), 113.

<sup>76</sup> *Ibid.*

<sup>77</sup> See discussion in Chapter Two.

those of which we most heartily disapprove'.<sup>78</sup> He protected publication 'because of the importance [attached] to freedom of the press: or, better put, the importance in a free society of the circulation of true information'.<sup>79</sup> Echoing this sentiment, Lord Justice Hoffmann (as he then was) acknowledged in *Central Television*,<sup>80</sup> that:

'Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-minded people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute. The principle that the press is free from both government and judicial control is more important than the particular case'.<sup>81</sup>

Indeed Lord Bingham went as far as to say that the risk of harm may be avoided by those affected ignoring media coverage.<sup>82</sup>

Yet, particularly in cases that did not involve the press, protection for free speech could appear much more precarious.<sup>83</sup> Certainly, the same principled approach to protection was not always entirely evident.<sup>84</sup> This may be explained by a number of factors, including the existence of statutory measures regulating the

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<sup>78</sup> *Re X*, fn. 51, 58.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Central Independent Television plc*, fn. 38.

<sup>81</sup> *Ibid.*, 204.

<sup>82</sup> *Secretary of State for the Home Department v. Central Broadcasting Ltd* (1993) EMLR 253 per Lord Bingham, 271: 'it is quite unnecessary for any relative of any of Nilsen's victims to be distressed by this programme if broadcast in its existing form in any way at all since all that anyone has to do is to switch off the programme'.

<sup>83</sup> See discussion in Fenwick 'the Right to Protest, the Human Rights Act and the Margin of Appreciation', fn. 8.

<sup>84</sup> Although *Brutus v. Cozens*, fn. 60, represents a notable exception.

contested behaviour (thus illustrating the weakness of a liberty-based approach to freedom of expression) – a particular issue in public protest cases.<sup>85</sup> Consequently, it was argued ‘the law in this area has developed in an incoherent fashion; the lack of a consistent pattern is probably due to the lack of a free speech clause against which the other interests have to be measured’<sup>86</sup> and ‘the judges’ readiness to allow freedom of expression to be restricted on uncertain or flimsy grounds’.<sup>87</sup> Writing in 1985, Barendt summarised the approach to free speech in similar terms: whilst freedom of speech is respected, ‘the courts in the absence of a constitutional text are unable to give adequate weight to the freedom when it conflicts with other public values and interests.’<sup>88</sup>

Thus, the introduction of the HRA raised great expectations for the protection of human rights, including freedom of expression. However, before turning to consider those expectations, it is important to acknowledge two cases, both decided at the cusp of the post-HRA era, which can be seen to have heightened those expectations given the strong statements of free speech principle contained within them: the House of Lords decisions in *Reynolds*<sup>89</sup> and *ex parte Simms*.<sup>90</sup> In both cases, having outlined the values underpinning freedom of expression in general, their Lordships made strong pronouncements on the right to freedom of expression in light of the forthcoming HRA. The facts of these cases are discussed in greater detail in

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<sup>85</sup> See, e.g., Helen Fenwick, ‘the Right to Protest, the Human Rights Act and the Margin of Appreciation’, fn. 8.

<sup>86</sup> Fenwick, *Civil Liberties*, (2<sup>nd</sup> edn.), fn. 45, 144.

<sup>87</sup> *Ibid.*

<sup>88</sup> Barendt, *Freedom of Speech*, (1<sup>st</sup> edn.), fn. 45, 299.

<sup>89</sup> *Reynolds v. Times Newspapers Ltd* (2001) 2 AC 127.

<sup>90</sup> *R. v. Secretary of State for the Home Department ex parte Simms* (2000) 2 AC 115.



Chapter Six.<sup>91</sup> In *Reynolds*, Lord Steyn stated that in the post-HRA era, ‘freedom of expression is the rule and regulation of speech is the exception requiring justification’.<sup>92</sup> Furthermore – of particular relevance to the point made above – his Lordship stated ‘it is true that in our system the media have no specially privileged position not shared by individual citizens’.<sup>93</sup> Moreover, of relevance to the discussion to be had in later chapters,<sup>94</sup> the strong statements of free speech principle (evident in established theory<sup>95</sup> and the Strasbourg jurisprudence)<sup>96</sup> provided a significant basis for their Lordships’ decision.<sup>97</sup> As set out above, it will be argued in this thesis that the UK judiciary has tended to overlook these strong statements of principle in favour of the outcomes in the Strasbourg jurisprudence.

In *ex parte Simms*, Lord Steyn set out the values underpinning freedom of expression in these terms:

‘Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’...Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power

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<sup>91</sup> *Reynolds* is discussed at pages 234 to 237 whilst *ex parte Simms* is discussed at pages 266 to 267; further, see analysis by Fenwick and Phillipson, *Media Freedom*, fn. 3, 298-300.

<sup>92</sup> Fn. 89, 208.

<sup>93</sup> *Ibid.*, 214.

<sup>94</sup> See Chapters Five, Six and Seven.

<sup>95</sup> As set out in Chapter Two.

<sup>96</sup> See discussion in Chapter Three.

<sup>97</sup> See, particularly, Lord Steyn’s judgment, *ibid.*, 213-215.

by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country'.<sup>98</sup>

It will be argued in this thesis that, despite Lord Steyn's assessment, freedom of expression is not valued for its intrinsic worth by the UK judiciary<sup>99</sup> (it is doubtful whether the ECtHR does either)<sup>100</sup> and, moreover, it will be argued that the UK courts' approach does not embody the broad instrumentalist approaches Lord Steyn sets out.<sup>101</sup> Instead, it is a narrow form of his Lordship's third point that prevails.<sup>102</sup> Fenwick and Phillipson provide an alternative interpretation of this late surge of judicial activism at the cusp of the HRA's inception: in light of an imminent 'unwelcome foreign impact' into UK law 'it appears to be no coincidence that there was a brief burst of strong free speech judgements in 1999-2000...: it might appear that the judiciary were determined that the common law should not be found to uphold lesser standards than the Convention at the moment of incorporation'.<sup>103</sup> Whatever the explanation, however, such strong judicial pronouncements matched the high expectations for the HRA evident in the academic literature. The general themes of these expectations are explored in the following section.

### *b) Expectations for the HRA*

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<sup>98</sup> Fn. 90, 126.

<sup>99</sup> See discussion in Chapter Two of established theories premised on the intrinsic value of free speech at pages 81-88.

<sup>100</sup> Fenwick and Phillipson cite the Commission's decision in *Scherer v. Switzerland* (1994) 18 EHRR 276 as a notable exception to the usual consequentialist approach: *Media Freedom*, fn. 3, 416. See discussion in Chapter Three, pages 116-128.

<sup>101</sup> See discussion in Chapters Five to Eight (particularly pages 311-329).

<sup>102</sup> See Chapters Five and Six, in particular.

<sup>103</sup> Fenwick and Phillipson, *Media Freedom*, fn. 3, 9.

The HRA was hailed as a ‘fundamental constitutional measure’<sup>104</sup> intended to give rise to a culture of human rights awareness:<sup>105</sup> it was said that the HRA would have a ‘profound and beneficial effect on our system of law and government and will develop over the years a strong culture of human rights’<sup>106</sup> in which ‘citizen’s rights will gain greater recognition as an integral part of the courts’ work’.<sup>107</sup> The Lord Chancellor’s Department commented that achievement of this would ‘involve a whole new way of thinking’ for the judiciary since they ‘will be in the front line in deciding whether Convention rights have been breached’.<sup>108</sup> It was argued that the HRA should be applied ‘boldly and in the spirit of liberal interpretation’<sup>109</sup> in order to protect rights. Furthermore, that the success of the Act depended upon the judiciary not being ‘so timid that the legislation loses its effectiveness as a guarantee of the citizen’s fundamental entitlements’.<sup>110</sup> Indeed, Lord Cooke went further, arguing that a restrained approach to the HRA risked the Act becoming a ‘dead letter’: the judiciary ‘must not consign the Act to the realm of lip-service and window-dressing’.<sup>111</sup> He added, ‘it is not enough to go through the mechanics of embracing human rights. There must be a commitment of the head – and of the heart as well’.<sup>112</sup> Leigh and Lustgarten felt that the HRA would provide ‘latitude to UK judges to give

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<sup>104</sup> Lord Lester, ‘The Art of the Possible – Interpreting Statutes under the Human Rights Act’ (1998) *EHRLR* 665, 668.

<sup>105</sup> Francesca Klug, ‘The Human Rights Act 1998, *Pepper v. Hart* and All That’ (1999) *Public Law* 246, 247.

<sup>106</sup> Lord Irvine, Third Reading, February 5, 1998, H.L. Debates, vol. 585, col. 840.

<sup>107</sup> Straw and Boateng, ‘Bringing Rights Home’ (1997) *EHRLR* 71, 78.

<sup>108</sup> Finlay, ‘The Human Rights Act: The Lord Chancellor’s Department’s Preparations for Implementation’, (1999) *EHRLR* 512, 516.

<sup>109</sup> Wade, ‘Human Rights and the Judiciary’ (1998) *EHRLR* 520, 532.

<sup>110</sup> Lord Irvine, fn. 23, 353.

<sup>111</sup> Lord Cooke, ‘The British Embracement of Human Rights’ (1999) *EHRLR* 243, 256.

<sup>112</sup> *Ibid.*, 260.

a distinctive domestic interpretation to the Convention, provided it is more generous to the complainant than that adopted at Strasbourg.’<sup>113</sup> Yet the HRA was not universally anticipated in such positive terms<sup>114</sup> and, indeed, it had been speculated before the HRA was proposed that the principles within the Convention could be developed through the common law *without* the need for statutory implementation.<sup>115</sup> Furthermore not all judges agreed that the HRA would have the anticipated effect on the law. Lord Hoffmann, for example, demonstrated resistance to the euphoria shown elsewhere: ‘its potential impact has been greatly exaggerated’.<sup>116</sup>

Thus, regardless of the previous position, the inception of the HRA meant, in free speech terms, that the judiciary could no longer treat free speech as simply the void in between legislative and common law measures: as Lord Steyn put it in *Reynolds*, as noted above, ‘freedom of expression is the rule and regulation of speech is the exception requiring justification’.<sup>117</sup> To achieve this arguably required a more positive approach that marked out a ‘zone of action’<sup>118</sup> in order to determine which of those statutory and/or common law measures violated this area. As mentioned above, Fenwick and Phillipson have coined the phrase ‘the Article 10 endeavour’ to describe the shift in attitude required for the judiciary to grapple with the right to freedom of expression under Article 10 being directly available to citizens in the UK. Thus, this phrase encompasses ‘the multiplicity of issues thrown up by the attempt to

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<sup>113</sup> Leigh and Lustgarten ‘Making Rights Real: the Courts, Remedies, and the Human Rights Act’ (1999) 58(3) *Cambridge Law Journal* 509, 510.

<sup>114</sup> Lyell, ‘Whither Strasbourg? Why Britain should think long and hard before incorporating the European Convention on Human Rights’ (1997) *EHRLR* 132; Ewing and Gearty, ‘Rocky foundations for Labour’s new rights’ (1997) *EHRLR* 146; Wadham, ‘Bringing Rights Halfway Home’ (1997) *EHRLR* 141

<sup>115</sup> Laws, fn. 18.

<sup>116</sup> Lord Hoffmann, fn. 29, 161.

<sup>117</sup> Fn. 89, 208.

<sup>118</sup> Singh, fn. 45.

interweave into a mass of existing statutory and common law provisions and restrictions governing [free speech], the uneven and often flawed jurisprudence of the ECtHR and in doing so to adopt a more theorized approach'.<sup>119</sup> Given its obvious significance, the UK judiciary's approach to the Strasbourg jurisprudence is critical to the discussion in this thesis. The ECtHR's approach to Article 10, in general terms, is outlined in the following section.

### *c) The Strasbourg approach to Article 10*

Freedom of expression is consistently described by the ECtHR as one of the essential foundations of a democratic society.<sup>120</sup> The Court has found that Article 10 applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that shock, offend or disturb such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.<sup>121</sup> It is, likewise, applicable to both the substance and form of the speech,<sup>122</sup> including photographs accompanying news stories.<sup>123</sup> Generally, there is no requirement that the State should take positive action in order to assist the Speaker to exercise her right,<sup>124</sup> although in exceptional

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<sup>119</sup> Fenwick and Phillipson, *Media Freedom*, fn. 3, 1.

<sup>120</sup> *Handyside v. UK* (1976) 1 EHRR 737, [49].

<sup>121</sup> *Ibid.*; *Vereinigung Bildender Künstler v. Austria* (2007) ECDR 7 [26]

<sup>122</sup> *Jersild v. Denmark*, fn. 10.

<sup>123</sup> *Von Hannover v. Germany* [2005] 40 EHRR 1; *Verlagsgruppe News GmbH v. Austria (No. 2)* (2007) EMLR 13

<sup>124</sup> The UK court finds similarly: see *Persey v. Secretary of State for the Environment, Food and Rural Affairs* (2002) EWHC 371 (Admin), where it held that Article 10 did not impose a requirement to commence an official inquiry as part of the right to know.

circumstances this requirement may be imposed.<sup>125</sup> The right can be claimed by all legal and natural persons (including companies).<sup>126</sup> Applicants must demonstrate that they have been the ‘victim’ of an unlawful interference with the right – a breach must have occurred and not be theoretical or prospective.<sup>127</sup> It may also be used where relations are governed by private law.<sup>128</sup> Applicants must exhaust all domestic remedies before the application is admissible to the ECtHR;<sup>129</sup> since Contracting States have the primary obligation to secure these rights they must be given the opportunity to redress any individual violation before it is brought to an international tribunal. It is important to note that the ECtHR is not an appellate court but a court of review; ‘it is in no way [its] task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation’.<sup>130</sup> The significance of this point will be developed more fully in Chapter Three. Broadly speaking, the ECtHR asks two questions when determining Article 10 claims: was the right under Article 10(1) interfered with and was that interference justified by the exceptions listed in Article 10(2)? Given the extensive broadness of Article 10(1), it is rare (though not impossible) that the

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<sup>125</sup> As in *Gundem v. Turkey* (2001) 31 EHRR 49 where a newspaper was forced to close after suffering repeated harassment and hostility

<sup>126</sup> *Autronic AG v. Switzerland* (1990) 12 EHRR 485

<sup>127</sup> *Magee v. UK* (1995) 19 EHRR CD 91, in which the Commission found an application inadmissible where an individual seeking to be a barrister claimed that at the appropriate time they would have difficulty swearing allegiance to the Queen.

<sup>128</sup> *Fuentes Bobo v. Spain* (2001) 31 EHRR 50.

<sup>129</sup> Article 34; Protocol 11; *Sadik v. Greece* (1997) 24 EHRR 323; *Earl Spencer v. UK*; *Countess Spencer v. UK* (1998) 25 EHRR CD105.

<sup>130</sup> *Handyside*, fn. 120, [50].

responding state would deny that the right has been interfered with<sup>131</sup> and so, typically, the main issue is whether this interference was justified under Article 10(2).

Article 10(2) states that since freedom of expression carries with it duties and responsibilities it may be restricted where a legitimate aim is identified which is prescribed by law and necessary in a democratic society. The legitimate aims listed in Article 10(2) are national security,<sup>132</sup> territorial integrity or public safety,<sup>133</sup> prevention of disorder or crime,<sup>134</sup> protection of health or morals,<sup>135</sup> protection of reputation or rights of others,<sup>136</sup> prevention of confidential information being disclosed<sup>137</sup> and maintenance of the authority and impartiality of the judiciary.<sup>138</sup>

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<sup>131</sup> Applications relating to licensing, for example, relate to Article 10(1) rather than 10(2) since it is there stated: 'this Article shall not prevent state from requiring the licensing of broadcasting, television or cinema enterprises'. This includes licensing broadcasting companies, *Groppera Radio AG v. Switzerland* (1990) 12 EHRR 321, and punishing those who broadcast without a licence, *Bellis v. UK* (1997) 24 EHRR CD 71. See also *R (on application of Wildman) v. Office of Communications* (2005) EWHC 1573.

<sup>132</sup> *Vogt v. Germany* (1996) 21 EHRR 205; *Brind v. UK* (1994) 18 EHRR CD76; *McLaughlin v. UK* (1994) 18 EHRR CD84; *Observer and Guardian v. UK* (1992) 14 EHRR 153; *Sunday Times v. UK*, fn. 68, *R. v. Shayler* (2002) UKHL 11, *R. v. Secretary of State for Home Department ex parte Brind* (1991) 1 AC 696

<sup>133</sup> *Farrakhan v. Secretary of State for the Home Department* (2002) EWCA Civ 606 (Farrakhan, a United States citizen and leader of the Nation of Islam deported on basis his presence in the UK would threaten relations between Muslim and Jewish communities).

<sup>134</sup> *i.e.*, breach of the peace offences: *Jones v. Carnegie* (2004) JC 136 (being mechanically fastened to a wheelchair and obstructing the highway whilst outside a naval base constituted a breach of the peace); *Emerson Developments v. Avery* (2004) EWHC 194 (animal rights activists); *Hammond v. DPP* (2004) EWHC 69 (evangelical Christian who protested in a busy town centre against homosexuality caused violent reactions). See also, *Chorherr v. Austria* (1994) 17 EHRR 358; *Vogt*, fn. 132. In Australia this has been found to include material useful to committing a crime: *Brown v. Classification Review Board* (1998) 5 BHRC 619.

<sup>135</sup> Blasphemy: *Lemon v. UK* (1983) 5 EHRR 123; *Basic Trademark SA's Trade Mark Application* (2006) ETMR 24 where a refusal to register the name 'Jesus' for commercial exploitation was upheld on basis it would be anathema to believers. Health and morals: *Wood v. Oldham College* (2004) EWCA Civ 1833 where the dismissal of college teacher for using sexually explicit language in front of his students was upheld. Outraging public decency: *R v. Gibson & Sylviere* (1990) 2 QB 619 (concerning a pair of freeze dried human foetuses used as earrings).

<sup>136</sup> Reputation extends to private individuals: *Fressoz v. France* (2001) 31 EHRR 2 (company chairman); Rights of others: *Church of Scientology v. Sweden* (1979) ECC 511; the 'rights of others' exception has received diverse interpretation, as discussed in the next chapter, thus includes: the 'right not to be harassed' *R v. Debnath* (2005) EWCA Crim 3472, *Howlett v. Holding* (2006) EWHC 41, *Georgallides v. Etzin* (2005) EWHC 1790, *Thomas v. News Group Newspapers Ltd* (2001) EWCA Civ 1233; 'the right not to be offended in your own home' *ProLife*, fn. 22 or, by extension, the work place,

As for ‘prescribed by law’, in *Sunday Times v. UK*<sup>139</sup> the ECtHR found this to have two requirements: the law<sup>140</sup> must be ‘adequately accessible’<sup>141</sup> and the consequences of it foreseeable.<sup>142</sup> Certainty in the law benefits the citizen in two ways: so that one may act within the law and so that the State may not act arbitrarily.<sup>143</sup> However, ‘those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable’.<sup>144</sup> For example, certainty may diminish with time as, say, the interest in maintaining confidentiality becomes less pressing.<sup>145</sup> Likewise, too much certainty may be undesirable since ‘it might well unduly reduce the effectiveness of the protection’<sup>146</sup> and, as Sales and Hooper note, is

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*Connolly*, fn. 35; ‘the right to be protected against the potential mischief of partial political advertising which Parliament had been entitled to regard as a real danger’, *Animal Defenders International*, fn. 22.

<sup>137</sup> Although whether this passes the ‘necessary in a democratic society’ depends on the information maintaining its confidential nature: *Vereniging Weekblad Bluf! v. Netherlands* (1995) 20 EHRR 189, including whether it is available from sources outside the UK, *Observer and Guardian v. UK* (1992) 14 EHRR 153; *Sunday Times*, fn. 68 or the internet *Mosley*, fn. 44.

<sup>138</sup> Including the risk of prejudicing criminal trial: *Sunday Times*, fn. 68; *AG v. Times Newspapers Ltd* (1974) AC 273; *BBC Scotland, McDonald, Rodgers and Donald v. UK* (1998) 25 EHRR CD 179);

<sup>139</sup> Fn. 68, [62]

<sup>140</sup> The ECtHR also clarified in *Sunday Times*, fn. 68, that ‘the word ‘law’ ... covers not only statute but also unwritten law’ [47].

<sup>141</sup> ‘the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case’, *ibid.*

<sup>142</sup> ‘a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’, *ibid.*

<sup>143</sup> In *Malone v. UK* (1984) 7 EHRR 14, [67], the ECtHR stated that ‘in accordance with law’ implies ‘a measure of legal protection in domestic law against arbitrary interferences by public authorities with rights’. This may be seen in the decision in *Hashman v. UK* (2000) 30 EHRR 241 where the ECtHR rejected the Government’s definition of *contra bonos mores* that “wrong rather than right in the judgment of the majority” contained an objective element equivalent to conduct “likely to cause annoyance”. It simply meant conduct likely to be wrong in the opinion of a majority of citizens.

<sup>144</sup> *Sunday Times*, fn. 68, [62]

<sup>145</sup> *Editions Plon v. France* (2006) 42 EHRR 36 where a breach of medical confidentiality was a foreseeable and likely consequence of publication yet the necessity of protecting this interest was found to diminish with time. The UK court found similarly in *AG. v Jonathan Cape (Crossman diaries)* (1976) QB 752, where it dismissed an injunction application seeking to restrain publication detailing Cabinet meetings of some ten years earlier.

<sup>146</sup> *Olsson v. Sweden* (1988) 11 EHRR 259 [62].



undesirable for, particularly, obscenity laws where flexibility is required for the law to keep pace with current attitudes.<sup>147</sup>

In many cases, the question of whether the interference was ‘necessary in a democratic society’ will be the pivotal test. In *Sunday Times v. UK*<sup>148</sup> the ECtHR set out a three stage test for this: does the interference correspond with a ‘pressing social need’; is the interference ‘proportionate to the legitimate aim pursued’; and, were the reasons given by the national authority to justify the interference ‘relevant and sufficient’.<sup>149</sup> In *Handyside v. UK*,<sup>150</sup> the ECtHR found that the term ‘necessary’ ‘is not synonymous with ‘indispensable’ neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ and [instead]...implies the existence of a ‘pressing social need’’. Satisfaction of the test requires the court, at whatever level, to apply the proportionality principle,<sup>151</sup> and (potentially) the margin of appreciation principle, in order to reach a decision.

In outline, the ‘proportionality’ requirement is that the interference must be proportionate to the legitimate objective sought by the State:<sup>152</sup> *i.e.* that a sledgehammer is not required to crack open a nut or, more accurately perhaps, that ‘sledgehammers are only used when nutcrackers prove impotent’.<sup>153</sup> The Court must determine whether ‘the disadvantage suffered by the applicant is excessive in relation

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<sup>147</sup> P. Sales and B. Hooper, ‘Proportionality and the form of law’ (2003) *LQR* 426, 438-439. Sales and Hooper also discuss the other two qualifications to certainty, 437-438.

<sup>148</sup> Fn. 68, [62]

<sup>149</sup> See, for example, Lavender, ‘the problem of the margin of appreciation’ (1997) *EHRLR* 380, where Lavender analyses the varying (and, he suggests, conflicting) approaches taken by the court to this question, 387-389.

<sup>150</sup> Fn. 132, [48].

<sup>151</sup> For a recent full discussion of the ECtHR’s use of proportionality test in an Article 10 context (albeit limited to the treatment of media freedom), see Fenwick and Phillipson, *Media Freedom*, fn. 3, 86-106.

<sup>152</sup> *Sunday Times*, fn. 68, [62]; *James v. UK* (1986) 8 EHRR 127: there must be a ‘reasonable relationship of proportionality between the means employed and the aim pursued’ [50].

<sup>153</sup> J. Rivers, fn. 26, 180.

to the legitimate aim pursued by the Government'.<sup>154</sup> Thus the State must strike a 'fair balance' between protecting individual rights and upholding competing general community interests or specific, counter rights. The concept of proportionality and specific test applied is keenly contested.<sup>155</sup> It has been noted that the principle may, in any event, present national authorities with difficulties since 'it may often be difficult to formulate simple and clear (and, hence, necessarily, rigid) laws that are capable of satisfying the doctrine of proportionality'.<sup>156</sup> In an Article 10 context, therefore, the State may be restricted, for example, from applying blanket bans on speech unless it can demonstrate such a draconian measure is proportionate.<sup>157</sup>

The margin of appreciation doctrine, meanwhile, explicitly recognises the ECtHR's 'subsidiary' role<sup>158</sup> and so provides some latitude to Member States in order to secure the Convention rights.<sup>159</sup> Arai-Takahashi describes the doctrine as the 'measure of discretion allowed the Member States in the manner in which they implement the Convention's standards, taking into account their own particular national circumstances and conditions'.<sup>160</sup> Thus, it serves to 'draw a line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the

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<sup>154</sup> *National Union of Belgian Police v. Belgium* (1979-1980) 1 EHRR 578, 595.

<sup>155</sup> For example, Rivers, fn. 153, argues that 'the general impression from both judicial and practitioner exposition is that there is essentially one doctrine of proportionality offering a range of tests directed towards the same end, with minor variations in formulation', 177; he argues that there are in fact two competing theories of proportionality at work, 177-182.

<sup>156</sup> Sales and Hooper, 'Proportionality and the form of law' (2003) *LQR* 426.

<sup>157</sup> As it did in *ADI*, fn. 6, and further in *Ahmed v. UK* (2000) 29 EHRR 1 where a blanket ban restricting the political activities of local government officers in senior posts was accepted on the Government's argument that it was necessary for them to appear to be politically impartial.

<sup>158</sup> *Sunday Times*, fn. 68, [59]: 'the Court has underlined that the initial responsibility for securing the rights and freedoms enshrined in the Convention lies with the individual Contracting States'.

<sup>159</sup> It was first used for free speech complaints in *Handyside*, fn. 120.

<sup>160</sup> Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002), 2

variations in traditions and cultures'.<sup>161</sup> For this reason, it has been described as the flip-side of proportionality.<sup>162</sup> Letsas argues that there are two broad categories where the discretion is applied:<sup>163</sup> either because there is no consensus among Member States on what human rights individuals have, *i.e.*, matters involving morality,<sup>164</sup> religion<sup>165</sup> or commercial speech,<sup>166</sup> or because national authorities are better placed to decide on politically sensitive issues.<sup>167</sup> Arai-Takahashi notes that 'the strictness of scrutiny involved covers a spectrum ranging from a very lax position...to a very vigorous appraisal of the merits'.<sup>168</sup> The existence of a wide margin, though, 'does not necessitate a finding in favour of the State...but it does make a cautious interpretation of the Convention more likely'<sup>169</sup> and so the intensity of scrutiny may be affected:<sup>170</sup> in these circumstances, the ECtHR is likely to be satisfied where the State acts 'reasonably and in good faith'<sup>171</sup> in its interference with

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<sup>161</sup> Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 HRLJ 1

<sup>162</sup> Y. Arai-Takahashi, fn. 160, 14.

<sup>163</sup> George Letsas, 'Two concepts of the margin of appreciation' (2006) *OJLS* 705, 722-723.

<sup>164</sup> *Handyside*, fn. 120. It has been held that a lack of public outcry does not necessarily mean restrictive judgments are not responding to a genuine public need, *Muller v. Switzerland* (1991) 13 EHRR 212.

<sup>165</sup> *Wingrove v. UK* (1997) 24 EHRR 1 where the Court confirmed that national authorities have a wider margin in making restrictions against items concerning matters of religion, morals or personal belief than those concerning politics or the public interest and so national authorities, rather than the European Court of Human Rights, were the right forum to decide what protection was necessary. See also *Otto-Preminger v. Austria* [1995] 19 EHRR 34; *Murphy v. Ireland* (2004) 38 EHRR 13; *IA v. Turkey* (2007) 45 EHRR 30.

<sup>166</sup> *Markt Intern Verlag GmbH v. Germany* (1990) 12 EHRR 161; *Casado Coca v. Spain* (1994) 18 EHRR 1; *Jacobowski v. Germany* (1995) 19 EHRR 64; *Krone Verlag GmbH & Co. KG v. Austria* (2006) 42 EHRR 28 though where a public interest is involved that margin is diminished *Hertel v. Switzerland* (1999) 28 EHRR 534.

<sup>167</sup> *Brind v. UK*, fn. 132; *McLaughlin v. UK*, fn. 132; *Zana v. Turkey* (1999) 27 EHRR 667 though it has been found that national authorities are not better placed than the European Court of Human Rights on matters involving the authority of the judiciary: *Sunday Times*, fn. 132.

<sup>168</sup> Arai-Takahashi, *supra*, fn. 160, 189.

<sup>169</sup> T.H. Jones, 'The devaluation of human rights under the European Convention' (1995) *Public Law* 430, 431.

<sup>170</sup> Fenwick and Phillipson, 'Direct Action, Convention Values and the Human Rights Act' (2001) 21 *Legal Studies* 535, 553-554.

<sup>171</sup> *Handyside*, fn. 112.

the right. The existence of a narrow margin means the ECtHR will scrutinise the decision more closely.<sup>172</sup> In an Article 10 context this occurs, in particular, where political speech or matters of public interest are at stake.<sup>173</sup> The margin of appreciation doctrine is variously described as both pragmatic<sup>174</sup> and threatening<sup>175</sup> to the objectives of the Convention in seemingly equal measure. It responds to a judicial understanding that the continuing existence and strength of the Convention rights depends upon Member States desiring to further protect and develop those rights and so accepting the ECtHR's jurisdiction.<sup>176</sup> Thus the ECtHR appears to accept that the Convention rights lose force if those Member States terminate their association.<sup>177</sup> Likewise, the ECtHR respects its subsidiary role and is keen not to undermine or ignore national sovereignty.<sup>178</sup> Thus the margin of appreciation 'is inherent in, and naturally derived from, the original understanding that the Convention should serve as a system complementary but subsidiary to national systems'.<sup>179</sup> For these reasons the doctrine has been described as 'necessary form of judicial restraint'.<sup>180</sup> Yet these aims may conflict with the ECtHR's primary role as guardian of Convention rights. As Jones notes, 'critics...maintain that the doctrine

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<sup>172</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 3, 86-106.

<sup>173</sup> This is particularly true where matters of public interest/political speech are involved: *Castells v. Spain* (1992) 14 EHRR 445; *Incal v. Turkey* (2000) 29 EHRR 449; *Erdogdu v. Turkey* (2002) 34 EHRR 50; *Aksoy v. Turkey* (2002) 34 EHRR 57; *Sener v. Turkey* (2003) 37 EHRR 34.

<sup>174</sup> See, e.g., Yuval Shany, 'Toward a general margin of appreciation doctrine in international law?' (2005) *European Journal of International Law* 907.

<sup>175</sup> See, e.g., Singh, Hunt and Demetriou, 'Is there a role for the Margin of Appreciation in national law after the Human Rights Act?' (1999) *EHRLR* 15.

<sup>176</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 3, 82-84 citing former President of the Commission, H. Waldock (1980) 1 *HRLJ* 1, 9, who makes this point.

<sup>177</sup> Although see Jones, fn. 169, 437, who argues that this fear ought to be diminished now that the ECtHR is more established.

<sup>178</sup> See, e.g., K. A. Kavanagh, 'Policing the margins: rights protection and the European Court of Human Rights' (2006) *EHRLR* 422, 442-444.

<sup>179</sup> Arai-Takahashi, fn. 160, 3.

<sup>180</sup> See, e.g., Kavanagh, fn. 178 for a recent discussion of this point.

represents an abdication by the Court of its enforcement responsibility'.<sup>181</sup> Furthermore, 'the elastic and elusive nature of the [Doctrine] is applied by the [ECtHR] on the basis of ad hoc pragmatic judgments, sometimes lacking in clear and consistent principles'<sup>182</sup> and so 'the principal objection...is that it introduces an unwarranted subjective element into the interpretation of various provisions of the [Convention]'.<sup>183</sup> This conflict is not assisted by the often obscured reasoning in application. The doctrine is sometimes applied abruptly such that the limit and nature of review<sup>184</sup> is not expanded or clarified and is thus a matter of some debate, in<sup>185</sup> and outside<sup>186</sup> of the ECtHR. Thus, 'the principal objection...is that it introduces an unwarranted subjective element into the interpretation of various provisions of the [Convention]'.<sup>187</sup> The issue of the margin of the appreciation is discussed further in Chapters Three and Four.

#### *d) Conclusion*

Without the benefit of a constitutional measure to ensure protection, the ability of the common law to protect free speech was uncertain pre-HRA. Likewise,

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<sup>181</sup> *Ibid.*

<sup>182</sup> Masterman, fn. 27, 922

<sup>183</sup> Lavender, fn. 149, 380.

<sup>184</sup> i.e., *Castells*, fn. 173.

<sup>185</sup> For example, see De Meyer J.'s comment, in *Z v. Finland* (1998) 25 EHRR 371. Likewise in *Mathieu-Mohin* (1987) 10 EHRR 1 where dissenting judges accused the majority of deciding cases merely by 'falling back on the margin of appreciation'.

<sup>186</sup> See Lester, 'Universality versus Subsidiarity: a reply' (1998) 1 *EHRLR* 73; Laws, 'The Limitations of Human Rights' (1998) *PL* 254; Lavender, fn. 149; Singh, Hunt and Demetriou, fn 175; Kavanaugh, fn. 180; Letsas, fn. 163; Mahoney, fn. 161; Jones, fn. 169; Fenwick, 'The Right to Protest, the Human Rights Act and the Margin of Appreciation', fn. 8; J. A. Sweeney, 'Margin of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era' (2005) *ICLQ* 459; Arai-Takahashi, fn. 160.

<sup>187</sup> Lavender, fn. 149, at 380.

the Strasbourg courts capacity to protect free speech was (and, arguably, remains) limited due to the margin of appreciation doctrine. In this regard, Barendt has previously argued that the ECtHR were 'less willing to uphold the bolder free speech claims'.<sup>188</sup> The reason for this is relevant to this enquiry: there are 'good reasons to expect supra-national tribunals to exercise a degree of restraint: they are not enforcing a...Bill of Rights or exercising an appellate jurisdiction over the national courts, but rather ensuring for the most part that certain minimum standards are met'.<sup>189</sup> These points signpost the two issues that the judiciary ought to have addressed (but, it is submitted, have not) when the main provisions of the HRA became operative. First, that due to these identified weaknesses both the common law and the ECtHR was unable to fully maximise the protection afforded to freedom of speech even if minded to. Secondly, as a consequence, the jurisprudence of both the pre-HRA common law approach to free speech and the Strasbourg Article 10 jurisprudence generally contain this minimalist approach to protection. Yet this limitation has not been fully recognised or addressed.<sup>190</sup> For this reason, courts could have seen introduction of HRA as representing a 'fresh start' to address these points, recognising that reference to existing case law might be the start not end point in order to achieve maximum protection. Yet the position of the common law remains unresolved: it has been said that 'the Human Rights Act 1998 now provides a domestic underpinning to the common law's acceptance of constitutional rights, and important new procedural

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<sup>188</sup> Barendt, *Freedom of Speech*, (1<sup>st</sup> edn.), fn. 45, 300.

<sup>189</sup> *Ibid.*

<sup>190</sup> Lord Justice Laws said in *International Transport Roth GmbH v. Secretary of State for the Home Department* (2003) QB 728, [71]: 'the common law has come to recognise and endorse the notion of constitutional, or fundamental rights. These are broadly the rights given expression in the Convention for the Protection of Human Rights and Fundamental Freedoms, but their recognition in the common law is autonomous'.

measures for their protection.’<sup>191</sup> Meanwhile, the House of Lords has decided that the UK Convention rights jurisprudence should ‘mirror’ the Strasbourg jurisprudence.<sup>192</sup> Thus, it will be argued in this thesis that the opportunity to achieve maximum protection for free speech has not yet been taken. The following section sets out the structure of the thesis in more detail.

#### **4. The domestic judicial response to Article 10**

Given the uncertain status that free speech had prior to the inception of the HRA, it is understandable that the greatest expectation for the HRA from a free speech perspective was that the right to freedom of expression under Article 10 in the UK would provide free speech with a clearer status and so allow it to become a more clearly established right.<sup>193</sup> Yet, as has also been recognised, despite the strong statements of free speech principle within the Strasbourg jurisprudence, the *outcomes* of ECtHR decisions largely fail to answer those expectations for the HRA due to the problematic effect of the margin of appreciation, which gives member states discretion (of varying levels) to both secure and limit the right in certain circumstances.<sup>194</sup> This point will be further explored in Chapter Three in order to establish the argument that close adherence to the outcomes of the Strasbourg

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<sup>191</sup> *Ibid.*

<sup>192</sup> See Chapter Four.

<sup>193</sup> See, *e.g.*, Fenwick and Phillipson, ‘Public protest, the Human Rights Act and judicial responses to political expression’, fn. 8.

<sup>194</sup> See, *e.g.*, Fenwick and Phillipson, *Media Freedom*, fn. 3; Barendt, *Freedom of Speech*, fn. 1. The Strasbourg jurisprudence is discussed in more detail in Chapter Three.

jurisprudence does not enhance the protection of free speech in the UK in this desired way (*i.e.*, in a way that achieves maximum protection for free speech in the UK).<sup>195</sup>

It has been argued that since the margin of appreciation cannot be applied domestically, the presence of this doctrine in the Strasbourg jurisprudence is no barrier to realising greater protection for free speech in the UK.<sup>196</sup> Indeed, reference to established free speech theory would allow the courts to both strip away the limiting effect of the margin of appreciation and develop Article 10 so as to determine the ‘ceiling’ of the right.<sup>197</sup> For example, Barendt has long argued that the meaning and scope of freedom of speech can only be properly understood against the background of the moral and political arguments for its protection and incorporation in constitutions.<sup>198</sup> The reasons why freedom of speech ought to be protected against undue state interference are firmly established in the academic literature.<sup>199</sup> Although there are several more established theories, there are, in broad terms, four main justifications for protecting expression in this way, which are based on the connection between speech and truth, participation in a democracy, self-fulfilment and autonomy. As Chapter Two will clarify, whilst theories drawn from the first three justifications are generally consequentialist, theories relating to the latter are firmly premised on the intrinsic value of expression. This is particularly significant in the context of the Strasbourg jurisprudence since, as Chapter Three will demonstrate, the

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<sup>195</sup> *Ibid.*

<sup>196</sup> Fenwick and Phillipson, *Media Freedom*, fn. 3.

<sup>197</sup> It is well-established that the Strasbourg jurisprudence provides a floor of rights not a ceiling. For a recent – albeit pessimistic – view of the UK courts’ approach to this issue, see Jonathan Lewis, ‘The European ceiling on human rights’ (2007) *Public Law* 720.

<sup>198</sup> See the first edition of *Freedom of Speech*, fn. 45, 1-8, and second edition, fn. 14, 1-6.

<sup>199</sup> See discussion in the following chapter.



ECtHR's approach to freedom of expression is firmly consequentialist.<sup>200</sup> Furthermore, it will be demonstrated in that chapter that the statements of free speech principle within the Strasbourg jurisprudence closely match the argument from participation in a democracy, in particular, and have similarities with the arguments from self-fulfilment and truth.<sup>201</sup> Therefore, for the UK judiciary to have greater regard to established theory would not conflict with the courts' obligations under section 2 of the HRA but rather would be in keeping with it since it would allow the courts to achieve greater protection for freedom of expression. In other words, the core values underpinning the Article 10 Strasbourg jurisprudence can only be unlocked by removing the problematic effect of margin of appreciation. Since those values echo established theoretical approaches to freedom of speech, greater adherence to those theories provides a means of achieving this end. This argument is set out more fully in Chapter Four.

Yet, it will be argued in Chapters Five to Seven that the UK judiciary has had scant regard to established theory. Aside from the recognition in *ex parte Simms* of the four main justifications for freedom of speech, there has been minimal reference since.<sup>202</sup> Certainly the breadth of justificatory reasons for protecting expression, evident in the established theory, is not overwhelmingly apparent in the post-HRA case law: the judiciary has hardly plumbed the depths of these justificatory theories when evaluating free speech claims. Of course, this is not to say that the UK

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<sup>200</sup> Fenwick and Phillipson have recently concluded similarly, *Media Freedom*, fn. 3, 71.

<sup>201</sup> See pages 120-128.

<sup>202</sup> One notable exception is the recent decision in *ADI*, fn. 22, in which the House of Lords referred to the argument from truth albeit of a variety not closely resembling J.S. Mill's classic statement of the argument (J. S. Mill, *On Liberty*, (London: Routledge, 1991), (1<sup>st</sup>. edn., 1859)). This approach is discussed more fully in Chapter Two, pages 69 to 81.

judiciary's approach to freedom of expression is not comparable to free speech theory. As will become apparent from the discussion in Chapters Five to Seven, since the UK courts have interpreted section 2 of the HRA as an obligation not to advance beyond or lag behind the Strasbourg jurisprudence,<sup>203</sup> the UK Article 10 jurisprudence, like that at Strasbourg, is comparable to the argument from participation in democracy.<sup>204</sup> Yet, in general terms, and specifically in relation to political expression, it will be argued that the UK courts have adopted a particularly narrow approach to Article 10.<sup>205</sup> Rather than simply enquire whether the expression engages with the democratic process, there is a discernible trend in the UK Article 10 jurisprudence for the judiciary to go one step further by attempting to measure that engagement as a means of determining whether the expression should be protected.<sup>206</sup> Thus, the greater the impact of the speech on the democratic process, the more likely the speech will be protected. Consequently, the strongest protection seems reserved for expression that *actually* influences or affects democracy, which gives the news media the upper hand on regular citizens who have a political message to disseminate. It will be argued in Chapter Six that this approach translates to the level of protection being determinable by reference not just to the category of speech involved but also the identity of the speaker and speech target (*i.e.*, a measurement of the influence of the speaker/speech target upon the democratic process). Furthermore, on the basis that popular ideas have more noticeable influence on the

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<sup>203</sup> *R. (on the application of Ullah) v. Special Adjudicator* (2004) 2 AC 323.

<sup>204</sup> As Fenwick and Phillipson argue in *Media Freedom*, fn. 3, 39; 106-107.

<sup>205</sup> See Chapters Five and Six.

<sup>206</sup> *E.g.*, *ADI*, fn. 22; *ProLife*, fn. 22; *Connolly*, fn. 35; *Sanders v. Kingston (No. 1)* (2005) EWHC 1145 (Admin).

democratic process than unpopular ones, it will be argued in Chapter Five that the risk of a heckler's veto being created is real as a consequence.

It will be argued that this narrow approach to freedom of expression is reminiscent of the unpopular theory advanced by American Robert Bork in the 1970s.<sup>207</sup> This theory, which is set out in more detail in the following chapter,<sup>208</sup> insists that a free speech guarantee, such as the First Amendment, must be reserved for political expression – narrowly defined – or else the judiciary risked acting in an unprincipled manner. Likewise, the UK approach echoes Vincent Blasi's theory<sup>209</sup> that the main purpose of free speech is its function as a check on government behaviour. This theory also takes a particularly limited view on the range of expression that falls within the free speech clause. Yet the approach to Article 10 in UK is somewhat enigmatic since the UK judiciary has also found, as will be discussed in Chapter Seven, that comparative advertising involves 'important issues of free speech'<sup>210</sup> and, furthermore, that pornography might be protected by it.<sup>211</sup> The Strasbourg jurisprudence contains liberal statements about the inclusion of such expression within the ambit of Article 10.<sup>212</sup> Thus, it might be said that the UK courts approach to such speech is simply a product of its obligations under s. 2, HRA. Yet, as will be shown in Chapters Three and Seven, in relation to such speech the ECtHR affords member states a wide margin of appreciation. Therefore, in

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<sup>207</sup> Robert Bork, "Neutral Principles and Some First Amendment Problems," [1971] 47 *Indiana Law Journal* 1.

<sup>208</sup> See pages 59-68. Academic criticism of this theory is also set out in the next chapter.

<sup>209</sup> Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521. This theory is also discussed in the following chapter, see pages 59-68.

<sup>210</sup> *Boehringer Ingelheim Ltd v. Vetplus Ltd* (2007) EWCA Civ 583.

<sup>211</sup> *O'Shea v. MGN Ltd.* (2001) EMLR 943.

<sup>212</sup> See, e.g., *Casado Coco v. Spain*, fn. 166; *Markt Intern Verlag GmbH v. Germany*, fn. 166 (Commercial expression); *Hoare v. UK* (1997) EHRLR 678 (Pornographic expression).

recognition of this, the UK judiciary could also treat such speech in the same narrow way that political expression is treated, finding that interferences with such speech are easily justifiable. Indeed, as will be shown in Chapter Seven, the House of Lords recently adopted such an approach in a case involving a failed licence application for a sex shop in Belfast.<sup>213</sup> These issues are set out more fully out in Chapters Five to Seven.

The purpose of this brief overview is to establish the argument to be made in this thesis that the UK judiciary's approach to Article 10 seems haphazard: in relation to political expression, it often seems particularly conservative and yet, elsewhere, there are moments of liberalism. It will be argued that this can be accounted for by what another commentator has described as a 'heavily under-theorised'<sup>214</sup> approach to freedom of expression. The introduction of Article 10 into the UK represented an opportunity to give greater constitutional protection to freedom of expression and that due to the weighty issues associated with the 'Article 10 endeavour',<sup>215</sup> greater adherence to established theory provided the means to realise this opportunity. As a result of the continued failure to consult theory more meaningfully, this opportunity has not yet been taken, although the opportunity is not lost yet.

## 5. Conclusion

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<sup>213</sup> *Miss Behavin' Ltd*, fn. 37.

<sup>214</sup> Ivan Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred,' fn. 7, 526.

<sup>215</sup> See fn. 3.

In setting out the parameters of the enquiry, this chapter has introduced the key issues that will be explored in this thesis. The purpose of this enquiry is to critique the UK judiciary's approach to Article 10 post-HRA. In particular, this thesis seeks to understand how the courts' approach compares to established theory. In this regard, it will explore the extent to which the UK judiciary has heeded the advice of commentators, such as Barendt, who have long argued that the meaning and scope of freedom of speech can only be properly understood in light of the moral and political arguments for its protection found in established theory. Adherence to such would provide for a richer and more certain free speech right in the UK. As set out above, by exploring the Article 10 case law in the UK post-HRA, it will be shown that the UK judiciary has not yet taken the opportunity that the HRA represented to realise a more fully formed free speech right in the UK. It will be argued that the strong statements of principle evident in the Strasbourg jurisprudence are not fully reflected in the UK Article 10 case law: the limitations of the Strasbourg court do not yet seem to be fully recognised by the UK courts. Moreover, the UK courts have had scant regard to established theory as a means of deciphering the Strasbourg jurisprudence. It will be argued that this misses the opportunity for a richer free speech right in the UK based on the arguments from self-fulfilment, truth and autonomy. Yet the key argument of this thesis will be that the UK judiciary have applied Article 10 in an unnecessarily narrow manner that goes beyond the consequentialist rationale of both the Strasbourg jurisprudence and popular conceptions of the argument from participation in a democracy found put forward by, for example, Alexander Meiklejohn.<sup>216</sup> Before setting out the key themes of the

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<sup>216</sup> Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper,

Strasbourg jurisprudence in Chapter Three, the following chapter sets out the established free speech theories in more detailed, including Meiklejohn's, and introduces the key features of the UK judiciary's approach to them.

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1948); 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245. This theory is discussed in detail in the following chapter.

# CHAPTER TWO

## Established free speech theories and Article 10

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### 1. Introduction

Four main justificatory arguments have been put forward to explain why freedom of expression deserves special protection against state interference. These are the arguments from: participation in a democracy; truth; self-realisation (or self-fulfilment); and autonomy. As set out in Chapter One, it will be argued in this thesis that, when determining Article 10 claims, the domestic judiciary has tended to neglect the latter three rationales in favour of a particularly narrow conception of the argument from participation in a democracy. This key argument will be sketched out further in this chapter. Of course, it is fully recognised that these justificatory arguments have been discussed extensively in the academic literature<sup>1</sup> and so there is no intention to provide new insights into them. Instead, this chapter will identify, and so establish, the significant features of these justificatory rationales that will be relied

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<sup>1</sup> For example see the discussion in Frederick Schauer, *Free Speech: A philosophical enquiry*, (Cambridge University Press, 1982), Eric Barendt, *Freedom of Speech*, (Oxford University Press, 2005) and Kent Greenawalt, *Speech, Crime and the Uses of Language*, (Oxford University Press, 1989).

upon in the remainder of this thesis. In order to contextualise this discussion, this chapter will refer to certain key Article 10 cases in domestic and Strasbourg jurisprudence. Rather than substantively engaging with these decisions, the purpose of these references is to highlight the four main justificatory arguments in action in order to both demonstrate that these theories are judicially recognised and to frame the key argument of this thesis, outlined above.

## **2. The interplay between theory and practice**

As set out in Chapter One,<sup>2</sup> Barendt makes a compelling argument as to why the courts ought to engage with the moral and political arguments that underpin the commitment to freedom of expression.<sup>3</sup> In short, he argues that the concept of free speech cannot be properly understood without such engagement. In the UK and at Strasbourg level, there has been judicial recognition of the theoretical arguments which inform the protection provided by Article 10. In the UK, Lord Steyn has so far given the fullest explanation in *ex parte Simms*:

‘Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market:”...Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs

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<sup>2</sup> Page 46.

<sup>3</sup> Barendt, *ibid.*, 2-6.



political debate. It is a safety value: people are more ready to accept decisions that go against them if they can in principle seek to influence them'.<sup>4</sup>

In doing so, Lord Steyn explicitly recognises the role of the argument from self-fulfilment, the argument from truth and the argument from participation in a democracy. It could be argued that the reference to protecting speech for its intrinsic value also implicates the argument from autonomy. These four arguments are commonly referred to as the main justificatory theories<sup>5</sup> that explain why speech phenomena should be afforded special protection from state interference. Lord Steyn's judgment echoes the approach of the ECtHR to justificatory theory: as it said in *Handyside*, 'freedom of expression constitutes one of the essential foundations of...a [democratic] society, one of the basic conditions for its progress and for the development of every man.'<sup>6</sup>

Fenwick and Phillipson have argued that 'the reference to 'progress' of such a society by the Strasbourg court in *Handyside* can plausibly be taken to refer to the 'discovery of truth' rationale, in one of its variants...The 'truth' and 'democracy' rationales are thus linked and the Court does not here sharply differentiate between the two'.<sup>7</sup> Lord Bingham has recently reached the same conclusion: 'the fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out

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<sup>4</sup> *R v. Secretary of State for the Home Department, ex parte Simms* (2000) 2 AC 115, 126.

<sup>5</sup> Barendt, fn. 1, 6.

<sup>6</sup> *Handyside v. UK* (1976) 1 EHRR 737 [49]

<sup>7</sup> Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act*, (Oxford University Press, 2006), 39.

the bad and the true prevail over the false'.<sup>8</sup> Schauer also notes the similarity between the two arguments but on a different basis: of the argument from democracy, he argues that 'the special concern for freedom to discuss public issues and freedom to criticize governmental officials is a form of the argument from truth, because the necessity for rational thinking and the possibility of error in governmental policy are both large and serious'.<sup>9</sup> Indeed, it is Schauer's view that these similarities extend further into the arguments from autonomy and self-realisation so that all four share the same significant doubt that government is competent to properly regulate speech and, therefore, he argues that the idea of protecting speech due to a deep-rooted distrust of government unifies these theories.<sup>10</sup> Barendt describes this argument as a powerful one.<sup>11</sup>

Yet Schauer's negative argument for protecting speech is not one that the UK courts appear to readily recognise: the judiciary does not seem to doubt its competency to know what speech is best for progressing democratic society. For example, in *ProLife*<sup>12</sup> (which is discussed in more detail in Chapters Five and Six),<sup>13</sup> a significant element of the decision that no violation of Article 10 had occurred turned on the finding that the speech in question did not sufficiently contribute to the democratic process.<sup>14</sup> By recognising the justificatory theories that apply, the courts have demonstrated *some* engagement with the philosophical arguments that underpin

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<sup>8</sup> *R. (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15, [27-28].

<sup>9</sup> Schauer, fn. 1, 46.

<sup>10</sup> *Ibid.*, 86.

<sup>11</sup> Barendt, fn. 1, 21, although he doubts that it makes the case for free speech protection on its own. See further, Horton and Alexander, 'The Impossibility of a Free Speech Principle' (1983) 78 *Northwestern University Law Review* 1319, which specifically critiques Schauer's work (fn. 1).

<sup>12</sup> *R. (on the application of ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23.

<sup>13</sup> See discussion at pages 199 to 217 and 256 to 266.

<sup>14</sup> See discussion at pages 203 to 204.

freedom of expression. Yet the extent to which the courts have so engaged is debatable.<sup>15</sup> Whilst the statements in *Handyside* and *ex parte Simms* have become touchstones for both domestic and Strasbourg courts and whilst these statements provide a wide variety of reasons to protect speech, it has been forcefully argued that both nationally and supranationally, the courts are most concerned with protecting speech for its beneficial effects in progressing democratic society.<sup>16</sup> Yet such concentration on the *instrumental* value inherent in the argument from participation in democracy neglects the other broader rationales as well as the *intrinsic* value of free speech. Moreover, it will be shown that this approach denotes a superficial engagement with these other justificatory theories thus causing the fuller statements in *ex parte Simms* and *Handyside* to resemble platitudes. Thus, as set out in Chapter One, the UK courts will be criticised in this thesis for neglecting the valuation of speech for its *intrinsic* value in favour of near total reliance on protection for its *instrumental* value (and a limited conception at that). The purpose of this chapter is not to synthesise the four main justificatory theories in full since that task has already been extensively undertaken by other commentators, particularly Schauer<sup>17</sup> and Barendt.<sup>18</sup> Instead, the following discussion aims to highlight why more than a superficial understanding of these theories is required in order for fuller protection of free speech to be realised. This task includes recognition of the weaknesses that other commentators have found in these theories, particularly in the argument from democracy, which is discussed next.

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<sup>15</sup> in Chapter Three in relation to Strasbourg jurisprudence and in Chapters Five to Eight in relation to the domestic jurisprudence.

<sup>16</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 7, 61-72.

<sup>17</sup> Schauer, fn. 1, 3-86.

<sup>18</sup> Barendt, fn. 1, 6-23.

### 3 The argument from democracy

Theories based on the argument from participation in a democracy tend to emphasise that speech ought to be protected because of its benefit to society. Perhaps the chief proponent is Meiklejohn, whose theory focuses on the value of free speech to the democratic process.<sup>19</sup> Without this protection, he argues, citizens would be unable to perform essential tasks in the political process. Therefore, to be self-governing, citizens must be free to hear information and ideas that are necessary for decision-making. As Brennan notes of the Meiklejohnian position, ‘he argued that the people created a form of government under which they granted only some powers to the federal and state instruments they established; they reserved very significant powers of government to themselves. This was because their basic decision was to govern themselves rather than to be governed by others’.<sup>20</sup> This is a Lockean conception of state/citizen interaction.<sup>21</sup> Meiklejohn argues that speech ‘must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing, we have sovereign power’.<sup>22</sup> Bork notes, further, the notion of democratic government

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<sup>19</sup> Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper, 1948), and ‘The First Amendment is an Absolute’ [1961] *Supreme Court Review* 245.

<sup>20</sup> William J. Brennan, Jr., ‘The Supreme Court and the Meiklejohn Interpretation of the First Amendment,’ (1965) *79 Harvard Law Review* 1, 11.

<sup>21</sup> John Locke, “The Second Treatise of Government” in *Two Treatise of Government*, critical edition by Peter Laslett, (Cambridge University Press, 1960)

<sup>22</sup> Meiklejohn, ‘The First Amendment is an Absolute,’ fn. 19, 257.

‘would be meaningless without freedom to discuss government and its policies’.<sup>23</sup> Such justifications for freedom of speech, therefore, stem from the existence of democratic government, not just the constitutional document which protects it.<sup>24</sup>

Themes from Meiklejohn’s theory can be found in a number of other important works: in particular, those of Blasi<sup>25</sup> and Bork.<sup>26</sup> This is not to say those commentators have analysed protection for freedom of expression in the same terms. Like Meiklejohn, Blasi argues that the First Amendment protects freedom of speech due to its significance as a necessary check on State power. He finds this ‘checking value’ to be a central influence on the drafters of the First Amendment due to ‘the central premise of the checking value [being] that the abuse of official power is an especially serious evil’.<sup>27</sup> Yet Blasi’s argument covers a much narrower range of communication than Meiklejohn’s does. Meiklejohn’s theory explicitly protects: public discussions of public issues together with the spreading of information and opinion bearing on those issues; education in all its phases; philosophy and science; literature and the arts.<sup>28</sup> These types of speech are afforded equal and absolute protection from interference.<sup>29</sup> Blasi’s theory, meanwhile, ‘focuses on the particular problem of misconduct by public officials’.<sup>30</sup> Furthermore, Meiklejohn’s argument is not confined to freedom of expression: it is a political vision that citizens express themselves in order to achieve the common goal of a better society. Thus Meiklejohn

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<sup>23</sup> Robert Bork, ‘Neutral Principles and Some First Amendment Problems,’ [1971] 47 *Indiana Law Journal* 1, 23.

<sup>24</sup> *Ibid.*

<sup>25</sup> Vincent Blasi, ‘The Checking Value in First Amendment Theory’ (1977) *American Bar Foundation Research Journal* 521.

<sup>26</sup> Bork, fn. 23.

<sup>27</sup> Blasi, fn. 25, 538.

<sup>28</sup> Meiklejohn, ‘The First Amendment is an Absolute’, fn. 19, 257.

<sup>29</sup> *Ibid.*

<sup>30</sup> Blasi, fn. 25, 558.

rejected Holmes' 'marketplace of ideas' conception for its emphasis on the self-interested nature of mankind: that people do not seek to collaborate with their ideas but, instead, only 'believe whatever will serve his own private interest'.<sup>31</sup> Meiklejohn's vision clearly goes further than the usual free speech model in determining whether the State ought to be prohibited from interfering (for Meiklejohn, the prohibition is absolute) with speech: it contains a positive obligation on government to provide citizens with the tools to be better informed politically, including better education to that end.<sup>32</sup> Blasi criticises Meiklejohn's theory for a number of reasons but makes an important point about what might be called the sinister undertone that individuals in this constructed reality must commit to political participation: 'I question whether the highly politicized society extolled by Meiklejohn is, or ever was, a shared ideal of the American people'.<sup>33</sup>

In common with both Meiklejohn and Blasi, Bork has argued for a free speech principle centred on political speech. Yet Bork's conception is certainly narrower than Meiklejohn's and possibly narrower than Blasi's. Bork argues that:

'[C]onstitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of the law'.<sup>34</sup>

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<sup>31</sup> Meiklejohn, *Free Speech and its Relation to Self-Government*, fn. 19, 73.

<sup>32</sup> Meiklejohn, 'The First Amendment is an Absolute', fn. 19, 257.

<sup>33</sup> Blasi, fn. 25, 561.

<sup>34</sup> Bork, fn. 23, 20.

Protected speech is limited, therefore, to ‘criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any government unit in the country.’<sup>35</sup> Bork argues that to interpret the First Amendment any more broadly than this would require judges to act in an unprincipled manner;<sup>36</sup> that to include literature and the arts or anything else in the vein of developing the individual is unprincipled because:

‘These functions or benefits of speech are...to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.’<sup>37</sup>

According to Bork, political speech, however, stands apart because it is implicit in the representative democracy formed by the Constitution.<sup>38</sup> As might be expected, this view has been widely criticised.<sup>39</sup> It is a common theme in such criticism to question the workability of the narrow approach taken to definition. Whereas Blasi’s theory has been criticised on the basis its operative definitional terms<sup>40</sup> are ‘by no means

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<sup>35</sup> *Ibid.*, 29.

<sup>36</sup> *Ibid.*, 20.

<sup>37</sup> *Ibid.*, 25.

<sup>38</sup> *Ibid.*, 23.

<sup>39</sup> See, in particular, Stephen Shiffrin, ‘The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,’ 78 *Northwestern University Law Review* 1212, 1232-1239; Martin Redish, ‘The Value of Free Speech,’ (1982) 130 *University of Pennsylvania Law Review* 591, 605-607, 610-611; Baker, *Human Liberty and Freedom of Speech*, (Oxford University Press, 1989), 26-27; Lee Bollinger, *The Tolerant Society*, (Oxford University Press, 1986), 153; Barendt, fn. 1, 156, 169; Kent Greenawalt, *Speech, Crime, and the Uses of Language*, (OUP, 1989), 177.

<sup>40</sup> *i.e.* speech concerning ‘abuse of power’, ‘misuse of official power’ and ‘breaches of trust by public officials’.

self-evident’,<sup>41</sup> Bork’s theory has been because the notion of ‘democracy’ it entails is ‘too shallow’.<sup>42</sup> Likewise, Barendt argues that Bork’s theory takes an overly narrow view of interpreting the US Constitution: since they ‘must be read as a whole...the scope of freedom of speech can only be understood in the light of the other rights guaranteed in the text’, for example, that the media’s right to report on criminal trials stems from freedom of speech *and* the right to a fair trial.<sup>43</sup> Finally, Redish has argued that Bork’s theory creates ‘an untenable situation’:

‘[W]hen an individual only has an indirect say in governing his life [by voting], he has a right to information that will enable him to exercise his power more effectively; but when the individual has full and total authority to make the very same decisions [affecting only himself], his right to the information mysteriously vanishes’.<sup>44</sup>

Redish finds this situation untenable because the individual requires such information as allows her to self-rule, which may well include speech beyond that deemed ‘political’.<sup>45</sup>

Thus the question of what counts as ‘political’ is in sharp focus.<sup>46</sup> Yet the reservation of the highest form of protection for speech that is ‘political’ has been extensively criticised by US commentators, in particular, primarily due to the obvious difficulty of defining ‘political’ with any sort of precision. As Baker has argued, ‘any

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<sup>41</sup> Redish, fn. 39, 612.

<sup>42</sup> Shiffrin, fn. 39, 1236.

<sup>43</sup> Barendt, fn. 1, 156-7.

<sup>44</sup> Redish, fn. 39, 607.

<sup>45</sup> *Ibid.*

<sup>46</sup> See discussion in Chapter Five.



focus on political speech is likely to be abused'.<sup>47</sup> This can be seen, for example, in Bork's theory by the particularly narrow approaches it takes to the definition of 'political'. In this regard, Kalven has questioned the competency of the judiciary to accurately determine what is 'political' and what is not: 'it must be recognised...that a reason implicit in the breadth of protection afforded speech is due to the judicial recognition of its own incapacity to make nice distinctions'.<sup>48</sup> He adds, that this 'reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected'.<sup>49</sup> This observation is in keeping with Greenawalt's assessment: 'politics is not hermetically sealed off from other human concerns'. He adds, 'speech that is not explicitly political often has political implications'.<sup>50</sup> Baker agrees: 'once the insight that the personal is political is fully accepted, the category of politically relevant speech could be virtually unlimited'.<sup>51</sup> Furthermore, Baker argues that 'like the difference between lyric and vulgarity, the identification of politically relevant speech depends on the eye of the beholder'.<sup>52</sup> Bollinger expands on the point to explain that '[w]hen we turn to open-ended, ambiguous words...we create the opportunity for distinctions to be drawn later that we did not originally intend'.<sup>53</sup> It will be argued in Chapter Five that several recent Divisional Court decisions demonstrate that judicial competency to determine what is 'political' is a live issue.<sup>54</sup> It will be further argued that Meiklejohn's approach to definition is more

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<sup>47</sup> Baker, fn. 39, 26.

<sup>48</sup> Harry Kalven Jr., 'The New York Times Case: A Note on the Central Meaning of the First Amendment,' [1964] *Supreme Court Review* 191, 213.

<sup>49</sup> *Ibid.*

<sup>50</sup> Greenawalt, both quotes, fn. 39, 45.

<sup>51</sup> Baker, fn. 39, 26.

<sup>52</sup> *Ibid.*

<sup>53</sup> Bollinger, fn. 39, 36

<sup>54</sup> See discussion at pages 183 to 193.

alluring than, say Bork's or Blasi's, because it better reflects the broader approach to definition that these criticisms call for than those narrow theories do.

As suggested in Chapter One, and as other commentators have said,<sup>55</sup> the Strasbourg jurisprudence heavily favours the argument from participation in a democracy as the principal rationale underpinning Article 10.<sup>56</sup> Indeed, it has been said that this preference is also apparent in the domestic Article 10 jurisprudence,<sup>57</sup> as will be shown in this thesis. Yet, it will be argued, that rather than following the Meiklejohnian model, the Article 10 jurisprudence in the UK seems more akin to the narrow approaches evident in Bork's or Blasi's theory. For example, whilst Meiklejohn would protect literature and the arts on an apparently equal footing with public discussion of public issues, the status of the same under Article 10 appears more precarious.<sup>58</sup> It has been argued that the ECtHR adopts a hierarchical approach to protecting expression with artistic expression below political expression in the pecking order.<sup>59</sup> Fenwick and Phillipson,<sup>60</sup> however, argue that because the Strasbourg jurisprudence evidences a strong consequentialist approach to protecting speech, artistic expression is particularly disadvantaged since demonstrating that the expression has some beneficial effect on democracy may be difficult to prove, especially where it offends morals<sup>61</sup> or religious sensibilities.<sup>62</sup> This point will be discussed more fully in Chapter Seven. Furthermore, in keeping with Bork's thesis

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<sup>55</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 7, Barendt, *Freedom of Speech*, fn. 1.

<sup>56</sup> This point is confirmed in Chapter Three through exploration of the recent case law, see pages 120 to 128.

<sup>57</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 7.

<sup>58</sup> See discussion in Chapter Seven.

<sup>59</sup> Harris, O'Boyle and Warbrick, *Law of the European Convention of Human Rights*, (Butterworths, 1995, 1<sup>st</sup> edn.), 397.

<sup>60</sup> Fenwick and Phillipson, *Media Freedom*, fn. 7, 50-61.

<sup>61</sup> *Muller v. Switzerland* (1998) 13 EHRR 212;

<sup>62</sup> *Otto-Preminger-Institut v. Austria* (1995) 19 EHRR 34.

especially, the ECtHR operates a strict principle that speech which is intended to undermine the principle of democracy will not be protected by Article 10 even though that speech may express a political idea, *e.g.*, fascism.<sup>63</sup> Likewise, the prohibition on Holocaust denial speech has been found to be consistent with Article 10 because such speech makes no contribution to the democratic process.<sup>64</sup> These points concerning the Strasbourg jurisprudence will be established more fully in the following chapter. Having outlined the argument that a comparison can be made between the narrow theses advanced by Bork and Blasi, it will be argued that the criticisms made of those theses are also applicable to the domestic approach to Article 10 in particular.<sup>65</sup> In particular, it will be argued that the requirement to establish what benefit the expression makes to the democratic progress is a test for which no independent calculus exists to determine the answer and thus requires the judiciary to resort to *ad hoc* balancing. As noted above, Kalven has previously made similar comments about approaches to the First Amendment.<sup>66</sup> It will be argued in Chapter Five that this criticism is particularly apt where offensive political expression is involved.<sup>67</sup> Furthermore, it will be argued, as Fenwick and Phillipson do,<sup>68</sup> that the heavy reliance upon the consequentialist rationale has the effect of favouring traditional sources of ideas and information, particularly the media, when the court is determining Article 10 claims.<sup>69</sup> Consequently, it will be argued that the principle of free speech is impoverished in the UK due to the onus that this consequentialist

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<sup>63</sup> *Norwood v. UK* (2005) 40 EHRR SE 11; *Jersild v. Denmark* (1995) 19 EHRR 1.

<sup>64</sup> *Lehideux & Isorni v. France* (2000) 30 EHRR 365

<sup>65</sup> See Chapters Five and Six.

<sup>66</sup> Fn. 48.

<sup>67</sup> See discussion at page 199 onwards.

<sup>68</sup> Fn. 7.

<sup>69</sup> See discussion in Chapter Six.

approach places on expression to demonstrate its worth<sup>70</sup> and so weakens the assumption evident in established theory that free speech of itself is worth protecting.

As Weinstein, for example, notes:

‘instrumentally based rights tend to be more fragile than morally based ones; they are vulnerable to being overridden ... if the utilitarian calculus suggests that society would be better off without them. In contrast, rights that are justified in terms of moral rights of individuals as well as benefiting society as a whole tend to be sturdier.’<sup>71</sup>

These criticisms of consequentialist approaches to freedom of speech do not yet seem consistently recognised by the UK judiciary.<sup>72</sup> Thus, despite having elements in common, it will be argued that the differential approach to types of expression (*i.e.*, political, artistic and commercial) is a major departure from Meiklejohn’s thesis since the latter makes no such distinction because the rationale for protecting speech is read into such forms of expression (*i.e.*, education in all its phases, literature and the arts, philosophy and science):

‘[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.’<sup>73</sup>

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<sup>70</sup> See Chapters Five and Six.

<sup>71</sup> James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, (Westview Press, 1999), 14.

<sup>72</sup> See Chapters Five and Six.

<sup>73</sup> Meiklejohn, ‘The First Amendment is an Absolute,’ fn. 19, 256.

It will be argued that the domestic jurisprudence does not adopt such a liberal approach to determining which expression may attain the highest levels of protection.<sup>74</sup>

Of course, it is recognised that Meiklejohn's approach is not without difficulties and thus, even if the judiciary were to recognise the issues with narrow approaches to freedom of expression, such as Bork's or Blasi's, close adherence to Meiklejohn's theory might not provide a total solution. For example, whilst Bork's theory clearly would not protect speech which attacks the foundation of democracy, Meiklejohn's theory, meanwhile, has been criticised because it would appear to protect such: Bollinger, for example, doubts that Meiklejohn's theory has 'anything to say about speech restrictions that are the *product* of the democratic system' and 'why in particular we should protect speech that seeks to undermine the system itself'.<sup>75</sup> Furthermore, it is unlikely that the domestic judiciary could protect such speech even if minded to do so: regardless of the conflict it would present with Strasbourg jurisprudence,<sup>76</sup> there are a number of legislative measures that might prohibit anti-democratic speech, such as the Race and Religious Hatred Act 2006, for example.

Moreover, as Barendt observes, concerns about consequentialism are applicable to Meiklejohn's theory as well<sup>77</sup> and so there are 'awkward repercussions' because a state might consider the values of democracy are best achieved by suppressing speech or, worse still, as Schauer observes, since the people are

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<sup>74</sup> See Chapters Five to Eight.

<sup>75</sup> Bollinger, fn. 39, 151.

<sup>76</sup> Fn. 63.

<sup>77</sup> Barendt, fn. 1, 19.

sovereign, the majority might demand the minority is silenced.<sup>78</sup> However Barendt argues that this concern can be remedied if the conception of democracy used is refined to a Dworkinian view embodying equal respect and concern.<sup>79</sup> In this way, Barendt argues, the fundamental principle that everyone is entitled to participate in public debate – including those with unpopular views – is preserved and so is not ‘surrendered to the powers of the elected majority’.<sup>80</sup> This is a crucial principle. Yet it will be argued that the domestic jurisprudence does not sufficiently guard against this and in Chapter Five it will be argued that the UK courts’ approach to offensive political expression, in particular, creates the risk of a Heckler’s Veto being established.

However, whilst the argument from participation in a democracy is the dominant rationale applied in Article 10 cases, it is not the only rationale applied, as will be shown. Chapter Three will demonstrate in more detail how the other broader established rationales for protecting speech have been applied in the Strasbourg jurisprudence, albeit with varying success. The following section explores the argument from truth and outlines how this established theory has recently been applied by the House of Lords in *ADI*.<sup>81</sup>

#### **4. The argument from truth**

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<sup>78</sup> Schauer, fn. 1, 40.

<sup>79</sup> Barendt, fn. 1, 19.

<sup>80</sup> *Ibid.*

<sup>81</sup> Fn. 8.

*ADI* concerned the blanket ban on political advertising using the broadcast media. More detailed facts, unnecessary for this chapter, are set out in Chapter Four.<sup>82</sup> Lord Bingham found the ban was not incompatible with the claimant's Article 10 rights on the following grounds: the fundamental rationale of the democratic process is that ideas, *etc.*, are debated and scrutinised in public so that, over time, 'the good will...drive out the bad and the true prevail over the false' and that 'it must be assumed that, given time, the public will make a sound choice'.<sup>83</sup> However, this is not achieved where the 'playing field of debate' is uneven: where wealthy organisations buy advertising/broadcast time to swamp the market with their own political ideas (true or false) so that these ideas 'may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them';<sup>84</sup> the public must be 'protected against the potential mischief of partial political advertising'.<sup>85</sup> Thus His Lordship finds the case is not really about serious debate but about the 'more pervasive and potent' effect of 'the broadcast media': essentially, that it seriously distorts perceptions of truth/falsehood within the mind of the citizen so that they are conditioned to accept them without applying any form of rational thought or reasoning.<sup>86</sup> Baroness Hale, in agreeing with Lord Bingham, adds that '[the Claimant] can seek to put their case across in any other way, but not the one which so greatly risks distorting the public debate in favour of the rich'.<sup>87</sup>

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<sup>82</sup> See pages 144 to 146.

<sup>83</sup> Fn. 8, [28].

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, see [30].

<sup>87</sup> *Ibid.*, [51].

Thus, Lord Bingham placed reliance on the central issue not being about serious debate because the effect of the broadcast media prevented such debate occurring. This finding is not particularly persuasive: the broadcast media *cannot* prevent serious debate ‘by dint of constant repetition’. Instead, the decision seems to be founded on the concern that voters may reach the ‘wrong’ decision when forming political opinion or voting for candidates; yet the reason why this should be so is unarticulated, which is particularly troubling given that Baroness Hale<sup>88</sup> notes the position is opposite in the USA where such an argument has been rejected in the context of limits on election expenditure on the basis such restrictions would breach the First Amendment.<sup>89</sup> Having acknowledged the elephant in the room, Baroness Hale does nothing much about it, commenting only that we do not want that sort of thing in the UK.<sup>90</sup> The difficulty with the reasoning in *ADI* is that it looks like control shrouded in paternalism: it is a big claim that political advertising can be so alluringly persuasive as to rob the citizen of all cognitive reasoning so that they become automatons at the polling station. Of course, this type of reasoning can be also found in the Strasbourg jurisprudence. In the seminal case of *Jersild v. Denmark*,<sup>91</sup> the ECtHR stated that ‘it is commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media’<sup>92</sup> but provided no further evidence of this claim, aside from passing reference

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<sup>88</sup> *Ibid.*, [47].

<sup>89</sup> *Buckley v. Valeo* (1976) 424 US 1; see also Ian Cram, *Contested Words – Legal Restrictions on Freedom of Expression in Liberal Democracies* (Ashgate, 2006), 73-96.

<sup>90</sup> *ADI*, fn. 8, [48] ‘In the United Kingdom, and elsewhere in Europe, we do not want our Government or its policies to be decided by the highest spenders’.

<sup>91</sup> Fn. 63.

<sup>92</sup> *Ibid.*, [31], later applied in *Murphy v. Ireland* (2004) 38 EHRR 13, [69].



to a similar finding in an earlier Commission decision.<sup>93</sup> Neither is the claim established by the *ipso facto* statement that ‘plainly, this application is made [by the Claimant] precisely because television and radio are judged to be the most effective advertising media’.<sup>94</sup> Instead, it strongly resembles an argument that citizens should be protected from making bad political decisions and, as such, it invokes an objection raised by Redish:

‘[Suppose] an individual wishes to ...vote for a candidate because the candidate looks good with his tie loosened and his jacket slung over his shoulder, who are we to tell him that these are improper acts? We may prefer that he make his judgments...on more traditionally ‘rational’ grounds...[b]ut in these areas society has left the ultimate right to decide to the individual, and this would not be much of a right if we prescribed how it was to be used’.<sup>95</sup>

Lord Bingham’s judgment implicates the argument from truth: that the power of broadcast media interferes with the usual process in which, eventually, goods defeats bad and truth overcomes falsehood. Yet, this application of it is different from the theory expounded by J. S. Mill: it is much narrower, as will be shown; Mill’s does not deny protection to speech because it is false or risks the audience reaching bad decisions. The inference in Lord Bingham’s *dicta* that the broadcast media conditions the viewer into accepting that view as fact parallels Mill’s argument that knowledge of ‘the truth’ results from an *understanding* of it (why it is true) not

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<sup>93</sup> *Purcell v. Ireland*, app. No. 15404/89, reported (1991) 12 HRLJ 254.

<sup>94</sup> *ADI*, fn. 8, [30]

<sup>95</sup> Redish, fn. 39, 619.

from being told that it is true;<sup>96</sup> however this argument is most powerful where the truth cannot be tested by virtue of competing evidence, testimony or opinion. Lord Bingham's judgment does not say that the competing views are prevented by virtue of the political advertising alone: indeed, His Lordship acknowledges that there would be good grounds to find Article 10 had been breached if the advert was 'to counter the effect of commercial advertising bearing on an issue of public controversy'.<sup>97</sup>

Yet it is positive that the argument from truth was employed to determine the case, albeit in a less than fully reasoned manner. It is submitted that Mill's argument provides a broader basis for protecting speech and, also, since it shares common features with the argument from self-fulfilment and autonomy, provides the basis for more meaningful applications of those theories. These arguments will be set out in the remainder of this chapter, commencing with an exploration of Mill's argument in more detail.

The argument from truth has long antecedents stretching back to the seventeenth century and beyond<sup>98</sup> yet the justification is predominantly associated with J. S. Mill. His classic work *On Liberty* contains his theory of free speech,

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<sup>96</sup> J. S. Mill, *On Liberty*, (London: Routledge, 1991), (1<sup>st</sup> edn., 1859), 56, 'Mankind ought to have a rational assurance that all objections have been satisfactorily answered; and how are they to be answered if that which requires to be answered is not spoken? Or how can the answer be known to be satisfactory, if the objectors have no opportunity of showing that it is unsatisfactory?' At 58, 'The fact, however, is, that not only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself...Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote...(76) with little comprehension or feeling of its rational grounds.'

<sup>97</sup> *ADI*, fn. 8, [34]: see further, Lewis and Cumper, 'Balancing freedom of political expression against equality of political opportunity: the courts and the UK's broadcasting ban on political advertising' (2009) *Public Law* 89 who describe this finding as the 'Parthian shot' which undermines the decision the position on deference adopted in the case, 106-111.

<sup>98</sup> It is apparent in other works of the seventeenth century, notably Milton's *Areopagitica*, (London: J. M. Dent & Sons Ltd, 1941, first published 1644): 'Let [truth] and Falsehood grapple; who ever knew Truth put to the worst in a free and open encounter?', 36.

which, in outline, is that speech ought to be protected because unimpeded debate leads to the discovery of truth.<sup>99</sup> The argument is not premised on truth always defeating falsehood in the short term but that truth will eventually surface in the long term.<sup>100</sup> Yet Mill strongly argues against suppression of opinion because it is held to be false. To do so would be an assumption of infallibility:<sup>101</sup> ‘We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still’<sup>102</sup> because the suppressed opinion may turn out to be true<sup>103</sup> or it may be false but falsehood has value in providing a ‘livelier impression’ of the truth.<sup>104</sup> Furthermore, rational discourse requires a proper understanding of the

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<sup>99</sup> Mill, fn. 96, 32, ‘[Man] is capable of rectifying his mistakes by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and argument, to produce any effect on the mind, must be brought before it.’

<sup>100</sup> *Ibid.*, 43, ‘but, indeed, the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution...It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake.’ (44), ‘The real advantage which truth has, consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favourable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it’.

<sup>101</sup> *Ibid.*, 29, ‘to refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility’.

<sup>102</sup> *Ibid.*, 28.

<sup>103</sup> *Ibid.*, 75, ‘if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true.’

<sup>104</sup> *Ibid.*, 34, ‘Strange that [society] should imagine that they are not assuming infallibility when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful*, but think that some particular principle or doctrine should be forbidden to be questioned because it is so *certain*, that is, because *they are certain* that it is certain. To call any proposition certain, while there is any one who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side’. Also, at 35, ‘the usefulness of an opinion is itself a matter of opinion: as disputable, and open to discussion and requiring discussion as much, as the opinion itself.’ Mill cites Cicero with approval, 54, ‘he who knows only his own side of the case, knows little of that’.

arguments for and against the ‘truth’. Holding a true opinion is not equivalent to understanding it.<sup>105</sup>

Mill’s theory has been criticised for a number of reasons, particularly where it has been interpreted as an argument that truth will succeed falsehood in the ‘marketplace of ideas’.<sup>106</sup> As Baker says, ‘why bet that truth will be the consistent or even the usual winner?’<sup>107</sup> If the focus of enquiry is on Mill’s apparent conditional assumption that truth will always be victor in ‘a grapple with falsehood’<sup>108</sup> then Mill’s theory has little value as an explanation of why speech ought to be protected. Certainly such causality seems dubious at best. Bollinger memorably dismisses the notion that truth will always ‘win out’ as ‘Pollyannaish’.<sup>109</sup> He says it deserves ‘the brushing aside that Alexander Bickel gave it when he said “We have lived through too much to believe it”’.<sup>110</sup> Nazi power in 1930s Germany, McCarthy’s America, and the general resistance to the American civil rights movement all illustrate the point. Yet this dismissal neglects Mill’s point. Mill acknowledges that it is a ‘pleasant falsehood’ to believe that ‘truth will always triumph over persecution’ but that ‘over

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<sup>105</sup> *Ibid.*, 56, ‘Mankind ought to have a rational assurance that all objections have been satisfactorily answered; and how are they to be answered if that which requires to be answered is not spoken? Or how can the answer be known to be satisfactory, if the objectors have no opportunity of showing that it is unsatisfactory?’ At 58, ‘The fact, however, is, that not only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself...Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote...(76) with little comprehension or feeling of its rational grounds.’

<sup>106</sup> This notion is derived from Holmes’s dissent in *Abrams v. United States* 250 US 616, 630 (1919), ‘the ultimate good desired is better reached by free trade in ideas – ...the best test of truth is the power of the thought to get itself accepted in the competition of the market’ and *Gitlow v. New York* 268 US 652, 673 (1925). See also Brandeis J in *Whitney v. California* 274 US 357, 375-8 (1919); Frankfurter J. in *Kovacs v. Cooper* 336 US 77 (1949) and *Dennis v. United States* 341US 494 (1951), 546 to 553; Hand, *United States v. Dennis* 181 F.2d 201 (2d Cir. 1950) and *International Brotherhood of Electrical Workers v. NLRB* 181 F.2d 34 (2<sup>nd</sup> Cir. 1950);

<sup>107</sup> Baker, fn. 39, 6.

<sup>108</sup> This is Milton’s phrase, see fn. 98.

<sup>109</sup> Bollinger, fn. 39, 74.

<sup>110</sup> *Ibid.*, citing Bickel, *The Morality of Consent*, (Yale University Press, 1975), 71.

the course of ages' it will 'escape persecution'.<sup>111</sup> Bollinger dismisses this argument as an 'empty plea' on the more cynical basis that 'to nearly all of us...the long run will always come too late'.<sup>112</sup> Yet this does not fully address Mill's argument. The illustrations above are snapshot evidence. Across a century, or even a decade, the choice of the collective was to put 'right' these 'wrongs', so perhaps Mill is right. Bollinger more firmly resists the argument from truth on the basis that it ignores the impact of 'propaganda and manipulative political rhetoric on political behaviour'.<sup>113</sup> Yet this dismissal by reference to propaganda<sup>114</sup> overlooks 'the importance that Mill attaches to trying to know the truth instead of merely having true opinions'.<sup>115</sup>

It has been said that Mill's theory has no longevity for the protection of free speech and, therefore, is of little value as a justification. Redish argues that 'any theory positing that the value of free speech is the search for truth creates a great danger that someone will...finally [attain] knowledge of the truth. At that point, that individual (or society) may feel fully justified, as a matter of both morality and logic, in shutting off expression of any views that are contrary to this "truth".'<sup>116</sup> As noted above,<sup>117</sup> Holocaust denial prohibition, which exists in many Eastern European countries, has been found compatible with Article 10<sup>118</sup> and so represents a practical example. Yet Redish's point may be challenged for a number of reasons. According

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<sup>111</sup> Mill, fn. 96, 43 to 44.

<sup>112</sup> Bollinger, fn. 39, 74.

<sup>113</sup> *Ibid.*

<sup>114</sup> Or indoctrination or manipulation of the sources of information and the media.

<sup>115</sup> C. L. Ten, *Mill On Liberty*, (Clarendon Press, Oxford, 1980), 128 to 130. Ten is critical of those that suggest Mill did not envisage the effect of propaganda.

<sup>116</sup> Redish, fn. 39, 617.

<sup>117</sup> Fn. 64.

<sup>118</sup> In *Jersild*, fn. 63 and *Lehideux*, fn. 64, the European Court of Human Rights agreed in principle that Holocaust denial prohibition was compatible with the Convention. Further, Robert Faurisson, a prominent revisionist, had his free speech claim rejected by the French courts and the United Nations Human Rights Commission, *Faurisson v. France* 2 BHRR 1 (UN HRC).

to Redish, over time the number of debatable topics will diminish as each discoverable truth is found and so the argument from truth will have diminishing application. Yet, as Redish recognises, Mill's theory protects falsehood because its 'expression makes the truth appear even stronger by contrast'.<sup>119</sup> Redish anticipates this point: 'acceptance of Mill's initial premise that the goal of free speech is the ultimate attainment of truth does not necessitate acceptance of this...premise'.<sup>120</sup> Yet this does not entirely displace Mill's point that falsehood is an indirect reinforcement of the truth once the 'truth' and 'falsehood' signifiers have been assigned. By way of illustration, Redish says that 'the view that the Earth is the center of the Universe does not deserve ... protection, because we know the truth to be different'.<sup>121</sup> Yet, equally, because the truth is known and demonstrable, this falsehood reinforces that truth since a request for proof cannot be satisfied. Furthermore, there are other two significant ways in which Mill's theory might be used to counter Redish's argument. First, through the 'Assumption of Infallibility'<sup>122</sup> argument: it is an assumption of infallibility to declare a statement false.<sup>123</sup> As Ten clarifies, 'the opinion we desire to suppress may very well be false, as we claim it to be, but, as fallible beings, we can have no rational assurance that it is false unless there is freedom to discuss it'.<sup>124</sup>

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<sup>119</sup> Redish, fn. 39, 617 summarising Mill, fn. 96, in particular his point at 28, that 'if the opinion...is wrong, they [society] lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error'.

<sup>120</sup> *Ibid.*, 617.

<sup>121</sup> *Ibid.*

<sup>122</sup> As Ten describes it, fn. 115, 126.

<sup>123</sup> As Ten establishes, Mill's infallibility principle is often interpreted as an 'Avoidance of Mistake' argument, i.e., that true opinion might be mistakenly suppressed. See Ten, *supra*, fn. 115, 125 to 126.

<sup>124</sup> See fn. 104. Ten, fn. 115, 126. Applying this logic to the Holocaust, it might be said that the insistence that the truth of the Holocaust be accepted without reference to contrary opinion will breed uncertainty of its actuality in some people. Free debate, on the other hand, involving those who doubt its existence provides the rational assurance to extinguish that doubt.

Second, through Mill's 'Necessity of Error'<sup>125</sup> argument, denial of discussion prevents understanding (in a meaningful sense) of the grounds of the opinion:<sup>126</sup> 'Men will hold on to a belief quite independently of the balance of arguments and evidence for and against it.'<sup>127</sup> Therefore, 'as far as Mill himself is concerned, the ultimate defence of freedom of discussion lies ...in his Assumption of Infallibility and Necessity of Error Arguments.'<sup>128</sup> C. L. Ten expands on this view:

'Though Mill thinks that in the end there would be a consensus of opinion on many currently contentious matters,<sup>129</sup> he believes that this state of affairs is desirable only if it results from freedom of discussion. He does not regard peace and tranquillity, to which the absence of conflicting and contentious views gives rise, as intrinsically desirable, irrespective of how they were attained. In this he differs from so many of his critics who share the views of Fitzjames Stephen that if all men could be made, without too great cost, to have true opinions, this would be "the greatest of all intellectual blessings". Whereas Stephen merely wanted men to have true beliefs, Mill wishes them to know the truth'.<sup>130</sup>

Thus, because of both these arguments true opinions cannot be foisted upon individuals as the only option: individuals ought to reach this conclusion independently. Admittedly, Mill's argument cannot account for any inequality of access to the 'marketplace' or that Mill's notional 'discussion', in practice, may not

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<sup>125</sup> Ten's description, fn. 115, 126 to 127.

<sup>126</sup> See fn. 105

<sup>127</sup> Ten, fn. 115, 126. Likewise this difficulty applies to Holocaust denial prohibition.

<sup>128</sup> Ten, fn. 115, 130.

<sup>129</sup> This is not to say that discussion would be prohibited because more truths were known but that the number of disputed 'truths' would diminish; the importance of knowing the basis of these truths would remain or else the truth would become a 'dead dogma'.

<sup>130</sup> Ten, fn. 115, 130.

be ‘open to everyone who wants to communicate his ideas’.<sup>131</sup> What Mill’s theory offers in response is minimal: it is the assertion that even ideas that ‘hardly figure in public discussion’<sup>132</sup> will emerge eventually if they are true.<sup>133</sup>

Furthermore, Redish’s argument concerning the diminishing number of ‘truths’ to be discovered appears to be posited on truth being a static concept. However, it is debatable whether the ‘truth’ is a static concept or whether, instead, ‘truths’ change or vary as society changes. For example, a fact may become unreliable as time progresses (the quantity of fossil fuels in the 1800s compared to today) or the discovery of a ‘truth’ in one context may alter a ‘truth’ in another (the discovery of the scientific effect of fossil fuels has affected political attitudes toward environmental issues). In a sense, Mill’s argument assumes that truth is a discoverable quality. It is not self-evident that such discoverability will always exist. The terms ‘truth’ and ‘falsehood’ are equal and opposite.<sup>134</sup> There is, therefore, an assumption that issues of a political and moral nature can be similarly segregated and this must be a weakness in Mill’s argument. Even on a collective level, across a broad timeframe, several courses of action for a political or moral issue may have equal appeal because each depends on a balance of desirable and undesirable outcomes (or potential outcomes). On this basis, the utility of Mill’s argument may be challenged since determination of which option is ‘truth’ and which is ‘falsehood’

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<sup>131</sup> Barendt, fn. 1, 12. Baker, fn. 39, 12 to 17, makes similar points. Similarly, in his response to Redish’s theory (fn. 39), Baker notes that disparities in financial strength between political candidates has a similar effect, Baker, “Realizing Self-Realization: Corporate Political Expenditures and Redish’s *The Value of Free Speech*”, (1982) 130 *University of Pennsylvania Law Review* 646.

<sup>132</sup> Barendt, fn. 1, 12.

<sup>133</sup> See fn. 100.

<sup>134</sup> Though Mill, fn. 96, 66, accepts that there will be cases of ‘conflicting doctrines, instead of one being true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part’. This admission, though, does not affect the point to be made.



will hold little scope for reliable classification on this binary basis. To say, when presented with these difficult choices, that one is truth and the others are not is an inaccurate reflection of reality. The outcome of the decision may be subject to unforeseen or random influences. For example, consider the dilemma of determining policy for purchasing expensive medicine that benefits a small group of individuals. To purchase them might save several lives but, minus that money, others might suffer. Equally, the medicine might be purchased but those patients die anyway. It seems implausible to suggest truth is a verifiable fact prior to the decision since the ‘correctness’ may be something that cannot be evaluated until afterwards. This highlights what Redish describes as an ‘internal contradiction’: ‘the theory’s goal is the attainment of truth, yet it posits that we can never really know the truth, so we must keep looking. But if we can never attain the truth, why bother to continue the fruitless search?’.<sup>135</sup> Yet arguably, it is the process of discovering truth that is most significant: that Mill’s theory illustrates the significance of ensuring the truth is not accepted as such until the reasons for it are understood. As Ten suggests,

‘[Mill] wants people to hold their opinions in a rational manner, with a knowledge of the significance of these opinions and the grounds for them, and with a willingness to change or modify them in the light of new arguments and evidence’.<sup>136</sup>

This is not naivety<sup>137</sup> or elitism<sup>138</sup> by Mill but an accurate depiction of what the process of debate ought to do. In other words, we might interpret Mill’s argument

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<sup>135</sup> Redish, fn. 39, 617.

<sup>136</sup> Ten, fn. 115, 127.

not as saying truth *will* be revealed if free debate prevails but rather that truth *can only* be revealed if free debate prevails. As Ten observes: Mill defends free speech as ‘an indispensable condition for the holding of rational beliefs’.<sup>139</sup> The emphasis, therefore, is on the value of the process in its connection to the outcome.<sup>140</sup>

These aspects of Mill’s argument do not seem apparent from the Strasbourg approach to Article 10 outlined earlier in this chapter. There does not seem to be a discernible judicial recognition that the Court lacks the competence to determine what ideas, *etc.*, are important or beneficial for society at large. As Schauer argues, ‘just as we are properly sceptical about our own power always to distinguish truth from falsity, so should we be even more sceptical of the power of any government authority to do it for us’.<sup>141</sup> Applying this principle ought to broaden the protection afforded by Article 10: it ought to restrict lesser protection being afforded to speech because it is to a limited audience or affects a limited number of individuals. Furthermore, since this principle is evident in other justificatory theories based on the intrinsic value of speech, greater recognition might cause these theories to be taken more seriously. These theories are discussed in the following section.

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<sup>137</sup> Dean Wellington, “On Freedom of Expression”, (1979) 88 *Yale Law Journal* 1105, 1130, ‘It is naïve to think that truth will *always* prevail over falsehood in a free and open encounter, for too many false ideas have captured the imagination of man’ (emphasis in original).

<sup>138</sup> Alan Haworth, *Free Speech*, (Routledge, London, 1988), 27, ‘it becomes clear enough that the liberty he is defending is - to coin a phrase - ‘the liberty of the seminar room’. Ten’s response to this argument is ‘certainly he recognizes that the intellectual powers and abilities of men differ greatly...But freedom [of speech] is not for them alone, and indeed he goes so far as to say explicitly that the chief benefit of freedom of discussion lies in what it can do for average human beings: ... “Not that it is solely, or chiefly, to form great thinkers, that freedom of thinking is required. On the contrary, it is as much and even more to enable average human beings to attain the mental stature which they are capable of. There have been, and may again, be, great individual thinkers in a general atmosphere of mental slavery. But there never has been, nor ever will be, in that atmosphere an intellectually active people”.’ Ten, fn. 115, 130 to 131.

<sup>139</sup> Ten, fn. 115, 126.

<sup>140</sup> Schauer, fn. 1, 16, describes the argument from truth as a ‘belief that freedom of speech is not an end but a means, a means of identifying and accepting truth.’

<sup>141</sup> *Ibid.*, 34.

## 5. The arguments from self-fulfilment and autonomy

Despite Lord Steyn's finding in *ex parte Simms* that freedom of speech serves the objective of promoting self-fulfilment,<sup>142</sup> the apparent judicial approach of protecting speech for its perceived beneficial effect on society at large seems fundamentally at odds with the argument from self-fulfilment (or self-realisation) as conceived by Redish:

'if the centrality of the self-realization value were recognized, the Court would necessarily acknowledge that it is not for external forces...to determine what communications or forms of expression are of value to the individual; how the individual is to develop his faculties is a choice for the individual to make'.<sup>143</sup>

In other words, awarding protection for speech based on judicial perceptions of its significance or contribution conflicts with the argument from self-realisation, which places such decision-making solely within the remit of the audience. This feature appears to conflict with *ADI* since in that case the House of Lords *does* appear to make such a decision for the audience. That the judiciary does not seem to recognise this point suggests that either the judiciary does not have a deep understanding of the theory or else, despite contrary statements, does not place much reliance upon the argument from self-fulfilment when determining Article 10 cases.

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<sup>142</sup> Fn. 4.

<sup>143</sup> Redish, fn. 39, 637.

The argument from self-fulfilment implicates a number of distinctive theories which regard freedom of speech as critical to the development of the individual and which values freedom of speech not only for its instrumental value but also for its intrinsic value. As Barendt notes, such theories argue that restrictions on speech ‘inhibit our personality and its growth’.<sup>144</sup> The inherent value achieved by protection has been described as ‘liberty’<sup>145</sup> and ‘self-realisation’<sup>146</sup> amongst other things<sup>147</sup> and is closely related to the argument from autonomy popularised by Scanlon.<sup>148</sup> These theories, though, are not just restatements of each other: there are significant differences between them.<sup>149</sup> The major difference between the argument from self-fulfilment and the argument from autonomy is that whilst theories based on self-fulfilment may be explicated in terms that value expression for its instrumental and intrinsic worth, theories based on autonomy value expression solely for its intrinsic worth.

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<sup>144</sup> Barendt, fn. 1, 13.

<sup>145</sup> Baker, fn. 39.

<sup>146</sup> Redish, fn. 39.

<sup>147</sup> Thomas Emerson refers to self-fulfilment within his identification of four values that free speech serves: ‘1) assuring individual self-fulfilment; 2) advancing knowledge and discovering truth; 3) provid[ing] for participation in decisionmaking by all members of society; 4) achieving a more adaptable and hence a more stable community, ...maintaining the precarious balance between healthy cleavage and necessary consensus,’ Thomas Emerson, *The System of Freedom of Expression*, (New York: Random House, 1970), 6. Lee Bollinger uses the term ‘tolerance’ in describing the value of speech. However in Bollinger’s analysis, ‘tolerance’ equates to ‘showing understanding or leniency for conduct or ideas...conflicting with one’s own’ rather than as the ability to endure (Bollinger, fn. 39, 10). Bollinger’s work is as much an agenda for future debate on free speech as it is a rationale for it (see 11, 237-248). In that sense he is not offering a complete theory but, as he calls it, a ‘preliminary inquiry’ (11).

<sup>148</sup> Thomas Scanlon, “A Theory of Freedom of Expression” in *The Philosophy of Law*, Ronald Dworkin, ed., (OUP, 1977), 153.

<sup>149</sup> For example, consider Baker and Redish’s disagreement on whether free speech directly or indirectly fosters ‘self-rule’. The difference in this outcome is apparent, they claim, in the definitional use of their theories with the result that corporate has a stronger or weaker claim depending on whether Redish or Baker’s theory is adopted. See Redish, fn. 39; Baker, “Realizing Self-Realisation: Corporate Political Expenditures and Redish’s *The Value of Free Speech*”, fn. 131; and, Redish, “Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker,” (1982) 130 *University of Pennsylvania Law Review* 678.

Redish's argument posits that self-realization is the 'ultimate value'<sup>150</sup> that the guarantee of free speech serves. This 'one true value'<sup>151</sup> is, in fact, two values: 'self-development' and 'self-rule'. Self-development allows an individual to realise their full potential in life by developing their 'powers and abilities'.<sup>152</sup> Self-rule permits 'control of [one's] own destiny through making life-affecting decisions'.<sup>153</sup> Baker meanwhile argues that 'the liberty theory justifies protection of expression because of the way the protected conduct fosters individuals' self-realization and self-determination'.<sup>154</sup> Baker notes that Redish's distinctions 'correspond closely to my presentation [of] self-realization (compare Redish's self-development component) and self-determination (compare Redish's self-rule component)'.<sup>155</sup> The liberty model 'repeatedly emphasizes people's self-fulfilment and participation in societal change'.<sup>156</sup> Scanlon's justification based upon autonomy derives from the principle that 'a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents'.<sup>157</sup> Scanlon explains that 'to regard himself as autonomous...a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action.' Therefore, 'an autonomous person cannot accept without independent consideration the

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<sup>150</sup> Redish, fn. 39, 596.

<sup>151</sup> *Ibid.*, 593.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> Baker, *Human Liberty and Freedom of Speech*, fn. 39, 5.

<sup>155</sup> *Ibid.*, 658.

<sup>156</sup> Baker, *ibid.* Oddly, Baker dismisses Redish's co-emphasis on the self-development value abruptly, noting, at 660, that this 'derivation quickly breaks down'. He adds 'although democracy may further the "development of the individual's human faculties," a concern with self-development does not in any obvious way require a democratic political order'. Redish is equally surprised by this dismissal since 'even if he is correct in his assertion that such a value is not logically implicit in the adoption of a democratic system, that value is nevertheless central to Baker's own theory'. (Redish, 'Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker', fn. 149, 685)

<sup>157</sup> Scanlon, fn. 148, 161.

judgment of others as to what he should believe or what he should do'.<sup>158</sup> Scanlon's thesis thus contains the decision-making functions and self-development function that Redish and Baker identify. Each of these variations also claims that there is value in speaking of itself regardless of content and, therefore, speech ought to be protected on that basis.

The difference between these theories appears sharp in application as definitional tools but oblique in justification terms. Baker dismisses Scanlon's theory because of the protected acts of expression it includes,<sup>159</sup> which is a definitional issue, yet, as a justification, notes, 'respect for people's autonomy is roughly the liberty theory'.<sup>160</sup> Redish asserts, unconvincingly, that 'autonomy' is too narrow because it includes only the 'decision-making value',<sup>161</sup> not individual development. Scanlon's thesis does focus on the limitation of state power,<sup>162</sup> which is perhaps more appropriate to decision-making issues, yet the accuracy of Redish's assertion appears challengeable. Scanlon's emphasis on the relationship between free speech as a means of rational deliberation<sup>163</sup> necessarily affects individual development in a positive way. Perhaps this does not extend as far as Redish's notion of individual development but his argument appears more applicable to definition than

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<sup>158</sup> *Ibid.*, 163. Though Scanlon did later reconsider the soundness of his argument, see Thomas Scanlon, 'Freedom of Expression and Categories of Expression,' (1979) 40 *University of Pittsburgh Law Review* 519. Irrespective, it remains an important theory, as Barendt notes, fn. 3, 17-18.

<sup>159</sup> Baker, *Human Liberty and Freedom of Speech*, fn. 39, 51.

<sup>160</sup> *Ibid.*, 278.

<sup>161</sup> Redish, fn. 39, 593.

<sup>162</sup> In that sense Schauer's thesis is similar to Scanlon's. Schauer posits that free speech can be defended due to our distrust of government's ability to 'make the necessary distinctions' (86) to regulate speech. See Schauer, fn. 1, 34, 44-46, 86. Scanlon, in his later article, described his theory as employing 'the idea of autonomy...as a constraint on justifications of authority' (Scanlon, fn. 158, 533).

<sup>163</sup> Scanlon, fn. 148, 166.

justification. Maybe Redish's best riposte would be that his self-fulfilment thesis removes any doubt as to whether self-development is included.

The arguments from self-realisation have been criticised on the basis that the values they promote may be achieved by methods besides debate. As Schauer argues 'even if communication is a sufficient condition for intellectual self-fulfilment, it does not follow that it is a necessary condition'<sup>164</sup> since experiences may produce the same result. Barendt argues likewise: '[u]nless some reasons can be given for treating expression as particularly significant, the case for a free speech principle made on this basis becomes hard to distinguish from general libertarian claims to do anything which an individual may consider integral to his personality'.<sup>165</sup> Self-realisation is unlikely to only stem from free debate. Experiences will also develop the self: escape from near-death leads, surely, to appreciation of life. Whilst this criticism is important in philosophical terms it need not interfere with the application in practice: a judge might easily limit the application to recognised expression.<sup>166</sup>

A further difficulty raised about these arguments is the causality they seem to assume between 'self-realisation' and free debate. As Barendt notes, 'it is far from clear that unlimited free speech is necessarily conducive to personal happiness'.<sup>167</sup> Schauer similarly argues that speech is not sufficient for this purpose: 'the value of communication in the process of intellectual development is of necessity limited by the range of experiences that are the subjects of the communication'.<sup>168</sup> Neither is it

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<sup>164</sup> Schauer, fn. 1, 57.

<sup>165</sup> *Ibid.*

<sup>166</sup> As set out in Chapter Three, the ECtHR affords a low threshold to the issue of what constitutes 'expression'.

<sup>167</sup> Barendt, fn. 1, 13.

<sup>168</sup> Schauer, fn. 1, 57.

clear that unlimited speech will necessarily promote or permit the individual to make autonomous decisions or lead to self-rule/self-determination. As Barendt also comments, some restrictions ‘on saturation advertising by a candidate for office, could be justified in order to foster a climate for rational thought by the public’.<sup>169</sup> These difficulties are not easily overcome. The argument from self-realisation values speech for its intrinsic worth. This might manifest in several ways, for example, as an emotional pressure valve or through an increased sense of dignity, respect or self-worth. Yet recognition of this intrinsic worth would suggest that any suppression of speech unduly restricts these benefits. This argument would seem to consider free speech as predominantly a speaker’s, rather than audience, right. The difficulty with this aspect of the argument is that it cannot explain when speech ought to be restricted without damaging its internal cogency. Any nontrivial theory must allow speech to be restricted in certain circumstances. As Greenawalt argues, ‘the government must protect citizens from social harms’.<sup>170</sup> Financial, emotional and physical harms might also be added to this list. Yet theories based on the benefit to individuals seem to be premised on it being the individual, not the State, deciding whether to access the information or not, which leaves little or no room for government interference. Government reasons for wishing to interfere, whether well-intended or not, would appear irrelevant. Greenawalt dismisses this aspect as ‘implausible’.<sup>171</sup> This criticism is particularly pertinent to Scanlon’s argument from autonomy since, as Blasi notes, ‘[it] rests on the proposition that unless individuals retain a basic minimum of choice-making capability, they cease to be ‘individuals’ at all’ yet ‘the

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<sup>169</sup> Barendt, fn. 1, 17.

<sup>170</sup> Greenawalt, fn. 39, 32.

<sup>171</sup> *Ibid.*



concept of human autonomy is largely irreducible',<sup>172</sup> which therefore significantly reduces scope for state interference. Neither, as Barendt notes, is the State 'entitled to suppress speech on the grounds ...that its audience will form harmful beliefs or that it may commit harmful acts as a result of these beliefs'.<sup>173</sup>

In a later article, Scanlon conceded that the benefit of such a broad principle was probably not as strong as he originally believed.<sup>174</sup> This is not to say that Scanlon does not make a good point, that the individual should have a strong voice in deciding what to say, think or hear but that the diminished scope for government to interfere is a significant weakness and, as Scanlon admits, such broadness is most likely unnecessary. Yet Scanlon's theory remains valuable because it focuses on the principle of the right rather than its consequential effect. The arguments from self-fulfilment do similarly. The importance of this is that it recognises that individuals ought to be able to hear all sides of the debate in order to decide for themselves. In this sense, the argument from self-fulfilment and autonomy need not be applied so broadly as Scanlon, Baker and Redish suggest in order to have a broader effect on Article 10 than is evident in, say, *ADI*.

Furthermore, in this sense, there is a clear connection with Mill's argument from truth in the value he places on rational discourse being achievable only where individuals understand the truth having heard all sides. Comparisons with the argument from truth have been recognised by a number of commentators. Redish, for example, says that the argument from truth<sup>175</sup> 'if viewed as merely a means by which

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<sup>172</sup> Blasi, fn. 25, 547.

<sup>173</sup> Barendt, fn. 1, 16.

<sup>174</sup> Scanlon, fn. 158.

<sup>175</sup> Although his emphasis is on the 'marketplace of ideas' formulation.

the ultimate value of self-realization is facilitated, the concept may prove quite valuable in determining what speech is deserving of constitutional protection' since 'the individual needs an uninhibited flow of information and opinion to aid him or her in making life-affecting decisions'.<sup>176</sup> Indeed, Baker self-promotes the 'liberty' model as a means of 'cur[ing] major inadequacies of the 'truth' argument.'<sup>177</sup> Likewise Scanlon explicitly states his 'autonomy' justification is an extension of Mill's thesis.<sup>178</sup> He describes it as the Millian Principle.<sup>179</sup> Perry similarly notes that 'the self-fulfilment value seems to me to reduce to the truth value'<sup>180</sup> on the basis both reflect 'an essential characteristic of human beings [which] is their need for, and their capacity to pursue and achieve, an even better understanding of reality'.<sup>181</sup> It is this essential element which is present in general terms in both the arguments from self-realisation and truth and, furthermore, it is this element which is not reflected either specifically in *ADI* or generally in the courts central positioning of the democratic-process value in Article 10 jurisprudence.

## 6. Conclusion

The discussion set out above is not an argument for the prioritisation of self-fulfilment, autonomy or truth arguments but for a better footing for each within the

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<sup>176</sup> Redish, fn. 39, 618.

<sup>177</sup> Particularly the 'marketplace of ideas', which as noted above, is particularly deficient. On that basis, it does not, therefore, provide an adequate account of the Mill thesis.

<sup>178</sup> Scanlon, fn. 148, 160.

<sup>179</sup> *Ibid.*

<sup>180</sup> Michael Perry, 'Freedom of expression: an essay on theory and doctrine' (1983) 78 *Northwestern University Law Review* 1139, 1154.

<sup>181</sup> *Ibid.*, 1155.

domestic Article 10 jurisprudence. In addition to the contribution to the democratic process, the Strasbourg jurisprudence states that freedom of expression under Article 10 'constitutes one of the essential foundations...for each individual's self-fulfilment'.<sup>182</sup> Yet this does not seem fully recognised in decision outcomes. This could be achieved more readily if the judiciary adopted a broader approach to the values inherent in freedom of speech so that its intrinsic value is not lost. In practical terms, this means greater prominence to the arguments from autonomy and self-fulfilment in particular. Furthermore, the judiciary should, in any event, recognise the limits of their competence to determine what speech is beneficial. As the UK Article 10 jurisprudence is surveyed in this thesis, it will be argued that the judiciary has not fully mapped out its approach to Article 10 and, indeed, Hare has recently argued that the UK approach to freedom of expression 'remains heavily under-theorised'.<sup>183</sup> Before exploring, in greater detail, what the UK domestic case law reveals about the judiciary's approach to Article 10 and established theory, the following chapter outlines, by reference to recent decisions, the evident approach in the Strasbourg jurisprudence to these issues.

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<sup>182</sup> *Lingens v. Austria*, (1986) 8 EHRR 407.

<sup>183</sup> Ivan Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred,' [2006] *Public Law* 521, 526.

# **CHAPTER THREE**

## **The Strasbourg approach to freedom of expression compared to theory:**

### **Examining recent Article 10 decisions in the European Court of Human Rights**

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#### **1. Introduction**

The discussion within this chapter considers the Article 10 jurisprudence of the European Court of Human Rights (the “ECtHR”). The following chapter goes on to consider how this rich and well-established jurisprudence is treated by the UK courts under the Human Rights Act 1998. The purpose of this chapter, therefore, is not to consider how the UK judiciary treats or ought to treat the Strasbourg case law but rather to map out both the nature and limitations of the ECtHR’s evident approach to Article 10 as a reference point to that later discussion.<sup>1</sup> Drawing upon extensive academic literature in this area and recent case law, the nature of the pre-eminent

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<sup>1</sup> In Chapters Four to Seven.

consequentialist rationale (outlined in Chapter One)<sup>2</sup> will be set out and comparisons made with the established body of free speech theory discussed in the previous chapter. It will be argued that the consequentialist approach of the ECtHR bears close comparison with the argument from participation in a democratic society (albeit it is not exclusively premised on this rationale) although more closely resembles Meiklejohn's theory<sup>3</sup> than the more conservative theories of Bork and Blasi.<sup>4</sup> This argument informs the main theme of this thesis that the dominant UK approach to Article 10 is discernibly narrower in scope than both the Strasbourg approach and the argument from democracy as formulated by Meiklejohn in particular.

## **2. The Strasbourg approach in outline: mechanics and rationale**

### *a) Mechanics*

The mechanics of the ECtHR's approach to the right to freedom of expression under Article 10 are well-documented in the academic literature<sup>5</sup> and are briefly set

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<sup>2</sup> At pages 35 to 44.

<sup>3</sup> Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper, 1948); "The First Amendment is an absolute," [1961] *Supreme Court Review* 245

<sup>4</sup> Robert Bork, 'Neutral Principles and Some First Amendment Problems,' [1971] 47 *Indiana Law Journal* 1; Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521. See discussion in previous chapter.

<sup>5</sup> See, e.g., Fenwick and Phillipson, *Media Freedom under the Human Rights Act*, (Oxford University Press, 2006); Eric Barendt, *Freedom of Speech*, (Oxford University Press, 2005, 2<sup>nd</sup> ed.); Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, (Intersentia, 2002); A. Mowbray, *Cases and Materials on the European Convention on Human Rights*, (Butterworths, 2001); Janis, Kay and Bradley, *European Human Rights Law*, (Oxford University Press, 2000, 2<sup>nd</sup> ed.); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, (Butterworths, 1995).

out<sup>6</sup> in this section in order to frame the following discussion of recent decisions. As, for example, Fenwick and Phillipson point out,<sup>7</sup> analysis of the Strasbourg approach to freedom of expression must be viewed in the context of its limitations as a court. In particular, the ECtHR cannot be equated with a constitutional court like those in the United States of America or Canada. As the ECtHR has reiterated many times, it is an international court of review and, consequently, ‘it is in no way [its] task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation’.<sup>8</sup> As is well-established in the academic literature,<sup>9</sup> this limitation is significant for a number of reasons but two in particular: first, in positive terms, the purpose of the ECtHR is to establish the minimum level of human rights protection that member states should achieve rather than establish its limits (*i.e.*, it establishes a ‘floor’ not a ‘ceiling’ of rights),<sup>10</sup> which means that members states have scope to maximise protection beyond the Strasbourg jurisprudence; secondly, in more negative terms, this limitation recognises two distinct aspects of the ECtHR’s position: first, the Convention applies ‘across a vast and disparate area, an area with hugely differing cultural sensitivities’<sup>11</sup> (and so achieving minimum harmonisation is arguably more pragmatic than maximum harmonisation); secondly, the Convention system has an obvious dependency upon the continuing support of its signatories for its authority

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<sup>6</sup> For a fuller discussion of the mechanics of the ECtHR’s approach to Article 10 albeit in a media law context see Fenwick and Phillipson, *Media Freedom*, fn. 5, 37-107.

<sup>7</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 6-7.

<sup>8</sup> *Handyside v. UK* (1976) 1 EHRR 737, [50].

<sup>9</sup> See fn. 5.

<sup>10</sup> See Jonathan Lewis, ‘The European ceiling on human rights’ [2007] *Public Law* 720.

<sup>11</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 7.

and, therefore, must ‘retain the loyalty of *governments*, rather than of the peoples of Europe’.<sup>12</sup>

The ECtHR has developed general principles to govern the operation of the Convention rights and specific principles relevant to Article 10. Of its general principles, the most significant are the margin of appreciation doctrine and proportionality principle, both of which were outlined in Chapter One.<sup>13</sup> These principles have been discussed extensively in the academic literature<sup>14</sup> and are mentioned briefly in order to contextualise later discussion in this chapter and the thesis generally. As set out in Chapter One, the ECtHR has adopted a three stage test to determining whether the Article 10 right has been violated: first, did the interference have a legitimate aim (as listed in Article 10(2));<sup>15</sup> secondly, was the interference prescribed by law;<sup>16</sup> and, finally, was the interference necessary in a democratic society? As set out in *Sunday Times v. UK*,<sup>17</sup> this latter test involves three questions: does the interference correspond with a ‘pressing social need’; is the interference ‘proportionate to the legitimate aim pursued’; and, were the reasons

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<sup>12</sup> *Ibid.*

<sup>13</sup> See pages 35 to 44.

<sup>14</sup> See Lester, ‘Universality versus Subsidiarity: a reply’ (1998) 1 *EHRLR* 73; Laws, ‘The Limitations of Human Rights’ (1998) *PL* 254; Lavender, ‘the problem of the margin of appreciation’ (1997) *EHRLR* 380; Singh, Hunt and Demetriou, ‘Is there a role for the Margin of Appreciation in national law after the Human Rights Act?’ (1999) *EHRLR* 15; K. A. Kavanagh, ‘Policing the margins: rights protection and the European Court of Human Rights’ (2006) *EHRLR* 422; George Letsas, ‘Two concepts of the margin of appreciation’ (2006) *OJLS* 705; Paul Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19 *HRLJ* 1; T. H. Jones, ‘The devaluation of human rights under the European Convention’ (1995) *PL* 430; Fenwick, ‘The Right to Protest, the Human Rights Act and the Margin of Appreciation’, (1999) 62(4) *MLR* 491; J. A. Sweeney, ‘Margin of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era’ (2005) *ICLQ* 459; Arai-Takahashi, fn. 5.

<sup>15</sup> The legitimate aims listed in Article 10(2) are national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of reputation or rights of others, prevention of confidential information being disclosed and maintenance of the authority and impartiality of the judiciary.

<sup>16</sup> *Sunday Times v. United Kingdom* (1979) 2 *EHRR* 245; *Hashman and Harrup v. UK* (2000) *EHRR* 24.

<sup>17</sup> Fn. 16, [62].

given by the national authority to justify the interference ‘relevant and sufficient’.<sup>18</sup> Thus the test implicates both the necessity of the state interference (in order to protect another right or interest) and the means adopted to achieve that protection.<sup>19</sup> Since it is the task of each member state to secure the rights and freedoms that the Convention enshrines,<sup>20</sup> the ECtHR allows each state a margin of appreciation in relation to both securing the right and in determining the reality of the ‘pressing social need’ to interfere.<sup>21</sup> The width of this margin depends on two factors: first, the correlation between the expression in question and the democratic principles underpinning the Convention;<sup>22</sup> secondly, in recognition of the cultural diversity between the member states, on whether the needs of the legitimate aim invoked can be assessed objectively or else entirely depend upon local conditions.<sup>23</sup> Consequently, in relation to the first element, it is commonly accepted that although the ‘*rhetorical* attachment to free speech is always strong’,<sup>24</sup> a much narrower margin exists for interfering with political expression than commercial expression since the former connects with the democratic process more keenly than the latter. This point will be discussed in more detail shortly. In relation to the second element, the ECtHR recognises that the extent to which the legitimate aims concern objective notions varies, thus the ECtHR is better able to assess the requirements of some of these aims compared to others. Letsas argues<sup>25</sup> that wider margins apply in these circumstances either because there

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<sup>18</sup> See, for example, Lavender, fn. 14, where Lavender analyses the varying (and, he suggests, conflicting) approaches taken by the court to this question, 387-389.

<sup>19</sup> *Handyside v. UK*, fn. 8, [48].

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, [49]

<sup>23</sup> *Ibid.*, [48].

<sup>24</sup> Fenwick and Phillipson, fn. 5, 50.

<sup>25</sup> Letsas, fn. 14, 722-723.



is no consensus among member states on what human rights individuals have (*i.e.*, on matters involving morality,<sup>26</sup> religion<sup>27</sup> or commercial speech<sup>28</sup>) or because politically sensitive issues are involved (*i.e.*, national security or public safety<sup>29</sup>).

Yet, although the ECtHR affords these margins, in order to ensure its supervision is not ‘illusory’<sup>30</sup> it scrutinises the interference to ensure it is proportionate to the legitimate aim pursued. Thus, regardless of the margin applied, the Court must be satisfied that ‘the disadvantage suffered by the applicant is [not] excessive in relation to the legitimate aim pursued by the Government’.<sup>31</sup> In recognition of their symbiotic relationship, the proportionality test is said to be the ‘flip-side’ of the margin of appreciation doctrine.<sup>32</sup> However, as has been observed by several commentators,<sup>33</sup> the intensity of this proportionality analysis covers a spectrum, according to the width of the margin involved, ranging ‘from a very lax position...to a very vigorous appraisal of the merits’.<sup>34</sup> Thus where the expression or legitimate aim involved permits only a narrow margin of interference, a stricter approach to the issue of proportionality is evident. For example, in *Sunday Times v.*

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<sup>26</sup> *Handyside*, fn. 8. It has been held that a lack of public outcry does not necessarily mean restrictive judgments are not responding to a genuine public need, *Muller v. Switzerland* (1991) 13 EHRR 212.

<sup>27</sup> *E.g.*, *Wingrove v. UK* (1997) 24 EHRR 1; *Otto-Preminger v. Austria* [1995] 19 EHRR 34; *Murphy v. Ireland* (2004) 38 EHRR 13; *IA v. Turkey* (2007) 45 EHRR 30.

<sup>28</sup> *E.g.*, *Markt Intern Verlag GmbH v. Germany* (1990) 12 EHRR 161; *Casado Coca v. Spain* (1994) 18 EHRR 1; *Jacobowski v. Germany* (1995) 19 EHRR 64; *Krone Verlag GmbH & Co. KG v. Austria* (2006) 42 EHRR 28 though where a public interest is involved that margin is diminished *Hertel v. Switzerland* (1999) 28 EHRR 534.

<sup>29</sup> *Brind v. UK*, (1994) 18 EHRR 76; *McLaughlin v. UK*, (1994) EHRR 84; *Zana v. Turkey* (1999) 27 EHRR 667, .

<sup>30</sup> *Handyside v. UK*, fn. 8, [50].

<sup>31</sup> *National Union of Belgian Police v. Belgium* (1979-1980) 1 EHRR 578, 595.

<sup>32</sup> Y. Arai-Takahashi describes the margin of appreciation as the ‘flip-side’ of proportionality: *The Margin of Appreciation Doctrine*, fn. 5, 14.

<sup>33</sup> See Letsas, fn. 163; J. Rivers, ‘Proportionality and variable intensity of review’ (2006) *CLJ* 174. See also Bosma, *Freedom of Expression in England and under the ECHR: In Search of a Common Ground* (Oxford: Hart Publishing, 2000) and Van Dijk and Van Hoof, *The European Convention on Human Rights: Theory and Practice*, (Kluwer, 1998, 2<sup>nd</sup> edn.) as discussed in Fenwick and Phillipson, fn. 5, 79-81.

<sup>34</sup> Arai-Takahashi, fn. 5, 189.

*UK*,<sup>35</sup> the expression in question involved a matter of utmost public interest (the effects of the drug thalidomide) and the legitimate aim involved (the authority of the judiciary) was one for which there was ‘a fairly substantial measure of common ground’<sup>36</sup> amongst the Member States. Consequently, the ECtHR adopted a strict approach to whether the interference was necessary in a democratic society.<sup>37</sup> Alternatively, where the margin is wider in respect of both the expression and the legitimate aim, the proportionality test appears limited to the issue of whether the State’s approach was not unreasonable.<sup>38</sup> As Fenwick and Phillipson argue, this lesser standard is ‘a world away’ from limiting inference to that which is least intrusive<sup>39</sup> and, furthermore, would seem to conflict with the principle that exceptions to Article 10 must be narrowly construed.<sup>40</sup> This does not, however, mean that the finding of a wide margin necessarily leads to no violation being found: the ECtHR may decide the reasons put forward by the Member State to show the interference was proportionate simply do not stack up.<sup>41</sup>

### *b) Rationale*

This section outlines the pre-eminent rationale that underpins the ECtHR’s approach to Article 10 in order to make initial assessments on how this approach

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<sup>35</sup> Fn. 16.

<sup>36</sup> *Ibid.*, [59].

<sup>37</sup> *Ibid.*, [59] in which the ECtHR said that the margin of appreciation ‘does not mean that the Court’s supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith’.

<sup>38</sup> See, e.g., *Casado Coca v. Spain* (1994) 18 EHRR 1 or *Otto-Preminger-Institut v. Austria* (1995) 19 EHRR 34.

<sup>39</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 81.

<sup>40</sup> *Handyside v. UK*, fn. 8, [49].

<sup>41</sup> See *Open Door Counselling and Dublin Well Woman v. Ireland* (1993) 15 EHRR 244.

compares with the established free speech theories (outlined in the previous chapter) for the purposes of analysing recent decisions.<sup>42</sup> Moreover, having set out the mechanics of the ECtHR's approach to Article 10 claims in the previous section, and in particular, having established that the width of the margin of appreciation is dependent upon both the type of expression and the legitimate aim of the interference and, furthermore, that this width directly affects the intensity of the proportionality test applied, the argument, outlined in Chapter One,<sup>43</sup> that the Strasbourg approach is heavily reliant upon a consequentialist rationale will be developed in this section in order to be tested in the following sections by reference to recent decisions.

The ECtHR's approach to Article 10 is fairly settled: in each Article 10 decision, the Court tends to reiterate the principles enunciated in earlier case law, particularly those set out in *Handyside*.<sup>44</sup> Thus, the ECtHR tends to begin its judgments by reminding itself that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment and that Article 10 applies to information and ideas, whether favourably received or not (including that which offends, shocks or disturbs) such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.<sup>45</sup>

As outlined in Chapter One, it has been argued that the ECtHR adopts a hierarchical approach to protecting expression so that categorisation of the speech determines the strength of protection afforded, with political expression sat atop

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<sup>42</sup> See Sections 3 and 4 below.

<sup>43</sup> See pages 35 to 44.

<sup>44</sup> Fn. 8.

<sup>45</sup> *Ibid.*, [49].

followed by artistic then commercial.<sup>46</sup> For example, in *VgT*<sup>47</sup> the ECtHR stated that the exceptions to Article 10(2) must be narrowly construed and convincingly established ‘particularly where the nature of the speech is political rather than commercial’.<sup>48</sup> Fenwick and Phillipson have developed this analysis by arguing that the categorisation of the speech is not the determinative factor: instead, it is the connection between the expression and the democratic principles underpinning the Convention that is the key to determining the level of protection to be afforded.<sup>49</sup> Consequently, certain types of political expression may be no better protected than, say, artistic or commercial expression, particularly where a wider margin of appreciation is implicated due to the competing right or interest which the speech conflicts with. Fenwick and Phillipson’s analysis relates to the observation outlined above that the margin of appreciation is based on both the type of expression involved *and* the nature of the state’s legitimate aim in interfering with the speech. The decision in *Handyside v. UK* attests to this analysis: despite the strong pro-free speech sentiment Handyside ultimately lost his claim because of the wide margin afforded to the UK on public morality.<sup>50</sup> The connection between freedom of expression and democratic principles was made explicit in *Refah Partisi v. Turkey*:<sup>51</sup> expression that conflicts with democratic principles (*i.e.*, that which attacks or seeks to undermine democracy) ‘cannot lay claim to protection of the Convention’.<sup>52</sup> Thus, in determining Article 10 claims, it has been argued that the ECtHR is examining the

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<sup>46</sup> Harris, O’Boyle and Warbrick, *Law of the European Convention of Human Rights*, (Butterworths, 1995, 1<sup>st</sup> edn.), 397.

<sup>47</sup> *VgT v. Switzerland* (2002) 34 EHRR 4.

<sup>48</sup> *Ibid.*, [66].

<sup>49</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 50-72.

<sup>50</sup> Fn. 8.

<sup>51</sup> (2002) 35 EHRR 3.

<sup>52</sup> *Ibid.*, [43].

expression for signs that it advances democratic participation or accountability.<sup>53</sup>

Applying this analysis, Fenwick and Phillipson conclude that ‘Strasbourg’s reasoning is firmly consequentialist, practical and concerned above all with ensuring the free flow of widely disseminated information relevant to legitimate public debate’.<sup>54</sup>

The similarity between this approach and the argument from participation in democracy outlined in the previous chapter is manifest (a more critical comparison is set out in section four below) but Fenwick and Phillipson are sceptical that the Strasbourg jurisprudence also upholds the self-fulfilment, truth and autonomy rationales, despite judicial statements (evident in *Handyside*) that suggest these rationales also inform the Article 10 right: ‘freedom of expression is valued [by the ECtHR] not really as an aspect of individual autonomy or for the contribution it makes to the flourishing of individuals but for the part it plays in maintaining a democratic society’.<sup>55</sup> It will be argued, below,<sup>56</sup> that the consequentialist rationale applied by the ECtHR is akin to Meiklejohn’s conception of the argument from participation in democracy in as much as it focuses attention on whether the speech *attempts* to contribute to the democratic process rather than whether that expression *actually* contributes and that this is particularly evident from the recent decisions to be discussed in the following section. This next section is subdivided so as to consider, first, the treatment of political expression and then, secondly, the treatment of non-political expression in order to demonstrate the ECtHR’s approach to each.

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<sup>53</sup> David Feldman, ‘Content Neutrality’ in Ian Loveland, ed., *Importing the First Amendment*, (Oxford: Hart Publishing, 1998, 2<sup>nd</sup> edn.), 157

<sup>54</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 71.

<sup>55</sup> *Ibid.*, 71.

<sup>56</sup> See Section Four.

### 3. Recent decisions

#### *a) Political expression*

In keeping with the argument from participation in a democracy, it is a clear and constant principle in the Strasbourg jurisprudence that political expression may only be interfered with in the narrowest of circumstances and thus any interference with it is subjected to the closest scrutiny.<sup>57</sup> The ECtHR has stated that ‘freedom of political debate’ lies ‘at the very core of the concept of a democratic society which prevails throughout the Convention’.<sup>58</sup> This principle has manifested itself in a number of specific ways. In particular, it is clear that the limits of acceptable criticism are wider for politicians than private individuals (because the former ‘inevitably and knowingly lays himself open to close scrutiny of his every word and deed’<sup>59</sup> unlike the latter). Similarly, attempts to interfere with the speech of politicians calls for ‘the closest scrutiny’ because politicians are spokesmen ‘for the opinions and anxieties of [their] electorate’.<sup>60</sup> The ECtHR acknowledges that the press has an ‘important role’ to play not just in terms of reporting matters of this nature (*i.e.*, on matters of accountability) but also on broader issues of public interest as seen, for example, in the case of *Jersild* which concerned the reporting of violent racist attitudes amongst groups of young people.<sup>61</sup> As a consequence, it has been

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<sup>57</sup> *Sunday Times v. UK*, fn. 16.

<sup>58</sup> *Lingens v. Austria* (1986) 8 EHRR 407, [42].

<sup>59</sup> *Ibid.*

<sup>60</sup> *Castells v. Spain* (1992) 14 EHRR 445, [40]-[42].

<sup>61</sup> *Jersild v. Denmark* (1995) 19 EHRR 1.

noted by several commentators that the audience interests in receiving speech relevant to the democratic process (in a broad sense) is a guiding principle in the Strasbourg jurisprudence<sup>62</sup> given the clear principle that the public has a right to receive information and ideas of public interest.<sup>63</sup> This has clear similarities with Meiklejohn's conception of argument from participation in democracy, which, as set out in the previous chapter, argued that in order to self-rule effectively, citizens require all information relevant to the voting process, including information of public interest.<sup>64</sup> However, the significance of audience interests within the Strasbourg jurisprudence provides the possibility that those who are able to communicate directly or more effectively to the public (*i.e.*, the press and politicians) than others (*i.e.*, individuals) may have an enhanced free speech right under Article 10 as a consequence. Thus, Fenwick and Phillipson argue that:

‘the ‘democracy’ rationale, in which the importance of informing and educating the voters has such prominence, therefore *inherently* gives particular weight to the role of the *media*, as opposed to individual expression, since it is only ‘the fourth estate’ which has the ability to disseminate information and political discussion on a large scale’<sup>65</sup>

Certainly statements made about the press by the ECtHR would seem to resonant with this argument: the Court consistently describes the press as holding a ‘vital role of “public watchdog”’<sup>66</sup> in which it has the task of imparting information of public

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<sup>62</sup> Eric Barendt, *Freedom of Speech*, (Oxford University Press, 2005, 2<sup>nd</sup> edn.), 26, 64-67; Fenwick and Phillipson, *Media Freedom*, fn. 5.

<sup>63</sup> See, e.g., *Jersild*, fn. 61, [31].

<sup>64</sup> See pages 58 to 69; Meiklejohn, ‘The First Amendment is an Absolute’, fn. 3, 257.

<sup>65</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 39, emphasis in original.

<sup>66</sup> See, e.g., *Jersild v. Denmark*, fn. 61, [31].

interest<sup>67</sup> and since the press ‘affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders’.<sup>68</sup> *Prima facie*, the press would seem to enjoy an advantage when claiming an infringement of Article 10.

It will be argued in later chapters<sup>69</sup> that the discernible approach of the UK courts toward the Article 10 claims of the press suggests a greater receptivity to free speech claims made by journalists than non-journalists, even though the same type of speech may be at stake. As a consequence it will be argued that the UK courts have also interpreted Article 10 in such a way as to value the beneficial effects of speech upon society as a whole rather than value it for its symbolic worth, as Fenwick and Phillipson argue the Strasbourg courts have done.<sup>70</sup> Thus it is agreed that the Strasbourg jurisprudence bears little comparison with the broader rationales for protecting speech, *i.e.*, the arguments from autonomy and self-fulfilment,<sup>71</sup> and it will be argued that this is also true of the UK judiciary’s approach. However, it is submitted that there are discernible and important differences between the ECtHR’s and UK judiciary’s approach to the question of ‘beneficial effect’. Whereas, as outlined in Chapter One,<sup>72</sup> it will be argued in this thesis that the UK courts seem to determine protection by reference to the *actual* contribution made by the speech, the Strasbourg court does not tend to look beyond the question of whether the speech *intended* to contribute to a debate of public interest. In other words, the Strasbourg

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<sup>67</sup> *Ibid.*

<sup>68</sup> *Lingens v. Austria*, fn. 58, [42].

<sup>69</sup> Particularly Chapters Five and Six.

<sup>70</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 67.

<sup>71</sup> These theories were discussed in the previous chapter at pages 81 to 88.

<sup>72</sup> See pages 45 to 50.



court seems more concerned with the issue of whether a genuine public interest existed – one that clearly connects with the democratic foundations of the Convention – as in *Jersild*, for example, rather than assessing the extent to which the speech made a worthwhile contribution to the democratic process. As is evident from the recent cases to be discussed, once the ECtHR is satisfied that a debate of public interest is identifiable and that the expression sought to engage with that debate, the critical question for determining whether Article 10 has been violated is whether the reasons for interfering with that expression are necessary in a democratic society (and this involves consideration of the right or interest at stake).

As a consequence of the ECtHR's approach to Article 10, which, as identified, must be understood not only in terms of its comparison with the argument from participation in democracy but also by reference to the ECtHR's limitations as a court, the press may appear to have an advantage over non-journalists. However this is not to suggest that the ECtHR overtly prefers the claims of journalists over non-journalists. If anything, the advantage arises due to the type of competing right or interest engaged since individual expression tends to involve questions of morality or public order that press freedom does not and thus a wider margin of appreciation doctrine is applied.<sup>73</sup> Furthermore, the ECtHR clearly draws a distinction between reporting information or ideas and advocating them with the result that controversial political ideas may or may not be protected under Article 10 depending on whether the speaker seeks to convince the public of these ideas<sup>74</sup> or rather alert the public to

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<sup>73</sup> This observation is also made by Fenwick and Phillipson and discussed in *Media Freedom*, fn. 5 at pages 50 to 72.

<sup>74</sup> As in *Norwood v. UK* (2005) 40 EHRR 11.

the fact that others hold these ideals.<sup>75</sup> Clearly, this also impacts on the press/individual expression distinction. The argument that the Strasbourg jurisprudence does not overtly prefer the press is, to some extent, borne out by two recent decisions, the first of which confirms the longstanding principle that press freedom has limits even where discussing matters of public interest whilst in the second decision the ECtHR explicitly states that the Article 10 claims of individuals should not be treated less seriously than those of the press.

As to the first case, it is well-established that there are limits which the press must not ‘overstep’,<sup>76</sup> including that the press must act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.<sup>77</sup> Thus the press receives no special treatment in this respect. The recent decision in *Lindon v. France*<sup>78</sup> demonstrates the ECtHR upholding this principle. In this case, the ECtHR held that the French courts had not violated Article 10 where it found a novelist and journalist had defamed a politician by comments made in a book which were then later repeated in a newspaper. *Prima facie*, the decision is perhaps unexpected given the principles outlined above that politicians must tolerate greater criticism than private individuals and the importance attached to the press. Moreover, the politician concerned, Jean Marie Le Pen, is a controversial figure in France due to his involvement with the ‘Front National’ and, as the ECtHR reported ‘is known for his virulence of his speech and his extremist views’,<sup>79</sup> which have led to previous convictions for ‘incitement to racial hatred, trivialising crimes against humanity,

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<sup>75</sup> As in *Jersild v. Denmark*, fn. 61.

<sup>76</sup> *Jersild v. Denmark*, fn. 61, [31]; *Lingens v. Austria*, fn. 58, [42].

<sup>77</sup> *Bladet Tromso and Stensaas v. Norway* (2000) 29 EHRR 125, [59].

<sup>78</sup> (2008) 46 EHRR 35.

<sup>79</sup> *Ibid.*, [56].

making allowances for atrocities, apologia for war crimes, proffering insults against public figures and making offensive remarks'.<sup>80</sup> Although the ECtHR recognised that, as set out in previous decisions, freedom of expression allows for a degree of exaggeration or even provocation<sup>81</sup> and, furthermore, that outspoken politicians with extreme views expose themselves to harsh criticism as a consequence and, therefore, must display a particularly high degree of tolerance<sup>82</sup> nevertheless it agreed with the French courts that the mark had been overstepped by accusations that Le Pen was the 'chief of a gang of killers'; that he had 'advocated' a murder (albeit in the context of a fictional novel); and that he was a 'vampire who thrives on the bitterness of his electorate but sometimes also on their blood'.<sup>83</sup> These comments were made first by a novelist and then repeated by a journalist who, after Le Pen had successfully pursued a defamation claim against the novelist, was so apparently outraged by the victory that he invited Le Pen to sue him as well, which he duly did. This case confirms that the media are not over-privileged in as much as it emphasises the requirement of responsible journalism.

Moreover, secondly, in the recent decision of *Steel & Morris v. UK*<sup>84</sup> the ECtHR expressly rejected the argument that the free speech claims of non-journalists should be treated less seriously than journalists. The case concerned members of a campaign group who had distributed leaflets attacking alleged practices of McDonald's restaurants and who were successfully sued for defamation as a

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Prager and Oberschlick v. Austria* (1996) 21 EHRR 1, [38].

<sup>82</sup> *Oberschlick v. Austria (No. 2)* (1998) 25 EHRR 357, [31]-[33]; *Lopes Gomes Da Silva v. Portugal* (2002) 34 EHRR 56, [35].

<sup>83</sup> *Lindon v. France*, fn. 78, [57].

<sup>84</sup> (2005) EMLR 15.

consequence. The campaigners claimed in the ECtHR that the denial of legal aid and inequality of arms amounted to a violation of Article 6 and a disproportionate interference with Article 10 and, further, that the size of the defamation award (£60,000 reduced to £40,000 on appeal) given the applicant's means and the fact that McDonald's had not proved any loss amounted to a violation of Article 10. In response, the UK government had argued that since the campaigners were not journalists they should not be afforded the high level of protection that the press received when discussing matters of public interest.<sup>85</sup> In finding that there had been a violation of both Article 6 and 10, the ECtHR rejected the government's argument, pointing out that 'in a democratic society...there exists a strong public interest in enabling [small and informal campaign groups] and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment'.<sup>86</sup> Elsewhere in the decision, the ECtHR referred to the 'legitimate and important role that campaign groups can play in stimulating public discussion'.<sup>87</sup> If the ECtHR did differentiate between the free speech claims of the press and non-journalists, seeing one as more valuable than the other, then this seemed to be an opportunity for the Court to confirm as much if not expand upon how this difference manifested itself in Article 10 terms. The fact that the ECtHR did not do so, emphasising instead the significance of speech 'outside the mainstream', would seem to confirm that the press does not qualify for preferential treatment under Article 10.

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<sup>85</sup> *Ibid.*, [82],[89].

<sup>86</sup> *Ibid.*, [89].

<sup>87</sup> *Ibid.*, [95].

It was argued, above, that, as part of its evaluation of the ‘beneficial effect’ of the expression, the ECtHR examines both the nature of the expression and the reasons put forward for the interference. Moreover, it was argued that, in terms of the expression, the ECtHR’s approach to the question of ‘beneficial effect’ is limited to identifying whether the speech concerns a matter of genuine public interest or not. This point is also illustrated by recent decisions. In *Von Hannover v. Germany*,<sup>88</sup> Princess Caroline of Monaco succeeded in her Article 8 claim that her right to respect for privacy had been violated by published photographs of her that revealed nothing more than aspects of her everyday life. As Fenwick and Phillipson note, ‘it was not possible to mount even a colourable argument that [the expression] contributed to any discussion of legitimate public concern’.<sup>89</sup> Thus the Article 10 claim failed because the speech did not demonstrate any *genuine* connection with the democratic process. This point is further apparent from consideration of the ECtHR’s recent findings in *Nikowitz v. Austria*,<sup>90</sup> *Tonsbergs Blad as and Haukom v. Norway*,<sup>91</sup> *Verlagsgruppe News GmbH v. Austria (No. 2)*<sup>92</sup> and *Vereinigung Bildender Kunstler (“VBK”) v. Austria*<sup>93</sup> where, in each case, the Article 10 claims succeeded despite the counter-claims made that the expression did not *actually* contribute to the democratic process. The findings in these decisions suggest that the intention to contribute to a discussion of public interest is more significant than the extent to which an actual contribution to that debate was made.

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<sup>88</sup> (2004) EMLR 21.

<sup>89</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 70.

<sup>90</sup> (2007) EMLR 8.

<sup>91</sup> (2008) 46 EHRR 40.

<sup>92</sup> (2007) EMLR 13.

<sup>93</sup> (2007) ECDR 7.

*Nikowitz* concerned a satirical cartoon published in the aftermath of a national skiing champion accidentally breaking his leg. The cartoon depicted a competitor, Mr. Eberharter, revelling because the accident improved his own chances of future success. Eberharter sued in defamation, successfully arguing that the image depicted him as disdainful of his colleague's injury and, in that sense, damaged his reputation. The Court found that this constituted a violation of Article 10. In particular, it stated that whilst obviously written in a satirical style, the cartoon 'sought to make a critical contribution to an issue of general interest, namely society's attitude towards a sports star'.<sup>94</sup> Arguably this evidences a generous approach to the question of both 'public interest' and 'contribution'. It is well-established in the Strasbourg jurisprudence that the notion of public interest extends beyond narrow issues of, say, political accountability<sup>95</sup> however the relevance of publicly recognisable figures to that context is a matter of debate.<sup>96</sup> In any event, however, it was not as if the expression sought to expose hypocritical or morally repugnant behaviour by that individual:<sup>97</sup> indeed, it was a central tenant of the ECtHR's decision that the cartoon could not be understood as depicting any sort of reality about Eberharter's attitudes toward his competitor. Thus, the decision confirms that it is the intention to contribute that is significant not the measurement of its actual contribution.

In *Tonsberg Blad as and Haukom v. Norway*, a newspaper reported on permanent residence requirements drawn up to control the high demand for holiday homes. In particular, it reported that two individuals, a well-known singer and Mr

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<sup>94</sup> *Nikowitz*, fn. 90, [25].

<sup>95</sup> See, e.g., *Thorgeirson v. Iceland* (1992) 14 EHRR 843 and *Jersild v. Denmark*, fn. 61

<sup>96</sup> E.g., see *A v. B plc* (2003) QB 195 and discussion of it in Chapter Six, from pages 239 to 247.

<sup>97</sup> E.g., see decision in *Campbell v. MGN* (2004) 2 AC 457 and discussion of it in Chapter Six, from pages 239 to 247.

Rygh, an Executive Vice President of a large Norwegian company, had ‘escaped’ this residence requirement due to a ‘major loophole’. In a later article, the newspaper reported that the properties of these individuals did not, in fact, qualify for the permanent residence requirement. Nevertheless Mr Rygh successfully sued in defamation. Whilst it was not disputed that the expression was defamatory, the ECtHR found that the amount awarded to Rygh represented an excessive and disproportionate interference with Article 10 ‘capable of having a chilling effect on press freedom’.<sup>98</sup> The Norwegian government had argued that the expression ‘hardly corresponded’ to a matter of public interest. In response, the ECtHR stressed that ‘whether or not a publication concerns an issue of public concern should depend on a broader assessment of the subject matter and the context of the publication’.<sup>99</sup> Furthermore, the ‘possible failure of a public figure to observe laws and regulations aimed at protecting serious public interests, even in the private sphere, may in certain circumstances constitute a matter of legitimate public interest’.<sup>100</sup> Thus whilst the Court accepted that the article did not ‘directly address’ Mr Rygh’s role as an industrial leader, neither was it entirely about his private life.

Similarly, in *Verlagsgruppe News GmbH v. Austria (No. 2)*, a newspaper reported on pending investigations against ‘Mr G.’, the managing director of a well-known enterprise producing pistols for use by the Police, on suspicion of large-scale tax evasion. This article was accompanied by a photograph of Mr G. At first instance, the Austrian courts granted Mr G.’s application for an injunction to restrain publication of the photograph but only in so far as the accompanying text described

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<sup>98</sup> Fn. 91, [101].

<sup>99</sup> *Ibid.*, [87].

<sup>100</sup> *Ibid.*

him as more than a suspect in the enquiry. However, the Supreme Court later widened the injunction so that the photograph could not be published in any context linking Mr G. to reports of tax evasion charges on the basis that tax evasion investigations were not public enquiries and that tax officials were bound by secrecy. Focusing on the restriction to accompany the report with a picture of Mr G., the ECtHR found that ‘articles of this kind are capable of contributing to a public debate on the integrity of business leaders, on illegal business practices and the functioning of the justice system in respect of economic offences’.<sup>101</sup>

As noted above, when determining the margin of appreciation involved in any particular claim, the ECtHR looks at the nature of both the expression and the competing interest involved. What these cases show – the latter two, in particular – is that in determining the level of protection to be afforded to the expression it is the *intention* to contribute to the democratic process that is significant; there is no measurement of the *actual* contribution made. If it were otherwise, then it might be expected that a lesser degree of protection would be evident in these cases given the qualified descriptions of the contribution made by the expression: in *Verlagsgruppe News GmbH*, the ECtHR referred to articles ‘of this kind’ rather than the actual article and, similarly, in *Tonsberg Blad as and Haukom* the Court said the article ‘may’ contribute to the debate. If the measure of the actual contribution to the democratic process was significant then the ECtHR might have attached less importance to the speech, particularly in *Tonsberg Blad as and Haukom* given that the speech was factually inaccurate. In other words, what the ECtHR did not say, as it might otherwise have done, was that since the speech in *Tonsberg Blad as and Haukom* was

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<sup>101</sup> Fn. 92, [37].



factually inaccurate it could not make any *real* contribution to the public interest debate and in *Verlagsgruppe News GmbH* it could have decided that the injunction on the photograph made no difference to the actual contribution that the accompanying text made to the debate.

Of course, it is recognised that these cases concern the press and therefore it is necessary to return, briefly, to the question of whether these decisions are also explainable by reference to the argument that the ECtHR adopts a preferential approach to media freedom over individual expression. It has already been argued above that the decision in *Steel & Morris v. UK* deals with that view. Moreover, it is submitted that the recent decision in *VBK v. Austria* is significant in this debate because not only does it graphically illustrate the principle that it is the intention to contribute not the actual contribution made that is critical but also it concerns a non-journalist speaker. This case concerned a painting by an infamous artist – Otto Muhl – depicting naked bodies involved in various sexually explicit acts with superimposed blown-up images of the faces of various public figures on the heads of these bodies. The painting was displayed in a public exhibition. The public figures involved were significant religious and political figures such as Mother Teresa, an Austrian Cardinal and several prominent politicians from the Austrian Freedom Party (FPO) such as Mr Meischberger, a former general secretary, who was depicted ‘gripping the ejaculating penis of Mr Haider [former head of the FPO] while at the same time being touched by two other FPO politicians and ejaculating on Mother Teresa’.<sup>102</sup> The painting, which had attracted press attention in any event, became more notorious after an outraged visitor to the exhibition threw red paint at it, covering the part that showed, amongst

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<sup>102</sup> Fn. 93, [8].

others, Mr Meischberger. Meishberger eventually obtained an injunction prohibiting exhibition of the painting on the basis that it debased his reputation and political activities.

The ECtHR, however, found that the injunction amounted to a violation of Article 10. The decision is interesting for a number of reasons, some of which are discussed below in the context of artistic expression,<sup>103</sup> but, in the context of this discussion, for the assessment that the ECtHR made about the contribution to the democratic process. In particular, the Court noted that ‘the painting could hardly be understood to address details of Mr Meishberger’s private life, but rather related to Mr Meishberger’s public standing as a politician from the FPO’<sup>104</sup> and, furthermore, stated ‘the court does not find unreasonable the view taken by the court of first instance that the scene in which Mr Meischberger was portrayed could be understood to constitute some sort of counter-attack against the Austrian Freedom Party, whose members had strongly criticised the painter’s work’.<sup>105</sup> Clearly, this is a rather guarded assessment of the connection between the painting and debate on a matter of public interest and, as such, is contrary to a requirement of an actual contribution to a debate of public interest. This point is further drawn out by reference to the dissenting opinion of Judge Loucaides who tersely rejected the majority opinion as flawed. The finding that the painting was ‘a form of criticism by the artist of Mr Meischberger’<sup>106</sup> was impossible because there was no such discernible message to be derived from the expression: ‘it is my firm belief that the images depicted in this

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<sup>103</sup> At page 117.

<sup>104</sup> Fn. 93, [34].

<sup>105</sup> *Ibid.*, [34].

<sup>106</sup> *Ibid.*, [1] of dissenting opinion.

product of what is, to say the least, a strange imagination, convey no message; the “painting” is just a senseless, disgusting combination of lewd images whose only effect is to debase, insult and ridicule...’<sup>107</sup>

Yet Judge Loucaides’ reasoning is unsound, it is submitted, precisely because judges are not qualified to criticise art or discern its actual meaning or contribution to society at large. The majority opinion is therefore on a sounder footing because it limited its evaluation to the question of whether *some* public interest debate was identifiable but asked no questions about what precisely that public interest debate was and the extent to which the painting contributed to that debate. This point is significant to the discussion in Chapters Five and Six because it will be argued there that the UK judiciary *has* made *ad hoc* calculations of the actual contribution made by the expression as a reason to uphold an interference with it.<sup>108</sup> It is unconvincing that the Strasbourg jurisprudence requires it to do such and, indeed, the decision in *VBK v. Austria* firmly points away from such a requirement. Furthermore, it is also relevant to note that the ECtHR operates a practice whereby it distinguishes between ‘value judgments’ and facts. For example, to accuse a politician of behaving ‘like a clown’ is to make a value judgment about that politician rather than a factual statement.<sup>109</sup> Such a finding is significant since value judgments – unlike facts – are not susceptible to standards of proof. Of course, determining whether the expression is a value judgment or statement of fact may be difficult<sup>110</sup> yet, it is submitted, this

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<sup>107</sup> *Ibid.*, [5] of dissenting opinion.

<sup>108</sup> *E.g.*, in *R. (ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23 and *R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15. See discussion in Chapters Five and Six on this point.

<sup>109</sup> *Lopes Gomes Da Silva v. Portugal*, fn. 82.

<sup>110</sup> See *Scharsach and News Verlagsgesellschaft v. Austria* (2005) 40 EHRR 22; *Grinberg v. Russia* (2006) 43 EHRR 45.

approach reinforces the point that the ECtHR is more concerned with the intention to contribute rather than the actual contribution made by the speech.

These recent decisions clarify the ECtHR's approach toward political expression, particularly in relation to the treatment of the speaker involved and the question of the contribution made by the speech to the democratic process. Furthermore, these cases support Fenwick and Phillipson's analysis that 'Strasbourg's reasoning is firmly consequentialist, practical and concerned above all with ensuring the free flow of widely disseminated information relevant to legitimate public debate'.<sup>111</sup> Yet, Fenwick and Phillipson also argue that, consequently, the place of expression which does not serve this value but serves other important values such as self-fulfilment and individual autonomy is threatened: 'the right of the individual artist to cry aloud from her soul...is, under this perspective, inevitably afforded much less protection because, *in terms of consequences*, it doesn't matter as much'.<sup>112</sup> Thus they argue that the protection of non-political expression is threatened by this approach. In order to reach overall conclusions about the place of established free speech theory within the Strasbourg jurisprudence,<sup>113</sup> the following section considers what recent decisions reveal about the protection afforded such speech.

### *b) Non-political expression*

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<sup>111</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 71.

<sup>112</sup> *Ibid.*, 68.

<sup>113</sup> See section 4 below.

As a result of the ECtHR's consequentialist approach to Article 10, it is broadly accepted that the Court adopts a hierarchical approach to freedom of expression in which political speech sits atop followed by artistic and then commercial speech.<sup>114</sup> The fit of this hierarchical approach with established theory is discussed in the following section. As Fenwick and Phillipson argue, the protection afforded to artistic expression compared to political speech in the Strasbourg jurisprudence is largely disappointing.<sup>115</sup> The findings against Article 10 in the well-known cases of *Otto-Preminger-Institut v. Austria*,<sup>116</sup> *Muller v. Switzerland*<sup>117</sup> and *Wingrove v. UK*<sup>118</sup> (which Fenwick and Phillipson discuss extensively)<sup>119</sup> suggest a low valuation is placed on the connection between artistic expression and the democratic process, particularly in circumstances where morality or religious sensibilities are implicated. However, it may be that the recent decisions in *VBK v. Austria* and *IA v. Turkey*<sup>120</sup> provide scope for optimism that a more liberal approach to artistic expression might emerge. The facts of *VBK v. Austria* have already been discussed and the implications for artistic expression are obvious. Whether the decision represents a radical departure from previous decisions such as *Muller v. Switzerland* is debatable. This case also concerned paintings of sexually explicit acts in a public exhibition albeit in this case acts between men, women and animals. In this case, however, the domestic authority cited the protection of morals as the reason

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<sup>114</sup> Harris, O'Boyle and Warbrick, *Law of the European Convention of Human Rights*, (Butterworths, 1995, 1<sup>st</sup> edn.), 397.

<sup>115</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 51-61. The UK judiciary's approach to artistic expression under the Human Rights Act 1998 is discussed in depth in Chapter Seven.

<sup>116</sup> (1995) EHRR 34.

<sup>117</sup> (1991) 13 EHRR 212.

<sup>118</sup> (1997) 24 EHRR 151.

<sup>119</sup> See reference in fn. 115.

<sup>120</sup> (2007) 45 EHRR 30.

for the interference and the ECtHR accepted these reasons as being relevant and sufficient<sup>121</sup> whereas in *VBK* the reasons for interfering with the speech solely related to the protection of Mr Meischberger's reputation and therefore the Member State's later attempt to justify the interference based on the protection of morals were found to be unsustainable by the ECtHR.<sup>122</sup> Yet the decision in *VBK* is significant for the comparative ease with which the ECtHR accepted that the expression made a political comment and was prepared to do so despite the vulgarity of the expression.

The case of *IA v. Turkey* concerned a novel which was critical of religious, particularly Islamic, beliefs. The decision itself is unremarkable: the ECtHR confirmed the well-established principle that although freedom of expression extends to that which shocks, offends or disturbs a wide margin of appreciation is afforded to Member States for the rights of others under Article 9 to have their religious sensibilities protected.<sup>123</sup> The ECtHR was thus satisfied that since the expression amounted to an abusive attack on Islam, the margin afforded to domestic courts had not been exceeded. The decision is remarkable, however, for the dissenting judgments within it. The decision was split by four votes to three and, as part of their dissent, Judges Costa, Cabral Barreto and Jungwiert called on the ECtHR to 'revisit' the case law on the protection of religious sensibilities (*i.e.*, *Otto-Preminger-Institut* and *Wingrove v. UK*) 'which in our view seems to place too much emphasis on

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<sup>121</sup> Although Fenwick and Phillipson, amongst others, criticise the ECtHR's approach to this issue, see Fenwick and Phillipson, *Media Freedom*, fn. 5, 56-59.

<sup>122</sup> *VBK*, fn. 93, [31].

<sup>123</sup> As confirmed by *Otto-Preminger-Institut*, fn. 116 and *Wingrove v. UK*, fn. 118.

conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press'.<sup>124</sup>

The implications of these two decisions for comparisons between the Strasbourg jurisprudence and established free speech theory are considered in the following section. Before doing so, the position of commercial expression is briefly considered. As noted above, commercial expression is said to be at the base of the protection hierarchy employed by the ECtHR. In the context of the Court's firm consequentialist approach, the reason for this may seem obvious: as Barendt notes, 'while political speech lies at the heart of a free speech guarantee, commercial speech...may be regarded as peripheral'.<sup>125</sup> There is, of course, an established body of academic literature which contests this positioning of commercial speech, emphasising instead that the connection between political and commercial speech may be greater than realised.<sup>126</sup> These arguments are discussed in Chapter Seven in the context of domestic approaches to commercial expression. The ECtHR has stated on several occasions that commercial expression is afforded the lowest weight by the Court whilst at the same time the domestic authorities are provided with the widest margin to decide how to regulate it.<sup>127</sup>

However, the decision in *Krone Verlag GmbH v. Austria (No. 3)*<sup>128</sup> demonstrates that the ECtHR is prepared to find a violation of Article 10 even in

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<sup>124</sup> Fn. 93, [OI-8].

<sup>125</sup> Barendt, fn. 62, 394.

<sup>126</sup> E.g., see Martin Redish, 'Tobacco Advertising and the First Amendment,' (1996) 81 *Iowa Law Review* 589; Stephen Shiffrin, 'The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,' 78 *Northwestern University Law Review* 1212; and, Alex Kozinski and Stuart Banner, "Who's Afraid of Commercial Speech?" (1990) 76 *Virginia Law Review* 627

<sup>127</sup> See Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: subordinate or equal?' (2006) 6 *Human Rights Law Review* 53.

<sup>128</sup> (2006) 42 EHRR 28.

these circumstances. In that case, a daily newspaper had published an advertisement comparing its own cost and quality with a competitor's newspaper. The competitor obtained an injunction, which required the newspaper to indicate differences in their coverage of foreign or domestic affairs, economy, culture, science, health, environmental issues and the law within that advertisement. Since this was a particularly onerous obligation, the ECtHR held that Article 10 had been violated. The decision may be explained on a number of grounds. Certainly, it fits with the ECtHR's overarching concern to protect freedom of information relevant to society at large (albeit in a commercial context in this example). This theme emerges from the finding that 'advertising is a means of discovering the characteristics of services and goods offered to [citizens]'.<sup>129</sup> In this way, commercial expression may have greater significance to the Article 10 jurisprudence than artistic expression, especially that which holds no value beyond its aesthetic qualities. Alternatively, the decision may be explainable simply by reference to the inferiority of the member state's argument on the necessity of interference in which case the significance of the case may be minimal.

#### **4. Analysis: comparisons between the Strasbourg jurisprudence and established theory**

As noted above, Fenwick and Phillipson have recently conducted a thorough exploration of the dominant rationale that underpins the ECtHR's approach to Article

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<sup>129</sup> *Ibid.*, [31].



10.<sup>130</sup> They argue that the emphasis by the ECtHR on information and ideas that the ‘public has a right to receive’ suggests that the Court values freedom of expression from an audience-based rather than speaker-based perspective: ‘it would follow naturally that the Court would be principally concerned with *media* freedom *not* individual freedom of expression. This follows logically from the pragmatic stance of the Court – expression is valued for its contribution to the democratic process, both in watchdog and education terms’.<sup>131</sup> They argue that, as a result, ‘freedom of expression is valued not really as an aspect of individual autonomy or for the contribution it makes to the flourishing of individuals but for the part it plays in maintaining a democratic society’.<sup>132</sup> Thus, their conclusion is that ‘where expression does not engage the functionalist virtues of directly contributing to general debate on public-political matters, the Court employs a style and method of review that largely fails to insist upon any proper justification for the interference in question’.<sup>133</sup> Thus, they conclude, that whilst media freedom is generously protected by this approach, freedom of individual expression is impoverished and that this is ironic since rather than promoting diversity of opinion (the ECtHR cites pluralism as an important Article 10 goal),<sup>134</sup> the approach actually confines opinion because the greatest protection is afforded to a narrow range of speakers (*i.e.*, traditional sources of the media).<sup>135</sup>

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<sup>130</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 37-107.

<sup>131</sup> *Ibid.*, 68.

<sup>132</sup> *Ibid.*, 71.

<sup>133</sup> *Ibid.*, 106.

<sup>134</sup> See *e.g.*, *Handyside v. UK*, fn. 8, [49].

<sup>135</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 106-107.

From this analysis, comparisons with established free speech theory are difficult. At an earlier stage in their discussion, Fenwick and Phillipson<sup>136</sup> – like Feldman<sup>137</sup> and Barendt<sup>138</sup> – compare the Strasbourg approach to Meiklejohn’s theory of free speech.<sup>139</sup> As set out in the last chapter, Meiklejohn’s conception of participation in a democracy centres on the argument that citizens require access to all information and ideas essential to such participation in order to realise the goal of self-rule. Yet whilst the strong rhetorical statements in favour of freedom of expression resonant with this rationale, the outcomes of the Strasbourg jurisprudence as a whole do not always match up with this approach. In some cases, information and ideas which the Court admits are of a genuine public interest are not protected. As noted, Fenwick and Phillipson attribute this to a differential approach based on speaker identity. They do not directly address the ECtHR’s findings in *Steel & Morris v. UK* in their argument.<sup>140</sup> Instead, in support of this argument, they refer to three cases concerning public protest type issues<sup>141</sup> and, elsewhere, two artistic expression cases<sup>142</sup> in which the ECtHR adopted particularly lacklustre approaches to the defence of individual expression. However, each of these cases concerned competing social interests where the ECtHR has conceded a wide margin of appreciation to member states: public order in the first set of cases and the protection

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<sup>136</sup> *Ibid.*, 70.

<sup>137</sup> Fenwick and Phillipson refer to D. Feldman, ‘Content Neutrality’, fn. 53.

<sup>138</sup> Barendt, fn. 62, 18-21.

<sup>139</sup> As discussed in the previous chapter, see pages 58 to 69.

<sup>140</sup> There is a brief discussion of it in the last substantive chapter on defamation and ‘political speech’, *Media Freedom*, fn. 5, 1041-1102 at 1071. Discussion is mainly limited to the Article 6 claim.

<sup>141</sup> The first two cases concerned typical public protest scenarios (*Choherr v. Austria* (1993) 17EHRR 358; *Steel v. UK* (1998) 28 EHRR 603) whereas as the latter concerned an ‘off duty’ journalist who became embroiled in a public argument with civil servants ostensibly in defence of subjugated street traders nearby (*Janowski v. Poland* (2000) 29 EHRR 705). For further discussion of this latter case see James Sweeney, ‘Margins of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era’ (2005) *International & Comparative Law Quarterly* 459.

<sup>142</sup> *Muller v. Switzerland*, fn. 27; *Otto-Preminger-Institut*, fn. 27.

of morals in the second. It may be, as Fenwick and Phillipson argue, that the Court can be criticised about the extent to which it scrutinised the member state's evidence on the severity of these interests.<sup>143</sup> However that criticism is a separate point (and not one that will be addressed here). As a consequence, two points might be made about the ECtHR's approaches in these cases: first, the same outcome ought to be apparent even if the speaker was the media, as is evident from the decision in *Lindon*;<sup>144</sup> secondly, the ECtHR had the opportunity to confirm that individual expression is of lesser value than media expression in *Steel & Morris*.<sup>145</sup> An alternative explanation for the Strasbourg reasoning is that in the final analysis, the Strasbourg court – whatever rationale it applies – is hamstrung by the limits it has set for the margin of appreciation on competing interests and, in circumstances where the margin is wide, it is forced to apply a lesser proportionality test. In other words, the operation of the margin of appreciation doctrine prevents true comparison between the Strasbourg approach to freedom of expression and established theories of free speech. Since the margin of appreciation cannot be applied domestically it is incumbent upon Member States to strip away the effect of the doctrine on the decision<sup>146</sup> in order to distil the underlying rationale for Article 10.<sup>147</sup> Of course, the danger is that decisions with unfavourable outcomes for freedom of expression – if not recognised as explainable by the margin of appreciation at work – can serve to legitimise both the interferences and the differential approach based on speaker status

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<sup>143</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 51-68.

<sup>144</sup> Fn. 78.

<sup>145</sup> Fn. 84.

<sup>146</sup> As Fenwick and Phillipson point out, fn. 5.

<sup>147</sup> The UK court's approach to the Strasbourg jurisprudence under the Human Rights Act 1998 is discussed in depth in the following chapter.

as compatible with Article 10.<sup>148</sup> Indeed, it will be argued in Chapters Five and Six that this effect is discernible in the UK Article 10 jurisprudence.

Yet by concentrating on the strong rhetorical statements in the Strasbourg jurisprudence for the protection of free speech, the comparison with Meiklejohn's theory of free speech becomes sharper. As set out in the previous chapter, in referring to all speech that would be relevant to self-rule, Meiklejohn specifically includes: public discussion of public issues together with the spreading of information and opinion bearing on those issues; education in all its phases; philosophy and science; literature and the arts.<sup>149</sup> In general terms this accords with the Strasbourg jurisprudence however, as noted, it has been said that the Strasbourg courts adopt a hierarchical approach to types of expression in which literature and the arts occupies a lesser position to political speech.<sup>150</sup> This appears to conflict with Meiklejohn's theory, which admits of no such approach. Established theory in general does not tend to categorise speech in this way although since coverage is based on how readily the speech in question engages with the justificatory theory in play<sup>151</sup> certain forms of speech might be said to be of 'high' or 'low' value.<sup>152</sup>

As Fenwick and Phillipson argue,<sup>153</sup> it is on the question of interferences with expression, not the significance of the expression itself, in which the lesser status of artistic expression becomes apparent. Indeed, the ECtHR has stated that 'those who

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<sup>148</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 8.

<sup>149</sup> Meiklejohn, 'The First Amendment is an Absolute', fn. 3, 257.

<sup>150</sup> Fn. 46.

<sup>151</sup> See Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

<sup>152</sup> E.g., see the discussion between Larry Alexander and Cass Sunstein on the question of placing values on speech: Larry Alexander, 'Low value speech' (1989) 83 *Northwestern University Law Review* 547 and Cass Sunstein, 'Low value speech revisited' (1989) 83 *Northwestern University Law Review* 555.

<sup>153</sup> Fenwick and Phillipson, *Media Freedom*, fn. 5, 57.

create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression'.<sup>154</sup> Also, it might be noted that artistic expression not intended to express ideas and opinions relevant to the democratic process would seem to be on uncertain grounds. In more general terms, however, the ECtHR's rhetorical statements about artistic expression seem to be in keeping with Meiklejohn's theory. Furthermore, at this point, it might be noted that the Strasbourg approach is broader than, say, Bork or Blasi's conception of the argument from participation in a democratic society. It will be recalled from the previous chapter that Bork explicitly demarcates artistic expression as outside his conception of the First Amendment.<sup>155</sup> Likewise, since Blasi centres his theory on the 'checking value' of free speech, expression unrelated to the abuse of official power has little connection with this theory.<sup>156</sup> It will be argued in later chapters that the UK judiciary's approach to Article 10 bears stronger comparison with Bork and Blasi's conceptions than Meiklejohn's.

Since Meiklejohn's list of specially included types of expression does not refer to commercial expression, this represents a potential point of departure by the ECtHR. The fit between the democratic process and the inclusion of commercial speech is questionable. Indeed, the academic literature contains a fierce debate on the question of the inclusion of commercial speech within a free speech guarantee. Barendt, for example, is particularly sceptical about its place on the basis that the

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<sup>154</sup> *Muller v. Switzerland*, fn. 27, [33].

<sup>155</sup> Bork, fn. 4, 20.

<sup>156</sup> Blasi, fn. 4, 538.

claim is particularly weak.<sup>157</sup> This debate is explored more fully in Chapter Seven. Yet the Strasbourg jurisprudence on commercial expression suggests that such speech significantly engages with Article 10 protection where it provides information and ideas relevant to decision-making. For example, this is apparent from the decision in *Krone Verlag GmbH*<sup>158</sup> although it remains questionable how comparative information on newspaper prices and quality connects with the maintenance of democratic society.

However, the ECtHR also states that freedom of expression constitutes one of the basic conditions ‘for the development of every man’.<sup>159</sup> By reference to established free speech theory, this aspect of the underlying rationale would seem to provide a better basis for defending the inclusion of artistic expression that does not seek to engage with the democratic process and also the inclusion of commercial speech. For example, Redish has argued strongly that self-fulfilment includes information and ideas that relate to the choices made by an individual in their private life.<sup>160</sup> Likewise, the argument from self-fulfilment as formulated by Redish would also account for the inclusion of pornography under Article 10 (albeit the ultimate protection of pornography depends upon the competing interest at stake<sup>161</sup>). As Redish argues the regulation of pornography ‘can be seen as a means of rejecting

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<sup>157</sup> Barendt, fn. 62, 416.

<sup>158</sup> Fn. 128.

<sup>159</sup> See, e.g., *Handyside v. UK*, fn. 8, [49].

<sup>160</sup> Martin Redish, ‘The Value of Free Speech’, (1982) 130 *University of Pennsylvania Law Review* 591, 630-635; ‘Tobacco Advertising and the First Amendment’ (1996) 81 *Iowa Law Review* 589; ‘First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy’ (1997) 24 *Northern Kentucky Law Review* 553.

<sup>161</sup> *Hoare v. UK*, (1997) EHRLR 678. See discussion of pornography in Chapter Five.

whatever life style such expression may implicitly urge'.<sup>162</sup> Furthermore, 'how the individual is to develop his faculties is a choice for the individual to make'.<sup>163</sup> This latter argument resonates with the argument from autonomy, as conceived by Dworkin<sup>164</sup> and Scanlon,<sup>165</sup> which was also discussed in the previous chapter.<sup>166</sup> As a rationale for protecting expression, the argument from autonomy hardly features in the Strasbourg jurisprudence.<sup>167</sup> This is largely unsurprising: whilst the argument from self-fulfilment is predominantly consequentialist,<sup>168</sup> the argument from autonomy values freedom of speech entirely for its intrinsic value. Thus, as set out in the previous chapter, Scanlon describes the aim of his argument from autonomy as '[establishing] that the authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include authority to prevent these harms by controlling people's sources of information to insure that they will maintain certain beliefs'.<sup>169</sup> This principle, however, conflicts with the Strasbourg jurisprudence which explicitly states that expression threatening or undermining democratic principles cannot be protected.<sup>170</sup> For this reason, calls for content neutrality in judicial decision-making largely fail.<sup>171</sup>

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<sup>162</sup> Redish, fn. 160, 637; see similarly Joseph Raz, 'Free Expression and Personal Identification,' in *Free Expression: Essays in Law and Philosophy*, (Clarendon Press, Oxford, 1994).

<sup>163</sup> *Ibid.*

<sup>164</sup> Ronald Dworkin, 'Is there a right to pornography?' (1981) 1 *Oxford Journal of Legal Studies* 177.

<sup>165</sup> Thomas Scanlon, 'A Theory of Freedom of Expression', (1972) *Philosophy and Public Affairs* 204.

<sup>166</sup> See pages 81 to 88.

<sup>167</sup> Fenwick and Phillipson argue that the autonomy rationale explains the protection afforded pornographic material in the Commission decision of *Scherer v. Switzerland* (1994) 18 EHRR 276.

<sup>168</sup> See debate between Redish and Baker: C. Edwin Baker, 'Realizing Self-Realization: Corporate Political Expenditures and Redish's *The Value of Free Speech*' (1982) 130 *University of Pennsylvania Law Review* 646; Martin Redish, 'Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker' (1982) 130 *University of Pennsylvania Law Review* 678.

<sup>169</sup> Scanlon, fn. 165, 222.

<sup>170</sup> E.g., see *Refah Partisi*, fn. 51; *Norwood v. UK*, fn. 74.

<sup>171</sup> See discussion in Chapter Six.

The argument from truth is also particularly evident within the Strasbourg jurisprudence. This is hardly surprising given the self-rule elements evident in both the argument from truth and the argument from participation in democracy, as discussed in the previous chapter.<sup>172</sup> It will be recalled from that discussion that in his classic statement,<sup>173</sup> J. S. Mill's argues that suppression of falsehood is both an assumption of infallibility<sup>174</sup> and prevents a proper understanding of the reasons that establish the 'truth' as true.<sup>175</sup> These elements of Mill's argument were echoed by the ECtHR in the recent case of *Salov v. Ukraine*<sup>176</sup> in which the Court stated that Article 10:

'as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10'.<sup>177</sup>

In the context of Mill's argument from truth, it is interesting that there appears to be a schism in the treatment of political speech compared to religious speech. Mill's argument refers equally to freedom to discuss religious issues as it does political: indeed, many of the examples Mill provides are religious.<sup>178</sup> The Strasbourg

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<sup>172</sup> The argument from participation in a democracy is discussed at pages 58 to 69 whereas the argument from truth is discussed at pages 69 to 81.

<sup>173</sup> J.S. Mill, *On Liberty*, (London: Routledge, 1991), (1<sup>st</sup> edn., 1859).

<sup>174</sup> *Ibid.*, 29.

<sup>175</sup> *Ibid.*, 56.

<sup>176</sup> (2007) 45 EHRR 51.

<sup>177</sup> *Ibid.*, [113].

<sup>178</sup> See fn. 173.



jurisprudence, however, seems to adopt a stricter position on religious expression, even prior to evaluating the competing interest at stake. For example, in *Refah Partisi*, the Court stated that the expression of religious views contradicting the principles of tolerance, pluralism and broadmindedness are not protected by Article 9.<sup>179</sup> Likewise, the margin of appreciation afforded to the competing interest at stake is broader when limiting religious expression compared to political expression as a consequence of Article 9.<sup>180</sup>

## 5. Conclusion

From the analysis above, it seems fairly clear that the Strasbourg approach to Article 10 is consequentialist and tends towards audience-based perspectives. When examining interferences with freedom of expression, the ECtHR considers the nature of expression and the nature of the interference. In respect of both, the Court allows Member States a certain margin of appreciation, which is wider in some cases than in others. It is submitted that comparisons between Strasbourg's reasoning and established free speech theory is most clear in respect of the statements of free speech principle evident in the case law rather than the outcome of those cases. It is further submitted that this is a consequence of the ECtHR's limitations as a court. In other words, because the ECtHR has conceded that certain societal interests admit no common European-wide standard, such as morality or the protection of religious

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<sup>179</sup> Fn. 51, [49]-[52].

<sup>180</sup> E.g., *Otto-Preminger-Institut*, fn. 27. See further, Ian Leigh, 'Homophobic Speech, Equality Denial and Religious Expression' in *Extreme Speech and Democracy* (Oxford University Press, 2009).

sensibilities, and that other societal interests, such as public order and national security, involve issues that are beyond the Court's competency, the full force of its rhetoric on freedom of expression cannot be realised. Thus, when taking the Strasbourg jurisprudence into account under s. 2 of the Human Rights Act 1998 it is imperative that the UK judiciary recognise the impact of these limitations<sup>181</sup> otherwise the arguments from truth, participation in democracy and self-fulfilment that the Strasbourg jurisprudence echoes may be overlooked or otherwise underestimated. The following chapter examines how the UK judiciary have interpreted their obligations to take the Strasbourg jurisprudence into account under s. 2.

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<sup>181</sup> As Fenwick and Phillipson argue in *Media Freedom*, fn. 5, 32.

# CHAPTER FOUR

## Key issues under the Human Rights

### Act:

## Is there scope to diverge from

## Strasbourg?

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### 1. Introduction

The Human Rights Act 1998 (the “HRA”) contains a number of provisions that have attracted comment in the academic literature. Amongst these, s. 3 relating to statutory interpretation and s. 4 relating to declarations of incompatibility have, arguably, received the greatest academic commentary.<sup>1</sup> However, so far, these provisions have not been significant in the development of Article 10 in the UK: the

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<sup>1</sup> C Gearty ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 *Law Quarterly Review* 248; R Clayton ‘Judicial Deference and “Democratic Dialogue”: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] *Public Law* 33; G Phillipson ‘(Mis)-Reading Section 3 of the Human Rights Act’ (2003) 119 *Law Quarterly Review* 183; C Gearty ‘Revisiting Section 3 of the Human Rights Act’, (2003) 119 *Law Quarterly Review* 551; D Nicol ‘Statutory Interpretation and Human Rights after *Anderson*’ [2004] *Public Law* 274.

principles relating to these provisions are fairly clear from the case law<sup>2</sup> and, moreover, in an Article 10 context, no specific issues relating to the interpretation of these sections have yet arisen. The focus of this chapter is, therefore, on s. 2 of the HRA, which, it will be argued, is a provision that is particularly relevant to the development of Article 10 in the UK. When deciding cases involving Convention rights,<sup>3</sup> s. 2 of the HRA states that the judiciary ‘must take into account’,<sup>4</sup> amongst other things, any relevant decision delivered by the European Court of Human Rights (the “ECtHR”) and/or European Commission of Human Rights (the “ECommHR”). So far, the dominant judicial approach<sup>5</sup> has been to interpret this section as an obligation not to depart from Strasbourg jurisprudence without good reason.<sup>6</sup> As will be shown, the ‘inevitable uncertainty’<sup>7</sup> created by the wording of s. 2 and its subsequent interpretation by the courts has given rise to significant academic debate about the manner in which the Strasbourg jurisprudence should be treated when determining Convention rights cases.

It will be argued in this chapter that the UK courts’ approach to s. 2 is often inconsistent and generally hard to discern. The aim of the next section of the discussion is to delineate the main arguments from the academic literature in order to show that the predominant view is that the courts’ approach has been disappointing.

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<sup>2</sup> See Fenwick, *Civil Liberties and Human Rights*, (Routledge-Cavendish, 2007, 4<sup>th</sup> edn.), 169-214.

<sup>3</sup> *i.e.*, those Convention rights to which the Human Rights Act 1998 applies, as set out in s. 1(1).

<sup>4</sup> S. 2(1), HRA.

<sup>5</sup> Although it has been argued that it is not the only evident approach: E. Wicks, ‘Taking Account of Strasbourg?’ (2005) 11(3) *European Public Law* 405 (see discussion below).

<sup>6</sup> *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* (2001) 2 All ER 929; *R (on the application of Anderson) v. Secretary of State for the Home Department* (2002) 4 All ER 1089; *R (on the application of Amin) v. Secretary of State for the Home Department* (2003) 4 All ER 1264; *Kay v. Lambeth LBC*; *Leeds City Council v. Price* (2006) 2 AC 465; *Huang v. Secretary of State for the Home Department* (2007) 2 AC 167; *R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) 2 WLR 781 (“ADI”).

<sup>7</sup> S. Tierney, ‘Devolution Issues and s. 2(1) of the Human Rights Act 1998’ (2000) *EHRLR* 380, 392

In effect, the courts appear to have interpreted s. 2 very restrictively. By adopting these academic views as a benchmark, it will be argued that, in an Article 10 context, the courts' approach is particularly concerning. As set out in Chapter Three, the Strasbourg jurisprudence contains both strong statements of free speech principle but, often, weak realisation of those principles in the *outcomes* of decisions due to its limitations as a court and, in particular, due to the operation of the margin of appreciation doctrine, as shown, for example, in *Handyside v. UK*.<sup>8</sup> From an Article 10 perspective, the courts' approach to s. 2 is particularly concerning to the extent that it seems to recommend the adoption of shallow approaches to the Strasbourg jurisprudence, thus discouraging judges from delving deeper where strong free speech principle lurks behind a margin of appreciation led outcome. This has the potential effect of leading judges to incorporate the margin of appreciation doctrine into the domestic jurisprudence by the back door.<sup>9</sup> Moreover, this minimalist approach provides little scope for an activist development of free speech in the UK, leading to a narrower interpretation of Article 10 than is evident at Strasbourg level.

By exploring the courts' approach to s. 2 in relation to Article 10 cases and by considering the academic literature on the margin of appreciation, it will be argued that there is no reason why the UK courts' cannot move away from timid Strasbourg decisions, where they arise, in order to fully realise the maximum protection of free speech in the UK. As set out in Chapter One, this could be achieved by greater recognition of the broader consequentialist rationales for the protection of free speech, such as the arguments from self-fulfilment or from truth or by recognition of

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<sup>8</sup> (1976) 1 EHRR 737.

<sup>9</sup> As Fenwick and Phillipson argue in *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 146.

the intrinsic worth of free speech evident in the argument from autonomy.<sup>10</sup> In this way, and by greater adherence to the amassed body of academic literature concerning these theories, the UK judiciary could create a richer free speech right. Alternatively, the UK judiciary might develop a broader approach to the democratic process value, evident in the Strasbourg jurisprudence, by greater adherence to, for example, Meiklejohn's conception of the argument from participation in a democracy.<sup>11</sup> Such changes need not represent some radical departure from Convention orthodoxy. Instead, it will be argued that because of the flexibility within the procedural principles that exist (domestically and at Strasbourg level) and the inherent broadness within the core principles underpinning the Convention, Article 10 in the UK could be developed according to this broader approach should the UK judiciary be so inclined.

## **2. Section 2, HRA: decisions and debate**

### *a) Introduction*

In critiquing the development of Article 10 post-HRA, s. 2 clearly represents a significant issue. As will be shown, the dominant approach emanating from the House of Lords is to treat it as an obligation not to depart from relevant Strasbourg case law in the absence of special circumstances. This would seem to place some limits on the extent to which the judiciary may theoretically develop Article 10 in the

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<sup>10</sup> These theories were discussed in Chapter Two.

<sup>11</sup> Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245.

UK beyond the Strasbourg jurisprudence: indeed, contrary to the anticipated liberating effect of the HRA on judicial thinking (*i.e.*, British rights for British courts, *etc.*), as explored in Chapter One,<sup>12</sup> this narrow interpretation of s. 2 may suggest that any ‘development’ of Article 10 is unlikely. This narrowness in approach has attracted a number of persuasive criticisms from commentators, as will be shown. Yet, despite this interpretation, it will be argued in this section that whilst this interpretation is bound to impose some limits on judicial activism, it should not be overestimated: in the context of free speech, it does not prevent differences emerging between the UK and ECtHR jurisprudence so long as the underlying substantive and procedural Strasbourg principles are followed and, further those procedural principles themselves permit some differences to emerge. Since it is also pertinent to the general discussion in this thesis, the view of leading commentators that this narrow approach to section 2 is an improper use of it and, further, that alternative approaches to it might pave the way to a more liberal realisation of HRA as a vehicle for a UK Bills of Rights will also be discussed. This possibility is clearly relevant to the critique that follows in this thesis.

*b) No departing from Strasbourg without good reason*

The leading case law evidences a rather narrow interpretation of s. 2 of the HRA. The dominant strand<sup>13</sup> is that s. 2 requires the judiciary not to depart from

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<sup>12</sup> At pages 33 to 35.

<sup>13</sup> Wicks, fn. 5, has argued that other (what are called here) softer approaches to section 2 are evident. These are discussed below in section c).

relevant Strasbourg jurisprudence without ‘good reason’<sup>14</sup> or ‘special circumstances’.<sup>15</sup> Lewis terms this the mirror principle<sup>16</sup> after Lord Nicholls’ observation that the ‘obligations of public authorities [including the courts]...mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention and its protocols’.<sup>17</sup> The leading proponent of this approach is undoubtedly Lord Bingham. Having established the principle in the House of Lords decision in *Anderson*, he has subsequently reiterated it in the further House of Lords decisions in *Ullah*,<sup>18</sup> *Huang*<sup>19</sup> and *ADI*.<sup>20</sup> Lord Bingham has also reminded the House, most notably in *Ullah*<sup>21</sup> and *ADI*<sup>22</sup> that whilst relevant Strasbourg case law ‘is not strictly binding’, any failure to follow ‘clear and constant’ Strasbourg jurisprudence would be unlawful under section 6(1) of the HRA.<sup>23</sup>

This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law...It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform

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<sup>14</sup> *Anderson*, fn. 6, [18] *per* Lord Bingham.

<sup>15</sup> *Alconbury*, fn. 6 [26] *per* Lord Slynn as endorsed by Lord Bingham in *R. (on the application of Ullah) v. Special Adjudicator* (2004) 2 AC 323, 350, [20]; *Huang*, fn. 6, [18] and *ADI*, fn. 6, [37].

<sup>16</sup> Jonathan Lewis, ‘The European ceiling on human rights’ [2007] *Public Law* 720.

<sup>17</sup> *R. (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* (2006) 1 AC 529, [34].

<sup>18</sup> Fn. 15.

<sup>19</sup> Fn. 6.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> S. 6(1) makes it unlawful for a public authority, including the courts, not to act compatibly with a Convention right.



throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'<sup>24</sup>

This passage will be referred to hereinafter as the *Ullah* principle.

Lord Slynn has likewise stated that if the UK courts do not follow Strasbourg jurisprudence in this way in circumstances where there are no 'special circumstances' then 'the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed'.<sup>25</sup> This apparently rigid approach has attracted much criticism from the academic community. Wicks, for example, has criticised this approach as 'com[ing] extremely close to abdicating judicial responsibility to Strasbourg',<sup>26</sup> while Masterman notes that 'in the absence of guidance as to what might amount to 'special circumstances' the possibility of lower courts unquestioningly adopting the relevant reasoning of Strasbourg is quite real'.<sup>27</sup> Lewis explains (without defending) the rationale for keeping pace with Strasbourg jurisprudence in the following terms:

'If a domestic court differs from Strasbourg in offering more generous rights protection, this mistake cannot be rectified as the Member State cannot question the decision at Strasbourg. However if a domestic court errs in providing less protection than Strasbourg this is easily remedied by the litigant taking his or her case there. Hence, it is better to err on the side of caution.'<sup>28</sup>

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<sup>24</sup> *Ullah*, fn. 15.

<sup>25</sup> *Amin*, fn. 6, [44].

<sup>26</sup> Wicks, fn. 5, 414.

<sup>27</sup> Roger Masterman, 'Taking the Strasbourg jurisprudence into account: developing a "municipal law of human rights" under the Human Rights Act' (2005) *ICLQ* 907, 918.

<sup>28</sup> Lewis, fn. 16, 728

The House of Lords' interpretation of section 2 is certainly disappointing: clearly, it dampens the jubilant rhetoric, which anticipated the introduction of the HRA,<sup>29</sup> that the UK judiciary should be 'allowed to make a distinctive British contribution to the development of human rights in Europe'; 'not grudgingly driven to swallow the medicine prescribed for us by the court in Strasbourg when we are found in breach of the Convention'.<sup>30</sup> Instead, as Wicks notes, 'this self-denying ordinance by certain members of the House of Lords may prevent the development of uniquely British rights and freedoms'.<sup>31</sup> Consequently, the position of the House of Lords would seem to anticipate that the efforts of this thesis to chart the Article 10 case law in the UK post-HRA will reveal nothing more than a mirror image of the Strasbourg jurisprudence. However, in the following sections, the argument will set out why this need not be the case and, further, specifically for the purposes of critiquing the UK judiciary's approach to Article 10, the arguments demonstrating why the judiciary does have scope to *develop* Article 10 without, necessarily, breaching the *Ullah* principle will also be set out.

### *c) Qualifications to this apparent rigidity?*

Despite its apparent rigidity, clearly the approach to s. 2 laid out in *Ullah* and afterwards admits of circumstances where the Strasbourg jurisprudence will not be followed. Although there is no specific guidance on the meaning of 'special

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<sup>29</sup> As discussed in Chapter One at pages 33 to 35.

<sup>30</sup> Lord Irvine of Lairg, 'Constitutional reform and a Bill of Rights' (1997) *European Human Rights Law Review* 483, 485.

<sup>31</sup> Wicks, fn. 5, 415

circumstances’, as Lewis notes, the judiciary have been prepared to depart from the Strasbourg jurisprudence where it is found that the ECtHR in the relevant case misunderstood some aspect of English law.<sup>32</sup> Further, Lewis<sup>33</sup> notes the possibility outlined by Lord Irvine in Parliamentary debates that the UK courts could depart from the Strasbourg jurisprudence where there has been no precise ruling on the matter. Likewise, Wicks<sup>34</sup> notes that Lord Irvine stated it would be inappropriate to be ‘bound to apply to the letter a judgment given decades ago’ because the interpretation of Convention rights develops over the years and, instead, domestic courts should preferably use their commonsense. On a similar theme, Masterman further notes Lord Irvine’s observations that the UK courts should not be bound by the Strasbourg jurisprudence because: 1) it is the Convention that is the ultimate source of relevant law not the jurisprudence of the ECtHR and as such the Convention system has no strict rule of precedent; 2) under the Convention, the UK is only bound to ‘abide by’ such ECtHR decisions that it is a party to; 3) the White Paper states that the UK courts ‘must be free to try to give a lead to Europe as well as be led’.<sup>35</sup> As to Masterman’s second point, it should be noted that the two cases commonly referred to as a significant source of Article 10 principle are cases against the UK (*Handyside*<sup>36</sup> and *Sunday Times*<sup>37</sup>). Therefore, in an Article 10 context, at least, there is less scope to argue that the courts are not abiding by this point.<sup>38</sup>

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<sup>32</sup> Lewis, fn. 16, 730, cites the cases of *R v. Lyons* (No. 3) (2003) 1 AC 976, [46] *per* Lord Hoffmann; *R v. Spear* (2003) 1 AC 734, [12] *per* Lord Bingham and *Ghaidan v. Godin-Mendoza* (2003) Ch. 380, [24] *per* Buxton LJ as examples where the Courts have departed from Strasbourg case law on the basis that the decisions are ‘manifestly wrong’ in English law (*ibid*).

<sup>33</sup> Lewis, fn. 16, 731.

<sup>34</sup> Wicks, fn. 5, 406.

<sup>35</sup> Roger Masterman, ‘Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?’ (2004) *Public Law* 725, 728-730

<sup>36</sup> *Handyside v. UK* [1976] 1 EHRR 737.

Whilst Lewis doubts that the exceptions to the mirror principle recognised by the courts so far (the ‘manifestly wrong’ scenario and the ‘lack of a precise ruling’ possibility outlined above) meaningfully allow for departure from Strasbourg jurisprudence (‘the mirror principle is practically inescapable’<sup>39</sup>), Masterman and Wicks identify alternative judicial approaches to s. 2 which demonstrate a more relaxed approach to the Strasbourg jurisprudence. Wicks labels these as ‘paying insufficient regard to Strasbourg’;<sup>40</sup> ‘assessing relevance by reference to [judge’s] own perception of merits’<sup>41</sup> and ‘consciously departing from Strasbourg’.<sup>42</sup> Of the first category (in which she identifies certain Court of Appeal judges as the chief culprits), whilst Wicks is critical that judges should not disregard the Strasbourg jurisprudence altogether in favour of ‘prioritis[ing] the development of a domestic law of human rights’<sup>43</sup> on the basis it would lead ‘judges into the territory of illegality’<sup>44</sup> (for the same reasons identified by Lord Bingham in *Ullah* and *ADI*), she endorses<sup>45</sup> Lord Justice Laws’s warning in the Court of Appeal decision in *Runa Begum*<sup>46</sup> that ‘the courts’ task under the [HRA]...is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct’.<sup>47</sup> Of the second category, Wicks observes that this is a more subtle approach to the application of s. 2 in which the judge ‘assesses the relevance of each

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<sup>37</sup> *Sunday Times v. UK* (1979) 2 EHRR 245.

<sup>38</sup> Also, in terms of protecting religious sensibilities against religiously offensive speech, the leading case is a UK one (*Wingrove v. UK* (1997) 24 EHRR 1). This case is mentioned in Chapter Seven.

<sup>39</sup> Lewis, fn. 16, 731.

<sup>40</sup> Wicks, fn. 5, 415-419.

<sup>41</sup> *Ibid.*, 419-423

<sup>42</sup> *Ibid.*, 423-425

<sup>43</sup> *Ibid.*, 415.

<sup>44</sup> *Ibid.*, 416.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Runa Begum v. Tower Hamlets London Borough Council* (2002) 2 All ER 668.

<sup>47</sup> *Ibid.*, [17]

Strasbourg judgment by reference to its implications for the outcome of the case before him'.<sup>48</sup> As an example, she cites Lord Hoffmann's judgment in *Alconbury* where he said that he would have 'considerable doubt' in following Strasbourg jurisprudence where it 'compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution'.<sup>49</sup> Wicks notes that 'for Lord Hoffmann it appears that his statutory obligation to 'take into account' only entails following Strasbourg where Strasbourg is, in his view, correct'.<sup>50</sup> Of the third category, Wicks cites the decision in *Ghaidan*<sup>51</sup> as representing 'an explicit rejection of a particular judgment'.<sup>52</sup> She describes this possibility as an 'inevitable consequence of a failure to oblige domestic courts to be bound by Strasbourg'.<sup>53</sup> Masterman, meanwhile, cites Lord Hoffmann's finding in *Re McKerr* that:

'although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention...their meaning and application [of Convention rights] is a matter for domestic courts, not the court in Strasbourg'.<sup>54</sup>

Masterman argues that this statement is 'remarkable': 'in asserting that the 'meaning and application' of the rights under the HRA is a 'matter for domestic courts' – and

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<sup>48</sup> Wicks, fn. 5, 419.

<sup>49</sup> *Alconbury*, fn. 6, [76].

<sup>50</sup> *Ibid.*, 421.

<sup>51</sup> Fn. 32.

<sup>52</sup> Wicks, fn. 5, 423.

<sup>53</sup> *Ibid.*, 425

<sup>54</sup> *Re McKerr* (2004) 2 All ER 409 [65]

explicitly denying this function to Strasbourg – Lord Hoffmann could be seen as laying claim to a more creativist role for domestic courts in rights litigation’.<sup>55</sup> Further, both Masterman and Lewis<sup>56</sup> cite with approval Sir Andrew Morritt V.C.’s finding in the Court of Appeal decision in *Wallbank*: ‘our task is not to cast around in the European Human Rights Reports like blackletter lawyers seeking clues. In the light of section 2(1) of the [HRA] it is to draw out the broad principles which animate the Convention’.<sup>57</sup> Masterman argues that this view is ‘closer’ to the intention behind section 2(1) (‘to allow domestic courts the scope to develop home-grown human rights principles’<sup>58</sup>) than the dominant approach in the House of Lords and that ‘to follow such an approach would avoid accusations of treating the relevant Strasbourg case law as tantamount to binding authority’.<sup>59</sup> To these observations may now be added the view of Lord Scott in *ADI*.<sup>60</sup> In a judgment that neither Lord Bingham<sup>61</sup> nor Baroness Hale<sup>62</sup> were able to agree with, Lord Scott emphasised in a full and reasoned manner that Strasbourg jurisprudence is binding only in international law but that in the UK, the House of Lords ‘interpretation of the incorporated articles [is], subject only to legislative intervention,...binding in domestic law’.<sup>63</sup> In clarifying the position, he stated:

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<sup>55</sup> Masterman, fn. 27, 930-931.

<sup>56</sup> Lewis, fn. 16, 747. Wicks, fn. 5, notes the decision at 418.

<sup>57</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* (2001) EWCA Civ 713, [44].

<sup>58</sup> Masterman, fn. 35, 737.

<sup>59</sup> *Ibid.*, 735.

<sup>60</sup> Fn. 6

<sup>61</sup> *Ibid.*, [37]

<sup>62</sup> *Ibid.*, [53]

<sup>63</sup> *Ibid.*, [44]

‘The judgments of the European court are, therefore, not binding on domestic courts. They constitute material, very important material, that must be taken into account, but domestic courts are nonetheless not bound by the [ECtHR]’s interpretation of an incorporated article. It is, in my opinion, important that that should be so and that its importance is not lost sight of.’<sup>64</sup>

Collectively, these observations of alternative judicial approaches to section 2 suggest some softening of the approach in *Ullah* is possible if not already evident.

Also, it is submitted, there is an evident slipperiness to the *Ullah* principle which affects its apparent rigidity. This can be seen in its application in recent case law. In *Kay*<sup>65</sup> the House of Lords resolved the prospective tension a lower court judge faced when presented with relevant Strasbourg jurisprudence and a conflicting House of Lords decision: s. 2 does not cause the domestic rules of precedent to be abandoned. Lord Bingham explained that:

‘The mandatory duty imposed on domestic courts by section 2...is to take into account any judgment of the Strasbourg court...Thus they are not strictly required to follow Strasbourg rulings, as they are bound by section 3(1) of the European Communities Act 1972 and as they are bound by the rulings of superior courts in the domestic curial hierarchy.’<sup>66</sup>

The significance of this finding should not be exaggerated: it is a sensible if not obvious outcome. Yet it does show that differences will exist between domestic and Strasbourg jurisprudence, temporarily at least, even though this difference may be

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<sup>64</sup> *Ibid.*, [44-45]

<sup>65</sup> Fn. 6.

<sup>66</sup> *Ibid.*, [28]

more or less generous than the relevant Strasbourg jurisprudence. How temporarily this may be is a different matter: it cannot be guaranteed that the disappointed will appeal and ultimately succeed in the House of Lords, particularly as a consequence of the decision in *ADI*,<sup>67</sup> which also happens to be an Article 10 decision.

This House of Lords case concerned a politically-motivated group against animal cruelty, ADI, who wished to advertise their latest campaign on television but were unable to by virtue of s. 321(2) of the Communications Act 2003 which prohibits such political advertising. Their claim for a declaration of incompatibility was unsuccessful. This was surprising given that their argument centred on the successful application of *VgT* in the ECtHR where it was held that a similar statutory prohibition on political advertising in Switzerland was in violation of Article 10.<sup>68</sup> Giving the leading judgment, Lord Bingham found it significant that the ‘full strength’<sup>69</sup> of the argument that the rights of others exception under Article 10(2) includes ‘a right to be protected against the potential mischief of partial political advertising’<sup>70</sup> had not been deployed in *VgT*. It was further significant that in *VgT* ‘the applicant was seeking to *respond* [emphasis added]... to commercials broadcast by the meat industry’.<sup>71</sup> Furthermore it was a ‘factor of some weight’<sup>72</sup> that ADI could campaign by other means such as ‘newspapers and magazines, direct mailshots, billboards, public meetings and marches. The claimant may also contribute to broadcast programmes and radio phone-ins’.<sup>73</sup> Thus the Court found the decision in

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<sup>67</sup> Fn. 6.

<sup>68</sup> *VgT Verein gegen Tierfabriken v. Switzerland* (2001) 34 EHRR 159

<sup>69</sup> *ADI*, fn. 6, [29]

<sup>70</sup> *Ibid.*, [28]

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, [32]

<sup>73</sup> *Ibid.*



*VgT* to be sufficiently different to the present facts. In agreeing with Lord Bingham, Baroness Hale said ‘[n]or do I think that the decision in [*VgT*] should lead us to any different conclusion. All Strasbourg decisions are fact-specific.’<sup>74</sup>

Thus, the *Ullah* principle would seem to be weakened: ‘distinguishing *VgT* and *ADI* is logically impossible’.<sup>75</sup> Yet the House of Lords felt able to do so, without breaching the principles set out so clearly in *Ullah*, on the basis that all Strasbourg cases are fact-sensitive but, as Knight notes,<sup>76</sup> not so fact sensitive for the House of Lords to find that the relevant, applicable Strasbourg jurisprudence was *Murphy v. Ireland*<sup>77</sup> – a case concerning a radio advertisement on a religious – not political – matter; a ‘noticeably less factually similar decision’.<sup>78</sup> Thus, as Knight accurately observes, the House of Lords relied upon ‘a distinction without a difference’.<sup>79</sup> In his judgment, Lord Bingham does not fully explain the difference: instead, his Lordship found it instructive that the rationale for a blanket prohibition of political advertising on television and radio was due to ‘the greater immediacy and impact of television and radio advertising’.<sup>80</sup> Since this point was recognised by the ECtHR in *Murphy v. Ireland*, that case was applied as opposed to *VgT* where ‘the court appeared to discount the point somewhat’.<sup>81</sup> Baroness Hale explained away the apparent factual discrepancy in one sentence: ‘if anything, the need to strike a fair balance between the competing interests is stronger in the political than in the religious context’.<sup>82</sup> Yet

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<sup>74</sup> *Ibid.*, [52]

<sup>75</sup> C.J.S. Knight, ‘Monkeying around with free speech’ (2008) *Law Quarterly Review* 557, 558.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Murphy v. Ireland* (2003) 38 EHRR 212

<sup>78</sup> Knight, fn. 75, 558

<sup>79</sup> *Ibid.*

<sup>80</sup> *ADI*, fn. 6, [30]

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, [52]

neither judge sufficiently addresses the point that the ECtHR in *Murphy* had distinguished *VgT* on the basis that Member States have a wider margin of appreciation in relation to matters of morals and religion as compared with political speech or debate on matters of public interest.<sup>83</sup> Thus it was appropriate that in *VgT* the ECtHR had attached ‘little weight’ to the possibility of other avenues of promoting the campaign because the case concerned political expression for which a much narrower margin of appreciation exists.

Thus the manner in which the House of Lords felt able to apply *Murphy* rather than *VgT* points to a greater flexibility when considering Strasbourg jurisprudence than *Ullah* may otherwise suggest. However, this does not remove the issue that both Lord Bingham and Baroness Hale steadfastly defended: it is not for the UK courts to develop the Convention rights beyond their understanding in Strasbourg. The decision in *ADI*, therefore, acts somewhat as a template to show how the apparent strictness of the *Ullah* principle may be avoided by means of ‘smoke and mirrors’ where the court wishes to achieve a different result. The following section explores, in more general terms, the UK courts’ approach to s. 2 in Article 10 claims.

#### *d) The use of section 2 in the UK Article 10 case law*

In relation to Article 10 cases, at least, the *Ullah* principle would seem to require systematic consideration of the relevant Strasbourg jurisprudence by the courts in order to ensure that the UK approach, evident in existing UK case law, is

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<sup>83</sup> *Murphy*, fn. 77, [67]

neither ahead nor behind. If it is determined that the UK approach is either ahead or behind then the next question is whether the court hearing the case is able to rectify this discrepancy; the court will not be able to remedy the situation if the discrepancy is due to a) a contrary Statutory provision that the court cannot make compatible or b) case law decided by a higher court. Yet this systematic approach is not readily apparent in the UK Article 10 jurisprudence. Instead, it is difficult to fully discern the UK courts' approach to s. 2 in an Article 10 context because different approaches are apparent.

Indeed, surveying the UK Article 10 case law, it seems that s. 2 is not always explicitly referred to by the courts when making their decisions.<sup>84</sup> In this regard, there is no real guidance on how the *Ullah* principle is to be realised in an Article 10 context so that it is left unspoken how the courts' should approach the margin of appreciation issue. This point is considered in more detail, below.<sup>85</sup> It may be that the UK judiciary finds it unnecessary to refer to s. 2 in every case, particularly where a liberal approach to free speech is contemplated. For example, in *Jameel*, there is limited reference to the Strasbourg jurisprudence: Lord Bingham and Lord Hope refer to those cases that enable them to determine the extent of the margin of appreciation that operates at Strasbourg level on the question of damages in a defamation context. The decision in *Jameel* itself, which is discussed in greater detail in Chapter Six,<sup>86</sup> evidences a liberal approach to media freedom in a defamation claim that is comparable to the strong statements of free speech principle evident in similar

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<sup>84</sup> For example, see the House of Lords decisions in *R. v. Shayler* (2003) 1 AC 247; *Re S* (2005) EMLR 2 and *Belfast City Council v. Miss Behavin' Ltd* (2007) 1 WLR 1420.

<sup>85</sup> See discussion in Section 4.

<sup>86</sup> See discussion from page 234.

ECtHR decisions, such as *Haukom*<sup>87</sup> discussed in the previous chapter.<sup>88</sup> In that respect, the fact that there is no explicit consideration of s. 2 is not problematic from a free speech perspective. Yet that is not to say that this approach might not be problematic in other circumstances where a less favourable approach to free speech is evident.

Furthermore, in keeping with Wicks's analysis,<sup>89</sup> there are instances in which the UK courts have not had regard to the Strasbourg jurisprudence when determining Article 10 claims. For example, in the House of Lords' decisions in *Re S*<sup>90</sup> and *Miss Behavin' Ltd*<sup>91</sup> the Court determined the Article 10 claims in each by reference to UK authorities only. Although such an approach may be criticised for its failure to uphold the *Ullah* principle – how is the court to determine if the law is ahead or behind the Strasbourg jurisprudence if it has no regard to it? – it is less problematic from a free speech perspective so long as the reasoning applied is pro-free speech.

In cases where the UK courts have considered the Strasbourg jurisprudence, the intensity of review appears to vary. For example, in *R. v. Shayler*,<sup>92</sup> on the question of whether Article 10 protects disclosure of official secrets in the name of public interest, their Lordships' consideration of the Strasbourg jurisprudence was fairly extensive whereas in other cases the review can appear much shallower, for example, in the Court of Appeal decision in *Charman*,<sup>93</sup> in which a defence of qualified privilege (*i.e.* the *Reynolds* defence) was made in respect of a libel claim.

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<sup>87</sup> *Tonsberg Blad as and Haukom v. Norway* (2008) 46 EHRR 40

<sup>88</sup> See page 111.

<sup>89</sup> Fn. 5.

<sup>90</sup> Fn. 84.

<sup>91</sup> Fn. 84.

<sup>92</sup> Fn. 84.

<sup>93</sup> *Charman v. Orion Publishing Group Ltd* (2007) EWCA Civ 972, see discussion in Chapter Six from page 234.

Since the *Reynolds* principles had recently been clarified in *Jameel*, Lord Justice Ward found it was ‘necessary only to cast an eye over the Strasbourg decisions since *Jameel* was argued’<sup>94</sup> and in doing so cited passages from three Strasbourg decisions.<sup>95</sup> A shallow approach to the Strasbourg jurisprudence is not necessarily problematic although, by doing so, it is possible the UK courts might not fully recognise subtle developments to the ECtHR’s approach to specific aspects of Article 10.

Given the courts’ approach to section 2 so far – and particularly given the analysis in *ADI* – it appears accurate to say that the courts may achieve whatever outcome is desired by either anticipating the operation of a wide margin of appreciation at Strasbourg level or by distinguishing comparable Strasbourg jurisprudence on the basis of ‘fact-sensitivity’. As *ADI* illustrates, such distinctions are not always convincing. From a free speech perspective, this approach is troubling since the desired outcome may not be favourable to freedom of expression. For example, in *Sanders v. Kingston*, a case which is discussed in greater detail in Chapters Five and Six, the disputed expression related to a series of vitriolic outbursts in the public domain by the leader of Peterborough City Council concerning Northern Ireland. In deciding whether or not this expression should enjoy the protection of Article 10, Wilkie J. cited passages from the ECtHR decisions in *Lingens v. Austria*<sup>96</sup> and *Jersulam v. Austria*,<sup>97</sup> which confirm that Article 10 applies to information that is not favourably received, including that which shocks, offends or disturbs; that

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<sup>94</sup> *Ibid.*, [69].

<sup>95</sup> *White v. Sweden* (2007) EMLR 1; *Verlagsgruppe News GmbH v. Austria* (App. No. 76918/01, 14 Dec. 2006) and *Selisto v. Finland* (2006) 42 EHRR 8.

<sup>96</sup> (1986) 8 EHRR 407.

<sup>97</sup> (2003) 37 EHRR 25.

freedom of political debate is at the core of the concept of democratic society and that whilst freedom of expression is important for everyone, it is particularly so for politicians. However, Wilkie J. found that these strong free speech principles could not be applied because the disputed speech was not ‘political’ but instead was ‘personal abuse’.<sup>98</sup> It is unnecessary to consider the merits of the decision at this stage – the substance of the decision is considered in greater detail in Chapter Five<sup>99</sup> – but it is relevant to note that Wilkie J. cited no Strasbourg case law to support this definitional finding.

Yet what the courts’ approach to s. 2 in relation to Article 10 resoundingly confirms is that differences between the UK and Strasbourg approach are inevitable.<sup>100</sup> Consequently, because these differences will emerge, it seems plausible to suggest that there is scope to develop Article 10 in the UK so as to maximise the protection afforded to freedom of speech. Indeed, it has been argued, in general terms, that s. 2 ought to be used more liberally so as to better secure human rights.<sup>101</sup> In an Article 10 context, this could be achieved by greater application of the strong statements of free speech principle in the Article 10 jurisprudence and greater adherence to the established body of academic literature on free speech so that a more fully formed free speech right might be realised. The following section explores this argument in more detail.

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<sup>98</sup> See discussion in Chapter Two on the academic view that the definition of ‘political’ is likely to be abused (page 63).

<sup>99</sup> See pages 183 to 187.

<sup>100</sup> As Fenwick and Phillipson argue in *Media Freedom*, fn. 9.

<sup>101</sup> See Masterman, fn. 27.

*e) Section 2 is a Gateway to a UK Bill of Rights: Aspiration or  
Aberration?*

As noted above, given that this thesis seeks to critique the development of Article 10 in the UK post-HRA, it is important to be aware of the arguments which point toward divergence from Strasbourg jurisprudence being probable in an Article 10 context. This is particularly important given the judicial indication, explored above, that *any* ‘development’ of Convention rights is not a matter for UK courts. It is fair to say that this interpretation has not been well-received by the academic community. Masterman, for example, describes the approach to s. 2 as ‘curious’<sup>102</sup> whilst Lewis complains that ‘the HRA has been interpreted in such a way as to put a ceiling on human rights protection.’<sup>103</sup> As Lewis notes (and as noted above), Lord Bingham has said that the Convention must be uniformly understood by all Member States and so there should be no divergence between domestic and ECHR jurisprudence. Yet the reason for this remains unclear (apart from the vague threat that to do otherwise is to be in breach of section 6(1)): ‘most often such statements are made as assumptions or are simply stated as self-evident truths’.<sup>104</sup> As the judgments in *ADI*, in particular, make clear, there is an evident tension between the view that there can be no domestic development of the Convention rights beyond their understanding in Strasbourg and the view (put forward by Lord Scott) that the relationship between international and domestic law is not properly understood by

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<sup>102</sup> Masterman, fn. 27, 917.

<sup>103</sup> Lewis, fn. 16, 726.

<sup>104</sup> *Ibid.*, 732.

such sentiments: ‘under the dualist constitution of the UK, international and domestic law are entirely separate fields. Both are supreme within their own field because they are the only legal system operating there’.<sup>105</sup>

Perhaps, though, there is scope to resolve this tension without contradicting Lord Bingham’s analysis that there must be uniformity (or comity) amongst Member States since, particularly in a free speech specific context, it is possible that divergence in the protection afforded freedom of expression in the UK compared to other signatories may exist, for a number of reasons, without interfering with the general principle evident in *Ullah*. The possibility depends entirely on the meanings attached to ‘divergence’ and ‘development’: so long as such divergence applies to the *interpretation* and *application* of the underlying principles of free speech that Strasbourg recognises but does not alter those underlying principles themselves, then divergence in *outcomes* but not *principles* may be evident and so the UK Article 10 jurisprudence may be developed in a way that is ‘distinctly British’ but does not destroy the dialogic function between Strasbourg and UK courts or offend against Strasbourg’s supervisory purpose. In other words, so long as the UK courts do not seek to alter the foundation of Article 10 – that it is built on democratic principles – then it is submitted that the UK courts can interpret these principles in any way that is compliant with those foundations without being in breach of s. 2 or risking a violation of Article 10 being found by the ECtHR. The reasons for this are outlined in the following paragraph and developed in later chapters.

Lord Bingham’s analysis in *Ullah* is set out above.<sup>106</sup> First, the observation that Convention rights cannot be more generous without Parliamentary intervention is

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<sup>105</sup> Wicks, fn. 5, 426.



uncontroversial for Article 10: Article 10 guarantees freedom of expression, which as Chapter Two observes, is a broad and generous commitment in any event. Second, the (connected) observation that the meaning of the Convention can be authoritatively expounded only by the Strasbourg court belies the fact that the principles on which the Convention right to freedom of expression is founded are extraordinary wide.<sup>107</sup> Consequently, whilst adherence to Lord Bingham's analysis might preclude the development of freedom of speech on an entirely new and radical footing (for example, on the basis that it only applies to pornographic and commercial speech but has no relevance to political expression), it subtly masks the fact that to say, as (former ECtHR President) Wildhaber has, that the protection of freedom of speech is built on notions of democracy and individual self-development<sup>108</sup> is to ensnare a broad range of moral and political philosophies about freedom of speech and the variance in protection for different types of speech that they involve.<sup>109</sup> It is for the UK courts to determine *which* moral and political philosophical interpretation is to be applied.<sup>110</sup> Given the criticism that the Strasbourg jurisprudence is essentially declaratory,<sup>111</sup> and, furthermore, (as set out in the previous chapter) given the effect of the margin of appreciation on decisions, the Strasbourg jurisprudence is not capable of wholesale transplantation in any event.

Thirdly, the obligation not to 'weaken or dilute the effect of Strasbourg case law' without 'strong reason' and to 'keep pace with the Strasbourg jurisprudence'

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<sup>106</sup> At page 137, fn. 24.

<sup>107</sup> See discussion in Chapter Three.

<sup>108</sup> L. Wildhaber, 'The Right to Offend, Shock or Disturb? – Aspects of Freedom of Expression under the European Convention on Human Rights' (2001) 36 *The Irish Jurist* 17.

<sup>109</sup> See discussion in Chapter Two, amplified in Chapters Five, Six and Seven.

<sup>110</sup> Eric Barendt, *Freedom of Speech*, (Oxford University Press, 2005, 2<sup>nd</sup> edn.), 1-6.

<sup>111</sup> Masterman, see fn. 35.

does not adequately acknowledge the role of the margin of appreciation within that jurisprudence. This significance of this will be spelt out more fully in the following section (exploring the scope of the doctrine) but, briefly (and as set out in previous chapters), it is established that where there is no European consensus on the correct treatment of certain speech, such as the protection of morals, and in areas which involve sensitive political issues (such as national security or public safety), Member States are afforded a wide discretion. Thus Lord Bingham's conclusion: 'no more [generous], but certainly no less' is problematic because although the *principles* employed may be no different, the *outcome* in cases *may* result in more generous protection for, say, pornographic speech in Member States that have strong liberal traditions as compared to those that do not. Yet such divergence between Member States does not necessarily implicate any divergence from Strasbourg case law: *Handyside v. UK*<sup>112</sup> is the classic example: whilst recognising the oft-cited principle that freedom of expression applies equally to speech that shocks or offends, the ECtHR accepted that the UK was better placed to decide on the protection of morals.<sup>113</sup> Consequently, it is submitted, it is possible that the development of Article 10 in the UK might take on a different appearance to Strasbourg jurisprudence without falling foul of Lord Bingham's analysis.

Whilst this argument leans towards the idea that divergence is inevitable, the popular view of academics tends to be that not only is the dominant position a betrayal of section 2's original purpose but also that a divergent approach to

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<sup>112</sup> *Handyside*, fn. 36.

<sup>113</sup> *Ibid.*

Strasbourg is desirable. The foundation of Wicks's argument, for example, is that the Parliamentary intention for the HRA demands divergence since otherwise:

'the Act designed to bring rights home will have done no such thing: it will merely have brought home the possibility of a domestic remedy for violations of international rights. If on the other hand, there is reasoned and purposeful divergence, the HRA will have heralded a new, and long overdue, domestic law of human rights'.<sup>114</sup>

Lewis, specifically taking Lord Bingham's decision in *Ullah* to task, argues that 'if domestic courts cannot fall behind Strasbourg jurisprudence and cannot overtake it, their only option is to stay in line with it. English human rights law finds itself to be nothing more than Strasbourg's shadow.'<sup>115</sup> Lewis recommends the approaches to Strasbourg decisions proposed by Starmer and Masterman.<sup>116</sup> Starmer suggests a weighted approach to Strasbourg jurisprudence which recognises: 1) the age (and so deteriorating quality/reliability) of a decision; 2) which Strasbourg institution made the decision: the ECtHR having more authority than the ECommHR; 3) the extent to which the margin of appreciation was relied upon in making the decision (the doctrine has no direct application in domestic law).<sup>117</sup> As will be explored below this final element is not without its difficulties: it is not always clear how and to what extent the doctrine has affected the outcome. However, it is submitted, that this is an important point. Masterman's position on s. 2 meanwhile is that the dominant position is tantamount to binding the UK courts to Strasbourg (which is not what was

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<sup>114</sup> Wicks, fn. 5, 426.

<sup>115</sup> Lewis, fn. 16, 729-730.

<sup>116</sup> *Ibid.*, 747. Masterman also endorses the views of Starmer, fn. 35, 726 and Morritt, (see. fn. 58).

<sup>117</sup> Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention* (Legal Action Group, London, 1999), 27.

intended) and is set out above.<sup>118</sup> In a later article,<sup>119</sup> Masterman argues that the interpretation of Convention rights in a domestic context is not something that the ECtHR is equipped to do and therefore some divergence from Strasbourg is vital so that the Convention rights can become fully formed. Masterman therefore argues that – so long as the underlying principles of the Convention remain intact – the UK judiciary must be free to look to existing common law<sup>120</sup> or comparative jurisprudence<sup>121</sup> (as it did in *Brown v. Stott*<sup>122</sup>) to remedy any deficiencies and lacunae it finds in Strasbourg jurisprudence. The significance of this, Masterman argues, is reflected in Clapham’s observation that: ‘it is important that national courts have the autonomy to interpret the relevant international human rights so as to make them appropriate to the national culture’.<sup>123</sup> On a literal reading of *Ullah* such a view may appear to be more aberration than aspiration yet as has been shown, there are significant reasons why it is inadvisable for the UK courts to simply follow the outcomes of ECtHR decisions.

### *f) Conclusion*

The concerns outlined in Chapter One that the HRA would cause judges to behave unconstitutionally and so overstep the mark appear unfounded in light of

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<sup>118</sup> Page 140, fn 35.

<sup>119</sup> Fn. 27

<sup>120</sup> *Ibid.*, 925.

<sup>121</sup> *Ibid.*, 921-923.

<sup>122</sup> *Brown v. Stott* (2003) 1 AC 681.

<sup>123</sup> A Clapham ‘The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights’ in P Alston (ed), *Promoting Human Rights Through Bills of Rights* (Oxford University Press, Oxford, 1999) 134-5

treatment of s. 2 so far: indeed, the opposite approach is evident in which the judiciary may be criticised for not being active enough. As noted, several commentators have warned that the HRA does not instruct the judiciary to be bound by Strasbourg precedent. This is not simply the attitude of Parliament: the ECtHR consistently emphasises this point as well in so far as it accepts that whilst it has supervisory functions, it is for Member States to interpret and apply the Convention rights, as will be shown in the next section. Although the approach to s. 2 in the UK has a rigid appearance, a case like *ADI* illustrates that this does not necessarily mean Strasbourg jurisprudence will automatically be followed: the finding that Strasbourg jurisprudence is entirely ‘fact sensitive’ presents opportunities for the judiciary to develop Article 10 differently in the UK *provided that* the underlying principles of the Convention are maintained. Furthermore, the *Ullah* principle seems unsustainable in light of the influence of the margin of appreciation doctrine on decision-making at Strasbourg level, as will be shown in the following section.

#### **4. The Margin of Appreciation doctrine and the *Ullah* principle**

The purpose of this section is to demonstrate that as a consequence of the manner in which the margin of appreciation doctrine (the “Doctrine”) has been applied in Strasbourg jurisprudence and the criticisms which have been made of it, the *Ullah* principle is only sustainable in an Article 10 context, at least, to the extent that it requires the UK courts to keep pace with the *underlying principles* which govern the Convention rights (which, in the context of free speech, are very broad, as

was shown in Chapters Two and Three), yet the *Ullah* principle seems to go beyond this by its implication that the UK courts are required to reach the same decisions that Strasbourg have so that protection is no more and no less generous. As noted in the previous section, leading commentators on s. 2, such as Masterman, doubt that the Strasbourg jurisprudence can be used, meaningfully and reliably, in this way because, for example, the decisions are essentially declaratory. In this section, it will be shown that the criticisms of the Doctrine made by commentators lend strong support to that view in an Article 10 context and so cast further doubt on the overall sustainability of the *Ullah* principle in relation to Article 10.

The nature of the Doctrine was discussed previously in Chapters One<sup>124</sup> and Three.<sup>125</sup> By way of brief reminder, in recognising its ‘subsidiary’ role to Member States, who have the initial responsibility for securing the rights enshrined in the Convention,<sup>126</sup> the ECtHR allows some latitude to Member States in their interpretation and development of those rights. As set out in Chapter One, a wide margin is applied where there is no European-wide consensus on what human rights individuals have or because the domestic authority is better placed to decide upon a sensitive issue.<sup>127</sup> As also set out in Chapters One and Three, there is a wealth of academic literature about the Doctrine. In broad terms, significant concerns have been raised that the Doctrine may engage too readily at Strasbourg level or else be applied too loosely.<sup>128</sup> With that in mind, it is difficult to accept the UK courts’

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<sup>124</sup> At pages 35 to 44.

<sup>125</sup> At pages 92 to 98.

<sup>126</sup> *Sunday Times v. UK*, fn. 37, [59].

<sup>127</sup> George Letsas, ‘Two concepts of the margin of appreciation’ (2006) *Oxford Journal of Legal Studies* 705.

<sup>128</sup> See pages 35 to 44.

concern that a failure to adhere to the Strasbourg jurisprudence would lead to ‘illegality’, especially in cases where a wide margin of appreciation was applied;<sup>129</sup> such concerns seem inconsistent with the fact that the ECtHR is a court of review rather than appeal. Furthermore, it is difficult to reconcile the concerns raised by commentators about the variable quality and intensity of review at Strasbourg level<sup>130</sup> with the deference to Strasbourg jurisprudence that the *Ullah* principle requires. Of course, this is not to say that the UK courts should not respect Strasbourg jurisprudence or have regard to it.<sup>131</sup> It is instead, to query what mechanism demands such devotion to Strasbourg jurisprudence. Moreover, as Lewis notes, the *Ullah* principle seems strangely at odds with the Doctrine.<sup>132</sup> Lord Bingham has recently said this about the Doctrine:

‘in its decisions on particular cases the Strasbourg Court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions.’<sup>133</sup>

As Lewis notes, clearly this gives dominance to the Doctrine over the *Ullah* principle.<sup>134</sup> On the face of it, there is a conflict. However, Lord Bingham does not

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<sup>129</sup> See view of Lord Bingham and Baroness Hale in *ADI*, fn. 6, discussed below.

<sup>130</sup> See discussion in Chapter One, pages 35 to 44.

<sup>131</sup> Which is a point that Masterman, (fn. 27, 930) Wicks, (fn. 5, 415-419) and Lewis (fn. 16, 746-747) all make.

<sup>132</sup> Lewis, fn. 16, 738.

<sup>133</sup> *Kay*, fn. 6, [44].

<sup>134</sup> Lewis, fn. 16, 738.

seem to recognise the conflict or else, as Lewis further notes, it may be implied that his Lordship believes the tension is resolved by there being a clear difference between *interpretation* and *application*.<sup>135</sup> In support of this latter explanation, Lewis cites Lord Hope in *ex parte Kebilene*: ‘by conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be *applied* [emphasis added] uniformly by all states but may vary in its application according to local needs and conditions’.<sup>136</sup> By way of reminder, Lord Bingham in *Ullah* said: ‘the Convention is an international instrument, the correct *interpretation* [emphasis added] of which can be authoritatively expounded only by the Strasbourg court’.<sup>137</sup> As Lewis notes, this analysis relies on there being a ‘clear cut’ distinction between interpretation and application. Yet, he argues ‘there is simply no intellectually honest and universally applicable method to distinguish the two exercises’: the distinction is ‘illusory’.<sup>138</sup> Thus, Lewis argues that the House of Lords in *Lambeth v. Kay* acted contrary to the *Ullah* (or, as he calls it, mirror) principle by deciding that precedent conflicting with an ECtHR decision should be followed: ‘if the mirror principle had been applied in that case, the Lords would have held that their decision in *Qazi*, was ECHR *per incuriam*, or that Strasbourg jurisprudence had developed subsequent to that decision and domestic courts should seek to catch up with it even if that resulted in [domestic] uncertainty’.<sup>139</sup>

It is submitted that the only ‘intellectually honest’ distinction which can be drawn from ‘interpret’ and ‘apply’ is the limited argument that it is for the Strasbourg

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<sup>135</sup> *Ibid.*

<sup>136</sup> *R. v. DPP ex p. Kebilene* (2000) 2 AC 326, 380.

<sup>137</sup> *Ullah*, fn. 15.

<sup>138</sup> Lewis, fn. 16, 738.

<sup>139</sup> *Ibid.*, 746.



courts to determine (or ‘interpret’) what the underlying principles of the Convention rights are and the UK courts to apply those principles. Theoretically, at least, this would allow the UK courts to ensure conformity with the standards set by Strasbourg whilst also ensuring the Convention rights in operation suit needs peculiar to the UK (whatever those needs might be). As noted, in a free speech context, this translates to the Strasbourg court determining, as it has, that the foundation of Article 10 is democracy and development of the individual and, thus, that certain types of speech are particularly important to protect; when these types of speech appear, the UK has a very narrow margin of appreciation to avoid protection. Therefore, applying these principles to domestic conditions is a matter for the UK courts.<sup>140</sup> Yet even this limited analysis is not without its difficulties: as set out in Chapter Two, there are a number of free speech theories which are premised on notions of democracy and individual self-development and they do not all coincide as to the type of speech to be protected or the reasons for protection. Thus, it is difficult to divorce application from interpretation without the argument appearing entirely artificial. Arguably, the ‘application’ of these principles requires at least some level of ‘interpretation’ to ensure that a fully formed Article 10 right is established in the UK. As set out in Chapter One, it is submitted that, in order to do so, the UK judiciary might have greater regard to the established body of academic literature on free speech theory.<sup>141</sup> In this regard, it might be said that the UK judiciary is uniquely positioned to determine whichever theory or theories best suit domestic conditions: this is not a task that Strasbourg can do on the UK’s behalf. As Sweeney puts it:

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<sup>140</sup> As Lord Hoffmann recognises in *Re McKerr*, fn. 54.

<sup>141</sup> These theories were discussed in Chapter Two.

‘human rights protection needs more than the examination of compliance with simple imperatives. It requires an understanding of the multitude of actors in society, each with their different interests and values, including recognition that it is the social and political institutions of particular societies that must deal with much of the actual protection of human rights’.<sup>142</sup>

Sweeney adds that whilst ‘human rights are *generally universal*...in becoming embedded in society some local particularities affect the substantiation of human rights and result in *specific qualifications*’.<sup>143</sup> This, he argues, is inherent in the operation of, and rationale behind, the Doctrine: international institutions must recognise ‘some realistic limitations to their own competence’.<sup>144</sup>

Of course, as Sweeney argues, the issue is not simply limited to judicial institutions: other social and political institutions must play their part as well.<sup>145</sup> Naturally, this implicates the role of judicial deference when determining rights. As Jones notes, the issue ‘connects with a much broader debate about the role of the judiciary in protecting fundamental rights and of the degree to which democratically elected legislatures should be constrained in their range of choices’.<sup>146</sup> This debate pits the attractions of legislative sovereignty against the perils of executive manipulation/abuse and judicial impotence. The issue of judicial deference was

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<sup>142</sup> J. A. Sweeney, ‘Margin of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era’ (2005) *ICLQ* 459, 471.

<sup>143</sup> Sweeney, fn. 142, 471; Kavanaugh similarly argues, ‘while the underpinning of the Convention is the protection of human rights, the principle of sovereignty necessitates that, in doing so, the State must retain the choice of the means of adoption’, Kavanaugh, ‘Policing the margins: rights protection and the European Court of Human Rights’ (2006) *EHRLR* 422, 425.

<sup>144</sup> *Ibid.*, 471.

<sup>145</sup> *Ibid.*

<sup>146</sup> T. H. Jones, ‘The devaluation of human rights under the European Convention’ (1995) *Public Law* 430, 432.

outlined in Chapter One. Of course, the presence of judicial deference to the other limbs of government *might* explain the persistence of the *Ullah* principle, although the sustainability of that principle cannot hang on this point since section 2 of the HRA does not impute such deference. Nor does the spectre of deference, be that to the Government or Strasbourg, extinguish concerns about the competency of the ECtHR to determine distinctly national issues. This is not to say that the ECtHR does not recognise the limits of its competency since it plainly does<sup>147</sup> but rather that this recognition taints the Strasbourg decisions such that the outcome may demonstrate, not an interpretation of the underlying principles, but recognition of the ECtHR's limits in competency to apply those principles. Consequently, this may affect the suitability of applying that ECtHR decision at domestic level.

Moreover, there is a further concern that the operation of the Doctrine in Strasbourg jurisprudence may not simply affect the applicability of the decision wholesale into domestic law but may mask or otherwise mislead as to which element of the decision reflects a universal principle and which is arrived at entirely by means of the Doctrine operating. This can result in decisions where the nature of review is not clear, causing concern inside<sup>148</sup> and outside the ECtHR.<sup>149</sup> As Singh, Hunt and Demetriou argue,

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<sup>147</sup> *Handyside*, fn. 36.

<sup>148</sup> For example, see De Meyer J.'s comment in *Z v. Finland* (1998) 25 EHRR 371: 'the empty phrases concerning the State's margin of appreciation – repeated in the Court's judgments for too long already – are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights. Such terminology, as wrong in principle as it is pointless in practice, should be abandoned without delay.' Likewise in *Mathieu-Mohin* (1987) 10 EHRR 1 where dissenting judges accused the majority of deciding cases merely by 'falling back on the margin of appreciation'.

<sup>149</sup> See Lester, 'Universality versus Subsidiarity: a reply' (1998) 1 *EHRLR* 73; Laws, 'The Limitations of Human Rights' (1998) *PL* 254; Lavender, 'the problem of the margin of appreciation' (1997) *EHRLR* 380; Singh, Hunt and Demetriou, 'Is there a role for the Margin of Appreciation in national

‘far from being a doctrine or principle capable of abstract definition and concrete application, [the Margin] is a conclusory label which only serves to obscure the true basis on which a reviewing court describes whether or not intervention in a particular case is justifiable. As such it tends to preclude courts from articulating the justification for and limits of their role as guardians of human rights in a democracy’.<sup>150</sup>

Fenwick argues that this may separate the activist from the restrained or deferential judge with the former recognising that the application of the Doctrine opens up the issue to (or else does not prevent) local judicial scrutiny whilst the latter may interpret it as confirmation of executive or legislative discretion<sup>151</sup> thus requiring little or no judicial scrutiny. Consequently, the principle – whilst not directly identified as the Doctrine operating – may be doubly applied: at national level, in recognition that the legitimate aim involves issues identified at supranational level as peculiar to the State, with this decision then endorsed supranationally. Thus *Singh et al* express the concern that the Doctrine ‘prevents articulation of the reasons why deference might be appropriate and to what degree in a particular case’<sup>152</sup> and so fails to ‘capture the subtlety of questions of appropriateness and intensity’<sup>153</sup> of reviewing decisions. In these circumstances, the Doctrine ‘obscures [the] important distinction between an

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law after the Human Rights Act?’ (1999) *EHRLR* 15; Kavanaugh, fn. 143; Letsas, fn. 127; Paul Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19 *HRLR* 1; Jones, fn. 146; Helen Fenwick, ‘The Right to Protest, the Human Rights Act and the Margin of Appreciation’ (1999) 62(4) *Modern Law Review* 491; Sweeney, fn. 142; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

<sup>150</sup> *Singh, ibid.*, 20-21.

<sup>151</sup> Fenwick, fn. 149, 500-505

<sup>152</sup> *Singh*, fn. 149, 21.

<sup>153</sup> *Ibid.*

unreviewable decision and a justifiable one by preventing the articulation of the Court's reasons for not intervening in the decision'.<sup>154</sup> Furthermore, it is important to acknowledge that the Doctrine should not be applied domestically since it is 'distinctively international law';<sup>155</sup> domestic courts 'will not be subject to an objective inhibition generated by any cultural distance between themselves and the State organs whose decisions are impleaded before them'.<sup>156</sup> In other words, the Doctrine is domestically inapplicable since whilst the Strasbourg court is not an appellate court, the domestic courts are. The express use of the Doctrine in this way has been judicially recognised: 'this technique is not available to the national courts when they are considering Convention issues arising within their own countries.'<sup>157</sup>

Yet this is not to argue that the UK courts should not be able to anticipate the existence of a margin of appreciation at Strasbourg level when determining a particular case. Indeed, such an approach would be welcomed as it might serve to remind the court that, in the case of a wide discretion, there is sufficient scope to 'apply' the principles according to domestic needs or, in the case of a narrow discretion, to remind itself of the relevant Strasbourg principle. Yet in both instances, the court ought to ensure that it adopts a strategic approach to the 'application' (or interpretation) of the relevant underlying principles so as to ensure uniformity within its own jurisdiction. Recognition of a margin existing is not objectionable except in circumstances where the court concludes that such existence provides a discretion for the public authority in question akin to the standard of *Wednesbury* unreasonableness.

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<sup>154</sup> *Ibid.*

<sup>155</sup> Fenwick, fn. 149, 500.

<sup>156</sup> Laws, fn. 149, 258.

<sup>157</sup> *Per* Lord Hope in *ex parte Kebilene*, fn. 136, 380-381.

As Lord Irvine stated in anticipation of enactment, the Doctrine is not just a restatement of *Wednesbury* principles.<sup>158</sup> Thus some concerns are raised by Lord Hoffmann's approach to Article 10 in *Miss Behavin' Ltd.*<sup>159</sup> Having noted that, if it applied at all, Article 10 operated only 'at a very low level' in such circumstances, his Lordship noted that the ECtHR:

'has always accorded a wide [Margin]...which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights'.<sup>160</sup>

The principal difficulty with this reference to the Doctrine is that it did not lead the Court to consider pornography in the connection of the Convention's underlying principles and then apply those principles in light of domestic conditions. Lord Hoffmann did state that he was 'prepared to assume, without deciding' that the Article 10 right includes the right to use premises to distribute pornographic material<sup>161</sup> however offered no theoretical justification for this reasoning. This is fairly unsatisfactory: as will be shown in Chapter Seven, Lord Hoffmann could have decided that pornography plays no role in democracy; that it is antithesis to democracy because it 'strips and devastates women of credibility'<sup>162</sup> and so leaves

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<sup>158</sup> Lord Irvine of Lairg, 'The development of human rights in Britain under an incorporated Convention on Human Rights' (1998) *PL* 221, 234.

<sup>159</sup> *Belfast City Council v. Miss Behavin' Ltd.* (2007) 1 *WLR* 1420.

<sup>160</sup> *Ibid.*, [16].

<sup>161</sup> *Ibid.*, [10].

<sup>162</sup> Catherine MacKinnon, *Feminism Unmodified*, (Harvard University Press, 1987), 193

them effectively voiceless in the democratic process.<sup>163</sup> Instead, he concluded that if Article 10 did engage it was ‘at a very low level’ since ‘the right to vend pornography is not the most important right of free expression in a democratic society’.<sup>164</sup> Thus, Lord Hoffmann’s finding is unclear: what level does pornography engage at in a democratic society? For example, it has been suggested that pornography *does* seek to engage the democratic process in order to seek ‘a fair opportunity to influence the sexual mores of the society’.<sup>165</sup> Likewise, Lord Hoffmann overlooks the argument that pornography engages the arguments from self-development or self-realisation, a popular view in the USA.<sup>166</sup> Instead, Lord Hoffmann’s analysis is not just deferential to the executive but also reminiscent of *Wednesbury* principles.

Thus, it has been argued that the *Ullah* principle does not sit well with the Doctrine. In particular, the distinction between ‘interpretation’ and ‘application’ appears fairly hollow except to the limited extent that it dictates that UK courts have no power to alter the underlying principles of the Convention rights. Yet even this argument is not without its difficulties: those underlying principles ensnare so many theoretical arguments for free speech that the UK courts must make *some* interpretation to determine which variants of the theoretical justifications for free speech engage. This requires a strategic approach, which will not be achieved if the Court is to simply follow Strasbourg jurisprudence without reference to established

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<sup>163</sup> Catherine MacKinnon, *Only Words* (Harvard University Press, 1993)

<sup>164</sup> Fn. 159, [16].

<sup>165</sup> Thomas Scanlon, ‘Freedom of expression and categories of expression’ (1979) 40 *University of Pittsburgh Law Review* 519, 545

<sup>166</sup> Michael J. Perry, ‘Freedom of expression: an essay on theory and doctrine’ (1983) 78 *Northwestern University Law Review* 1139; Martin Redish, ‘The Value of Free Speech’, (1982) 130 *University of Pennsylvania Law Review* 591; Larry Alexander, “Low Value Speech,” (1989) 83 *Northwestern University Law Review* 547; Ronald Dworkin, “Is there a right to pornography?” (1981) 1 *Oxford J. Legal Stud.* 177; Thomas Emerson, “Pornography and the First Amendment: A Reply to Professor MacKinnon,” (1984) 3 *Yale L. & Pol’y Rev.* 130.

theory, particularly where the Doctrine is recognised in a way that is reminiscent of *Wednesbury* unreasonableness.

## 5. Conclusion

The academic community's view on the interpretation of section 2 in *Ullah* so far has been fairly damning. As Lewis puts it, 'there is neither a mandate for [it] nor any advantages flowing from its adoption'.<sup>167</sup> Furthermore it is difficult to reconcile the view that UK case law must 'keep pace' with Strasbourg so as not to be more or less generous with the margin of appreciation doctrine since some divergence seems inevitable due to the discretions available to domestic authorities that this doctrine promotes. The apparent reliance on some clear cut distinction between 'interpretation' and 'application' of the Convention's underlying principles seems unsustainable, yet it is the current state of the law after the House of Lords decisions in *Kay*<sup>168</sup> and *Ullah*.<sup>169</sup>

In an Article 10 context, it is difficult to discern a consistent approach to the application of s. 2. The finding that all ECtHR decisions are 'fact-sensitive' compounds the issue since, as *ADI* illustrates, decisions that appear broadly comparable may be distinguished on the slightest factual discrepancy. The instruction within the *Ullah* principle that UK courts should not interpret the underlying principles of the Convention is cogent enough; yet, it is submitted, those underlying principles are so broad in an Article 10 context that the UK courts ought

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<sup>167</sup> Lewis, fn. 16, 747.

<sup>168</sup> Fn. 6.

<sup>169</sup> Fn. 15.



to adhere to established theory in order to realise the full potential of those principles when applying them and, inevitably, this process must involve some level of interpretation. By exploring the UK post-HRA case law, the following three chapters explore how the UK judiciary has so far treated Article 10 by comparison to both Strasbourg jurisprudence and established theory. In particular, the next chapter deals with the UK courts' approach to offensive political expression.

# CHAPTER FIVE

## Offensive political expression and the

### ‘right not to be offended’:

## Toward a heckler’s veto?

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### 1. Introduction

It is a common feature of established free speech theories that political expression is particularly significant and ought to enjoy preferential treatment in protection terms.<sup>1</sup> This chapter and the next will consider the UK courts’ approach to political expression post-Human Rights Act 1998 (the “HRA”). Whereas this chapter specifically examines the courts approach to offensive political expression in the context of its commitment to protect political expression, the following chapter

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<sup>1</sup> See, e.g., Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper, 1948); “The First Amendment is an absolute,” [1961] *Supreme Court Review* 245; Thomas Scanlon, “A Theory of Freedom of Expression,” in *The Philosophy of Law*, R. M. Dworkin, ed., (OUP, 1977); “Freedom of Expression and Categories of Expression,” (1979) *University of Pittsburgh Law Review* 519; Thomas Emerson, *The System of Freedom of Expression*, (New York: Random House, 1970); C. Edwin Baker, *Human Liberty and Freedom of Speech*, (OUP, 1989); Martin Redish, “The Value of Free Speech”, (1982) 130 *University of Pennsylvania Law Review* 591; Lee Bollinger, *The Tolerant Society*, (OUP, 1986); Michael Perry, ‘Freedom of expression: an essay on theory and doctrine’ (1983) 78 *Northwestern University Law Review* 1139.

examines the domestic judicial approach to such expression in a broader context. Thus, this chapter lays some of the foundation for that discussion. Meanwhile, Chapter Seven concentrates on the UK courts' approach to non-political speech post-HRA. In keeping with established theory and the consequentialist rationale that underpins Article 10, it is a well-established feature of the Strasbourg jurisprudence that since 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention',<sup>2</sup> a narrow margin of appreciation is applied where such speech is at stake. The UK judiciary clearly recognises this principle and, as will be shown, there is a clear commitment to protect political expression within the case law. Indeed, although it is not central to the argument to be made, it might be said that the UK courts' clearly recognised the importance of protecting political speech even before the HRA was implemented.<sup>3</sup> Furthermore, it is also a well-established Strasbourg principle that this high level of protection also applies to political expression that shocks, offends or disturbs.<sup>4</sup> As will be shown, the UK courts have also recognised this principle.<sup>5</sup> At face value, it might be thought that, as a consequence, 'hate speech' is included within the ambit of Article 10: it is clear from the established academic literature that such expression might be classified as political and, moreover, that such speech tends to shock, offend or disturb those that hear it.<sup>6</sup> Yet, as the European Court of Human Rights ("ECtHR") has confirmed, such an argument is a non-starter: Article 10 protection

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<sup>2</sup> *Lingens v. Austria* (1986) 8 EHRR 407, [42].

<sup>3</sup> See discussion in Section 2, below.

<sup>4</sup> *Handyside v. UK* (1976) 1 EHRR 737.

<sup>5</sup> See discussion in Section 2, below.

<sup>6</sup> See, for example, Ian Cram, *Contested Words* (Ashgate, 2006); James Weinstein, *Hate Speech, Pornography and the Radical Attack on Free Speech Doctrine* (Westview Press, 1999).

will not be afforded to any speech that seeks to undermine the democratic principles that the Convention is built upon.<sup>7</sup>

The purpose of this chapter is to explore the UK courts' approach to the protection of offensive political expression. This will involve consideration of the type of expression that engages with the principle (so, for the reasons set out above, there will be no significant discussion of hate speech). It will be recalled from Chapter One that the core argument of this thesis is that the UK judiciary has adopted a particularly narrow approach to protection under Article 10. It will be argued in this chapter that this is particularly apparent in the context of offensive political expression: the UK courts do not appear to *uphold* the principle that the commitment to protect political expression includes that which shocks, offends or disturbs. Further, it will be argued that this narrow approach has manifested in the development of the counter-right 'not to be offended'. As will be shown, there is a paucity of judicial guidance on how this non-Convention right should be treated and it will be argued that, as a consequence, the UK courts have resolved the apparent conflict between a 'right to offend' and a 'right not to be offended' by divining in each case the expression's value to the democratic process as a means of determining the level of protection it should be afforded. Whilst it will be argued that the UK courts lack the competency to accurately measure the contribution that offensive expression makes to society at large, it will also be argued that such an approach nurtures a Heckler's veto culture: the more people that reject an offensive idea, the less value it would appear to have to society at large.

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<sup>7</sup> See *Norwood v. UK* (2005) 40 EHRR 11; *Refah Partisi v. Turkey* (2002) 35 EHRR 3, [43].

## 2. The commitment to protect offensive political expression

### *a) The terms of the commitment to protect political expression*

The commitment to protect freedom of political speech has a long history within the common law, pre-dating both the introduction of the HRA and the European Convention on Human Rights (the “Convention”). As Crompton J. remarked in the nineteenth century, ‘it is the right of all the Queen’s subjects to discuss public matters’.<sup>8</sup> Likewise, John Stuart Mill, writing in the seventeenth century, notes that ‘the time, it is to be hoped, is gone by when any defence [of freedom of political speech] would be necessary...there is little danger of it being [repressed], except during some temporary panic, when fear of insurrection drives ministers and judges from their propriety’.<sup>9</sup> Indeed, it might be thought that the commitment to protect political expression was so well established prior to the HRA that its enactment has had no discernible effect in determining the claim to protect it, particularly since it had been found prior to the inception of the HRA that the common law was already in synch with Article 10.<sup>10</sup> However, it will be argued that the development of Article 10 under the auspices of the HRA *has* altered the terms of the commitment to protect political speech: the accentuation of protection of free speech for its instrumental value has caused protection for its intrinsic value to whither away; the focus of this instrumentalist development has been limited to the

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<sup>8</sup> *Campbell v. Spottiswoode* (1863) 3 B & S 769, 779

<sup>9</sup> J.S. Mill, *On Liberty*, (London: Routledge, 1991), (1<sup>st</sup>. ed., 1859), 26-27.

<sup>10</sup> *AG v. Guardian Newspapers (No. 2)* (1990) 1 AC 109, 178; *Derbyshire County Council v. Times Newspapers Ltd.* (1993) AC 534, 551.

direct contribution made to the democratic process value (narrowly interpreted). Thus, the mantra evident in UK case law that: ‘freedom of political speech is a core value of our legal system’<sup>11</sup> and ‘in a democracy it is the primary right’<sup>12</sup> (which mirrors the position in Strasbourg<sup>13</sup>) has transformed from justification to definition: in order to gain full protection, the speech in question must demonstrate its contribution to the democratic process. This approach risks narrowing down the ambit of what expression may qualify for the highest level of protection.<sup>14</sup> Whilst it is not argued in this thesis that the judiciary do not treat unpopular speech as ‘political’, it will be argued that the courts approach to offensive political expression excludes such speech from the highest level of protection afforded to less offensive or inoffensive political expression. It will be argued that the development of the ‘rights of others’ exception under Article 10(2) threatens the commitment to protect political expression on the terms that the UK judiciary had previously set out. Before considering this development, and how it might affect the commitment, it is worth reminding ourselves of what the terms of the commitment are.

In recent years, the judiciary has said the following about this core value and its nature. In *Reynolds*, a defamation case concerning a politician, Lord Nicholls made the general observation that:

‘At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this

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<sup>11</sup> *R (on the application of Rusbridger) v. Attorney General*, (2004) 1 AC 357, [7] per Lord Steyn.

<sup>12</sup> *R. v. Secretary of State for the Home Department ex parte Simms* (2000) 2 AC 115, 125 per Lord Steyn.

<sup>13</sup> *Lingens v. Austria* (1986) 8 EHRR 407, [42]; *Handyside v. UK*, fn. 4; *Jersild v. Denmark* (1995) 19 EHRR 1; see discussion in Chapter Four on the ‘Mirror Principle’.

<sup>14</sup> See further discussion in Chapter Six.

country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions.’<sup>15</sup>

This reflects what Lord Bingham had previously said in the Court of Appeal:

‘We do not for an instant doubt that the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community...Recognition that the common convenience and welfare of society are best served in this way is a modern democratic imperative which the law must accept...It would be strange if the law in this country -- the land of Milton, Paine and Mill -- were to deny this recognition...’<sup>16</sup>

Likewise, it echoes Lord Denning’s position in another defamation claim, *London Artists Ltd v. Littler*:<sup>17</sup>

‘whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.’

Similarly, Lord Steyn remarked in the House of Lords decision in *ex parte Simms* that: ‘freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to

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<sup>15</sup> *Reynolds v. Times Newspapers Ltd and Others* [1999] 2 AC 127, 200.

<sup>16</sup> *Ibid.*, 176-177.

<sup>17</sup> (1969) 2 QB 375, 391.

accept decisions that go against them if they can in principle seek to influence them'.<sup>18</sup> Given these strong statements of principle, it is unsurprising that Lord Justice Brown observed in the Court of Appeal decision in *ProLife* that 'the importance of freedom of expression in the context of political speech is hard to exaggerate'.<sup>19</sup> As Barendt notes, 'although the House of Lords upheld the BBC's appeal, its decision did not question the importance of political speech'.<sup>20</sup> Lord Hoffmann, for example, in the House of Lords confirmed that he was 'fully conscious of the importance of free political speech'.<sup>21</sup>

The most recent statement on political speech is to be found in *Animal Defenders International*<sup>22</sup> (and Lord Bingham's speech in particular), which has been discussed in previous chapters.<sup>23</sup> It is instructive to set out a pertinent passage from Lord Bingham's judgment in full:

'Freedom of thought and expression is an essential condition of an intellectually healthy society. The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government. These are the values which Article 10 exists to protect, and their importance gives it a central role in the Convention regime, protecting free speech in general and free political speech in particular...The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and

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<sup>18</sup> *R v. Secretary of State for the Home Department ex parte Simms* (2000) 2 AC 115, 126.

<sup>19</sup> *R (on the application of ProLife Alliance) v. BBC* (2002) EWCA Civ 297, CA, [59]

<sup>20</sup> Eric Barendt, *Freedom of Speech*, (OUP, 2005, 2<sup>nd</sup> edn.), 161

<sup>21</sup> *R (on the application of ProLife Alliance) v. BBC* (2004) 1 AC 185, HL, [54]

<sup>22</sup> *R. (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15

<sup>23</sup> See discussion in Chapter Four at pages 143 to 145.



the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated.<sup>24</sup>

Thus, according to this judgment, the democratic process requires competing views to be heard so that they can be ‘exposed to public scrutiny’: for the public to ‘make a sound choice’ a ‘level playing field’ must exist where ‘differing views are expressed, contradicted, answered and debated’. Clearly, the judiciary has an important role to play in providing for this level playing field, especially where the views expressed are unpopular. Indeed, Lord Justice Laws, in the Court of Appeal decision of *ProLife*, was particularly emphatic about this point: ‘as a matter of domestic law the courts owe a special responsibility to the public as the constitutional guardian of the freedom of political debate’.<sup>25</sup>

*b) The inclusion of offensive political expression within the definition*

Clearly, the definition of ‘political speech’ is significant in determining the range of speech that this ‘special responsibility’ extends to. As the discussion in Chapter Two shows, the term ‘political speech’ can be understood broadly, as in Meiklejohn’s conception of the argument from participation in a democratic society<sup>26</sup>

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<sup>24</sup> *Ibid.*, [27-28]

<sup>25</sup> *ProLife*, CA, fn. 19, [36]

<sup>26</sup> See fn. 1.

or Redish's argument from self-fulfilment<sup>27</sup> or it can be understood narrowly as in Bork's theory.<sup>28</sup> Yet, whatever else might constitute political speech, it is well-established at Strasbourg level that Article 10 applies equally to speech that is shocking and offensive.<sup>29</sup> In one of the fullest expositions so far, Lord Justice Sedley, in *Redmond-Bate v. DPP*,<sup>30</sup> stated that:

'Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having'.<sup>31</sup>

This echoes the findings of Lord Justice Hoffmann (as he then was) in *R. v. Central Television plc*,<sup>32</sup> a case involving the parental jurisdiction of the court, and Diplock J. (as he then was) in *Silkin v. Beaverbrook Newspapers Ltd*,<sup>33</sup> a decision on fair comment in defamation cases. In *Central Television*, Hoffmann stated that:

'Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible'.<sup>34</sup>

In *Silkin*, Diplock stated that:

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<sup>27</sup> See fn. 1. See discussion in Chapter Two.

<sup>28</sup> Robert Bork, 'Neutral Principles and Some First Amendment Problems,' [1971] 47 *Indiana Law Journal* 1, 23. See discussion in Chapter Two.

<sup>29</sup> *Handyside v. UK*, fn. 4

<sup>30</sup> (1999) 7 BHRC 375

<sup>31</sup> *Ibid.*, [20]

<sup>32</sup> (1994) 2 All ER 641

<sup>33</sup> (1958) 1 WLR 743.

<sup>34</sup> *Central Independent Television*, fn. 32.

‘people are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided -- and this is the important thing -- that they are views which they honestly hold’.<sup>35</sup>

Two important points should be made about these findings: first, although they are made in different contexts on different areas of law the general principle that free speech includes that which is offensive is not diminished; second, these findings do not say that offensive political speech *will* be protected, only that it is not excluded from protection simply because it is offensive.

As with the term ‘political speech’, it is essential to consider what type of speech is captured by the term ‘offensive’. The term ‘offensive’ could be deployed in wide-ranging circumstances. Of course, the requirement that the speech is political sets some limits on what speech is included. Pornography, for example, tends to shock, offend or disturb but is rarely said to be a form of political speech.<sup>36</sup> Also, it is important to acknowledge the effect that Article 17 has on the range of offensive political expression that may be captured by Article 10. As mentioned above, any speech which undermines the democratic foundation of the Convention rights will not be protected and, therefore, hate speech, although generally recognised in theory as capable of advancing a political ideal, is outside the ambit of Article 10.<sup>37</sup> Furthermore, offensive political speech might also engage a competing Convention

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<sup>35</sup> *Silkin*, fn. 33.

<sup>36</sup> See further discussion in Chapter Seven. For argument that it could be a form of political expression see Thomas Scanlon, ‘Freedom of Expression and Categories of Expression,’ (1979) *University of Pittsburgh Law Review* 519.

<sup>37</sup> *Glimmerveen v. Netherlands* (1982) 4 EHRR 260; *Norwood v. UK*, fn. 7; *Refah Partisi*, fn. 7.

right such as Article 8 or 9: as the decision in *Otto-Preminger* confirms in the context of Article 9, Article 10 includes ‘an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights’.<sup>38</sup> Since this chapter considers the effect that the development of the ‘rights of others’ exception to include non-Convention rights has had on the prospect of offensive political speech being protected, the type of speech to be discussed in this chapter is not that which engages Article 17 or another Convention right. Although this narrows down the ambit of what may constitute ‘offensive political speech’, it still contains a wide variety of expression. In broad terms, such speech could be separated into two categories: first, ideas that are inherently offensive, disturbing or shocking or, secondly, non-offensive ideas that are expressed in an offensive manner, *i.e.*, ‘Fuck the draft!’<sup>39</sup> or ‘Go fuck yourself with your atom bomb’.<sup>40</sup> Expression concerning moral or ethical issues which are particularly prone to polarising opinion, such as abortion, animal rights, war, euthanasia or sexual orientation may be included in either or both of these categories. The development of the right of others not to be offended stems from two decisions, both of which concerned abortion. These cases are discussed below.<sup>41</sup> Prior to that discussion, the following subsection discusses two recent Divisional Court decisions concerning politicians appealing against the findings of disciplinary tribunals that touch on the UK courts’ approach to the definition of ‘political’ in the context of offensive speech. These are the decisions in

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<sup>38</sup> *Otto-Preminger-Institut v. Austria* (1994) 19 EHRR 34, [49].

<sup>39</sup> *Cohen v. California* 403 US 15 (1971).

<sup>40</sup> *Wiggins v. Field* (1968) Crim LR 503.

<sup>41</sup> See section 3, below.

*Sanders v. Kingston*<sup>42</sup> and *Livingstone v. the Adjudication Panel for England*.<sup>43</sup> The facts of both cases are fairly lengthy but it is important to set them out fully for the purposes of discussion that follows.

*c) Two recent decisions on the definition of ‘political’ in the context of offensive expression*

*i) Sanders v. Kingston*

In *Sanders*, the former leader of Peterborough City Council appealed against a tribunal decision that he had breached the Council’s Code of Conduct by not treating others with respect and bringing his office or authority into disrepute. This breach was found to have arisen following Mr Sanders’s conduct of a request from Carrickfergus Borough Council, Northern Ireland (made to Chief Executives of all local authorities in the UK) to bring to their MP’s attention the unexplained death of a soldier with the Royal Irish Regiment in circumstances which suggested suicide, possibly as a result of bullying (and which followed a number of other similar deaths amongst Army personnel). It seems that Sanders misconstrued the letter as referring to a death in connection with ‘the Troubles’ and sent an ‘unreflective and immediate’ handwritten response: ‘Members of the Armed Forces DO get killed be it accident or design – THAT is what they are paid for’.<sup>44</sup> The Chief Executive of Carrickfergus

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<sup>42</sup> (2005) EWHC 1145 (Admin).

<sup>43</sup> (2006) EWHC 2533 (Admin).

<sup>44</sup> Fn. 42, [32].

replied, asking Sanders to identify himself as the author of these comments, to which Sanders wrote on the letter 'PCC was elected to look after the local affairs of Peterborough NOT indulge in matters relating to the armed forces. Many things happen in Ireland that defy common sense BUT that is a matter for the IRISH people not PCC'<sup>45</sup> and returned it.

The situation then escalated into a media event. Following a 'heated conversation'<sup>46</sup> between a journalist at the Belgraph Telegraph and Sanders, the newspaper printed an article attributing 'foul-mouthed, potentially racist and personally abusive' comments to Sanders<sup>47</sup> (the accuracy of which was disputed, Sanders maintaining 'we were both being offensive, we were mutually offensive'<sup>48</sup>). It became clear from this interview and subsequent ones with Ulster TV and BBC Northern Ireland that Sanders remained 'under the misapprehension that the 'unexplained deaths'...arose from the Troubles and not the way in which young recruits were being treated in training camps'.<sup>49</sup> Indeed, in his interview with BBC Northern Ireland, Sanders maintained:

'I believe in my heart of hearts that Paul Cochrane's family owe me an abject apology for the amount of time that I have spent on this particular cause because it is absolutely nothing to do with me. I do not know why, I do not know when, I do not know how their son was either killed or committed suicide. The circumstances are not within my power to investigate.

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<sup>45</sup> *Ibid.*, [34].

<sup>46</sup> *Ibid.*, [37].

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, [51].

<sup>49</sup> *Ibid.* [37].

And I take very very serious offence to being asked to interfere in the affairs of state in Northern Ireland...

...You've killed hundreds of my friends. You've killed people in Peterborough. You've caused distress to hundreds of families in England. Now that one of your own has committed suicide – I presume in your own country – yet it suddenly becomes an Englishman's fault.

...When do I get my apology from the Cochrane family and when will the English people get an apology from the people of Northern Ireland for killing so many of our soldiers over the past 25 years?

I think you should all hang your heads deeply in shame for involving the English people in your own quarrel'.<sup>50</sup>

As should be expected Sanders's behaviour attracted little sympathy: his views were variously labelled as 'ignorant', 'disgraceful' and 'beneath contempt'.<sup>51</sup> His actions caused the Conservative Party to issue the statement that 'none of what Mr Sanders said reflects the view of our party'.<sup>52</sup> Sir Brian Mawhinney (MP for North West Cambridgeshire at the time) was reported as saying 'these remarks don't reflect the views of Peterborough, the Conservative party or me as the local MP. I speak with some authority because I am one of those Northern Irish people about whom he is being so critical'.<sup>53</sup> Yet Sanders was unrepentant: 'I think it is an absolute cheek when one of their own commits suicide they come to me and ask me and our Council

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<sup>50</sup> *Ibid.*, [38].

<sup>51</sup> *Ibid.*, [39].

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, [42].

for support. I want an apology from Northern Ireland for hundreds of British policemen and soldiers they have killed'.<sup>54</sup> Furthermore, he defended his actions on this basis: 'My hallmark is plain speaking. The electorate acknowledge my lower deck language and refusal to be influenced by blackmail, favours, friends, or enemies by installing the first PCC Conservative administrative since 1979'.<sup>55</sup>

On the basis that he had breached the code of conduct established by s. 50 of the Local Government Act 2000, Mr. Sanders was removed as leader of the Council and as a member of the Conservative Party. Later, the Adjudication Panel of England disqualified him from being a councillor for a period of two years but omitted to consider his claim that the disciplinary action amounted to a breach of Article 10: the Respondent, Mr. Kingston, the Ethical Standards Officer, had reported to the Panel prior to the tribunal hearing that 'it is unclear precisely what Councillor Sanders is complaining about in that context. It is my opinion that the Standards Board procedures are fully in accord with all applicable provision of the [HRA]'.<sup>56</sup> Sanders appealed to the High Court on the basis that the tribunal failed to consider his Article 10 complaint and, furthermore, since political speech was involved, that the highest level of protection should have been applied. Finding against Sanders on this point (but finding for him on the severity of the penalty, which did not take into account that Sanders had been subsequently re-elected to the Council as an Independent), Wilkie J. refused to accept Counsel's submission for the Defendant that 'what a councillor says in the course of the discharge of his office can never amount to political expression...[It can] only [do so] when he is acting as a politician rather than

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, [46].



in his official capacity as member of a council'<sup>57</sup> but did find that 'there was nothing in what Councillor Sanders [did or said] which amounts to a political expression of views at all'.<sup>58</sup> His initial response to Carrickfergus was 'little more than an expression of personal anger at his time being wasted by Carrickfergus's request' whilst what he said to the BBC 'amounts to no more than a personal attack upon the family of Paul Cochrane and the people of Northern Ireland. It is little more than vulgar abuse'.<sup>59</sup> On that basis, the comments were not entitled to the highest protection under Article 10. Thus, whilst Wilkie J. noted the ECtHR decisions in *Lingens v. Austria*<sup>60</sup> and *Jerusalem v. Austria*,<sup>61</sup> both of which confirm that Article 10 applies particularly to political expression, even that which shocks, offends or disturbs, especially where the speech is by an elected representative of the people, these principles did not apply: 'the overwhelming impression [of Sanders's views] is that they are the ill-tempered response of a person who thought that he should not be being troubled by the request of Carrickfergus and who has chosen to express his annoyance in personal and abusive terms'<sup>62</sup> which 'did not constitute political expression'.<sup>63</sup>

Wilkie J.'s rationale for this decision could be interpreted in a number of ways. It could be read as implying a connection between the level of offensiveness and the definition of political content: that Sanders's speech was *not* political *because* it was offensive. Alternatively, it could be read as implying no connection: that

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<sup>57</sup> *Ibid.*, [77].

<sup>58</sup> *Ibid.*, [78].

<sup>59</sup> *Ibid.*, [79]-[80].

<sup>60</sup> (1986) 8 EHRR 407.

<sup>61</sup> (2003) 37 EHRR 25.

<sup>62</sup> Fn. 42, [81].

<sup>63</sup> *Ibid.*, [84].

Sanders's speech was *not* political, *just* offensive. The former interpretation seems to conflict with the notion of protecting offensive political expression and, amongst other things, would be contrary to the 'mirror principle' (discussed in the previous chapter) given the findings in *Lingens v. Austria*. If the decision reflects the latter interpretation then the finding is unconvincing. Wilkie J.'s finding that Sanders's initial reaction to the Carrickfergus letter was born out of nothing more than irritation seems convincing based on the facts, however once the press became involved, Sanders was given a platform to express his views on the political situation in Northern Ireland (albeit in a brusque and insensitive manner). Yet the reason *why* that platform was established (due to his misunderstanding) is surely irrelevant. Consequently, the fact that Sanders's view is unattractive, unsustainable and insulting is a reason to condemn his political position and for the people of Peterborough not to re-elect him (which, however, they did). In other words, it seems more accurate to say the speech was *poor* political speech rather than *not* political speech. Although Wilkie J. might still have found Article 10 had not been violated (there is no absolute right to freedom of political expression) the higher level of judicial scrutiny into interferences with political expression ought to have been apparent. This point is expanded upon, below.<sup>64</sup>

## ii) *Livingstone v. the Adjudication Panel for England*

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<sup>64</sup> See section 3, below.

The decision in *Livingstone* provides points of comparison and contrast with the decision in *Sanders*.<sup>65</sup> It concerned the behaviour of Ken Livingstone, whilst Mayor of London, toward a reporter, after leaving a reception to mark the twentieth anniversary of Chris Smith MP's public declaration of his homosexuality. When the reporter said he worked for the *Evening Standard*, Livingstone remarked 'how awful for you...Have you thought of having treatment?' (which the journalist ignored) before asking 'Were you a German war criminal?'. The reporter replied 'No, I'm Jewish...I'm actually quite offended by that' to which Livingstone said 'Well you might be, but actually you are just like a concentration camp guard. You're just doing it 'cause you're paid to aren't you?' and, whilst continually ignoring the journalist's question 'How did tonight go?', said, between interruptions by the journalist, 'It's nothing to do with you because your paper is a load of scumbags...It's reactionary bigots...and who supported fascism...Well, work for a paper that isn't...that hadn't a record of supporting fascism'.<sup>66</sup> Mr Livingstone appealed against the sanction imposed by the Adjudication Panel of England to suspend him consequently for four weeks on the basis, amongst other things, that his right to freedom of speech had been infringed. Unlike in *Sanders*, the Court agreed that the right had been infringed by the sanction – not because the speech was political but because there were no clear and satisfactory reasons advanced to render him liable to sanctions.<sup>67</sup> Collins J. did not accept the Tribunal's reasoning that Livingstone's actions implicated his position as Mayor. Instead, the Court found that Livingstone was 'off duty' at the point at which the offensive remarks were made

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<sup>65</sup> Fn. 43.

<sup>66</sup> *Ibid.*, [5].

<sup>67</sup> *Ibid.*, [32]-[38].

and, furthermore, that the offensive remarks did not bring the office of London Mayor into disrepute therefore the code of conduct could not be applied.<sup>68</sup>

Had the Divisional Court said nothing further, the decision would be unremarkable. Yet Collins J. also found that the sanctions imposed on Livingstone amounted to a breach of Article 10. His treatment of this claim is interesting for a number of reasons. In general terms, the treatment of freedom of speech appears out of kilter with the narrow consequentialist approach seen in other Article 10 cases.<sup>69</sup> Also, the finding that the speech was not political seems contestable for similar reasons as with *Sanders*: Livingstone is making a comment on the Evening Standard and its journalists, in particular that they are ‘bigots...who supported fascism’. This is not to say it is political expression in its best form or at its most persuasive but to say it is not political at all is hard to accept, especially since Collins J.’s treatment of this point is more declaratory than explanatory:

‘I have no doubt that the appellant was not to be regarded as expressing a political opinion which attracts the high level of protection. He was indulging in offensive abuse of a journalist whom he regarded as carrying out on his newspaper’s behalf activities which the appellant regarded as abhorrent’<sup>70</sup>

As in *Sanders*, this finding might be read as suggesting that offensive speech and political speech are mutually exclusive. Yet having found that the speech did not engage the higher level of protection afforded to political speech, Collins J.

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<sup>68</sup> *Ibid.*, [37].

<sup>69</sup> See discussion of Article 10 cases involving politicians in the following chapter at pages 247 to 255.

<sup>70</sup> Fn. 43, [35].

nevertheless cited Hoffmann LJ's findings in *Central Television* in the following terms in order to support his finding that freedom of speech under Article 10 covers abuse:

'Freedom means ... the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute ... It cannot be too strongly emphasised that outside the established exceptions ... there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.'<sup>71</sup>

Yet, as set out above, Hoffmann LJ's comments were made in a case where both political expression and the freedom to publish were found to be at stake. Given the liberalness of Hoffmann LJ's approach to freedom of speech, it is apparent that he was applying a high level of protection to such expression. Thus, by citing this passage in spite of finding that Livingstone's expression did not deserve the highest level of protection, Collins J.'s analysis strongly suggests the application of that high level in any event. Moreover, the reference to Hoffmann's comment that freedom of speech is 'trump card which always wins' is not only unhelpful in the circumstances but also seems to suggest a right to abuse. Such a finding seems not only unnecessary given the earlier finding that the code of conduct did not apply to the circumstances in any event but also risks overstating the significance of the expression at stake. It is unremarkable to say that abuse is covered by Article 10: as set out above, the Strasbourg jurisprudence applies a low threshold. It is concerning,

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<sup>71</sup> *Ibid.*

however, that *Livingstone* might be read as establishing a *right* to abuse. Furthermore, the finding is intriguing given the development of the ‘right of others’ exception to include ‘the right not to be offended’ (this point is discussed further in the following section).

### iii) Conclusions

In many ways these two cases appear contradictory. Whereas the decision in *Livingstone* suggests that the expression could be protected under Article 10 even though it was just abuse, the decision in *Sanders* suggests the opposite: that the expression could not be protected *because* it was just abuse. Of course, it is important not to overlook the context of these decisions. The key issue at stake in both was whether the expression brought the office in question into disrepute. On that basis, it may be said that the issue was not what the individuals said but the circumstances in which they said them. Thus, it was significant in *Livingstone* that Mr Livingstone was found to be ‘off-duty’ when speaking. Similarly, it might be said that Mr Sanders was entitled to make his comments if speaking as a private citizen but not as leader of Peterborough City Council. Yet it is the treatment of the Article 10 claims in these decisions rather than the outcomes that is at the centre of the discussion above: it is the courts’ treatment of expression that shocks, offends or disturbs that is in issue. Amongst other things, these decisions narrow down the ambit of what counts as ‘political’ in the context of offensive expression. Whereas *Sanders* suggests the level of offensive may be such as to negate this categorisation,

*Livingstone* confirms that such categorisation stands or falls based on the plain meaning of the specific expression: a political texture cannot be inferred based on extrinsic evidence. However, these interpretations of the term ‘political’ do not appear harmonious with the ECtHR’s finding in *Vereinigung Bildender Künstler (“VBK”) v. Austria*,<sup>72</sup> which it will be recalled was discussed in Chapter Three.<sup>73</sup> In *VBK*, the ECtHR adopted a particularly liberal stance in which it accepted that the depiction of a politician ejaculating on Mother Teresa could be regarded as a form of ‘counter attack’ against that the political party (that the politician had belonged to) who had previously criticised the artist. Given that such an interpretation specifically required extrinsic knowledge of that previous criticism, it represents a point of contrast with the decision in *Livingstone*. There is a further issue to be discussed in respect of these cases: as is well-established in the Strasbourg jurisprudence, politicians are provided with a further level of protection as speakers because of their place in the democratic process. This point is specifically discussed in the following chapter, which examines the UK courts differential treatment of speakers based on their identity.<sup>74</sup>

Moreover, these two cases are significant in so far as they relate to the theme of the next section, which explores the UK courts’ development of the ‘rights of others’ exception under Article 10(2). By exploring this case law, the discussion in the next section builds toward the conclusion that the development of rights of others not to be offended, combined with the treatment of ‘political’ in decisions like

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<sup>72</sup> (2007) ECDR 7.

<sup>73</sup> See discussion at pages 112 to 115.

<sup>74</sup> See discussion from pages 247 to 255

*Sanders* and *Livingstone*, do not qualify the commitment to protect offensive political expression so much as render it sterile.

### 3. Development of the ‘rights of others’ exception

Within the exceptions to Article 10, listed in subsection 2, is the ‘rights of others’. Clearly, this exception will apply where another Convention right is at stake and in that case, save for the situation where one of the absolute (or near-absolute rights) is in issue (Articles 2, 3, 4, 6 and 7), neither right has presumptive priority.<sup>75</sup> a close factual analysis is called for in which the appeal of both rights is closely scrutinised so that interferences with either are proportionate, otherwise known as the ‘ultimate balancing act’.<sup>76</sup> An interesting feature of the development of the ‘rights of others’ exception in the UK is its application in circumstances where another Convention right is *not* engaged. In the House of Lords decision in *ProLife*, Lord Scott, whilst dissenting on the outcome of the balancing act, found that the reference in Article 10(2) to the ‘rights of others’:

‘need not be limited to strictly legal rights...and is well capable of extending to a recognition of the sense of outrage that might be felt by ordinary members of the public who in the

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<sup>75</sup> *Campbell v. MGN Ltd.* (2004) 2 All ER 995; *Re S* [2004] UKHL 47

<sup>76</sup> *Re W (Children) (Identification: Restrictions on Publication)* [2005] EWHC 1564 (Fam), [53]. This ‘balancing act’ can be particularly seen in Article 10 v. Article 8 claims: e.g. *Campbell*, *ibid*, *Re S*, *ibid*, and *Re W*: see further discussion on treatment of clashing rights in Fenwick, ‘Clashing Rights, the Welfare of the Child and the Human Rights Act’ (2004) 67(6) *MLR* 889, ‘Judicial reasoning in clashing rights cases’ in Helen Fenwick, Gavin Phillipson and Roger Masterman, eds., *Judicial Reasoning under the UK Human Rights Act*, (2007, Cambridge University Press), 255-307.



privacy of their own homes had switched on the television set and been confronted by gratuitously offensive material'.<sup>77</sup>

Thus the 'rights of others' exception applied to 'the right of home-owners that offensive material should not be transmitted into their homes'.<sup>78</sup> Lord Walker likewise found that the citizen 'has a right not to be shocked or affronted by inappropriate material transmitted into the privacy of his home'.<sup>79</sup> This aspect of the decision was applied in *Connolly v. DPP* (the facts of which are discussed in Chapter Six)<sup>80</sup> where Dyson LJ found that the right extended to the workplace:

'just as members of the public have the right to be protected from such material (sent for such a purpose) in the privacy of their homes, so too, in general terms, do people in the workplace...The more offensive the material, the greater the likelihood that such persons have the right to be protected from receiving it'<sup>81</sup>

This, he added, might be subject to the recipient's profession: a doctor who routinely performs abortions 'may well be materially different'<sup>82</sup> from that of employees in a pharmacy.

Judicial recognition of these 'rights' not to be offended at home or in the workplace is intriguing on a number of levels. For example, what does Lord Scott mean by 'not...strictly legal rights'? How does this fit with the established notions of

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<sup>77</sup> *ProLife*, fn. 21, [91]

<sup>78</sup> *Ibid.*, [92] & [96]

<sup>79</sup> *Ibid.*, [123]

<sup>80</sup> See pages 257 to 260.

<sup>81</sup> *Connolly v. DPP* (2007) EWHC 237, [28]

<sup>82</sup> *Ibid.*

rights advanced by Dworkin<sup>83</sup> or Hohfeld,<sup>84</sup> for example? In what circumstances can this right be deployed? Can an individual initiate a claim based on an infringement of this right? For example, is it a species of, or does it belong to, the concept of respect for the home which has been cautiously recognised by the ECtHR<sup>85</sup> under Article 8 of the Convention? The peaceful enjoyment of the home<sup>86</sup> is a recognised aspect of this concept (albeit recognised in the context of noise<sup>87</sup> and air pollution).<sup>88</sup> However, Lord Scott's reference to 'not...strictly legal' would seem to suggest otherwise given that Article 8 *is* a legal right under the Convention. Yet these are important questions for which no immediate answers exist within Lord Scott's judgment in *ProLife*.

In the context of the decision in *ProLife*, Collins J.'s approach to the expression in *Livingstone* is intriguing: certainly, it does not seem in keeping with the consequentialist approach to freedom of expression seen in other cases. There is no reference to the right not to be offended in the judgment. Instead, Collins J. found that:

'however offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided that it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions...The restraint was not in my judgment shown to be

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<sup>83</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).

<sup>84</sup> Wesley Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 1920.

<sup>85</sup> *Cyprus v. Turkey* (1976) 3 EHRR 482; *Buckley v. UK* (1997) 23 EHRR 101.

<sup>86</sup> See further, Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2006).

<sup>87</sup> *Powell v. UK* (1990) 12 EHRR 355.

<sup>88</sup> *Lopez Ostra v. Spain* (1994) 20 EHRR 277.

necessary in a democratic society even though the higher level of protection appropriate for the expression of political opinion was not engaged'.<sup>89</sup>

Given the finding that political expression was not at stake, the facts of this case would seem to provide fertile ground for the 'right not to be offended' to be applied. In other words, since the higher level of protection afforded to political expression was not applicable and since the 'right not to be offended' is a recognised exception by dint of the decision in *ProLife*, Collins J. could have found that the interference with the right was justifiable.

From the opposite perspective, the decision in *Sanders* is interesting. Wilkie J. did not explicitly state that the right not to be offended applied. However, he was referred in very general terms by Counsel for the Respondent to *ProLife* and he did refer to the legitimate aim of suppression being 'the rights of others',<sup>90</sup> without further explanation of what specific 'right' was invoked. Consequently, given the strong emphasis on Sanders's speech being offensive, it might be implied that the 'right' invoked by Article 10(2) was the right not to be offended. Given that no other Convention right was specifically mentioned or implied, it is difficult to see what other right Wilkie J. might have been referring to. In any event, the absence of further explanation of *which* 'right of others' applied suggests a loose and casual application of the right, which is troubling. The application of the exception in this way is not just apparent in the lower courts. In *ADI*, Lord Bingham stated that 'the rights of others which a restriction on the exercise of the right to free expression may

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<sup>89</sup> *Livingstone*, fn. 43, [38].

<sup>90</sup> *Sanders*, fn. 42, [84]

properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising’,<sup>91</sup> without any explanation of why or how the exception includes this particular non-Convention right. Thus, the status of these ‘non-Convention rights’ is unresolved. Lord Scott’s explanation that the right of others exception need not be limited to strictly legal rights is intriguing. Yet these rights would seem to have no freestanding status: they do not seem to be the type of ‘legal rights’ that can be used to initiate an action. Since it is, typically, existing legislative provisions that are applied to deny the Article 10 claim, are these ‘rights’ parasitic so as to enhance the force of those legislative provisions? Furthermore, although described as not ‘strictly legal rights’, the effect seems more comparable to legal rights than societal interests. In theory, the distinction is crucial since the former holds the greater weight, acting as an equal but conflicting principle to the Article 10 right in action rather than a narrowly construed exception.<sup>92</sup> Yet given that it remains unarticulated and capable of application to a wide variety of circumstances, the ‘right not to be offended’ does not seem equivalent to a narrowly construed exception: it seems fairly broad. In this sense, it is disappointing that the House of Lords has not expanded upon the meaning, or provided guidance about the operation, of these non-Convention ‘rights’.

In practice, however, the need to clarify status as ‘right’ or ‘societal interest’ may have little practical effect in any event since the operation of a real distinction between interest and right, as they operate to justify interferences, is not readily discernible in the HRA case law. As Greer argues in the context of the Strasbourg

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<sup>91</sup> *ADI*, fn. 22, [28].

<sup>92</sup> *Sunday Times v. UK* (1979) 2 EHRR 245, [65].

jurisprudence, the problem with the approach to societal interests lies with the use of the ‘balancing’ metaphor: it ‘is not the notion that Convention rights and competing social interests have to be weighed, but the implication that, *prima facie*, each has equal value’.<sup>93</sup> Yet, even so, given how nebulous the ‘right not to be offended’ is, its application is troubling in free speech terms: certainly, its treatment so far does not suggest the application of a ‘narrowly construed exception’. The following section expands upon the argument that this development of the rights of others exception represents a threat to freedom of expression that should not be ignored.

#### **4. The threat to free speech**

It is recognised that the use of the rights of others exception to uphold non-Convention rights over freedom of expression has occurred in a small number of cases. Yet at the same time, it is important not to downplay the significance of these cases for two reasons: first, the *interpretation* of the exception, to include a wide variety of non-specific non-Convention rights, is happening at House of Lords level and, secondly, the *application* of the exception by first instance judges is especially important because they are the frontline guardians of human rights protection. The purpose of this section is to establish the argument that as a result of the paucity of guidance emanating from the courts on the ‘right not to be offended’, the threat to freedom of speech that exists in the exception is two-fold: first, it is turning judges into regulators of the public debate and, second, it risks becoming a charter for the

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<sup>93</sup> Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge University Press, 2006), 259.

‘heckler’s veto’. Given the dominance of the instrumentalist approach to free speech protection, it will be important to establish why this is an issue if the risk extends no further than to speech that contributes nothing much to public debate in any event.

As Fenwick and Phillipson have argued in general terms, the courts’ consequentialist approach to Article 10 may favour journalists rather than non-journalists.<sup>94</sup> This seems particularly true where the ‘right not to be offended’ is applied. This argument is more fully discussed in the next chapter. Luzius Wildhaber, former President of the European Court of Human Rights has said that ‘what the right to offend is intended to guarantee is the participation in the democratic process through public debate of questions of general concern. The strength of the protection offered will depend on the extent to which the expression can be linked to the direct functioning of democratic society’.<sup>95</sup> This principle is clear from Strasbourg decisions such as *Handyside v. UK*<sup>96</sup> and *Lingens v. Austria*<sup>97</sup> and is firmly established in the UK in cases such as *ProLife*.<sup>98</sup> Thus, where offensive political speech offends, the conflict will be decided, ultimately, on the value of the speech at stake. In this way, it seems that political expression will be protected to the extent that its associated offensiveness does not expunge its instrumental value. In this regard, journalists may be in a better position than non-journalists based on the difference in effect between reporting and advocating offensive political speech. As

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<sup>94</sup> Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006).

<sup>95</sup> Luzius Wildhaber, ‘The Right to Offend, Shock or Disturb? Aspects of Freedom of Expression under the European Convention on Human Rights’ (2001) 36 *The Irish Jurist* 17, 19.

<sup>96</sup> Fn. 4.

<sup>97</sup> Fn. 13.

<sup>98</sup> Fn. 21.

*Jersild v. Denmark*<sup>99</sup> evidences, journalists can better insulate themselves from the offensiveness of the ideas in question if they are *reporting* rather than *advocating* those ideas. In *Jersild*, the fact that the journalist was said to be assisting in the dissemination of extreme racist views did not defeat the Article 10 claim because the journalist was fulfilling his duty to assist in the discussion of public interest matters. Furthermore, the reporting of offensive ideas, arguably, contextualises any associated advocacy that may take place: the argument that this advocacy fits the democratic process value is likely to be better received on the basis that the journalist is entitled to express a view on the issue, within reason.<sup>100</sup>

Yet it might be said that if the capacity to speak freely is diminished in circumstances where the speech, even political speech, offends then why mourn that loss if the speech does not contribute much to the democratic process value in any event? So in the context of the cases discussed above, it might be asked why Mrs Connolly should not be prevented from upsetting pharmacy workers who are just doing their job? Alternatively, it might be said, as Lord Hoffmann did, that a political broadcast on abortion has got very little to do with a general election. Furthermore, it is important to recognise that, in the context of offensive political speech, public order issues and freedom of speech principles may be in direct conflict. As much as it is possible to do so, the discussion in this thesis has sought to divorce the two, ignoring the public order principles in order to focus exclusively on the free speech ones. Yet discussion of offensive political expression forces those public order issues

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<sup>99</sup> Fn. 13.

<sup>100</sup> The significance of press freedom is outweighed where journalists behave so recklessly as to endanger the lives and property of others, as in *Green Corns Ltd v. Claverley Group Ltd* [2005] EWJC 958 (QB) where the printing of care home addresses led to violent demonstrations by angry members of the public living close by.

into the spotlight. Obviously, it is important that freedom of speech is not so grossly exaggerated that the police, *etc*, feel impotent in the face of unrest (and worse) for fear of breaching Article 10. Clearly, there are circumstances in which the political ideal is so offensive in its specific context that free speech principles must give way.<sup>101</sup> Thus it is recognised that in some circumstances, the judiciary *ought to* decide against free speech principles because of those larger community concerns. Yet not all offensive political speech cases will involve such immediate public order issues, especially where there is no direct interaction between the speaker and the audience or bystanders. Moreover, it is important that the judiciary are mindful of the free speech implications, particularly where public order issues arise.<sup>102</sup> In particular, the judiciary should be mindful against installing themselves as regulators of the public debate at large and permitting the ‘heckler’s veto’ to gain a strong foothold. These are the principal threats to freedom of expression that the development of the ‘rights of others not to be offended’ represents.

Thus, the concern is that the judiciary may interpret the rights of others exception as essentially providing licence to dictate the *quality* of public debate: this risk is inherent in the exception being applied in a manner that is both largely unarticulated and unprincipled. Yet there is no need for the courts to go so far. Albeit in the context of press freedom, Lord Hoffmann has previously warned against the dangers of the judiciary ‘whittling away’ freedom of speech by employing ‘ad hoc judge-made exceptions’ according to their own sensibilities of what is best for the

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<sup>101</sup> See Michael Hamilton, ‘Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty Limiting Principles in the Context of Transition’ (2007) 27(1) *Oxford Journal of Legal Studies* 75.

<sup>102</sup> See Andrew Geddis, ‘Free speech martyrs or unreasonable threats to social peace? – ‘Insulting’ expression and s. 5 of the Public Order Act 1986’ (2004) *Public Law* 853, who argues that freedom of speech principles are often neglected in public order cases.



public: the point seems particularly prescient and equally applicable to the development of the rights of others exception. His Lordship recognised that this might pit interests against each other that are ‘not easily commensurable’ but:

‘no freedom is without cost...[yet] a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom...In the area of human rights like freedom of speech, I respectfully doubt the wisdom of creating judge-made exceptions, particularly when they require a judicial balancing of interests. The danger about such exceptions is that judges are tempted to use them.’<sup>103</sup>

Whilst it could be argued that Lord Hoffmann’s fervour is for press freedom rather than freedom of speech for the individual, that is no reason why the principle cannot be universally applied, particularly since it seems to recognise the principle that ‘freedom of expression cannot be exercised in a vacuum’.<sup>104</sup>

Yet there are also issues about the competency of judges to determine what speech is ‘important’ to public debate. Given the above quote, it is ironic that Lord Hoffmann should find in *ProLife* that the speech was hardly critical to a general election: as Barendt argues ‘it is surely not for the courts to determine the relevance of the Alliance PEB (or any political broadcast) to the electoral campaign waged by the main parties’.<sup>105</sup> Furthermore, the potential for the judiciary to decide that speech is unbecoming public debate (and so deny the Article 10 claim) invites comparison with the dark days of the Licensing Act regime, which permitted the superintendence

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<sup>103</sup> *Central Independent Television*, fn. 32, 652-653.

<sup>104</sup> *Committee for the Commonwealth of Canada v. Canada* (1991) 77 DLR (4<sup>th</sup>) 385, 394 per Lamer CJ

<sup>105</sup> Eric Barendt, ‘Free Speech & Abortion,’ (2003) *Public Law* 580, 584

of a licenser to regulate the printing press.<sup>106</sup> This is not to say that the ‘right not to be offended’ will always act as a prior restraint but certainly it has the capacity to do so *if* the judiciary apply the right too literally or liberally. Alternatively, it has the capacity to replicate the old ‘seditious libel’ offence which, as Levy observes, was a ‘commodious concept encompassing anything from criticism of public policy to advocacy of overthrow of government’.<sup>107</sup> It is (hopefully) highly unlikely that the judiciary would deny Article 10 protection because the speech *criticises* government in some way. As Lord Scott said in the House of Lords decision in *Rusbridger*, ‘the United Kingdom is a mature democracy and in a mature democracy people do not get prosecuted for advocating political change by peaceful and constitutional means’.<sup>108</sup> Of course this is susceptible to a narrow reading of ‘peaceful and constitutional means’ since this stipulation may be read as requiring the non-journalist to communicate to a newspaper or politician so that these constitutional actors may take up the cudgels. This narrowness is implicit in *Connolly*: Dyson LJ found that the prosecution of Mrs Connolly was necessary in a democratic society because, amongst other things, the photographs ‘were sent to persons who had not taken up a public position on the abortion issue and who, unlike, for example, politicians, could have no influence on what is ultimately a political debate’.<sup>109</sup>

The reaction of the ‘audience’ to the speech is also clearly critical and this raises the further concern that a literal and liberal application of the ‘right not to be

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<sup>106</sup> See Geoffrey Marshall, ‘Press Freedom and Free Speech Theory’ (1992) *Public Law* 40; Leonard Levy, *Emergence of a Free Press* (OUP, 1985); David Colcough, *Freedom of Speech in Early Stuart England*, (Cambridge University Press, 2005).

<sup>107</sup> Levy, fn. 106, 100.

<sup>108</sup> *Rusbridger*, fn. 11, [46].

<sup>109</sup> *Connolly*, fn. 81, [31].

offended' is a charter for the 'heckler's veto' in which the 'audience' effectively controls what may or may not be said according to their own sensibilities; that the most aggressive or most sensitive members of the audience may prevent the speaker speaking. The potential threat to freedom of political expression of the 'heckler's veto' is well-recognised in case law and academic commentary. *Beatty v. Gilbanks*<sup>110</sup> is the classic statement of what Barendt describes as 'an uncompromisingly pro-free speech'<sup>111</sup> stance on the issue. In *Brutus v. Cozens*, the court found that s. 5 of the Public Order Act 1936 did not apply to all speech that was likely to occasion a breach of the peace otherwise 'determined opponents may not shrink from organising or at least threatening [such] in order to silence a speaker whose view they detest'.<sup>112</sup> *Redmond-Bate v. DPP*<sup>113</sup> is the most recent statement of protection in such uncompromising terms. Yet these instances show the term deployed in public order contexts. It is important that the judiciary is cautious not to limit the notion of the heckler's veto as only applicable in public order contexts. The same concerns apply in broader circumstances than street protest and seem particularly appropriate to the 'right not to be offended'. It is important the judiciary do not allow the most vulnerable *actual* or *potential* audience member to determine what may or may not be said.

'Offence' and 'contribution to democratic process value' are fairly elastic terms. The risk, discussed above, is that the courts' approach to the right not to be offended may erode the commitment to protect offensive political speech in two

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<sup>110</sup> (1882) 9 QBD 308.

<sup>111</sup> Barendt, fn. 20, 303.

<sup>112</sup> (1972) 2 All ER 1297, 1299-1300.

<sup>113</sup> Fn. 30.

ways: first, the offensiveness of the speech may lead the court to classify or misclassify the speech as not ‘political’;<sup>114</sup> secondly, the court may decide that the expression does not sufficiently contribute to the democratic process so as to warrant protection because, for example, it tends to alienate the audience from the speaker’s desired political objective due to its offensiveness. Thus, the interpretation of the ‘rights of others’ exception in *ProLife* and *ADI* may be treated as providing licence to the judiciary to use it as a ‘blocking device’ against the free speech arguments deployed. Starting from the position that the speech in question does not significantly contribute to the democratic process value, the ‘rights of others’ exception may then be adjusted and labelled in whatever terms reflect the negative effect that the speech is said to have: if it offends, the exception manifests as the right not to be offended; if it misleads, it becomes the right not to be misled; if it sensationalises, it becomes the right not to be whipped into a frenzy; and so on. Quite clearly, then, the UK courts interpretation of the ‘rights of others’ exception, so far, carries a wildcard quality. Moreover, used in this way, the ‘rights of others’ exception fences off the domain of Article 10 protection, reducing the space that Article 10 may inhabit. The threat this poses to free speech is very real: that space may be reduced to a small area. Thus, it is submitted that the approach to offensive political expression ought to be revisited. At present, because it is so heavily consequentialist focused, it requires the courts to balance the contribution made against the offence caused. Yet the court cannot objectively determine such a balance and so must rely upon *ad hoc* calculations. This is an inherently unreliable test. An extreme example of this happening can be seen in Lord Hoffmann’s judgment in *ProLife*. This produces a very narrow application of

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<sup>114</sup> As in *Sanders* and *Livingstone*, discussed above.

the argument from participation in a democracy, *i.e.*, it treats the rationale as a requirement that the expression results in an *actual* influence on the democratic process. This goes further than a requirement that an intention to contribute to public debate is evident.<sup>115</sup>

## 5. A resolution?

It will be argued in this section that the *potential* mischief to free speech principle that the development of the rights of others exception represents may be resolved in two ways, both of which involve greater adherence to the rationales outlined by Lord Steyn in *ex parte Simms*. First, the judges could better realise the broader rationales that Lord Steyn refers to, as recognised in established theory by the arguments from self-fulfilment and truth or, even, the argument from autonomy. These theories were discussed in general terms in Chapter Two; the application of them to offensive political expression is considered in more detail below. It is recognised that these broader approaches to freedom of expression may be unattractive to the UK judiciary: it may be concluded that such broader rationales conflict with the ECtHR's approach to freedom of expression and, therefore, conflict with the 'mirror principle' under s. 2, HRA (as discussed in Chapter Four). Alternatively, the UK judiciary might adopt a broader approach to the argument from participation in a democracy evident in, for example, Meiklejohn's conception of the

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<sup>115</sup> See discussion in Chapter Three.

theory.<sup>116</sup> No conflict need arise with the Strasbourg jurisprudence if the UK judiciary adopted such an approach – indeed, it was argued in Chapter Three that the Strasbourg jurisprudence seems to have greater parallels with Meiklejohn’s approach than the narrow consequentialist approach evident in the UK jurisprudence. Furthermore, such an approach would not require the judiciary to measure (or, at least, try to measure) the actual contribution of such speech to the democratic process but rather would require the judges to do no more than identify whether the speech intended to make such a contribution.

Arguably, the common law already contains signs of these broader approaches to freedom of expression. For example, these can be seen in Lord Justice Sedley’s comments in *Redmond-Bate*:

‘What Speaker’s Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of State control of unofficial ideas. A central purpose of the [Convention] has been to set close limits to any such assumed power.’<sup>117</sup>

Amongst other things, these comments emphasise the need for the judiciary to stop short of determining what value the expression actually makes to society at large. Likewise, the Court of Appeal decision in *ProLife* provides further evidence. Lord Justice Laws noted that the intended PEB ‘is certainly graphic; and as I have said,

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<sup>116</sup> Meiklejohn, fn. 1.

<sup>117</sup> *Ibid.*

disturbing. But if we are to take political free speech seriously, those characteristics cannot begin to justify the censorship that was done in this case'.<sup>118</sup> Moreover, it reinforces the special role of the judiciary in protecting diverse sources of political expression: 'I would assert that as a matter of domestic law the courts owe a special responsibility to the public as the constitutional guardian of the freedom of political debate'.<sup>119</sup> Likewise, as noted above, Lord Justice Simon Brown found that 'the importance of freedom of expression in the context of political speech is hard to exaggerate'.<sup>120</sup>

The UK judiciary might also have regard to the broader consequentialist values evident in the established theories concerning the contribution free speech makes to the development of individual faculties. The arguments for this rationale were discussed in Chapter Two and, as noted, have been well-established by commentators such as Emerson,<sup>121</sup> Baker<sup>122</sup> and Redish,<sup>123</sup> to name a few. Although such theories extend the ambit of free speech beyond the narrow conceptions of the democratic process value,<sup>124</sup> they have also application to that process: as Baker argues, his model 'emphasizes people's self-fulfilment and participation in societal change'.<sup>125</sup> Such theories go beyond the democratic process value because, as Redish argues, 'the very exercise of one's freedom to speak, write, create, appreciate or learn

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<sup>118</sup> *ProLife*, fn. 21, [43].

<sup>119</sup> *Ibid.*, [36].

<sup>120</sup> *Ibid.*, [59].

<sup>121</sup> Thomas Emerson, 'An Essay on Freedom of Political Expression Today' (1951) 11 *Law. Guild Rev.* 1

<sup>122</sup> Baker, fn. 1.

<sup>123</sup> Redish, fn. 1.

<sup>124</sup> Redish, for example, argues that the self-development rationale extends to 'all life-affecting decisionmaking, no matter how personally limited, in much the same manner in which it aids the political process...there thus is no logical basis for distinguishing the role speech plays in the political process', Redish, fn. 1, 604.

<sup>125</sup> C. Edwin Baker, 'Realizing Self-Realization: Corporate Political Expenditures and Redish's *The Value of Free Speech*' (1982) 130 *University of Pennsylvania Law Review* 646, 658.

represents a use, and therefore a development, of an individual's uniquely human faculties'.<sup>126</sup> This observation accords with Emerson's view that 'freedom of expression is essential to the full development of the human personality'<sup>127</sup> or, as Perry puts it, that individuals achieve an 'even better understanding of reality'.<sup>128</sup> On this basis, the speech in *ProLife* seems to have a stronger position: it intends to depict a sharper image of the abortion process so as to provide a better understanding of reality. This argument would seem to increase the range of reasons for protecting speech: it does not limit free speech to a narrow sense of contribution to the democratic process, *i.e.*, to elect candidates to office and then scrutinise them once there, but rather it protects speech that provides the electorate with a deeper understanding of political issues in a more generalised way.

Furthermore, the UK judiciary might apply the argument from truth more liberally. As set out in Chapter Two, the argument is easily misunderstood as validating the exclusion of speech that is 'false': this can be seen, for example, in Lord Hobhouse's judgment in *Reynolds*,

'The citizen is at liberty to comment and take part in free discussion. It is of fundamental importance to a free society that this liberty be recognised and protected by the law. [Yet] there is no human right to disseminate information that is not true...The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society'<sup>129</sup>

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<sup>126</sup> *Ibid.*

<sup>127</sup> Emerson, fn. 121, 3.

<sup>128</sup> Perry, fn. 1, 1158.

<sup>129</sup> *Reynolds*, fn. 15, 238.



However, such resistance to falsehood may be challenged on the grounds put forward by J.S. Mill, explored in Chapter Two:<sup>130</sup> that such exclusion is both an assumption of infallibility and neglects the importance of error (that a meaningful understanding of the truth can only be arrived through discussion of all views of it). Furthermore, there is a discrepancy between Lord Hobhouse's assessment and the recent findings of the ECtHR that Article 10 'as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful'.<sup>131</sup> This statement by the ECtHR seems in keeping with Mill's argument from truth.

However, the judiciary might feel that greater recognition of these broader rationales for free speech protection would conflict with the established Strasbourg interpretation of the principles underpinning Article 10 (and, therefore, the courts' obligations under s. 2 of the HRA), which clearly gives pre-eminence to a consequentialist rationale in keeping with the argument from participation in a democracy.<sup>132</sup> As set out in Chapter Four, Lord Bingham has made it clear on a number of occasions, most recently in *ADI*, that fresh interpretation of those principles is not an option open to the UK courts.<sup>133</sup> Yet greater recognition of these broader rationales need not clash with the Strasbourg approach. Indeed, as is evident from the decision in *Handyside*, for example, these rationales are recognised by the

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<sup>130</sup> See pages 69 to 81.

<sup>131</sup> *Salov v. Ukraine* (2007) 45 EHRR 51.

<sup>132</sup> See discussion in Chapter Three.

<sup>133</sup> *ADI*, fn. 22, [37].

ECtHR.<sup>134</sup> However, as other commentators have argued, these broader rationales have not been realised to their full extent in the Strasbourg jurisprudence:<sup>135</sup> they are limited to the extent that the democratic process value must also be satisfied. In other words, whilst self-fulfilment and truth are relevant, as former President of the ECtHR, Luzius Wildhaber has said of the Strasbourg jurisprudence ‘ultimately it is the role played in democratic society by the expression at issue which determines the level of protection that will be accorded to it’.<sup>136</sup>

As set out in Chapter Two, however, there are several established theories centred on the argument from participation in a democracy and some are broader than others. Thus, the UK courts could realise a broader approach to freedom of expression by adhering to one of these broader rationales, such as Meiklejohn’s conception which adopts a broad approach to definition of ‘political’ and places emphasis on the intention to contribute not the level of contribution made in terms of the protection to be afforded to the speech.<sup>137</sup> Such an approach would also be in keeping with the Strasbourg jurisprudence. For example, as set out in Chapter Three, the ECtHR has recently provided guidance on the question of what constitutes a matter of public interest in which it recommended a broad approach is taken to the subject matter and context.<sup>138</sup> The liberal approach taken to the question of contribution is apparent, for example, in the *VBK* decision or, for that matter, in *Salov v. Ukraine* mentioned above, where the ECtHR found that the dissemination of untrue

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<sup>134</sup> See discussion in Chapter Two.

<sup>135</sup> See, e.g., Fenwick and Phillipson, *Media Freedom*, fn. 94; Barendt, *Freedom of Speech*, fn. 20. See discussion in Chapter Three.

<sup>136</sup> Wildhaber, fn. 95, 31.

<sup>137</sup> See discussion in Chapter Two at pages 58 to 69.

<sup>138</sup> *Tonsberg Blad as and Haukom v. Norway* (2008) 46 EHRR 40, [87].

statements that a political candidate had died still constituted ‘important issues which may give rise to a serious public interest’<sup>139</sup> and therefore applied the highest level of protection afforded to political debate.

As noted above, the UK judiciary appears to have adopted a narrower approach to the question of ‘contribution’ by seeking to measure the actual impact such speech has on public debate. There is a dearth of case law on the question of defining ‘public interest’. In non-free speech contexts, the term ‘political’ has tended to be interpreted narrowly. For example, in charity cases, a ‘political object’ has been defined as that which seeks to further the interests of a political party or procure changes in laws, policies or administrative decisions, domestically or internationally.<sup>140</sup> Similarly, in extradition and asylum cases, it has been found that ‘offences of a political nature’ were those directed against the State in suffrage against laws and policies of that State.<sup>141</sup> Thus there is a clear theme in such cases that in order to find positively for the accused, the accused must be ‘at odds with the state...on some issue connected with the political control or government of the country’<sup>142</sup> and the offence must be directed against the State (possibly including opposition parties)<sup>143</sup> in order to change its policies or laws:<sup>144</sup> thus the criminal act

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<sup>139</sup> Fn. 131, [111].

<sup>140</sup> *McGovern v. Attorney-General* (1982) Ch 321, 340, per Slade J. summarising the House of Lords decisions in *Bowman v. Secular Society Ltd* (1917) AC 406 and *National Anti-Vivisection Society v. Inland Revenue Commissioners* (1947) 2 All ER 217

<sup>141</sup> *Schtraks v. Government of Israel* (1964) AC 556, 584, 589-92; *Cheng v. Governor of Pentonville Prison* (1973) AC 931, 942-3, 944-6.

<sup>142</sup> *Schtraks*, fn. 141, 591 per Viscount Radcliffe.

<sup>143</sup> *Obiter dicta* of Lord Slynn in *T v. Immigration Officer* (1996) AC 742, 775.

<sup>144</sup> *R. v. Governor of Pentonville Prison, ex parte Cheung* (1973) AC 931.

must affect only public officials<sup>145</sup> and not innocent civilians.<sup>146</sup> Furthermore, criminal acts by anarchists might not be captured on the basis they are ‘anti-political’ in nature.<sup>147</sup> There is Canadian authority for the proposition that the phrase ‘politician opinion’ embraces any ‘opinion on any matter in which the machinery of state, government and policy may be engaged’.<sup>148</sup> In general overview, these decisions would seem to promote a narrow definition of ‘political’, restricted to specific actions of the State.

However, two recent decisions (both, coincidentally, concerning statements made by Baroness Hale) provide mixed signs for whether a more liberal approach to the definition may be realised. The first provides some encouragement. In *Campbell v. MGN Ltd.*,<sup>149</sup> after noting that political speech is ‘top of the list’ of speech deserving protection in a democratic society,<sup>150</sup> Baroness Hale expands upon what this would include:

‘The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also

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<sup>145</sup> In *In Re Castioni* (1891) 1 QB 149 extradition was refused where dissidents killed a public official in course of attacking the municipal palace of a Swiss canton due to dissatisfaction with the government.

<sup>146</sup> Therefore terrorism is excluded: see *T. v. Immigration Officer*, fn. 143.

<sup>147</sup> *In Re Meunier* (1894) 2 QB 415.

<sup>148</sup> *Canada (Attorney-General) v. Ward* (1993) 2 SCR 689, 746-7, referred to by the Court of Appeal in *Storozhenko v. Secretary of State for the Home Department* (2001) EWCA Civ 895, [18]-[22] although in that case it was found to be unnecessary to reach any decisions on the boundaries of the expression.

<sup>149</sup> Fn. 75.

<sup>150</sup> *Ibid.*, [148]

important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our domestic life'.<sup>151</sup>

This list is not intended to be exhaustive and certainly seems shaped by context of the case: the extent to which revelations about Naomi Campbell's private life engaged the right to free speech.<sup>152</sup> However, to some extent, it echoes Meiklejohn's categorisation of the speech that would be protected due to its effect on the audience's capacity to fully engage with democracy.<sup>153</sup>

However, in the second case, *Jameel v. Wall Street Journal Europe*,<sup>154</sup> the approach appears more cautious. In this defamation action, the House of Lords applied the principle from *Reynolds v. Times Newspapers Ltd*:<sup>155</sup> *i.e.*, publication being in the public interest as a defence to defamation. In this context, and in explaining the nature of the defence, Baroness Hale commented on what she meant by 'a real public interest':

'this is, as we all know, very different from saying that it is information which interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it. It is also different from the test...of whether the information is 'newsworthy'. That is too subjective a test, based on the target audience, inclinations and

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<sup>151</sup> *Ibid.*

<sup>152</sup> This case is discussed in greater detail in the following chapter at pages 239 to 247.

<sup>153</sup> See discussion in Chapter Three.

<sup>154</sup> (2007) 1 AC 359.

<sup>155</sup> Fn. 15.

interests of the particular publication. There must be some real public interest in having this information in the public domain.’<sup>156</sup>

It has been argued that this assessment of ‘public interest’ is ‘arguably complacent’: ‘there is a wide grey area between matters of crucial political import and mere trivia, and the tipping point will not always be obvious to either media practitioners or to the courts’.<sup>157</sup> Thus, the definition is fairly empty: certainly, it does not indicate whether the UK judiciary will adopt a liberal or conservative approach to the question of ‘real’. Whilst it is fairly obvious that matters that interest the public are not necessarily in the public interest, Baroness Hale’s summary does not fully address the issue. Neither does Lord Scott’s assessment that ‘information may be interesting but trivial...[or alternatively] it may be lacking in much interest but nonetheless important’.<sup>158</sup>

Finally, within this section, two other, more circumspect, arguments will be advanced. First, that since the ‘rights of others not to be offended’ may be deployed in situations where those hearing the message are or might be offended, is it not equally important, on the same basis, to consider the ‘rights of other others’?, namely those who are not or might not be offended; those who may not think they want to hear the political view but, on hearing it, derive some positive benefit? Hypothetically, an individual exposed to a PEB by *ProLife* may be so educated through exposure to the graphic images as to decide either that, due to this

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<sup>156</sup> *Jameel*, above, fn. 154, [147].

<sup>157</sup> Scott, ‘The same river twice? *Jameel v. Wall Street Journal Europe*’ (2007) *Communications Law* 52, 55. Beattie offers a more supportive analysis of the decision: ‘New life for the Reynolds “public interest defence”?’ *Jameel v. Wall Street Journal Europe*’ (2007) *EHRLR* 81.

<sup>158</sup> *Jameel*, fn. 154, [138]

improvement of their faculties, they would not want to proceed with an abortion or, alternatively, that this new information does not outweigh the important considerations that have led them to want an abortion in the first place. This seems to accord with Lord Scott's view in *ProLife* that censoring the intended PEB 'denigrates the voting public, treating them like children who need to be protected from the unpleasant realities of life, [and] seriously undervalues their political maturity'.<sup>159</sup> On this basis, the operation of the right not to be offended may be tempered by the consideration that the greater societal interest is not fully encapsulated by, and so cannot be dictated by, the most sensitive members of society.

Secondly, the judiciary might also have greater regard to the limits of those 'constitutional means' that Lord Scott mentions in *Rusbridger* to promote unpopular ideas. Arguably, the capacity of the media, the executive or Parliament to devote time and energy to promoting and debating unpopular ideas is limited. Consequently, to imply, as Lord Justice Dyson did in *Connolly*, that the object of free speech may be achieved by referring such matters to a local MP or newspaper is questionable. It is self-evident that the executive and Parliament have limited time to discuss such issues, particularly where urgent matters of national security, *etc*, impinge. Furthermore, it should not be overlooked that the print media faces a looming crisis as it competes with the internet, television and other faster sources of information to survive: the need to ensure commercial viability (which has already been noted by the

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<sup>159</sup> *ProLife*, fn. 21, [99]. Furthermore, although in a press freedom context, the view of Sir Thomas Bingham MR (as he then was) is relevant. In 1993, in deciding that an interview with murderer Denis Nilsen be televised, he endorsed the view that: 'it is quite unnecessary for any relative of any of Nilsen's victims to be distressed by this programme if broadcast in its existing form in any way at all, since all that anyone has to do is to switch off the programme,' *Secretary of State for the Home Department v. Central Broadcasting Limited and Another* (1993) EMLR 253, 271.

UK courts as a reason to protect media freedom)<sup>160</sup> may distract the press from its public watchdog function as it seeks to sell newspapers through the (apparently) more lucrative appeal of celebrity gossip-focused, ‘confessional’-style journalism.<sup>161</sup> Consequently, ‘offensive’ political speech may be reduced to footnote status through any of these constitutional means and so not get the full exposure that passionate proponents of the idea feel it deserves (and, furthermore, those passionate proponents may be more convincing in their explanation of why these offensive ideas deserve political consideration).

## 6. Conclusion

Lord Justice Sedley’s principled stance on freedom of speech in *Redmond-Bate v. DPP* seems outdated already.<sup>162</sup> Rather than demonstrating that unpopular speech is protected *because* it is political *despite* being offensive the post-HRA case law suggests, instead, that the terms of the commitment to protect political expression have been altered so that, at most, offensive political speech *may* be protected *if* there is a clear connection to political expression *and* the offensive element is incidental or else justified by the circumstances. Lord Bingham’s reference in *ADI* to a ‘level playing field’ for ideas to be debated suggests that all speakers are equal and so the quality of speech is irrelevant. Yet the pre-eminence of an apparently narrow consequentialist approach to Article 10 protection suggests the opposite is true: that

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<sup>160</sup> See judgments of Lord Hoffmann and Baroness Hale in *Campbell*, fn. 75 and Lord Woolf in *A v. B plc* (2003) QB 195.

<sup>161</sup> See discussion in Fenwick and Phillipson, *Media Freedom*, fn. 94 on this point, 1-33.

<sup>162</sup> As set out on p. 180, above.



the quality of speech *is* relevant when deciding whether to protect political speech. This is particularly pertinent where the speech is also labelled as ‘offensive’ since, it seems, the ‘right of others not to be offended’ becomes engaged. Yet, as *Handyside* confirms, the commitment to protect political speech clearly includes offensive political expression. The apparent tension between this right to offend and the right not to be offended is certainly capable of being resolved in favour of Article 10 where the media are involved, for two reasons: *reporting* offensive speech is not as objectionable as *advocating* offensive speech and, where some opinion is advanced, a collective (rather than individual) interest is likely to be at stake on the basis of the contribution that media freedom makes to the public interest and the proper functioning of a democracy. However, where it is spoken by a non-journalist, the commitment to protect offensive political speech seems more uncertain and the zealous stance of Lord Justice Sedley in *Redmond-Bate* less likely to be apparent in the outcome. Applying the consequentialist rationale, the prospect of such speech satisfactorily demonstrating a contribution to the democratic process which outweighs its offensiveness is questionable. The significance of the speaker’s identity to determining the level of protection afforded is discussed in greater detail in the following chapter.

The concern raised by this apparent treatment of offensive political speech, which should not be overstated but nevertheless recognised, is that it requires judges to assess the level of importance of the expression to public debate. It is submitted that this is an assessment that the judiciary cannot accurately determine. Moreover, the ‘right not to be offended’ risks becoming a charter for the heckler’s veto: that the

suppression of unpopular ideas is at the whim of the most sensitive *actual* or, even, *hypothetical* members of society. The narrow consequentialist rationale, equality of societal interests with Convention rights *and* the paucity of guidance on the ‘right not to be offended’ exception is a heady combination that provides fertile ground for this risk to be realised. Moreover, they raise the concern that these principles when combined effectively neutralise the claim that Article 10 applies to political expression that shocks, offends or disturbs.

To avoid this possibility, judges might have greater regard to the broader rationales for protecting freedom of speech, evident in the arguments from self-fulfilment and truth, in particular. Although such an approach *might* conflict (or else be seen as conflicting with) the Strasbourg jurisprudence, a broader approach to the democratic process value offers no such conflict. This would require a broader approach to both the definition of ‘public interest’ and toward the connection of the speech to the democratic process (in which the court should look no further than for evidence of an intention to contribute to such). At present, it may be too soon to concede that the ‘freedom to speak inoffensively is not worth having’ since it may be the most pragmatic option available to the individual non-journalist if they are to be free to speak at all.

# **CHAPTER SIX**

## **Beyond a simple taxonomy of the speech content:**

### **Speaker, speech and speech target**

### **valuations in determining the Article 10 weight**

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#### **1. Introduction**

Whereas the previous chapter explored the UK judiciary's approach to speech content (*i.e.*, offensive political expression), this chapter deals with the courts' approach to free speech in broader terms. It will be recalled that the Strasbourg jurisprudence is said to reflect a hierarchical approach to content, which suggests that the determinative factor in assessing the weight of the Article 10 claim is the classification of the speech involved. Thus, it has been said that this approach risks

reducing the judiciary to taxonomists.<sup>1</sup> Yet, as other commentators have argued, in relation to political speech particularly, the *content* of the speech is not the only discernible factor in the UK's Article 10 jurisprudence to determining the level of protection afforded.<sup>2</sup> It will be argued that a broader assessment of the claim is made based not only on the taxonomy of the speech at stake but also the qualities of the speaker and speech target and how these three factors connect to the consequentialist underpinning of Article 10. It is this combined weight that is then balanced against the competing claim. Moreover, as in the previous chapter, it will be argued that the UK courts' tend to seek to measure the actual contribution to the democratic process value in order to determine the level of protection. Thus the more significantly the speaker, speech or speech target contributes to the democratic process, the greater the chance that the Article 10 claim will succeed. The purpose of this chapter is to identify this pattern in operation in the post-Human Rights Act (the "HRA") case law.

## **2. Outlining the 'speaker, speech, speech target' pattern**

As outlined in Chapter One, free speech protection is determined according to the outcome of a balancing process. Thus the free speech claim is afforded weight as is the competing claim. In determining the strength of this opposing claim, differing weight values are assigned. The guiding principle is that competing Convention rights are taken to hold equal face value to free speech; neither takes automatic

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<sup>1</sup> Tony Martino, 'In conversation with Professor Eric Barendt: hatred, ridicule, contempt and plain bigotry' (2007) 18(2) *Entertainment Law Review* 48, 51.

<sup>2</sup> See, for example, Fenwick and Phillipson, *Media Freedom under the Human Rights Act*, (OUP, 2006), 107 onwards.

precedence over the other.<sup>3</sup> In theory, this presumptive parity does not apply to competing interests: since these are not Convention rights they should only interfere with such rights in very limited circumstances.<sup>4</sup> However, this distinction is not abundantly apparent in practice.<sup>5</sup> As discussed in Chapter Three, the Strasbourg jurisprudence clearly evidences a hierarchical approach to Article 10 in which the weight of the claim depends upon categorisation of the speech, with political expression at the top and commercial expression bottom. Consequently, it may be thought that the UK courts determine the weight of the Article 10 claim by this taxonomical approach. Yet it will be argued that the approach is more nuanced. In relation to the Strasbourg jurisprudence, Fenwick and Phillipson have argued that ‘political expression is...divisible in normative terms’ so that some speakers are better placed to mount a successful free speech claim than others.<sup>6</sup> It is submitted that this division is also apparent in the UK jurisprudence so that the qualities of the speaker and speech target, in terms of their contribution or significance to the consequentialist rationale, also determine the strength of the claim. Thus, it will be argued that there is a discernible, emergent theme in the UK Article 10 jurisprudence in which the UK courts determine the significance of the speech at stake by reference to the connection between each of these three elements (*i.e.*, speaker, speech and speech target) and the ‘democratic process’ value. Thus: politicians and the media score higher on the speaker valuation than non-journalists or protesters with prisoners

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<sup>3</sup> See, for example, *Campbell v. MGN Ltd.* [2004] 2 All ER 995, [55], [138]; *Re S* [2004] UKHL 47

<sup>4</sup> Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge University Press, 2006)

<sup>5</sup> *Ibid.*

<sup>6</sup> Fenwick and Phillipson, *Media Freedom*, fn. 2, 589, although see discussion of this analysis in Chapter Three at pages 120 to 123.

receiving the lowest valuation; speech about a core political issue scores higher than speech about isolated or peripheral political concerns; speech about a politician scores higher than speech about celebrities.

It is acknowledged that this is not an absolute rule and the UK courts have not articulated their approach to Article 10 in these terms. Yet there does seem to be a discernible theme to this effect. This pattern seems to emerge, it is submitted, as a consequence, or manifestation, of the overarching theme in Article 10 cases outlined in previous chapters: that speech is given the highest protection where it benefits the democratic process most. Since it is a theme and not an absolute rule, naturally there are exceptions which defy explanation on these terms. For example, free speech cases involving Royalty seem to contradict this approach: for reasons which are unarticulated (and unclear), speech concerning Royalty is typically afforded a low valuation in speech and speech target terms so that their competing privacy claims tend to succeed.<sup>7</sup> On a similar theme, the development of other Convention rights may affect the pattern, particularly Article 8.<sup>8</sup> Thus it should be recognised that the weight allocated to the opposing claim may represent something of a wildcard which might affect the pattern. That aside, an important consequence of this pattern in action is that the speaker at the lowest end of the value spectrum may find his or her claim disadvantaged in the balancing process even though the speech content might

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<sup>7</sup> See *Prince Radu of Hohenzollern v. Houston* [2007] EWHC 2735; *HRH Prince of Wales v. Associated Newspapers Ltd* [2007] EWHC 1685; *AG v. Parry* [2002] EWHC 3201; *Argyll (Duchess) v. Duke of Argyll* [1965] 1 All ER 611; *Albert (Prince) v. Strange* (1849) De G & Sm 652, LC.

<sup>8</sup> For example, the decision in *A v. B plc* [2003] QB 195 compared to *Mosley v. News Group Newspapers Ltd* (2008) EWHC 687. These cases are discussed below.

attract a high valuation on account of its political theme.<sup>9</sup> By comparison, speakers of (judicially perceived) greater value may obtain Article 10 protection for speech of a more trivial nature (such as celebrity gossip).<sup>10</sup> The following sections evidence this pattern at work, first in relation to those speakers afforded evident greater value and then those afforded lesser value.

### 3. Of greater value: the media and politicians

#### *a) Journalists*

##### i) Open justice

In keeping with the notion that the free speech weight has three elements, the strength of the journalist's right to speak depends on the circumstances. Media freedom, though, consistently receives strong (if not the strongest) speaker status.<sup>11</sup> Arguably, the strongest 'speech' and 'speech target' valuations occur when reporting criminal proceedings and, for slightly different reasons, family proceedings.<sup>12</sup> It is a

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<sup>9</sup> See *R. (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15 and *R. (on the application of ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23. These cases are also discussed below.

<sup>10</sup> *E.g., A v. B plc*, fn. 8.

<sup>11</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 2.

<sup>12</sup> There is a separate debate to this discussion that family law proceedings are shrouded in secrecy. Ryder J. in *BBC v. Rochdale MBC* [2005] EWHC 2862 reports, at [62], that there is a consequent 'increasing recognition of the need to permit greater openness in family cases'. See also, *W (Children) (Identification: Restrictions on Publication), Re* [2005] EWHC 1564; *H (Children), Re* [2005] EWCA Civ 1325; *B (A Child) (Disclosure), Re* [2004] EWHC 411. The issues are different though compared to criminal proceedings, not least that in family law proceedings the need to protect the identity of children involved has a statutory footing.

longstanding principle that ‘open justice’ is secured by such free reporting.<sup>13</sup> Thus ‘the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court’.<sup>14</sup> This is a strong rule,<sup>15</sup> which is now ‘buttressed’ by Article 10:<sup>16</sup> ‘it can only be displaced by unusual or exceptional circumstances’.<sup>17</sup> It is necessary not only to protect the accused’s interest in a fair trial<sup>18</sup> (which is the defendant’s ‘birthright’)<sup>19</sup> but also maintain public confidence in the justice system.<sup>20</sup> Thus it ensures those participating, including judges, are put ‘under intense scrutiny’, so that trials are ‘properly conducted’<sup>21</sup> and that informed public debate may follow.<sup>22</sup> Consequently, it has been said that ‘it is impossible to over emphasise the importance to be attached to the ability of the media’<sup>23</sup> to freely report such. This principle has resonance in any court matter.<sup>24</sup> The court is advised to be ‘vigilant [against] the natural tendency for the general principle to be eroded and for exceptions to grow by accretion’.<sup>25</sup>

However ‘it is not a mechanical rule’.<sup>26</sup> The court has power to disapply the rule but only in exceptional circumstances. This is ‘a power which should be used

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<sup>13</sup> See the leading decision of *Re S*, fn. 3

<sup>14</sup> *Ibid.*, [18] *per* Lord Steyn

<sup>15</sup> *Ibid.*

<sup>16</sup> *R v. J* [2003] EWCA Crim 3268 [2]

<sup>17</sup> *Re S.*, fn. 3, [18] *per* Lord Steyn

<sup>18</sup> *R (on the application of Trinity Mirror plc) v. Croydon Crown Court* [2008] EWCA Crim 50, [17]

<sup>19</sup> *R. v. Bentley* [2001] 1 CAR 307, *per* Lord Bingham

<sup>20</sup> *Re S*, fn. 3, [30]; *Re Webster (A Child)* [2006] EWHC 2898, *per* Munby J., where a miscarriage of justice is alleged, ‘there is a pressing social need for public confidence to be restored – either by the public and convincing demonstration that there has *not* been a miscarriage of justice or, as the case may be, by public acknowledgement that there has been’, [104].

<sup>21</sup> *Re S*, *ibid.*

<sup>22</sup> *Ibid.*, [34]

<sup>23</sup> *Trinity Mirror plc*, fn. 18, [32]

<sup>24</sup> For example, in *Re Webster*, fn. 20, the principle was applied in care proceedings.

<sup>25</sup> *R v. Legal Aid Board, ex parte Kaim Todner* [1999] QB 966, 977 *per* Lord Woolf.

<sup>26</sup> *Re S*, fn. 3, [18].



sparingly...based only on convincing evidence of the need for it'.<sup>27</sup> It is used where publicity 'would frustrate or render impracticable the administration of justice'.<sup>28</sup> This is a well-established power that has survived the post-HRA transition. Cases are now decided according to the balance of Articles 8 and 10. An important aspect of publicity is the public interest in the administration of justice being secured, amongst other things, by ensuring the identity of those convicted is not concealed: 'uncomfortable though it may be...that is a normal consequence of...crime'.<sup>29</sup> Without such identity, it is often said, the trial report would be 'disembodied' and, consequently, 'informed debate about criminal justice would suffer'.<sup>30</sup> Yet it may be necessary to keep this identity concealed, although mere embarrassment is not sufficient<sup>31</sup> and neither is the 'misery, shame and disadvantage' caused to relations of the defendant:<sup>32</sup> there must be reasons 'of a nature that such scrutiny would prove not only embarrassing but positively damaging'.<sup>33</sup> A significant mental<sup>34</sup> or physical<sup>35</sup> harm must be established, such as a serious psychological effect on a related child<sup>36</sup> or consequential prejudicial effect upon placement of a related child into care.<sup>37</sup> Yet the 'onus firmly rests upon an applicant who seeks a departure from 'the general rule';<sup>38</sup> 'the burden is heavy one'.<sup>39</sup> These principles equally apply to similar issues

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<sup>27</sup> *R v. J*, fn. 16, [4].

<sup>28</sup> *AG v. Leveiler Magazine* (1979) AC 440, [450], per Lord Diplock.

<sup>29</sup> *Trinity Mirror plc*, fn. 18, [32], expanded in [33].

<sup>30</sup> *Re S*, fn. 3, [34].

<sup>31</sup> *Crawford v. Crown Prosecution Service* [2008] EWHC 854 (Admin), [31].

<sup>32</sup> *Trinity Mirror plc*, fn. 18, [33].

<sup>33</sup> *H v. The Ministry of Defence* [1991] 2 QB 103, 106H, per Donaldson MR.

<sup>34</sup> *R v. J*, *supra*, fn. 16.

<sup>35</sup> *Carr v. News Group Newspapers Ltd* [2005] EWHC 971 (QB).

<sup>36</sup> *Re LM (Reporting Restrictions: Coroner's Inquest)* [2007] EWHC 1902 (Fam); cf. *Crawford v. Crown Prosecution Service* [2008] EWHC 854 and *A Local Authority v. PD* [2005] EWHC 1832 (Fam).

<sup>37</sup> *Re W*, fn. 12, [77].

<sup>38</sup> *R v. J*, fn. 16.

affecting witnesses.<sup>40</sup> Statutory provisions may also justify interference with the rule<sup>41</sup> though may be vulnerable to s. 4 HRA claims<sup>42</sup> and any such interference must be necessary and proportionate (Article 10(2)). Likewise, if an order against publication is granted, it must be made ‘in clear and unambiguous terms’.<sup>43</sup>

It has been said that there is no ‘presumptive priority’ that the media’s Article 10 claim will succeed any competing Article 8 one.<sup>44</sup> However, this finding is hard to accept in the context, particularly, of ‘open justice’ cases; the case law does not seem to significantly bear out the claim.<sup>45</sup> Given the strength of the rule in favour of media freedom, the balance seems decidedly tipped; it requires circumstances of the utmost contrary public interest to nullify the heavy public interest in unimpeded reporting.<sup>46</sup> Although it is perhaps necessary to state there is no presumptive priority due to the overarching recognition that the Convention rights are equal amongst themselves, the denial seems no more than a paper exercise.<sup>47</sup> Cram has previously noted the courts’ failure in the context of minors’ privacy: ‘to probe free speech

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<sup>39</sup> *A Local Authority v. PD*, fn. 36, [30]. The proposed publication of private medical information may not be enough to discharge the burden, especially where a strong public interest in disclosure exists: *Stone v. South East Coast Strategic Health Authority* [2006] EWHC 1668 (Admin) though compare *Z v. Finland* [1997] 25 EHRR 371 where the ECtHR found the protection of private medical data to be of fundamental importance to a person’s enjoyment of Article 8.

<sup>40</sup> *BBC v. Rochdale MBC* [2005] EWHC 2862 (Fam).

<sup>41</sup> *i.e.*, the *Sexual Offences (Amendment) Act 1992*, s.1(1) prohibits publication of name and photograph of child who is victim of a sexual offence: *O’Riordan v. DPP* [2005] EWHC 1240 (Admin); likewise, the *Contempt of Court Act 1981* may justify interference in matters involving national security (*R v. Times Newspapers Ltd* [2007] EWCA Crim 1925 and *AG v. Punch Ltd and another* [2003] 1 AC 1046).

<sup>42</sup> *Pelling v. Bruce-Williams* [2004] EWCA Civ 845 represents a failed attempt.

<sup>43</sup> *Briffett v. DPP* [2001] EWHC Admin 841, [24].

<sup>44</sup> *Re S*, fn. 3, [17] and in *Re W*, fn. 12, [39].

<sup>45</sup> See Fenwick, ‘Clashing Rights, the Welfare of the Child and the Human Rights Act’ (2004) 67(6) *Modern Law Review* 889.

<sup>46</sup> For example, the provision of total anonymity has occurred in rare cases where genuine threats to life and/or significant risk to health arise due to the widespread notoriety of individuals involved: *Carr*, fn. 35; *X (formerly known as Mary Bell) v. SO* (2003) EWHC 1101 (QB); *Thompson and Venables v. News Group Newspapers Ltd* [2001] 1 FLR 791.

<sup>47</sup> Fenwick makes a similar argument, fn. 45.

claims advanced by the media by reference to accepted free speech rationales'.<sup>48</sup> Furthermore, it is difficult to see why an admission of presumptive priority for Article 10 in this context cannot be made, especially since this admission would not guarantee success for the free speech claim. The clash of Article 8 and Article 10 claims in other media freedom contexts will be discussed further in the following section in the context of broader public interest matters. The strength of media freedom in 'open justice' is consistent with Strasbourg principles since such cases concern, *inter alia*, matters of significant public concern. The ECtHR has recently reiterated its long held stance that 'the most careful scrutiny...is called for when...the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern',<sup>49</sup> which includes allowing the press to scrutinise the performance of the judiciary.<sup>50</sup> However, a considerable issue with domestic application of this principle is the degree of scrutiny attached to the term 'legitimate public concern', as the following section explores.

## ii) Matters of public interest

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<sup>48</sup> Ian Cram, 'Minors' Privacy, Free Speech and the Courts' (1997) *Public Law* 410, 419.

<sup>49</sup> *Tonsbergs Blad as and Haukom v. Norway* [2008] 46 EHRR 40, [88] reiterating the position taken in *Jersild v. Denmark* [1995] 19 EHRR 1 and *Bergens Tidende v. Norway* [2001] 31 EHRR 16.

<sup>50</sup> *Prager and Oberschlick v. Austria* [1996] 21 EHRR 1, 'this undoubtedly includes questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a matter that is in conformity with the aim which is the basis of the task entrusted to them' [34].

It might be thought that cases involving broader issues of public interest provide the media with a lesser accumulative free speech weight than those involving open justice, given that there is unlikely to be any issue of confidence in the justice system involved in such instances. However, there are two additional principles, particularly apparent at Strasbourg level, which assist the media in such cases: first, the press has a ‘vital role of public watchdog’<sup>51</sup> to play: ‘not only does the press have the task of imparting...information and ideas [of public interest], the public also has a right to receive them’.<sup>52</sup> Secondly, and consequently, as noted, the court must give the ‘closest scrutiny’ to measures that would otherwise discourage public debate over matters of legitimate public concern. Thus the distinction in the weight afforded speech of general public interest compared to open justice speech may be slight if not non-existent, particularly where the need for the public to be informed is high. Thus, in *H*,<sup>53</sup> the Court of Appeal confirmed that ‘the right of the press to inform the public, and of the public to be informed by the press...is an aspect of the right to freedom of expression...that is of paramount importance’<sup>54</sup> and one which will be ‘rarely’<sup>55</sup> interfered with. However, despite it being a matter of ‘strong public interest’<sup>56</sup> that the public be informed of an HIV positive healthcare worker, that interest did not extend to identifying H or the Health Authority involved.<sup>57</sup> Yet, this type of limited interference is equally likely in open justice cases: in *W*,<sup>58</sup> an open justice case, the

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<sup>51</sup> *Jersild*, fn. 49, [31]

<sup>52</sup> *Ibid.*

<sup>53</sup> *H (A Healthcare Worker) v. Associated Newspapers Ltd* [2002] EWCA Civ 195

<sup>54</sup> *Ibid.*, [23]

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, [24]

<sup>57</sup> *Ibid.*, [58], although it did permit identification of his speciality, [59].

<sup>58</sup> Fn. 12

particular stigma of AIDS justified preserving anonymity.<sup>59</sup> In *H*, the decision to preserve anonymity was, evidently, influenced by the countervailing public interest in preserving the confidentiality of HIV positive healthcare workers so as to maintain the incentive of others to declare (rather than hide) their condition and, further, there being no issue of culpability against H.

In evaluating the strength of general public interest claims, compared to open justice ones, it is important to note the competing claim is likely to be of a different quality. Theoretically, there is greater scope for successful interference with speech; beyond narrower conceptions of ‘privacy’, the claim may be for protection of reputation or breach of confidence (under Article 8). As noted, neither Convention right is treated as having presumptive priority yet the absence of the ‘open justice’ element removes the shackles that might otherwise restrict the force of the Article 8 argument. Of course, this does not provide the competing claim with an automatic advantage; a reasonable expectation of privacy must first be established and sustained.<sup>60</sup> This may be particularly unlikely in circumstances where the disclosure of information will affect public confidence in public services.<sup>61</sup> However, the court may be more willing to interfere if it is to restrain publication of specific details that

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<sup>59</sup> In *W*, the court found that ‘there is likely to be serious short-term and long-term prejudice to the children [of the accused] if the injunction is not granted’ including prejudice to future placement of the children with foster parents, *ibid*.

<sup>60</sup> See *Mahmood v. Galloway* [2006] EWHC 1286 (discussed below).

<sup>61</sup> See the cluster of cases involving surreptitious undercover filming involving public service providers, including: lapses in security at call centres regarding bank account details, *Response Handling Ltd v. BBC* [2007] CSOH 102; failing schools, *Leeds City Council v. Channel Four Television Corp* [2005] EWHC 3522 (Fam); instances of unsafe food provided to public sector markets, *Tillery Valley Foods v. Channel Four Television, Shine Limited* [2004] EWHC 1075 (Ch); poor standards of care at nursing homes, *Lakeside Homes Ltd. v BBC*, unreported, 14 November 2000 *cf. AG v. Parry* (2002) EWHC 3201 where publication was enjoined involving undercover reporting of security issues at Buckingham Palace and Windsor Castle.

would not ‘disembody’ the debate. This is evident in *Green Corns Ltd*,<sup>62</sup> which concerned the public furore following a newspaper campaign where addresses of properties operating, or intending to be operated, as care homes for troubled teenagers and sex offenders were published. The court recognised that a strong public interest existed but distinguished between the public interest in the policy of how such children should be cared for and the private interest in where such houses should be.<sup>63</sup> Thus the public interest debate was not affected by restraining publication of such addresses.<sup>64</sup> The court was particularly concerned<sup>64</sup> by the actions of an angry mob that had formed outside one of the care homes resulting in a 15-year-old child and two carers inside having to be escorted by the police from the house.<sup>65</sup> Further acts of violence, vandalism and damage occurred at the property.<sup>66</sup> For the court, this rendered the argument of legitimate public protest nugatory since such behaviour was ‘the opposite of democratic’.<sup>67</sup> Clearly, the court was influenced by this behaviour and so made the public/private distinction, which it may be said is not otherwise particularly compelling.

The presence of a strong public interest in the speech target likewise bolsters the free speech claim. In *Browne*,<sup>68</sup> the *Mail on Sunday* sought to publish various allegations against the claimant group chief executive of BP plc concerning the use of BP plc resources to assist his sexual partner and disclosure of confidential BP plc information to him, and, further, within this story, the newspaper sought to publish

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<sup>62</sup> *Green Corns Ltd v. Claverley Group Ltd* [2005] EWJC 958 (QB).

<sup>63</sup> *Ibid.*, [99].

<sup>64</sup> *Ibid.*, [100].

<sup>65</sup> *Ibid.*, [21].

<sup>66</sup> *Ibid.*, [29].

<sup>67</sup> *Ibid.*, [105].

<sup>68</sup> *Browne v. Associated Newspapers Ltd* [2007] EWCA Civ 295.

the fact of their homosexual relationship. The claimant sought an injunction on Article 8 grounds. Being a public listed company, the public interest in the claimant and BP plc was not disputed.<sup>69</sup> The newspaper, additionally, was required to argue in respect of the intended speech. Dismissing the claim, the Court of Appeal found that the bare fact of the relationship contextualised the other issues of public interest and thus was satisfied that the information ‘would make no sense without [such] publication’.<sup>70</sup> Likewise, in *Long Beach Ltd*,<sup>71</sup> the court dismissed an injunction application due to the important public interest in publishing documents which inferred that the President of Congo’s son had obtained secret profits from a public company:<sup>72</sup> ‘once there is good reason to doubt the propriety of the financial affairs of a public official, there is a public interest in those affairs being open to public scrutiny’.<sup>73</sup> Conversely, in *Northern Rock plc*,<sup>74</sup> the *Financial Times* had obtained, and then published in full on its website, a confidential financial document. Certain other news outlets had published some, but not all, information from this document. The public interest in the speech target, a public listed company, was not in dispute, or that the financial difficulties of the company were high profile, however Tugendhat J. was satisfied that there was not a sufficiently high public interest to necessitate continued or further publication of the document in full,<sup>75</sup> despite certain information already being in the public domain.

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<sup>69</sup> *Ibid.*, [38].

<sup>70</sup> *Ibid.*, [59].

<sup>71</sup> *Long Beach Ltd v. Global Witness Ltd* [2007] EWHC 1980 (QB).

<sup>72</sup> *Ibid.*, [45]-[50], [52]-[53].

<sup>73</sup> *Ibid.*, [52].

<sup>74</sup> *Northern Rock plc v. Financial Times Ltd* [2007] EWHC 2677 (QB).

<sup>75</sup> *Ibid.*, [20].

Further, the public interest in the speech and/or speech target may be so significant as to permit false information to be protected.<sup>76</sup> This type of qualified privilege (*i.e.* the *Reynolds* privilege), as a defence to defamation, applies to information presented as fact. In such cases, the media must satisfy the court that: i) taken as a whole, the public interest in the subject matter permits publication despite the presence of untruth; and, ii) the steps taken to gather and publish the information were responsible and fair.<sup>77</sup> Similarly, the newspaper may have a defence of ‘reportage’ if it neutrally reports a defamatory statement made elsewhere.<sup>78</sup> Protection is lost if the journalist adopts what has been said and makes it his own or else fails to report in a neutral manner.<sup>79</sup> The availability of the *Reynolds* privilege may also lend weight to the argument that the media receive a higher speaker status than others. Although the privilege is not confined, in theory, to the media (indeed in *Jameel*, Lord Hoffman noted that although the privilege was established ‘in the context of publication in a newspaper...the defence is of course available to anyone who publishes material of public interest in any medium’)<sup>80</sup> the news media might find it easier to make a successful case on account of circumstances peculiar to them. The offending material must be viewed as a whole<sup>81</sup> thus the significance of a defamatory passage may be reduced, especially in a voluminous tome. The court should also consider the time pressures placed on journalists, which may affect their assessment of the article: ‘journalists act without the benefit of the clear light of

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<sup>76</sup> *Reynolds v. Times Newspapers Ltd and Others* [1999] 3 WLR 1010; *Jameel v. Wall Street Journal Europe SPRL (No. 3)* [2006] UKHL 44; *Charman v. Orion Publishing Group Ltd* [2007] EWCA Civ 972.

<sup>77</sup> *Jameel*, fn. 76, [31]-[32].

<sup>78</sup> *Roberts v. Gable* [2007] ECWA Civ 721.

<sup>79</sup> *Charman*, fn. 76, [48].

<sup>80</sup> *Jameel*, fn. 76, [54].

<sup>81</sup> *Charman*, fn. 76, [72]; *Jameel*, fn. 76, [108].



hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment’;<sup>82</sup> and, further, the urgency of the matter: ‘news is often a perishable commodity’.<sup>83</sup> This may be more relevant to the initial reporting of the news than post-reporting analysis. Thus non-journalists such as ‘bloggers’ and protesters may find it difficult to sustain the point since they are unlikely to be under any real, immediate or significant time pressures to report and so there might be a greater expectation of reflection prior to publication. Likewise, they may struggle to demonstrate there was any duty to publish;<sup>84</sup> ‘not only do the media have the task of imparting [matters of public interest] in such information and ideas: the public also has a right to receive them’.<sup>85</sup> Further, in this regard, reliance is placed upon editorial judgment:

‘it [has] to be a body other than the publisher, namely the court, which [decides] whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner’<sup>86</sup>

In *Charman*, it was similarly noted that:

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<sup>82</sup> *Reynolds*, fn. 76, 204H to 205E, *per* Lord Nicholls.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Jameel*, fn. 76, [138], *per* Lord Scott of Foscote.

<sup>85</sup> *Sunday Times v. UK* (1979) 2 EHRR 245, [64].

<sup>86</sup> *Ibid.*, *per* Lord Bingham. Lord Hope of Craighead likewise noted, [108]: ‘A piece of information that, taken on its own, would be gratuitous can change its character entirely when its place in the article read as a whole is evaluated. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public. Weight will be given to the judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as editor’

*Jameel* emphasises how important it is that weight be given to the professional judgment of the journalist. Where opinions may reasonably differ over the details which are needed to convey the general message, then deference has to be paid to the editorial decisions of the author, journalist or editor. True it may be that the journalist has to subject the material, as the judge held, to “critical analysis”. But it is *his* assessment of that evaluation which is important, not the judge’s own evaluation of the material conducted with the benefit of hindsight and with the sharp eye of a trained lawyer’.<sup>87</sup>

Non-journalists are unlikely to benefit from this principle and, perhaps, for good reason. Editors and journalists are appointed by their peers with their performance closely monitored. Non-journalists, regardless of the observable merits in their work, may be observed by no-one (they may be read by no-one). Thus the consequences of shoddy workmanship may be more keenly guarded against by such journalists, particularly those in the most serious and prestigious mediums, than, say, ‘bloggers’ and protesters who perhaps wish, first and foremost, to be heard rather than respected.

This consideration is borne out by previous judicial findings, derived from the Strasbourg jurisprudence, that the form of speech is a matter for journalists rather than the court.<sup>88</sup> Perhaps the high point of the principle (for reasons discussed below) was Lord Woolf’s finding in *A v. B plc*<sup>89</sup> that ‘once it is accepted that the freedom of the press should prevail, then the form of reporting in the press is not a matter for the courts but for the Press Complaints Commission and the customers of the newspaper

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<sup>87</sup> *Charman*, fn. 76, [75].

<sup>88</sup> *Jersild*, fn. 49; *News Verlags Gmbh & Co Kg v. Austria* (2002) ECDR 21.

<sup>89</sup> Fn. 8.

concerned'.<sup>90</sup> This may be an overstatement and, certainly, the principle should not be exaggerated: the Strasbourg jurisprudence makes it clear that the media are to be permitted a degree of exaggeration or, even, provocation in their reporting,<sup>91</sup> particularly where politicians are the speech target,<sup>92</sup> yet, regardless of the *Reynolds* privilege, 'there is no public interest in the dissemination of falsehood'.<sup>93</sup> Thus even the media will fail in their claim, despite the generous principles afforded to them, if the defamatory words were adopted and embellished 'with relish'.<sup>94</sup>

The protection afforded to the press when discussing matters of public interest is strong. This strength is also confirmed by the high level of protection afforded to journalistic sources,<sup>95</sup> which the ECtHR describes as 'one of the basic conditions for press freedom'.<sup>96</sup> As recognised in the Strasbourg jurisprudence,<sup>97</sup> it is important that the press are free to scrutinise the activities of the executive, Parliament and judiciary and report back their findings to the public. However, arguably, the UK judiciary is so enamoured with media freedom that some concerns arise. Fenwick and Phillipson, in particular, criticise the tendency to over-protect media expression, arguing that the

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<sup>90</sup> *Ibid.*, [48].

<sup>91</sup> *Prager & Oberschlick v. Austria* (1996) 21 EHRR 1; *Fuentes Bobo v. Spain* (2001) 31 EHRR 50; *Nikowitz v. Austria* (2007) EMLR 8. *De Haes v. Belgium* (1998) 25 EHRR 1 establishes that the degree of acceptable provocation may depend on its comparison to the topic. For example, the acceptable degree may be higher if made in response to equally provocative statements: *Oberschlick v. Austria* (1998) 25 EHRR 357. 'Provocative' may include comments that are inflammatory, particularly where the public interest is significant: *Dalban v. Romania* (2001) 31 EHRR 39; *Nilsen v. Norway* (2000) 30 EHRR 878.

<sup>92</sup> *Lingens v. Austria* (1986) 8 EHRR 407; *Castells v. Spain* (1992) 14 EHRR 445; *Arslan v. Turkey* (2001) 31 EHRR 9; *Karhuvaara v. Finland* (2005) 41 EHRR 51; *Lopes Gomes Da Silva v. Portugal* (2002) 34 EHRR 56; *Vereinigung Bildener Künstler v. Austria* (2007) ECDR 7; *Salov v. Ukraine* (2007) 45 EHRR 51. The Court of Appeal noted this point in *Berezovsky v. Forbes Inc (No. 2)* [2001] EWCA Civ 1251, [12].

<sup>93</sup> *Interbrew SA v. Financial Times Ltd* [2002] EWCA Civ 274, [68].

<sup>94</sup> *Galloway v. Telegraph Group Ltd.* [2006] EWCA Civ 17, [72].

<sup>95</sup> For a recent discussion of the protection of journalistic sources see Fenwick and Phillipson, *Media Freedom*, fn. 2, 311-384.

<sup>96</sup> *Goodwin v. UK* (1996) 22 EHRR 123, [39].

<sup>97</sup> *Lingens v. Austria*, fn. 92.

court should assess the free speech claims more ‘rigorously and sceptically’.<sup>98</sup> Indeed, although writing in 2002, Amos’s evaluation of the court’s approach to freedom of expression is distinctly prescient: ‘the importance of the freedom of the press has begun to eclipse the importance of freedom of expression’.<sup>99</sup> Given the apparent strength of the press, these concerns arise particularly where the press focuses its critical lens not on the government but the public itself, especially on those it terms ‘celebrities’. The following section will explore the judiciary’s position on matters that interest the public and will argue that although the position appears to be hardening against the press, nevertheless the weight of the media’s speaker status still provides some cause for concern that the strength of their free speech right may be abused.

### iii) Matters of interest to the public?

As discussed in Chapter Two, free speech theories that reserve protection for ‘political speech’ are susceptible to heavy criticism that the definition may be manipulated to suit certain ends: it may be interpreted narrowly, as Bork does, so that, say, only serious political speech is included<sup>100</sup> or it may be interpreted broadly so as to lose all meaning, as Baker warns against.<sup>101</sup> In the UK, it is debatable whether the notion of ‘public interest’ has been fixed at any point in this spectrum in

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<sup>98</sup> Fenwick and Phillipson, *Media Freedom*, fn. 2, 31.

<sup>99</sup> Merris Amos, ‘Can we speak freely now? Freedom of expression under the Human Rights Act’ (2002) *EHRLR* 750, 756.

<sup>100</sup> Robert Bork, ‘Neutral Principles and Some First Amendment Problems,’ [1971] 47 *Indiana Law Journal* 1, 20.

<sup>101</sup> C. Edwin Baker, *Human Liberty and Freedom of Speech*, (Oxford University Press, 1989).

relation to the media. For example, in *Jameel*, in the context of the *Reynolds* privilege, Baroness Hale defined public interest as something ‘very different from...information which interests the public – the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told about it’.<sup>102</sup> As set out in the previous chapter, aside from excluding an obvious example of information lacking genuine public interest, this assessment does not provide any clear insight into the meaning of ‘real’ public interest.<sup>103</sup> Further, the early ‘celebrity gossip’ cases (media attempts to publish stories exposing the private lives of celebrity figures) post-HRA gave the impression of a broader notion of ‘public interest’ being used to determine the weight of the free speech claim, even in cases where the Article 10 claim was unsuccessful.<sup>104</sup> Yet given the recent decision in *Mosley*<sup>105</sup> perhaps the attitude toward the media in these cases is hardening.

As noted above, the high-point for celebrity gossip cases was, arguably, the Court of Appeal decision in *A v. B plc*.<sup>106</sup> Briefly, the case involved an injunction application by A, a Premiership footballer, against newspaper B and individuals C and D, both of whom A had had extra-marital affairs with and, consequently, both of whom wished to sell their respective stories to newspaper B. Finding against A, Lord Woolf set out a number of principles, some of which proved to be contentious, to be applied in future injunctive relief claims. In particular, Lord Woolf found the continuing commercial viability of the newspaper to be relevant: ‘the courts must not

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<sup>102</sup> *Jameel*, fn. 76, 147

<sup>103</sup> See discussion at page 214.

<sup>104</sup> *Campbell*, fn. 3.

<sup>105</sup> *Mosley*, fn. 8.

<sup>106</sup> fn. 8.

ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest'.<sup>107</sup> Further, having noted that A had only a 'very modest' claim to confidentiality,<sup>108</sup> his Lordship resisted the notion that details of the affair lacked public interest:

'it is not self-evident that how a well known premiership football player...chooses to spend his time off the football field does not have a modicum of public interest. Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example'.<sup>109</sup>

Thus the public interest subsisted in the media's need to sell newspapers (speaker valuation), the premiership footballer as a role model (speech target valuation) and details of his unsavoury behaviour which were not in keeping with his role model status (speech valuation). Lord Woolf's observation on the importance of the newspaper's commercial viability also bolstered the strength of both the speech and speaker valuation, providing the expression with, it is submitted, a disproportionately strong claim. Similar – if not identical – views about the significance of the print media's commercial viability can also be found in the House of Lords judgment of the leading celebrity gossip decision, *Campbell*,<sup>110</sup> (which is discussed in more detail shortly). Here, Lord Hoffman, dissenting, noted 'we value the freedom of the press

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<sup>107</sup> *Ibid.*, 208.

<sup>108</sup> *Ibid.*, 217; See also *Theakston v. MGN Ltd* [2002] EWHC 137, [60] 'sexual relations within marriage at home would be at one end of the range or matrix of circumstances to be protected from most forms of disclosure; a one night stand with a recent acquaintance in a hotel bedroom might very well be protected from press publicity. A transitory engagement in a brothel is yet further away'.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Campbell*, fn. 3.

but the press is a commercial enterprise and can flourish only by selling newspapers'.<sup>111</sup> Baroness Hale likewise noted 'one reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all'.<sup>112</sup>

A later, differently composed, Court of Appeal in *McKennitt*,<sup>113</sup> expressed doubt on the viability of Lord Woolf's view. The facts of *McKennitt* were significantly different to *A v. B plc*; Ms McKennitt, a singer, sought to restrain the publication of a book by a former friend, detailing parts of her private life but which contained no allegations of wrongdoing.<sup>114</sup> Buxton LJ, delivering judgment, criticised Lord Woolf's view: 'that weight must be given to the commercial interest of newspapers in reporting matter that interests the public'<sup>115</sup> but, mysteriously, cited Lord Phillips in the Court of Appeal decision in *Campbell* to support that criticism, thus overlooking the House of Lords decision and the citations set out above:

'[Lord Woolf's] view has also received criticism, and it seems clear that this court in *Campbell*, in the passage cited above, was not entirely happy with it. It is difficult to reconcile with the long-standing view that what interests the public is not necessarily in the public interest'.<sup>116</sup>

Buxton then cited Baroness Hale in *Jameel* (set out above) as evidence of that latter point. However, it might be said that Baroness Hale's comment in *Jameel* is limited

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<sup>111</sup> *Ibid.*, [77].

<sup>112</sup> *Ibid.*, [143].

<sup>113</sup> *McKennitt v. Ash* [2006] EWCA Civ 1714.

<sup>114</sup> *Ibid.*, [68] 'Ms McKennitt had not behaved disreputably or insincerely in any way'.

<sup>115</sup> *Ibid.*, [66].

<sup>116</sup> *Ibid.*, *per* Buxton LJ [66], followed by citation of Baroness Hale in *Jameel*, fn. 76, as set out above.

to instances relating to the use of the *Reynolds* privilege rather than celebrity gossip cases, *i.e.*, cases in which the truth is disputed rather than where it is not. Yet such an argument is not particularly convincing: Lord Justice Buxton makes a forceful point in saying the two issues are not easily reconcilable. It is relevant, however, to note that Baroness Hale also stated in *Campbell* that she did not believe anodyne photographs, such as of a celebrity ‘popping out for a bottle of milk’ for example, would provide for a strong Article 8 claim on the basis that ‘there is nothing essentially private about the information nor can it be expected to damage her private life’.<sup>117</sup> Expression of this kind may represent a situation where information that interests the public would be protected to the extent that an Article 8 claim to suppress the information would, applying this principle, fail. It has been argued that this finding might be in contravention of the ECtHR decision in *Von Hannover*,<sup>118</sup> where it was found that a person would have a reasonable expectation of privacy whenever they were engaged in activities that did not form part of their official duties.<sup>119</sup> Discussion of the UK courts’ approach to Article 8 is outside the scope of this thesis,<sup>120</sup> however if the *Von Hannover* argument were to gain currency in the UK, then it would be for the press to put up an Article 10 defence and the ‘commercial viability’ claim might be one method of doing so (albeit not a particularly convincing one). In any event, of course, Baroness Hale’s finding in

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<sup>117</sup> *Campbell*, fn. 3, [154].

<sup>118</sup> *Von Hannover v. Germany* (2006) 43 EHRR 7.

<sup>119</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 2, 707-770.

<sup>120</sup> See Fenwick and Phillipson, *Media Freedom*, *ibid.*; see further N. Moreham, ‘Recognising Privacy in England and New Zealand’ (2005) 63(3) *Cambridge Law Journal* 555; Phillipson, ‘Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously’ (2003) *European Human Rights Law Review (Privacy Special)* 53; Fenwick and Phillipson, ‘Breach of Confidence as a Privacy Remedy in the Human Rights Act Era’ (2000) 63(5) *Modern Law Review* 660.



*Campbell* is tempered somewhat by the finding in *Murray* that the expectation of privacy for a child – particularly the child of a celebrity who is not ‘famous’ in their own right – may be less than that of the celebrity parent.<sup>121</sup>

Furthermore, it should not be overlooked that the question of whether information is of public interest or simply interests the public is further complicated by the broad approach to the definition of ‘public figure’ that both the UK and Strasbourg jurisprudence<sup>122</sup> adopts. In other words, whilst there might be no public interest in knowing of instances where ‘ordinary’ citizens have lied, there might be where that individual is a public figure. This is evident, for example, in the decision of *Campbell*, in which fashion model Naomi Campbell brought Article 8 proceedings against the *Daily Mirror* following a series of articles exposing her attendance at *Narcotics Anonymous* meetings for drug addiction. Further, one such story carried photographs of her leaving a meeting, taken by a telescopic lens. Finding in her favour by majority decision, the House was divided on the level of private information divulged by the articles (including information within the photographs) with the majority considering that the newspaper had gone too far: there being a significant public interest in the anonymity of receiving such treatment.<sup>123</sup> Yet the House was in agreement that the fact of Ms Campbell’s drug addiction and that she was engaged in therapy were appropriate matters for publication on public interest grounds because Campbell had previously represented herself as someone who did

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<sup>121</sup> *Murray v. Express Newspapers Plc* (2008) EWCA Civ 446.

<sup>122</sup> *E.g.*, a prominent businessman was found to be ‘public figure’ in *Tonsbergs Blad as and Haukom v. Norway* (2008) 46 EHRR 40.

<sup>123</sup> *Campbell*, fn. 3; See judgments of Lord Hope, [98]-[99], [124]; Baroness Hale, [153]-[157]; and, Lord Carswell, [165].

not take drugs.<sup>124</sup> Thus, the public interest in knowing of Campbell's hypocrisy was heightened by the Court's treatment of her as a 'public figure', which arguably instilled in her certain duties and responsibilities toward the public that ordinary citizens would not necessarily have. Had the Court adopted a narrower approach to the definition of public figure to, say, limit it to those who hold public office, for example, then the strength of the media's claim may have diminished in this respect. Of course, it should not be overlooked that it is on account of the media that Naomi Campbell, for example, is a celebrity figure; certainly, she would not be so recognisable without the significant media attention she has received: indeed, Baroness Hale described it as a symbiotic relationship.<sup>125</sup> Yet it is somewhat problematic that the media may determine who is a 'public figure'. Whilst there is undoubtedly a category of individuals who are naturally termed 'public figures' on account of holding public office (for example), there is another category of individuals who hold no such public responsibility but, nevertheless, might be elevated to the position of public figure by dint of constant media attention, *i.e.*, Jordan or 'Big Brother' contestants such as the late Jade Goody. Thus whilst it is ultimately a decision for the courts to determine when information amounts to being of public interest, the press have a certain level of advantage in establishing the public interest claim because they control who becomes a publicly recognisable figure.

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<sup>124</sup> *Ibid.*; See dissenting judgments, generally, of Lord Nicholls and Lord Hoffmann. See also judgments of Lord Hope, [112], 'there is no doubt that the presentation of the material that it was legitimate to convey to the public in this case without breaching the duty of confidence was a matter for the journalists'; Baroness Hale, [151]-[152], 'the possession and use of illegal drugs is a criminal offence and a matter of serious public concern. The press must be free to expose the truth and put the record straight. That consideration justified the publication of the fact that, contrary to her previous statement, Miss Campbell had been involved with illegal drugs'; and, Lord Carswell, [170], '[publication] went significantly beyond the revelation that the appellant was a drug addict and was engaged in drug therapy'.

<sup>125</sup> *Ibid.*, [143].

Of course, as the recent decision in *Mosley*<sup>126</sup> evidences, there are limits to this advantage. Furthermore, although at Divisional Court level, the decision suggests that immoral rather than illegal behaviour may be of lesser comparative public interest. *Mosley* concerned ‘clandestine reporting...on a massive scale’<sup>127</sup> of Max Mosley’s (head of the FIA) sexual antics with five prostitutes described by the newspaper, erroneously the court found, as a ‘sick Nazi orgy’ involving a sustained Nazi and/or Holocaust theme. Having ‘enlisted’<sup>128</sup> the help of one of the prostitutes, the newspaper published information, photographs and a video extract (on its website) of the events. Finding for the claimant, Eady J. found there to be no public interest in Mosley’s ‘parties’<sup>129</sup> regardless of whether they may be considered immoral:<sup>130</sup> ‘I accept that such behaviour is viewed by some people with distaste and moral disapproval, but in the light of modern rights-based jurisprudence that does not provide any justification for the intrusion on the personal privacy of the Claimant’.<sup>131</sup>

It may be thought that *Mosley* is confined to its particularly extreme facts; certainly Eady J. thought there was ‘nothing landmark’ about the decision.<sup>132</sup> Indeed, it is in keeping with remarks made by Lord Hoffmann in *Campbell* in which he postulated that *even if* ‘there is a public interest in the disclosure of the existence of a sexual relationship... the addition of salacious details or intimate photographs is

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<sup>126</sup> *Mosley*, fn. 8.

<sup>127</sup> *Ibid.*, [233].

<sup>128</sup> Although it was described by the Court as more akin to blackmail than anything else, [87].

<sup>129</sup> *Ibid.*, [121]

<sup>130</sup> *Ibid.*, [127], ‘it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade...Everyone is entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong...That does not mean that they are entitled to hound those who practice them or to detract from their right to live life as they choose’.

<sup>131</sup> *Ibid.*, [233].

<sup>132</sup> *Ibid.*, [234].

disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning'.<sup>133</sup> However, the *Mosley* decision was not reached solely on the newspaper going too far in its reporting but that there was no public interest in the exposed behaviour or, even if adulterous, 'it by no means follows that they are matters of genuine public interest'.<sup>134</sup> Despite Eady J.'s conclusion, the case may be considered landmark given the close scrutiny as to whether a genuine public interest was established (of which it is the court's not the journalist's perception that is significant).<sup>135</sup> Regardless of its significance, there still remain issues about the strength of the media's position in determining *who* is of public interest combined with the weight of the speaker valuation typically applied. On this basis, there remains cause for concern that the media may abuse its privileged position as public watchdog where it suits its commercial ends.

### *b) Politicians*

The significance of ensuring politicians are able to speak freely is well-recognised in the Strasbourg jurisprudence. As the ECtHR noted in the well-known case of *Castells v. Spain*:<sup>136</sup> 'while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his

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<sup>133</sup> *Campbell*, fn. 3, [60].

<sup>134</sup> *Ibid.*

<sup>135</sup> *Mosley*, fn. 8, [137].

<sup>136</sup> Fn. 92.

electorate, draws attention to their preoccupations and defends their interests'.<sup>137</sup> Accordingly, the ECtHR treats politicians as a special category of speaker in which any interference with their freedom of expression 'call[s] for the closest scrutiny'.<sup>138</sup> Whilst this significance is recognised in the UK when politicians speak in Parliament (clause 9 of the Bill of Rights 1689<sup>139</sup> guarantees a near absolute form of free speech to MPs in Parliament<sup>140</sup>), the post-HRA case law does not provide much evidence of the principle from *Castells* in action when politicians speak outside Parliament.

Before addressing the post-HRA case law, it is useful for the purposes of the discussion that follows to set out the decision in *Castells* in more detail. *Castells* was an elected representative of an opposition party in Spain who published an article in a weekly magazine severely criticising the government, blaming them directly for the failure to identify those responsible for terrorist activities in the Basque region. Consequently, *Castells* was prosecuted under the Criminal Code for insulting the Government. *Castells* sought to adduce evidence to establish the truth of the allegations but the court refused to admit such evidence on the basis that the accuracy of the information was not decisive for a charge of insulting the government. As part of its reasoning to imprison *Castells* for a year and a day (although this sentence was later stayed for two years) and disqualify him for the same period from holding public office or exercising a profession, the court at first instance noted that *Castells* could have made his comments in the senate as a senator and the fact that he had failed to

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<sup>137</sup> *Ibid.*, [42].

<sup>138</sup> *Ibid.*

<sup>139</sup> '...the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in a court of place out of Parlyament'.

<sup>140</sup> The ECtHR has recently considered this immunity: *A v. UK* (2003) 36 EHRR 51, [27], [86] in which the ECtHR noted with approval that each House of Parliament has its own mechanism for disciplining members who deliberately make false statements in the course of debates thus providing victims of defamatory misstatement in Parliament with a limited means of redress.

do so meant that he could not claim to have acted on behalf of his electorate.<sup>141</sup> Furthermore, it found that the comments had gone beyond the limits of political criticism and were, instead, insults that attacked the Government's honour.<sup>142</sup> In dismissing Castells's appeal, the Constitutional Court of Spain agreed with the public prosecutor that Castells had not been acting in an official capacity and, therefore, he had to be treated in the same way as any other citizen.<sup>143</sup> The court also had regard to the fact that state security could be jeopardised by attempts to discredit democratic institutions.<sup>144</sup> Castells complained to the ECtHR that there had been a breach of Articles 6, 7, 10 and 14. Castell's made two complaints under Article 10: first, that he had been convicted for making statements, the truth of which he had been prevented from establishing and, secondly, that the contested article came within the sphere of political criticism which it was the duty of any elected representative to engage in.<sup>145</sup> In finding that there had been a violation of Article 10, the ECtHR emphasised both the high importance of politicians being able to speak on matters of public concern and the significance of the press in that regard. Furthermore, the Court reiterated that the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen or even a politician and therefore although it remained open to the relevant authorities to adopt measures – including criminal ones – to deal with defamatory accusations devoid of foundation in the interests of public order, nevertheless the Government must show restraint before resorting to criminal proceedings, particularly where other means were available for

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<sup>141</sup> Fn. 92, [13].

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*, [16] and [17].

<sup>144</sup> *Ibid.*, [17].

<sup>145</sup> *Ibid.*, [28].

replying to unjustified attacks or criticisms.<sup>146</sup> Therefore the truth of the statements was a relevant consideration that the Spanish court should have had regard to.<sup>147</sup>

One case where *Castells* was specifically considered is *Quinan v. Carnegie*,<sup>148</sup> in which a Scottish MP appealed against his conviction for breach of the peace (whilst peacefully protesting about the continuation of a nuclear submarine facility) by reason of his obstruction of the highway outside the naval base and refusal to move when asked to do so by the police. The MP was one of 20 or 30 protesters who had been sat in the road with their arms linked. When asked to move the MP simply shook his head. He was fined £100 by the court. In dismissing the appeal, the Scottish court took a fairly narrow view of its obligations stemming from the decision in *Castells*, interpreting the decision as indicating no more than:

‘the necessity for a court to scrutinise with particular care interferences with the freedom of expression of elected representatives when acting as such. That is because the exercise of that freedom by such a person acting in such a capacity may, in particular circumstances, be an aspect of the democratic process. Accordingly, the court must consider whether the bringing of criminal proceedings was, in the circumstances, necessary in a democratic society or, in other words, was proportionate to the aim pursued’<sup>149</sup>

Since the court is required to take such an approach to every interference with freedom of expression – *i.e.*, determine whether it is proportionate to the aim pursued – it is difficult to accept that this achieves the higher threshold envisaged by *Castells*

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<sup>146</sup> *Ibid.*, [46].

<sup>147</sup> *Ibid.*, [48].

<sup>148</sup> [2005] HCJAC 24.

<sup>149</sup> *Ibid.*, [17].

or that such an approach demonstrates a ‘particular care’ toward interferences with a politician’s freedom of expression. The court in *Quinan* found that the interference was proportionate ‘even on the basis that the appellant was, and conceived himself to be, acting in a representative rather than in a personal capacity at the material time’.<sup>150</sup> It justified this finding in the following terms: ‘in the present context, where the democratic interest in freedom of expression by elected representatives can be met as readily by such a representative publicly demonstrating lawfully as unlawfully, we see no ground for holding that it is disproportionate to apply the law to him in the same way as to his fellow citizens’.<sup>151</sup>

The court’s findings in *Quinan* are more declaratory than explanatory, particularly on the question of lawfulness. Furthermore, the court seemed particularly keen to emphasise the ‘equality before the law’ aspect of the decision. Yet this seems to take a particularly narrow view of the principle in *Castells*. The decision in *Castells* emphasises the importance of politicians’ being able to draw attention to matters preoccupying public opinion, thus enabling everyone to participate in free political debate. Whereas Mr Castells spoke through the press, Mr Quinan spoke through public protest. It does not seem to be in issue in *Quinan* that public protest represents a legitimate means of participating in a democratic society: this point is well-established in academic literature<sup>152</sup> and the Strasbourg jurisprudence.<sup>153</sup> Thus both *Castells* and *Quinan* concern the issue of whether a lawful medium has been used unlawfully such that the right to freedom of expression under Article 10 is not

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<sup>150</sup> *Ibid.*, [18].

<sup>151</sup> *Ibid.*

<sup>152</sup> See, for example, Fenwick, ‘The Right to Protest, the Human Rights Act and the Margin of Appreciation’ (1999) 62(4) *Modern Law Review* 491.

<sup>153</sup> *Steel v. UK* (1999) 28 EHRR 603.



violated. Whereas *Castells* evidences intense scrutiny of this issue, *Quinan* does not demonstrate a preparedness to vigorously explore and question the need to prosecute peaceful demonstrations that obstruct the highway directly outside a naval base. In the context of the Highways Act 1980, Fenwick has argued that the issue of lawful obstruction of the highway involves asking whether the obstructive behaviour was reasonable or not in the circumstances.<sup>154</sup> Furthermore, she argues that ‘the use of a criminal charge against peaceful protesters who had caused some obstruction cannot be defended on proportionality grounds’.<sup>155</sup> She suggests that since obstruction is not necessarily equivalent to disorder, in order to be proportionate a risk to safety or a disproportionate impact on freedom of movement due to its length must be achieved by the peaceful obstructive assembly in order to amount to an unreasonable user of the highway.<sup>156</sup> The finding that Quinan could have made his point lawfully rather deflects away from the issue.

A similar point occurred in the Divisional Court decision in *Horsnell v. Boston BC*,<sup>157</sup> which concerned the revocation/denial of a market stall licence to a UKIP candidate, who had wanted to use the stall for the purpose of publicising the UKIP and his own candidacy in the General Election. The Court upheld the local council’s decision on that basis that the use of the stall for the purposes of canvassing electors would put the council in breach of s. 2(3) of the Local Government Act 1986, which states that ‘a local authority shall not give financial or other assistance to a person for the publication of material which the authority are prohibited from

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<sup>154</sup> Helen Fenwick, *Civil Liberties and Human Rights*, (Routledge-Cavendish, 2007, 4<sup>th</sup> edn.), 736.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*, 737.

<sup>157</sup> [2005] EWHC 1311 (QB).

publishing themselves'. Section 2(1) of the same Act prohibits local authorities from publishing material which appears to be designed to affect public support for a political party. As in *Quinan*, the court placed weight on the fact that the politician affected could have expressed his views by other means, *i.e.*, by canvassing in the marketplace.<sup>158</sup> However, this finding has merit in the sense that the state is both under no positive obligation to assist individuals to speak (*i.e.*, by providing market stalls) and, further, that it should not treat particular candidates preferentially, which may have been an issue if subsequent to granting a licence there were not enough stalls to provide other candidates with.<sup>159</sup>

Like *Quinan*, the decision in *Sanders v. Kingston*,<sup>160</sup> discussed at length in the previous chapter<sup>161</sup> also bears some comparison with *Castells*. By way of brief reminder, *Sanders* concerned the leader of Peterborough City Council who had reacted with hostility to the request to petition central government over the treatment of soldiers at a barracks in Northern Ireland. Sanders's stubborn refusal to apologise for his error (he had thought the issue related to the Troubles) had resulted in a media circus. Like the first instance court in *Castells*, the disciplinary tribunal in *Sanders* disqualified Sanders from holding public office (although this was overturned on appeal). It will be recalled that Collins J. in the Division Court had determined that the expression in question 'amounted to no more than expressions of personal anger and personal abuse'<sup>162</sup> and therefore was not political expression. The court's approach to the interference with Sanders's expression does not readily equate to an

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<sup>158</sup> *Ibid.*, [29].

<sup>159</sup> *Ibid.*

<sup>160</sup> [2005] EWHC 1145 (Admin)

<sup>161</sup> See pages 183 to 188.

<sup>162</sup> *Ibid.*, [84], see also [81].

intense scrutiny of the necessity of the interference as seen in the ECtHR decision in *Castells*: Collins J. adopted a fairly dismissive and minimalist approach to both the taxonomy of the speech and the necessity to interfere. This may be accounted for by the extraordinary facts of *Sanders*. However the decision raises some interesting hypothetical questions. It might be said that *Sanders* could have expressed his opinions in other circumstances but not as leader of Peterborough City Council. In other words, *Sanders* voluntarily accepted limits on his capacity to speak when he became leader of the Council by reason of the local council code of conduct in operation under s. 50 of the Local Government Act 2000. However, on the face of it at least, this would appear to reverse the *Castells* principle: rather than affording a greater free speech right to politicians over citizens, it would seem to provide a lesser right if *Sanders* was free to say something as citizen that he could not say as a councillor. Of course, the right to freedom of political expression is not absolute therefore perhaps the decision in *Sanders* may be explained alternatively on the basis that it demonstrates the operation of the ‘reputation of others’ exception under Article 10(2). As set out in the previous chapter, Collins J.’s finding that the expression did not amount to political expression is hard to accept. However, even if the court had accepted that the speech was political, it might have been determined that the expression went beyond the acceptable limits of criticism and, furthermore, since *Sanders* was speaking as a representative of Peterborough City Council, the interference was justifiable on the basis that it tarnished the reputation of both the Council and the Conservative Party.

In surveying these decisions involving politicians, it might be questioned whether the principle that freedom of expression is especially important for elected representatives of the people has been fully realised in the UK post-HRA. Certainly, it does not seem to be consistently recognised in every case involving politicians. In *Mahmood v. Galloway*,<sup>163</sup> for example, although it was ultimately unnecessary for the court to examine the free speech rights of an MP seeking to expose the investigative reporting practices of a notorious undercover journalist (since the Claimant reporter was unable to establish a convincing Article 8 claim), the court nevertheless opined that the public interest was against publication of the Claimant's true identity but made no reference to the superior free speech status of politicians in its assessment.<sup>164</sup> It may be that since the free speech right for politicians is particularly strong inside Parliament the court feels little obligation to extend that protection beyond it.<sup>165</sup> However, that view is arguably inconsistent with Strasbourg case law, as discussed. It might be said that these cases say little about politicians' free speech status given the unorthodox or contentious speech issues involved in each although that would seem to be a generous concession. Certainly, the rigorous scrutiny of interferences with political speech by politicians, evident at Strasbourg level, is not readily apparent in these decisions. Furthermore, it is intriguing that the right to free speech

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<sup>163</sup> Fn. 60

<sup>164</sup> *Mahmood*, fn. 60, [24] 'Mr Galloway's view is that it is in the public interest that his identity should be exposed so that people like him are not subject to the activities of a man whom he regards as an unscrupulous agent provocateur. Were I to have to decide the case on the balance of where the public interest lay, I would decide it in favour of Mr Mahmood because it seems to me that his track record establishes that on balance his activities have been in furtherance of the public interest by bringing criminals to book rather more than they have been against the public interest by encouraging those who might not otherwise have committed crimes to do so. But that is not an issue that I could possibly determine at this stage in the proceedings'.

<sup>165</sup> This echoes the historical approach to free speech of the sixteenth and seventeenth century, see Leonard Levy, *Emergence of a Free Press*, (OUP, 1985); David Colcough, *Freedom of Speech in Early Stuart England*, (Cambridge University Press, 2005)

does not appear as jealously guarded by the courts in these cases as it is in cases involving the press.

#### **4. Of lesser value: from non-journalists to prisoners**

Previously, Fenwick and Phillipson, in noting that different judicial approaches are taken to political speech by the media compared to protesters, have argued that different outcomes follow because, for the former, the starting point for decisions are ‘the *values* underlying free expression’ whereas for the latter it was, pre-HRA at least, the ‘legal content of the restrictions on public protest’,<sup>166</sup> with little or no regard to those free speech values. The term protester tends to be used in a narrow context in the academic literature, to refer to street demonstrators in order to discuss the broader public order issues which are often intertwined with the free speech issues involved. As noted in Chapter One, it is beyond the ambit of this thesis to discuss those public order issues and, instead, the discussion concentrates exclusively on the free speech issues. In this context, it will be argued that the term ‘protester’ can be applied more broadly to include those individuals who communicate their protest without engaging in street demonstration. In order to draw out the central theme of this section that journalists receive better treatment than these speakers even where the content of the speech may be similar, these individuals will be referred to as non-journalists. Naturally, this includes a broad category of speakers, yet this is an important element of the argument: the lesser treatment of

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<sup>166</sup> Helen Fenwick and Gavin Phillipson, ‘Public protest, the Human Rights Act and judicial responses to political expression,’ (2000) *Public Law* 627, 630-631.

‘non-journalists’ implicates a great many people. It will be argued that whilst the courts have demonstrated some recognition of free speech values for these non-journalists, they have tended to do so in a minimal or superficial manner. A partial explanation of this differential treatment is the absence of the ‘public watchdog’ principle for non-journalists: this principle clearly assists the media speaker attain higher prospective levels of protection, although the absence of it in non-journalistic cases remains unarticulated. In any event, it seems that Fenwick and Phillipson’s view remains accurate: there is ‘little recognition of the distinctive value of public protest’<sup>167</sup> when non-journalists speak.

#### *a) Non-journalists*

Traditionally, protesters have not enjoyed the same speech freedom as the media.<sup>168</sup> The judicial endorsement of free speech principles, so jealously guarded by the courts when applied to the press, is generally more subdued in such cases.<sup>169</sup> There is a discernible theme of a restrained attitude toward protection where ‘extreme’ speech and speakers are involved, with the value of free speech principle rarely defended and, often, barely considered.<sup>170</sup> This judicial attitude is evident in

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<sup>167</sup> *Ibid.*, 629-630.

<sup>168</sup> See, for example, Fenwick, ‘The right to protest, the Human Rights Act and the Margin of Appreciation’ (1999) 62 *MLR* 491

<sup>169</sup> *Redmond-Bate v. DPP* (1999) 7 BHRC 375 represents a notable exception (see discussion in Chapter Five).

<sup>170</sup> See Andrew Geddis, ‘Free Speech Martyrs or Unreasonable Threats to Social Peace? – ‘Insulting’ Expression and s. 5 of the Public Order Act 1986’ (2004) *Public Law* 853 for a discussion of these issues in the context of public order issues.

the recent decision of *Connolly*,<sup>171</sup> which was briefly mentioned in the previous chapter.<sup>172</sup> It will be recalled that the case involved a sole protester who lost her appeal against conviction for sending graphic pictures of aborted foetuses to three pharmacies which stocked the ‘morning after’ pill. This behaviour was found to be ‘grossly offensive or indecent’ by the Crown Court and so prosecution under the Malicious Communications Act 1988 followed. The Divisional Court found that the expression constituted political expression and, moreover, recognised that as a consequence the highest level of protection to freedom of speech applied:

‘the sending of photographs ... was not the mere sending of an offensive article: the article contained a message, namely that abortion involves the destruction of life and should be prohibited. Since it related to political issues, it was an expression of the kind that is regarded as particularly entitled to protection by Article 10.’<sup>173</sup>

Yet, despite this, the court found that the right of Mrs Connolly under Article 10(1) to express her deeply held belief that abortion was murder did not outweigh the ‘rights of others’ exception in Article 10(2), including the pharmacy workers’ ‘right not to have sent to them material of the kind that she sent when it was her purpose, or one of her purposes, to cause distress or anxiety to the recipient’.<sup>174</sup> Since the UK courts’ approach to the right of others not to be offended was considered in detail in the previous chapter, it is not considered here. Instead, the discussion focuses on the

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<sup>171</sup> *Connolly v. DPP* [2007] EWHC 237 (Admin); see further Paul Wragg, ‘Free speech is not valued if only valued speech is free: *Connolly*, consistency and some Article 10 concerns’ (2009) 15(1) *European Public Law* 111.

<sup>172</sup> See page 195.

<sup>173</sup> *Connolly*, fn. 171, [14].

<sup>174</sup> *Ibid.*, [28]

court's approach in *Connolly* to the expression at stake and it will be argued that the reasoning in the decision suggests a fairly dismissive approach.

Whilst the *outcome* of *Connolly* is not particularly troubling from a free speech perspective, it is submitted that the *reasoning* applied contains elements that are concerning. In particular, in finding against the speech, Lord Justice Dyson noted that 'of particular significance is the fact that those who work in the three pharmacies were not targeted because they were in a position to influence a public debate on abortion'.<sup>175</sup> Expanding on this point, he said,

'in any event, even if the three pharmacies were persuaded to stop selling the pill, it is difficult to see what contribution this would make to any public debate about abortion generally and how that would increase the likelihood that abortion would be prohibited'<sup>176</sup> ... 'disseminating material of this kind to a number of pharmacists because they sell the 'morning after pill' is hardly an effective way of promoting the anti-abortion cause'.<sup>177</sup>

Dyson LJ concluded that Connolly could have made her concerns to someone in a position to influence the debate, such as a politician or, even, a doctor.<sup>178</sup> In effect, Lord Justice Dyson is measuring the effectiveness of the speech in the democratic process. Arguably, this finding adds nothing to the decision: he could, instead, have limited his judgment to a finding that Connolly's expression overstepped the line in terms of acceptable behaviour. Instead, Dyson LJ's approach seems to confirm that

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*, [31]

<sup>178</sup> *Ibid.*



the status of the speaker is relevant: *i.e.*, if a speaker such as Connolly or the expression or both had had a greater relevance to the democratic process then the Article 10 claim might have fared better. It is concerning that this type of reasoning might be applied in a future case in order to justify the differential treatment of non-journalists compared to journalists since this approach undermines the spirit of the established rationales for protecting freedom of speech. Moreover, if the *actual* contribution to the democratic process is a key factor then how are judges to effectively measure this contribution? It is submitted that no safe method exists by which to do so.

The Divisional Court's approach in *Connolly* is consistent with the decisions in *ProLife*,<sup>179</sup> *Hammond*,<sup>180</sup> and *Percy*,<sup>181</sup> which also involved suppression of (and, in most, conviction for) 'insulting' expression. Yet, although the court found the behaviour insulting in each, and mostly for manifest reasons, each concerned clear political behaviour that should not be overlooked. In *Connolly* and *ProLife*, the expression concerned abortion. In *Hammond*, it concerned homosexuality. Whilst in *Hammond* the views expressed were particularly odious and in *Connolly* and *ProLife* shocking, such reasons ought not to prohibit free speech protection: as *Handyside*

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<sup>179</sup> *ProLife*, fn. 9: See Eric Barendt, 'Free Speech & Abortion,' (2003) *Public Law* 580.

<sup>180</sup> *Hammond v. DPP* [2004] EWHC 69 (Admin), *The Times*, January 28, 2004 in which a street preacher was convicted for speeches and signs that conveyed the message homosexuality was morally wrong. See discussion in Geddis, fn. 170.

<sup>181</sup> *Percy v. DPP* [2001] EWHC Admin 1125; [2002] Crim. L. R. 835 in which a sole protestor was convicted for standing on an American flag (her own) in front of a vehicle carrying American servicemen. Whilst her conviction was quashed on appeal, it was not done so because her protest was reasonable but rather because the Divisional Court had misdirected itself in its proportionality test including its failure to consider 'that the accused's behaviour went beyond legitimate protest' instead being 'a gratuitous and calculated insult'. See discussion in Geddis, fn. 170.

establishes, Article 10 applies equally to speech which shocks or offends<sup>182</sup> although the evidence of this principle in action is far from compelling, as discussed in the previous chapter.

The *ProLife*<sup>183</sup> decision likewise evidences a diminished free speech weight being afforded to extreme speakers. Although ‘the media’ was implicated – to the extent that a broadcast was at the centre of the claim – the ProLife Alliance is not a body of journalists and was not treated like such a body either. In this case, various broadcasters, but specifically the BBC, had refused to screen ProLife’s Party Election Broadcast (PEB) on the basis their campaign, for absolute respect for innocent life, contained prolonged and graphic images that would be likely to offend very large numbers of viewers. In a decision that contains particularly liberal statements of free speech principle, the Court of Appeal found this decision to be in breach of Article 10. In particular, the Court heavily relied upon the constant principle of the ECtHR that political expression can only be interfered with in narrow circumstances, particularly in the context of a general election.<sup>184</sup> The Court’s heavily free speech orientated approach was, as Fenwick and Phillipson describe it, ‘a seminal...principled ruling that looked closely at the importance of the type of speech in question and found that flexibility had to be imposed on the regulatory scheme in order to accommodate it’.<sup>185</sup> By contrast, the House of Lords decision was

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<sup>182</sup> The principle from *Handyside v. UK* [1976] 1 EHRR 737 is that Article 10 applies to material that shocks and/or offends.

<sup>183</sup> *ProLife*, fn. 9.

<sup>184</sup> *Ibid.*, Lord Justice Laws, at [30] cited *Bowman v. UK* (1998) 26 EHRR 1 to support this finding.

<sup>185</sup> Fenwick and Phillipson, *Media Freedom*, fn. 2, 581-582. For criticism of the Court of Appeal’s approach see Geddis, ‘What Future for Political Advertising on the United Kingdom’s Television Screens?’ [2002] *Public Law* 615. For discussion of the House of Lords decision see Geddis, ‘If Thy Right Eye Offend Thee, Pluck It Out’: *R v. BBC ex parte ProLife Alliance*’ (2003) 66 *MLR* 885.

‘disappointing’.<sup>186</sup> In allowing the appeal, their Lordships gave differing reasons for their decision although a common theme seems to have been that the case involved matters of judicial review procedure rather than substantive free speech issues. Thus, Lord Nicholls, with whom Lord Millett agreed, emphasised that the Court of Appeal had underestimated the significance of the statutory provision governing the original decision; that the Court of Appeal had neglected the limitations that the statutory provision imposed upon the broadcasters.<sup>187</sup> Lord Hoffmann, noting that there is ‘no human right to use a television channel’, questioned whether the primary right under Article 10 was actually engaged and, instead, suggested that the only significant question was whether the broadcasters had acted in a discriminatory way.<sup>188</sup> As noted in the previous chapter, Lord Walker found the competing interest to be most significant; in particular, that ‘the citizen has a right not to be shocked or affronted by inappropriate material transmitted into the privacy of his home’<sup>189</sup> and thus recognised that ‘the broadcasters also had to take into account the special power and intrusiveness of television’:<sup>190</sup> a point which, as noted in Chapter Two,<sup>191</sup> cropped up later in *ADI* although with no reference to *ProLife*.

The House of Lords decision in *ProLife* has generated criticism from several free speech commentators<sup>192</sup> As Barendt has argued, the reasoning in the decision was ‘baffling or, to be frank, obscure’.<sup>193</sup> There is no compelling reason why a

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<sup>186</sup> Barendt, fn. 179.

<sup>187</sup> *ProLife*, fn. 9, [12]-[15]

<sup>188</sup> *Ibid.*, [56]-[58], [61]

<sup>189</sup> *Ibid.*, [123]

<sup>190</sup> *Ibid.*, [124]

<sup>191</sup> See discussion at page 69.

<sup>192</sup> See Barendt, fn. 179, Fenwick and Phillipson, *Media Freedom*, fn. 2, 559-617; Ian Cram, *Contested Words*, (Ashgate, 2006), 50-57.

<sup>193</sup> Barendt, fn. 179, 581

statutory provision to maintain standards of taste and decency should have constrained either the court or original decision-maker in this way. Both were required under s. 3 of the HRA 1998 to read the provision compatibly with the Convention rights (and Article 10, in this case).<sup>194</sup> Lord Hoffmann's suggestion, in particular, that the primary right to speak was not engaged is mysterious; it was precisely because of what ProLife wanted to say that their speech was interfered with.<sup>195</sup> Therefore his Lordship's finding that there is no human right to broadcast, whilst undoubtedly correct, was irrelevant. At the point of interference, the opportunity to broadcast a PEB was secured (and, indeed, a heavily censored version was broadcast) and thus the situation was analogous to an author who – likewise has no positive right to be published – undoubtedly has an Article 10 claim, for breach of the primary right, if his unpublished work is interfered with by the state. As Barendt argues, it 'is clear that [the House] misunderstood the character of the Alliance Party case'.<sup>196</sup> The House of Lords also showed little understanding of fundamental theoretical principles such as, as Barendt notes,<sup>197</sup> the significance of speaker freedom to control form and content. The idea that Article 10 applies equally to the form of the expression is well-established in the Strasbourg jurisprudence.<sup>198</sup> The House of Lords apparently dismissive approach to form also contrasts with the courts' approach to the press: in news media cases, it is well-recognised that the form of expression is not a matter for the judiciary to interfere with.<sup>199</sup>

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<sup>194</sup> See Gavin Phillipson, '(Mis)Reading Section 3 of the Human Rights Act' (2003) *Law Quarterly Review* 183.

<sup>195</sup> See Barendt fn. 179.

<sup>196</sup> *Ibid.*,

<sup>197</sup> *Ibid.*, 583

<sup>198</sup> See, e.g., *Steel v. UK* (1999) 28 EHRR 603.

<sup>199</sup> See, e.g., *A v. B plc*, fn. 8 discussed above.

It is also clear that the court attached little weight to the importance of the speaker (as a political organisation) or the speech (being political speech) or, even, the occasion (a general election); only Lord Scott, dissenting, attached significant weight to these points, and, in doing so, found for ProLife.<sup>200</sup> Clearly the content of ProLife's intended PEB was problematic, for the BBC and the Court, yet as Lord Nicholls noted 'from time to time harrowing scenes are screened as part of news programmes or documentaries or other suitable programmes'.<sup>201</sup> Thus, the content of ProLife's intended PEB should not have been fatal. Arguably, the use of the word 'suitable' in Lord Nicholls *dicta* may be instructive: it suggests that certain speakers may have stronger claims to show harrowing images than others based on their 'suitability to speak' which may be interpreted as either a reference to their seriousness or relevance as sources of information. The general theme of the majority's reasoning suggests that little weight was attached to ProLife as a speaker. Indeed, Lord Hoffmann, addressing the point explicitly, in effect, notes, dismissively, that ProLife were hardly in a position to affect the general election by advocacy on a single issue matter.<sup>202</sup> As Barendt argues 'the implication seems to be that the Alliance broadcast was not a genuine PEB or should not be taken seriously as the exercise of political speech in the context of an election. This argument is a very bad one'.<sup>203</sup> The decision appears consistent with the narrow consequentialist attitude toward Article 10 identified in previous chapters: ProLife were fighting a single issue

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<sup>200</sup> *ProLife*, fn. 9, [83]-[100]

<sup>201</sup> *Ibid.*, [12].

<sup>202</sup> *Ibid.*, [68].

<sup>203</sup> Barendt, fn. 179, 583-584.

and, in Lord Hoffmann's words, were not serious about competing in a general election beyond gaining cheap publicity for their cause.

It has been argued in this chapter that there exists an apparent difference in treatment between classes of speaker depending on the contribution that speaker is perceived to make to the democratic process value. As discussed in Chapter Three, Fenwick and Phillipson have previously argued that this differential approach to the press compared to non-journalist speakers is also evident in the Strasbourg jurisprudence.<sup>204</sup> It was argued in Chapter Three that the margin of appreciation may account for the difference in outcomes for journalists compared to non-journalists in ECtHR decisions but, as the case of *Steel & Morris v. UK* demonstrates,<sup>205</sup> the ECtHR does not adopt an overt preference for journalists over non-journalists.<sup>206</sup> It seems, however, that the UK judiciary has adopted a particularly narrow approach to the Strasbourg jurisprudence. The UK courts' appear to have recognised that 'the [ECtHR] closely scrutinizes any interference with speech and associated activities (particularly those of the press and broadcasters) which may advance democratic participation or accountability or the free market of ideas.'<sup>207</sup> Yet, in doing so, appear to have designated this approach to be the primary if not solitary function of Article 10. This would, for example, explain the apparent differing levels of weight afforded to speakers based on their identity: to use the consequentialist approach as a blunt instrument when applying Article 10 principles indirectly creates distinctions between speakers based on their capacity to directly contribute to the democratic

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<sup>204</sup> Fenwick and Phillipson, *Media Freedom*, fn. 2.

<sup>205</sup> (2005) EMLR 15, [89].

<sup>206</sup> See discussion in Chapter Three.

<sup>207</sup> D. Feldman, 'Content Neutrality' in *Importing the First Amendment*, I Loveland, (ed.), (Hart Publishing, 2008, 2<sup>nd</sup> ed.), 157

process value. In this sense, traditional protesters *may* be better placed than unconventional protesters such as Mrs Connolly whose ‘protest’, directed to an extremely limited audience is less likely to engage the democratic process value than if she had organised a rally on the topic in London. This argument is returned to in Chapter Eight. To complete the argument that distinctions are made based on the type of speaker involved, the following section explores the protection afforded to prisoners, who are, arguably, afforded the lowest speaker valuation.

### *b) Prisoners*

As noted above, arguably, the lowest speaker valuation is given to prisoners. Naturally, the competing public interest justifying this low valuation is that ‘a sentence of imprisonment is *intended* to restrict the rights and freedoms of a prisoner’.<sup>208</sup> This does not mean that prisoners may be silenced altogether. There is a strong potential connection with ‘open justice’ cases: even after incarceration, the public interest that justice was done continues. Consequently, if a prisoner wishes to challenge the safety of his or her conviction, the speech target (the justice system) and speech are of the highest value; it is highly unlikely a higher competing claims exists to deny the exercise of the right.<sup>209</sup> Yet because the speaker valuation is low, prisoners have had to fight in order to have this strong right (albeit in a narrow context) recognised, as demonstrated by *ex parte Simms*,<sup>210</sup> in which two convicted

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<sup>208</sup> *R. v. Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 120 *per* Lord Steyn (emphasis added).

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

murderers sought judicial review of the decision that visiting journalists could not use any information obtained from the prisoners for professional purposes. The prisoners sought to exercise their right to free speech for the specific reason that access to journalists would permit the safety of their conviction to be challenged through the media. In finding for them, the House of Lords held that allowing prisoners to discuss their cases with journalists acts as a ‘safety valve’ against the fallibility of the justice system.<sup>211</sup> Thus, it is the high importance of the speech and speech target that strengthens the prisoner’s free speech claim. This is illustrated in situations where the speech is of significantly lesser value. For example, if the prisoner wishes to ‘sell his story’ of the crimes he committed, the claim is likely to fail, as shown by the decision in *Nilsen*.<sup>212</sup>

## 5. Conclusion

The domestic treatment of free speech in practice suggests that, in general, there will be a consideration of the public interest in the speech and the counter public interest in suppressing speech. These two interests are ‘balanced’ with the heavier weight determining the outcome. It seems that in a number of cases the free speech weight is the combined weight of the different public interest valuations based on the perceived contributions to the democratic process value inherent in the speaker, speech and speech target. As other commentators have said, the UK courts’ have adopted a pragmatic approach to free speech which does not convincingly

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<sup>211</sup> *Ibid.*, per Lord Steyn, 131.

<sup>212</sup> *Nilsen v. Governor of HMP Sutton & Another* [2004] EWCA Civ 1540



demonstrate a rights-based analysis at work.<sup>213</sup> Moreover, as a consequence of this approach, certain types of speakers seem capable of achieving a potentially higher free speech weight than others. Consequently, assuming a constant public interest in the content, speech by the media will be better protected than the same speech by a non-journalist. In general terms, the view of Fenwick and Phillipson coincides with the view expressed on the media in this thesis: it is important that the media is strongly protected where it does indeed fulfil its ‘public watchdog’ role against ‘oppressive legislation, governmental interference, or wealthy, powerful individuals using libel or privacy actions to stifle legitimate, important public debate’<sup>214</sup> but not on other occasions. This thesis agrees with their ethos: ‘we are not media freedom fundamentalists, seeing media freedom as an unqualified good...we therefore advocate a preparedness to strip away Article 10 protection...or to minimize it, where there is no substantive claim that the free speech rationales are being furthered’.<sup>215</sup> Consequently, they argue against the privileging of the journalist above the non-journalist.<sup>216</sup> This is an eminently sensible proposition, which may be achieved in a number of ways, such as by a more universal application of the ‘public watchdog’ concept and/or recognising in stronger terms the broader rationales for protecting free speech. Furthermore, the rationale for the public watchdog function ought to be revisited on the basis that, as other commentators have recently noted, the threat to traditional printing that the internet represents combined with the phenomena of social networking sites, ‘wikis’, ‘blogs’ and ‘twitters’ means that it is no longer safe

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<sup>213</sup> For example, see Fenwick and Phillipson, *Media Freedom*, fn. 2, 108-166.

<sup>214</sup> Fenwick and Phillipson, *Media Freedom*, fn. 2, 32.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

to assume that the traditional media exclusively influences the forming of popular views.<sup>217</sup>

Arguably, the theme emerging from the cases discussed above (that different free speech weights are applied to different speakers) is a consequence of the apparent application of consequentialist principles as a blunt instrument when determining Article 10 claims: certain speakers have an advantage over others in arguing their speech benefits the democratic process. The following chapter considers how this consequentialist rationale affects the level of protection that may be afforded to non-political expression.

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<sup>217</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 2, 1-33 and Jacob Rowbottom, 'Media Freedom and Political Debate in the Digital Era,' (2006) 69(4) *Modern Law Review* 489.

# CHAPTER SEVEN

## Identifying the domestic judiciary's approach to 'non-political' speech

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### 1. Introduction

Unlike established theory, the European Court of Human Rights (the "ECtHR") sets a low threshold for what counts as 'expression' for the purposes of Article 10. It has been said that the UK judiciary adopts the same approach: as Merris Amos has previously noted, 'it is very rare for a UK court to find Article 10 is not engaged when freedom of expression is argued'.<sup>1</sup> Established theory, however, adopts a different approach on the basis that some speech 'simply [has] nothing to do with what the concept of free speech is all about'.<sup>2</sup> Thus the critical test is not whether the activity in question amounts to 'expression' but rather whether that expression fits with the justificatory argument under consideration. Consequently, in theoretical terms, the question of what type of expression beyond political speech

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<sup>1</sup> Merris Amos, 'Can we speak freely now? Freedom of expression under the Human Rights Act' (2002) *EHRLR* 750, 751.

<sup>2</sup> Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, 1981), 91.

falls within the ambit of a free speech guarantee is hotly contested. As set out in Chapter Two, some commentators would exclude all speech that is not strictly political.<sup>3</sup> It will be argued in this chapter that although the UK courts' approach is not this pronounced there are notable similarities with this type of narrow approach. Thus, whilst the UK courts have recognised post-Human Rights Act ("HRA") that the Strasbourg jurisprudence adopts a hierarchical approach to protection,<sup>4</sup> their approach to securing protection for non-political speech does not seem to follow the same contours as the ECtHR's. Because the UK courts appear to have aligned themselves to a narrow interpretation of the argument from participation in a democratic society, the prospect of protection for any speech that does not reflect the democratic process valued may be doubtful. In order to establish this argument, this chapter explores the post-HRA case law in relation to artistic, commercial and pornographic expression. So far there have only been a handful of cases involving non-political speech and often the Article 10 claim has been at the periphery. However, should the apparent narrow approach to non-political speech become established, it is submitted that the trend raises serious concerns. The prospect of ultimately dismissing the Article 10 claim, particularly artistic expression, for want of a significant public interest being at stake is troubling. It is well-established in theory that non-political speech serves broader values than its contribution to the democratic process, as will be shown. In broad terms, it will be argued that this approach risks overstating the significance of commercial expression (almost giving it parity with political speech) but under-

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<sup>3</sup> *i.e.*, Robert Bork, "Neutral Principles and Some First Amendment Problems," [1971] 47 *Indiana Law Journal* 1; see discussion in Chapter Two.

<sup>4</sup> *R. v. British American Tobacco UK Ltd and others* (2004) EWHC 2493 (Admin). See also judgment of Baroness Hale in *Campbell v. MGN* (2004) 2 AC 457 and *Jameel (Mohammed) and another v. Wall Street Journal Europe Sprl* [2007] 1 AC 359 discussed below.

protects artistic expression. The domestic courts' apparent dismissive approach to pornography is concerning only to the extent that it may affect artistic expression.

## 2. Artistic expression

Whereas the ECtHR has been called upon to consider artistic expression in a number of cases, the post-HRA domestic case law contains few instances of such speech being at stake. As set out in Chapter Three, the ECtHR protects artistic expression under Article 10 on the basis that 'those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression'.<sup>5</sup> This consequentialist approach to artistic expression echoes the approach to political expression yet does not fully articulate the broader values that artistic expression contributes. As will be shown below, such broader values are evident in other consequentialist rationales such as the argument from self-fulfilment<sup>6</sup> and, even, Meiklejohn's conception of the argument from participation in a democracy.<sup>7</sup> Although the UK judiciary have confirmed in *British and American Tobacco*<sup>8</sup> that political and artistic expression is treated more favourably than commercial expression, the post-HRA case law contains signs that it takes the same approach to artistic expression as political expression and thus

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<sup>5</sup> *Muller v. Switzerland* (1998) 13 EHRR 212, [31]

<sup>6</sup> See, for example, Thomas Emerson, *The System of Freedom of Expression*, (New York: Random House, 1970); Martin Redish, "The Value of Free Speech", (1982) 130 *University of Pennsylvania Law Review* 591; C. Edwin Baker, *Human Liberty and Freedom of Speech*, (OUP, 1989).

<sup>7</sup> Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245, 257.

<sup>8</sup> *R. v. British American Tobacco UK Ltd. and others* (2004) EWHC 2493 (Admin).

examines such expression for its contribution to the democratic process. Should this approach take root, aside from neglecting broader contributions that artistic expression makes, it raises the same competency issue discussed in Chapter Five:<sup>9</sup> no independent measurement can be made of the actual contribution that artistic expression makes to the democratic process value and so the courts are left to make *ad hoc* balancing decisions.

As mentioned above, in several cases involving artistic expression, the Article 10 issue has played little or no part in the outcome of the case. This can be seen, for example, in the high profile Divisional Court decision in *Green*,<sup>10</sup> which concerned a failed private prosecution for blasphemous libel in respect of a theatrical work entitled ‘Jerry Springer: the Opera’ in which the eponymous chat show host is parodied. The second act of this play depicts Springer in Hell hosting his chat show with Satan, Jesus Christ, God, the Virgin Mary and Adam and Eve as his guests. The characters, at various points, behave as Springer’s regular guests would, *i.e.*, swearing and insulting each other. The legal action failed because the elements of the offence had not been made out: in particular, it had not been shown that the play had induced a reaction involving civil strife, damage to the fabric of society or an equivalent.<sup>11</sup> Consequently, there was no need for the court to consider the Article 10 defence in any detail.<sup>12</sup> Arguably, however, if the law had been such as to allow a *prima facie* case to prohibit the play then the Article 10 defence might have been weak given the

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<sup>9</sup> See discussion at pages 199 to 205.

<sup>10</sup> *R (on the application of Green) v. City of Westminster Magistrates Court* (2007) EWHC 2785.

<sup>11</sup> *Ibid.*, [33].

<sup>12</sup> *Ibid.*, [34].

approach of the ECtHR in *Otto-Preminger*,<sup>13</sup> which concerned a film distinctly similar in theme to the second act of ‘Jerry Springer: the Opera’. In this case, the ECtHR found that Member States have a wider margin of appreciation where religious sensibilities are affronted on the basis that there is no discernible consensus on the significance of religion in society.<sup>14</sup> Furthermore, the ECtHR found that Article 10(2) includes the ‘obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs’.<sup>15</sup> One distinction of possible significance is that in *Green* the court found that the play had ‘as the object of its attack not religion but the exploitative television chat show’.<sup>16</sup> Furthermore, the court stated ‘it does not seem to us that insulting a man’s religious beliefs, deeply held though they are likely to be, will normally amount to an infringement of his Article 9 rights since his right to hold [such views] is generally unaffected by such insults’.<sup>17</sup> This contrasts with the finding in *Otto-Preminger* that such insults could (and did) constitute a breach of Article 9. The distinction, however, may be explained by the difference in circumstances. In *Otto-Preminger* the ECtHR found the film to be ‘an abusive attack’ on the Roman Catholic religion in a region where ‘the Roman Catholic religion is the religion of the overwhelming majority’.<sup>18</sup> Such cultural circumstances could not be said to apply in *Green*.

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<sup>13</sup> *Otto-Preminger-Institut v. Austria* [1995] 19 EHRR 34

<sup>14</sup> *Ibid.*, [50].

<sup>15</sup> *Ibid.*, [49]. This principle was recently reiterated by the ECtHR in *IA v. Turkey* (2007) 45 EHRR 30.

<sup>16</sup> *Green*, fn. 10, [32].

<sup>17</sup> *Ibid.*, [17].

<sup>18</sup> *Ibid.*, [56]

In *R (on the application of British Board of Film Classification) v. Video Appeals Committee*,<sup>19</sup> the court was asked to review the decision of the VAC to overturn the BBFC's refusal to classify a video game entitled 'Manhunter 2' whose object was said to be 'brutal and unremitting violence'<sup>20</sup> toward the humans depicted within it. In concluding that the decision was in error, the Court quashed the decision and remitted the case for re-examination. The Article 10 claim did not form the critical basis of this appeal and so was not considered in any detail. The only treatment of the claim was for the court to note that 'the word 'harm' in Section 4A(1) [Criminal Justice and Public Order Act 1994] must be construed as referring only to harm of a kind identified in Article 10(2)'.<sup>21</sup> Given that the ECtHR affords member states a wide margin of appreciation where the protection of morals is at stake (as discussed in Chapter Three), arguably, the Article 10 claim in this case is not strong.

In *P v. Quigley*,<sup>22</sup> Quigley, a disgruntled former employee of Company R, of which second claimant Q was a former director and chief executive (P & Q being husband and wife), threatened to publish a novella on the internet in 'which P and Q would appear, thinly disguised, as partaking in various unsavoury and fictitious sexual activities'.<sup>23</sup> In restricting publication on the basis of there being 'no conceivable public interest in making such scurrilous allegations against P and Q, whether directly or under the transparent disguise mentioned',<sup>24</sup> Eady J. noted that

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<sup>19</sup> *R (on the application of British Board of Film Classification) v. Video Appeals Committee* (2008) EWHC 203 (Admin)

<sup>20</sup> *Ibid.*, [7].

<sup>21</sup> *Ibid.*, [29].

<sup>22</sup> *P v. Quigley* (2008) EWHC 1051.

<sup>23</sup> *Ibid.*, [6].

<sup>24</sup> *Ibid.*, [7].



‘although the threats related to imaginary activities, the publication would plainly be likely to cause distress and embarrassment and would constitute an unacceptable intrusion into a personal and intimate area of their lives’.<sup>25</sup> It is clear from the judgment that Eady J. treated this case as having little to do with artistic expression: the medium of a novella seemed to be an excuse to launch a stinging attack against P & Q in apparent retribution for a criminal prosecution they had previously initiated against Quigley. This was not a disguised libel claim but rather, as Eady J. concludes, ‘what they [P & Q] are seeking to restrain is the publication of clearly scandalous matter which serves no legitimate purpose’.<sup>26</sup> The judgment is particularly short and so there is no explanation of Quigley’s motive to publish the novella beyond seeking to intimidate or embarrass P & Q and, accordingly, no consideration of whether the novella might have had artistic merit, *etc*, which might have made the balancing act between Articles 8 and 10 more finely balanced. Instead, Eady J.’s approach echoes that adopted for political expression: the lack of an identifiably valuable contribution to the democratic process provided for an apparently dismissive approach to the claim.

Whilst this approach may be entirely defensible on the facts, it is important that the court is sensitive to the facts of each case of artistic expression used to make comment about public figures. As discussed in Chapter Three, the ECtHR decision in *VBK v. Austria*<sup>27</sup> concerned similar issues. The decision is significant in this context for the liberal approach the court took to the issue of political comment. As set out in Chapter Three, the court was satisfied that a painting depicting a number of

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<sup>25</sup> *Ibid.*, [6].

<sup>26</sup> *Ibid.*, [7].

<sup>27</sup> *Vereinigung Bildener Künstler v. Austria* (2007) ECDR 7.

recognisable figures (including some from the Austrian Freedom Party) in sexually explicit poses could represent some sort of ‘counter-attack’ against the Austrian Freedom Party, whose members had strongly criticised the painter’s work.<sup>28</sup> This finding is particularly significant because the court did not seek to decipher the actual message within the painting and neither did it seek to measure the actual contribution made by the expression. Thus it was satisfied that the painting *might* make such a contribution. Of course, in this way the art is the medium by which the political message is made (and therefore the case might be treated as a political expression claim). *VBK* also illustrates how the ECtHR adopts a broad approach to the definition of public figure. In other cases, the ECtHR has included businessmen within that definition.<sup>29</sup> It was noted in Chapter Six that the UK judiciary also appears to have adopted a broad approach to the definition of ‘public figure’.<sup>30</sup> Thus, it would seem that after *VBK* the fact that the artistic expression is ‘scurrilous’ (as Eady J. noted of the expression in *P v. Quigley*) is not, necessarily, a bar on finding that it contributes to the democratic process according to the ECtHR. Of course, where a businessman rather than a politician is the speech target, the court may have regard to the Strasbourg principle that politicians are expected to tolerate a greater degree of criticism than regular citizens<sup>31</sup> (with businessmen sitting somewhere between the two). In this regard, the decision in *Murray*<sup>32</sup> is relevant.

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<sup>28</sup> *Ibid.*, [34].

<sup>29</sup> See, e.g., *Verlagsgruppe News GmbH v. Austria (No. 2)* (2007) EMLR 13; *Tonsberg Blad as and Haukom v. Norway* (2008) 46 EHRR 40.

<sup>30</sup> See discussion at page 245.

<sup>31</sup> *Lingens v. Austria* (1986) 8 EHRR 407.

<sup>32</sup> *Murray v. Express Newspapers Plc* (2008) EWCA Civ 446.

In *Murray*, the Court of Appeal considered an appeal by Mr and Mrs Murray (Mrs Murray being better known as J. K. Rowling) against the first instance decision to strike out the Article 8 claim made in respect of unauthorised surreptitious photography of their young son, David in a public place. It is well-established in theory<sup>33</sup> and practice<sup>34</sup> that photographs constitute expression for the purposes of applying a free speech clause. Yet since it was for the Murrays to first establish a claim (which they had been unable to do at first instance), the nature of the Article 10 claim was not explored, either in the first instance or Court of Appeal decision. In finding that the child of a celebrity may establish a *prima facie* Article 8 claim in circumstances where the celebrity parent may not, the Court set out the test to be followed to determine the case, indicating that in such cases two questions should be answered: ‘first, whether the information is private in the sense that it is in principle protected by Article 8 (*i.e.* such that Article 8 is in principle engaged) and, secondly, if so, whether in all the circumstances the interest of the owner of the information must yield to the right to freedom of expression conferred on the publisher by Article 10’.<sup>35</sup> Sir Anthony Clarke MR, giving the sole judgment, then proceeded to consider in detail how the first question should be tackled but did not address the second. In many ways, this is disappointing since it would have been interesting to learn what the Article 10 claim was premised on in this case. Perhaps the Court of Appeal felt the claim was obvious given the implication that a legitimate interest in

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<sup>33</sup> Schauer, fn. 2, 97.

<sup>34</sup> *Campbell*, fn. 4.

<sup>35</sup> *Murray*, fn. 32, [27]

photographing a celebrity was at stake.<sup>36</sup> Yet how should such pictures be treated? Are they a form of political expression: does the photograph depict a matter of public interest because Murray is a celebrity? Or are the photographs protected because the composition of them is of artistic value? Alternatively, is it commercial expression? As Lord Hoffmann recognised in *Campbell*, photographs grab attention (they are worth a thousand words),<sup>37</sup> corroborate the written story and so help sell newspapers.<sup>38</sup> On a similar theme, photographs of the Douglas/Zeta-Jones wedding were found to be information of commercial value.<sup>39</sup> Clearly, the answers to these questions are significant in determining the level of protection the expression should be afforded (assuming the hierarchical approach evident in the Strasbourg jurisprudence is followed).

It has been noted in previous chapters that the UK judiciary's approach to freedom of expression bears strong resemblances to Bork's conception of the argument from participation in a democratic society. Such alignment, however, is troubling for the protection of artistic expression since Bork's theory would not protect any expression that is not 'explicitly political'.<sup>40</sup> Whilst the Strasbourg jurisprudence clearly extends protection to artistic expression it has already been noted by Fenwick and Phillipson that such statements of principle have greater *rhetorical* significance than practical value given that the outcomes of artistic

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<sup>36</sup> *Ibid.*, [13], 'the evidence supports the conclusion that David's mother has not sought to protect herself from the Press, no doubt on the basis that she recognises that because of her fame the media are likely to be interested in her'.

<sup>37</sup> *Campbell*, fn. 4, [72].

<sup>38</sup> *Ibid.*, [77], 'We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers. From a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the...story was true.'

<sup>39</sup> *OBG Ltd v. Allan* (2007) UKHL 21.

<sup>40</sup> Bork, fn. 3, 27

expression claims do not tend to reinforce these statements.<sup>41</sup> Thus adherence to the mirror principle may not safeguard artistic expression. Of course, this point should not be overstated: as Schauer observes, ‘there are works commonly referred to as ‘art’ whose content clearly places them within the range of the type of communication covered by the free speech principle’<sup>42</sup> not least because the positive contribution made is readily apparent or otherwise uncontested. Art may seek to directly or indirectly comment on political and religious matters or it may seek no such thing and yet be considered highly beneficial to improving mental faculties. However, for reasons of competency (set out above) it is important the judiciary adopt a broad approach to artistic expression. This need not entail a departure from a consequentialist rationale based on the argument from participation in a democracy. Meiklejohn’s conception of this argument, for example, explicitly recognises the contribution that literature and the arts make toward improving the voter’s capacity to make informed decisions.<sup>43</sup> Moreover, Perry has argued that Bork’s argument is ‘seriously flawed’ because much artistic expression ‘must be understood as moral in character...[and] every moral vision is ultimately and irreducibly a political vision: a vision (or understanding or experience) of the world and of our place, as fundamentally social beings, in that world’.<sup>44</sup> Thus, he concludes: ‘to say that efforts to express political vision should be protected...is necessarily to say that efforts to express moral vision, and access to such expression, should be protected as well’.<sup>45</sup>

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<sup>41</sup> Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 50.

<sup>42</sup> Schauer, fn. 2, 109.

<sup>43</sup> Meiklejohn, ‘The First Amendment is an Absolute’, fn. 7, 257.

<sup>44</sup> Michael J. Perry, ‘Freedom of expression: an essay on theory and doctrine’ (1983) 78 *Northwestern University Law Review* 1139, 1149.

<sup>45</sup> *Ibid.*, 1149-1150.

Furthermore, as set out previously, any narrow approach by the court to question of contribution made by artistic expression to society at large is unsafe: the judiciary are entirely unqualified to know the wider impact art has on society at large.

### 3. Commercial speech

As with artistic expression, there has only been a handful of cases post-HRA involving commercial expression. The first case, *British American Tobacco*,<sup>46</sup> concerned the lawfulness of the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004. The Divisional Court was asked to consider the claim that, amongst other things, the Regulations were disproportionate to the aim of promoting health because they allowed so little advertising as to impair the ‘very essence’ of commercial free speech under Article 10. McCombe J., demonstrating a minimalist approach to the Article 10 claim, found that since ‘freedom of commercial expression has been treated traditionally as of less significance than freedom of political or artistic expression’<sup>47</sup> it was not ‘disproportionate to meet the objective of promoting health by restricting advertising at POS to a single advert of the type to be permitted’.<sup>48</sup> To a certain extent, this approach to commercial expression may be contrasted with the more liberal approach evident in *North Cyprus Tourism Centre*,<sup>49</sup> in which the claimant sought judicial review of a decision of the defendant (Transport for London) to stop carrying advertisements promoting holidays in North Cyprus.

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<sup>46</sup> *British American Tobacco*, fn. 8.

<sup>47</sup> *Ibid.*, [28].

<sup>48</sup> *Ibid.*, [51].

<sup>49</sup> *R (on the application of North Cyprus Tourism Centre Ltd.) v. Transport for London* (2005) EWHC 1698

The advertisements were removed following complaints that North Cyprus was not a country recognised by the UK government because it was illegally occupied by Turkey. It was not suggested by the claimant that the advertisements were a form of political expression: on the contrary, the claimant argued that the advertisements were wholly unconnected to the political landscape of the region (bearing only an innocuous strapline). Rather than find that the speech concerned was of limited significance in Article 10 terms, Newman J. in the Divisional Court upheld the Article 10 claim on the basis that since the defendant had not identified a legitimate aim in removing the advertisements<sup>50</sup> and neither had it demonstrated any pressing social need for the interference,<sup>51</sup> there had been a violation.

Since that decision both the Divisional Court<sup>52</sup> and the Court of Appeal has considered the Article 10 claims of commercial expression in respect of comparative advertising. In the Court of Appeal decision in *Boehringer*,<sup>53</sup> Vetplus UK, the respondent, claimed, amongst other things, that a product made by Boehringer was of inferior quality to the claims made on its label. Dismissing the appeal, the court found that it would offend the rule against prior restraint to grant an injunction in circumstances where the claimant had not shown the publication was libellous or untrue.<sup>54</sup> Thus there was no reason to suppress the speech regardless of the fact it was also commercial in nature. Furthermore, the case involved issues beyond Article 10. In recognising this, Lord Justice Jacob stated that ‘although there is an important issue of free speech involved in comparative advertising, other more complex factors

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<sup>50</sup> *North Cyprus Tourism Centre*, fn. 49, [93]

<sup>51</sup> *Ibid.*, [95]-[96].

<sup>52</sup> *Red Dot Technologies Limited v. Apollo Fire Detectors Limited* (2007) EWHC 1166 (Ch)

<sup>53</sup> *Boehringer Ingelheim Ltd v. Vetplus Ltd* (2007) EWCA Civ 583

<sup>54</sup> *Ibid.*, [48]

are involved too'.<sup>55</sup> The finding that the expression involved 'important issues of free speech' is, however, significant in Article 10 terms. This approach is consistent with the Strasbourg jurisprudence on commercial expression, as discussed in Chapter Three.<sup>56</sup> It will be recalled that the ECtHR stated in *Casado Coca*<sup>57</sup> that 'for the citizen, advertising is a means of discovering the characteristics of goods and services offered to him'.<sup>58</sup> As noted, this approach has obvious comparisons with the approach to freedom of political expression: when assessing whether the expression should be protected, the court examines the extent to which information is communicated that assists individual decision-making.<sup>59</sup> This may account for Richards J. finding in the Divisional Court decision in *Red Dot Technologies*<sup>60</sup> that 'comparative advertising is also a form of expression which, if fair and not misleading, is in the public interest'.<sup>61</sup>

Yet to treat commercial expression as involving matters of public interest risks elevating such speech to the same level of importance as political speech: indeed, it might be said that it is tantamount to treating such expression as a form of political speech. Although the decision, for example, in *North Cyprus Tourism Centre* is explainable by reference to the weakness of the defence, it is intriguing that the Court found that the decision to remove the advertisements 'restricted the...claimant's freedom of expression by denying it a vital medium for its advertisements. The decision involves a 'restriction' regardless of the possibility that

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<sup>55</sup> *Ibid.*, [41]

<sup>56</sup> See discussion at page 119.

<sup>57</sup> *Casado Coca v. Spain* (1994) 18 EHRR 1

<sup>58</sup> *Ibid.*, [51].

<sup>59</sup> D. Feldman, 'Content Neutrality', in Ian Loveland (ed.), *Importing the First Amendment*, (Oxford University Press, 1998, 2<sup>nd</sup> edn.), 157.

<sup>60</sup> *Red Dot Technologies Ltd. v. Apollo Fire Detectors Ltd.* (2007) EWHC 1902 (Fam).

<sup>61</sup> *Ibid.*, [13].



the...claimant could advertise elsewhere'.<sup>62</sup> This provides an interesting point of comparison with the later House of Lords decision in *ADI*,<sup>63</sup> which was discussed in the previous two chapters. In that case, which it will be recalled involved a ban on political advertising using the broadcast media, Lord Bingham found the opportunity of advertising elsewhere to be a 'factor of some weight'<sup>64</sup> in determining that the ban in question was not disproportionate even though his Lordship recognised that the broadcast media was the 'most effective advertising media'.<sup>65</sup> The decision in *ADI* does not expressly overrule *North Cyprus Tourism Centre*: indeed, none of the commercial speech cases were referred to by the House of Lords. These two sets of principle do not marry up well; arguably, the only means by which to preserve both is to confine them to the specific categories of speech to which they apply. Of course, this would obviously place political advertising in a comparatively weaker position than commercial advertising. Given the preponderance of the courts in other Article 10 cases to find that alternative means of speaking is a relevant factor,<sup>66</sup> it is arguable that this principle in *North Cyprus Tourism Centre* is now out of touch with other case law and, for that reason, a court may be less inclined to follow this principle where it arose in future decisions.

In more general terms, these statements of principle connote a more serious approach to the free speech claims of commercial expression than has been seen in relation to pornographic speech, as will be shown. Yet this need not be the case: as

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<sup>62</sup> *North Cyprus Tourism Centre*, fn. 49, [78].

<sup>63</sup> *R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15.

<sup>64</sup> *Ibid.*, [32].

<sup>65</sup> *Ibid.*, [30].

<sup>66</sup> As discussed in the previous chapter.

noted, at Strasbourg level it has been found that for commercial speech – like pornographic speech – the member state is afforded a wide margin of appreciation. Indeed, in *Casado Coco*,<sup>67</sup> a case commonly cited in commercial expression cases, the claimant lost his commercial speech claim: the ECtHR recognised that the margin of appreciation was ‘particularly essential’ since advertising like unfair competition was an area of ‘complex and fluctuating’ issues and the Court ‘confined’ itself to the question of whether the interference was justifiable and proportionate.<sup>68</sup> Thus, as was argued in Chapter Four, in situations such as this, the UK judiciary has considerable scope to rationalise the protection afforded commercial expression so that it sits within the hierarchy more recognisably. Yet, from the brief foray of the case law set out above, it seems the UK judiciary has not taken account of this margin and, instead, is receptive to the argument that the commercial expression is important for its contribution to individual decision-making. As with pornography, in identifying the value at stake the court might refer to the significant debate about the free speech claims of commercial expression. Indeed, the comparison to pornography has been taken further: it has been said that ‘advertising is the pornography of capitalism, intended to arouse desire for objects rather than for person’.<sup>69</sup> In its approach to commercial expression, as with its approach to freedom of speech more generally, the UK courts have had little regard to the intense academic debate that exists in respect of commercial expression.

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<sup>67</sup> Fn. 57

<sup>68</sup> *Casado Coco*, fn. 57, [50].

<sup>69</sup> Daniel Farber, “Commercial Speech and First Amendment Theory,” (1979) 74 *Northwestern University Law Review* 372, 383-384.

As this debate demonstrates, the idea that free speech theory should cover (and protect) commercial expression divides opinion. Those that maintain that it is ‘intuitive’ that commercial expression is excluded,<sup>70</sup> since inclusion would ‘trivialise’<sup>71</sup> the concept of free speech clash with those that say ‘the commercial/noncommercial speech dichotomy is illusory, undefinable, based on erroneous assumptions, and should be eradicated’.<sup>72</sup> For such divided opinion there is no middle ground that would satisfy both and so, arguably, the two-tier categorisation (where commercial expression enjoys a lesser status to political expression), which may be seen as a middle ground, arguably satisfies neither camp. The conservative approach to coverage would exclude commercial speech because it is significantly different to the type of public discourse that political speech represents. As Post notes,

‘commercial speech...does not seem a likely candidate for inclusion ... because we most naturally understand persons who are advertising products for sale as seeking to advance their commercial interest rather than as participating in the public life of the nation...if pressed, this is not ultimately a judgment about the motivations of particular persons, but instead about the social significance of a certain kind of speech’<sup>73</sup>

Thus, a Canadian judge has found that:

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<sup>70</sup> See Roger Shiner, *Freedom of Commercial Expression*, (OUP, 2003).

<sup>71</sup> As the Attorney General of Quebec argued unsuccessfully in *Ford v. Attorney General of Quebec* [1988] 2 SCR 712, [53]; see also Geoffrey Marshall, Case Comment, ‘Taking rights for an override: free speech and commercial expression,’ (1989) *Public Law* 4.

<sup>72</sup> Scott Joachim, “Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations,” (1997) 19 *Hastings Comm. & Ent. L.J.* 518, 541.

<sup>73</sup> Robert Post, ‘The Constitutional Status of Commercial Speech,’ (2000) 48 *UCLA Law Review* 1, 11

‘Commercial speech contributes nothing to democratic government because it says nothing about how people are governed or how they should govern themselves. It does not relate to government policies or matters of public concern essential to a democratic process. It pertains to the economic realm and is a matter appropriate to regulation by the Legislature’.<sup>74</sup>

Yet since the UK courts have not substantially engaged with the academic debate in this regard, arguments such as these have not been addressed. Although the UK courts seem satisfied that certain types of commercial expression, at least, promote the democratic process value, such a finding does not entirely address the argument that ‘the censorship of commercial speech does not endanger the process of democratic legitimation. It does not threaten to alienate citizens from their government or to render the state heteronymous with respect to speakers’.<sup>75</sup>

In this respect, however, the UK courts might have regard to the challenges that have been made against the conservative position. For example, against the argument that the ‘profit motive’ of commercial expression should defeat its claim to freedom of speech status, it has been argued that:

‘the greatest irony in the widespread disdain for self-interested expression inherent in the commercial speech distinction is the fact that in many other aspects of legal and political culture our society actually places a premium on self-interest. Indeed, the entire premise of our largely capitalistic economic system is the belief that reliance on self-interest will maximise societal welfare. The central assumption of capitalism, of course, is that the

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<sup>74</sup> Callaghan J., in *Re Klein and Law Society of Upper Canada* (1985) 16 DLR (4<sup>th</sup>) 489, 539.

<sup>75</sup> Post, fn. 73, 14-15

individual's incentive to maximize profits will lead to the creation of improvements in products and services.<sup>76</sup>

The 'profit motive' argument, for example, is difficult to sustain since newspapers, in particular, depend upon their commercial success in order to survive and thrive.<sup>77</sup> Aside from the difficulty of determining coverage where political and commercial expression converges and co-exists, a judge is presented with difficulties if expression driven by a commercial incentive must be excluded. To say that newspapers engage the free speech principle because they occupy the position of 'public watchdog'<sup>78</sup> may lead to awkward conclusions if that coverage is unavailable for corporations, even though a clear public element may be discernible in a commercial advertisement. Indeed, many forms of political expression may have profit and, more broadly conceived, monetary considerations at their heart, particularly any criticisms of government spending tax-payers' money: for example, in criticising the government, the motive of the speaker may well be financially-driven. In any event, the Strasbourg jurisprudence establishes that the 'profit motive' argument is ineffective for Article 10 claims: the ECtHR has previously said that because Article 10 guarantees freedom of expression to "everyone" 'no distinction is made in it according to whether the type of aim pursued is profit-making or not'.<sup>79</sup>

The liberal argument for coverage tends to be that commercial expression aids self-fulfilment. It will be recalled that freedom of expression under Article 10

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<sup>76</sup> *Ibid.*, 573

<sup>77</sup> Thus it was noted in *A v. B plc* (2003) QB 195, [11], 'the courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest' *per* Lord Woolf.

<sup>78</sup> *Jersild v. Denmark* (1995) 19 EHRR 1.

<sup>79</sup> *Casado Coco*, fn. 57, [35].

‘constitutes one of the essential foundations...for each individual’s self-fulfilment’.<sup>80</sup> Barendt, for example, has challenged this argument on the basis that ‘it is nonsense to contend that advertising is vital to a corporation’s sense of its ability to develop or achieve self-fulfilment, in the same way that the freedom to write or to paint is essential to the identity and self-fulfilment of authors and artists’.<sup>81</sup> Yet Redish is dismissive of this ‘corporate speaker’ analysis, arguing that ‘at least a significant portion of the value served by free expression is the benefit received by the reader, viewer or listener’.<sup>82</sup> On this basis, ‘logically neither the motivation for the speech nor its effect on the speaker should be dispositive of its [protection] status’.<sup>83</sup> Redish concludes that ‘the only other conceivable explanation for the reduced level of First Amendment protection afforded commercial advertising, then, is some sort of ideologically based distaste for, or rejection of, the value of the commercial promotion of a product or service’.<sup>84</sup>

Shiffrin has argued that there is no ‘squeaky-clean separation between commercial advertising and political speech’.<sup>85</sup> Likewise, Redish argues that any distinction between commercial speech and political expression is ‘irrational’ since ‘commercial speech may serve the very same values as are fostered by political expression, in that it facilitates an individual’s “private self-governing” process. It thereby assists in attainment of the values of individual autonomy and self-

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<sup>80</sup> *Lingens v. Austria*, fn. 31.

<sup>81</sup> Eric Barendt, *Freedom of Speech*, (Oxford University Press, 2<sup>nd</sup> ed., 2005), 400.

<sup>82</sup> Martin Redish, “First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy,” (1997) 24 *Northern Kentucky Law Review* 553, 570

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, 575

<sup>85</sup> Steven Shiffrin, ‘The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment’ (1984) 78 *Northwestern University Law Review* 1212, 1228.

realization’.<sup>86</sup> Thus coverage should not be denied under ‘the self-realization model, [as] advertising deserves substantial constitutional protection since advertising provides information which is more useful in life decisions than what is available from other sources’.<sup>87</sup> Likewise, whilst it may be said, ‘purely commercial speech plays little role in the exposition and debate of political ideas, (political speech might be *about* commercial matters, but it does more than propose a commercial transaction)’,<sup>88</sup> and that ‘commercial speech differs from public discourse because it is constitutionally valued merely for the information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination,’<sup>89</sup> a convincing rejoinder is that ‘the interplay between the forces of a free market and democracy are not a one-way street. A free market economy can be both conducive and detrimental to a pluralistic political system.’<sup>90</sup> Likewise, Post notes that ‘visions of the good life articulated within commercial advertisements are relevant to this [political] process’<sup>91</sup> whilst Shiffrin concludes ‘there is good reason to think that much so-called economic regulation touches speech of political importance’.<sup>92</sup>

Admittedly, the transactional element of commercial advertising cannot be ignored or else commercial speech may be imbued with an importance it is genuinely undeserving of. Farber, for example, notes there is an ‘intuitive belief that commercial speech is somehow more akin to conduct than are other forms of speech’

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<sup>86</sup> *Ibid.*, 566

<sup>87</sup> *Ibid.*

<sup>88</sup> John Valauri, “Smoking and Self-Realization: A Reply to Professor Redish,” (1997) 24 *Northern Kentucky Law Review* 585, 587

<sup>89</sup> Post, fn. 73, 4.

<sup>90</sup> Maya Hertig Randall, “Commercial speech under the European Convention on Human Rights: subordinate or equal?” (2006) *Human Rights Law Review* 53, 80

<sup>91</sup> Post, fn. 73, 11

<sup>92</sup> Shiffrin, fn. 85, 1232

on the basis that ‘it is a prelude to and therefore becomes integrated into, a contract, the essence of which is the presence of a promise.’<sup>93</sup> Consequently, since ‘a promise is an undertaking to ensure that a certain state of affairs takes place, promises obviously have a closer connection with conduct than with self-expression.’<sup>94</sup> On this basis, ‘false advertisements are indistinguishable from unfulfilled contractual promises’.<sup>95</sup> Thus it has been said that commercial speech should be treated as ‘no more than proposing a commercial transaction’.<sup>96</sup> Yet Kozinski and Banner, for example, contest this line of reasoning, arguing that modern advertising does not typically contain the essential elements of a commercial transaction, such as price or purchase location.<sup>97</sup> Instead, advertisers tend to link their product to achievement of an image or ideal. It may be said that politicians do something similar by trying to sell an image or ideal to the voter and linking a political party to achievement of such.

Thus, the UK courts might better explicate the reasons for protecting commercial expression by having regard to the academic debate on this point. For example, Redish has said that ‘commercial speech serves the values of free speech protection as much or more than does any category of fully protected expression’<sup>98</sup> and, further, that ‘careful examination reveals that without question, none of the remaining arguments relied upon to justify commercial speech’s second class status justifies the distinction’s continued existence’.<sup>99</sup> Similarly, Post notes,

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<sup>93</sup> Farber, fn. 69, 389

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, 390

<sup>96</sup> Which is how American case law has tended to treat commercial speech, see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 US 748 (1976).

<sup>97</sup> Alex Kozinski and Stuart Banner, “Who’s Afraid of Commercial Speech?” (1990) 76 *Virginia Law Review* 627, 638-641.

<sup>98</sup> Redish, fn. 82, 564

<sup>99</sup> *Ibid.*, 565.



‘underlying [the view that commercial speech may be of public interest] is the notion that citizens may acquire information from commercial speech that is highly relevant to the formation of democratic public opinion. Democratic public opinion, in turn, is the ultimate source of government decision making. If citizens learn from commercial advertising that pharmacy drugs are too expensive, for example, they might organize politically to advocate within public discourse for the creation of national health insurance’.<sup>100</sup>

This line of reasoning would seem to have currency in Article 10 terms: certainly, it seems in keeping with the UK and Strasbourg findings that commercial expression may involve ‘important issues of free speech’. Yet the UK courts’ have not fully articulated their approach to commercial expression in such terms and, neither have they demonstrated any engagement with the countervailing arguments. Redish may be right when he says that ‘most of these attacks [on free speech protection for commercial speech] – much like similar attacks against obscenity protection – may be deconstructed into little more than a result-orientated attempt to stifle advocacy of a particular ideological perspective or point of view’.<sup>101</sup> Yet what these differing viewpoints demonstrate is the need for the UK judiciary to engage with this debate in order to resolve the uncertainty because, presently, the connection between commercial expression and the democratic process, together with the apparent parity in strength between political and commercial speech presents a risk that the importance of commercial expression is overstated.

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<sup>100</sup> Post, fn. 73, 11.

<sup>101</sup> Redish, fn. 82, 556.

## 4. Pornography

Shortly before the main HRA provisions became operational, Hooper J., in considering an appeal concerning the BBFC classification of a pornographic film, briefly referred to Article 10 but without fuller consideration of how it would be treated in the post-HRA landscape.<sup>102</sup> This brief mention however suggested that a liberal approach to pornographic expression might follow. A similarly liberal approach is apparent in the first post-HRA pornographic expression decision, *O'Shea*,<sup>103</sup> which Amos discusses in her article.<sup>104</sup> Here, the Divisional Court held that a pornographic advertisement was form of protected speech under Article 10. The facts of *O'Shea* are novel: it concerned an individual who claimed that an advertisement for an adult internet service was defamatory because the glamour model used in that advertisement closely resembled her. In considering whether the strict liability principle within the Defamation Act 1952 interfered with Article 10, Morland J. commented that the advertisement 'will have been regarded by many as squalid and degrading to women but distasteful though it may be, it is not unlawful and in accordance with European law is a form of expression protected by Article 10'.<sup>105</sup> However, as with Hooper J.'s assessment, this decision is not fully reasoned: most notably, there is no identification of the value or values at stake in the suppression of such speech.

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<sup>102</sup> *R. v. Video Appeals Committee of British Board of Film Classification ex parte British Board of Film Classification* (2000) EMLR 850. Decision of 16 May 2000. See Susan Edwards, 'The Video Appeals Committee and the standard of legal pornography' (2001) *Criminal Law Review* 305.

<sup>103</sup> *O'Shea v. MGN Ltd.* (2001) EMLR 943.

<sup>104</sup> Amos, fn. 1.

<sup>105</sup> *O'Shea*, fn. 103, [37]

Perhaps unsurprisingly given the establishment of a firmly consequentialist approach to Article 10 in the UK, the liberalism that underpins the decision in *O'Shea* has not established itself in the post-HRA pornographic expression case law. The Court of Appeal briefly considered Article 10 in a pornographic context in *R. v. Perrin*,<sup>106</sup> which concerned a conviction for publishing an obscene website depicting 'people covered in faeces, coprophilia or coprophagia, and men involved in fellatio'.<sup>107</sup> The Court did not fully engage with the Article 10 claim; instead, finding that any interference with the right was justified under Article 10(2). In *Interfact*,<sup>108</sup> which concerned prosecutions against two licensed sex shops in breach of a statutory prohibition on mail order sales of R18 videos,<sup>109</sup> the Divisional Court reached a similar conclusion as in *Perrin*. The affected companies argued that the prohibition violated their Article 10 rights. In common with *Perrin*, the Court did not consider in any detail the Article 10 claim, instead concluding that the right had not been violated because the protection of health or morals exception applied under Article 10(2).

Since *Interfact*, the House of Lords has considered the status of pornographic speech within Article 10 in *Miss Behavin' Ltd*,<sup>110</sup> which was an appeal concerning an unsuccessful application for a sex shop licence. In considering whether the original decision-maker had fully considered the alleged Article 10 claim at stake, their Lordships found that whilst vending pornographic material engaged Article 10, it did so 'at a very low level'<sup>111</sup> and 'hardly in a very compelling sense'.<sup>112</sup> Lord Hoffmann

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<sup>106</sup> *R. v. Perrin* (2002) EWCA Crim 747.

<sup>107</sup> *Ibid.*, [2].

<sup>108</sup> *Interfact Ltd. v. Liverpool City Council* (2005) EWHC 995.

<sup>109</sup> s. 12(1), Video Recordings Act 1984.

<sup>110</sup> *Belfast City Council v. Miss Behavin' Ltd* (2007) 1 WLR 1420.

<sup>111</sup> *Ibid.*, per Lord Hoffmann, [16].

<sup>112</sup> *Ibid.*, per Lord Mance, [42].

explained that ‘the right to vend pornography is not the most important right of free expression in a democratic society’.<sup>113</sup> The focus of the claim in this case concerned the licence application rather than the merits of the literature itself and therefore the Article 10 claim centred on whether *vending* pornography constituted an act of free speech. Yet the judgment reveals telling signs of the Court’s attitude toward pornography: for example, at one point in her judgment Baroness Hale notes that ‘there are far more important human rights in this world...Pornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law. Far too often it entails the sexual exploitation and degradation of women for the titillation of men’.<sup>114</sup>

Such harmful effects of pornography were at the forefront of the claim in *In Re St Peter and St Paul’s Church*,<sup>115</sup> which concerned an appeal against the decision to prevent installation of a telecommunications mast in a church tower due to the risk that pornographic images may be transmitted to adults and children. However, applying the rationale in *Miss Behavin’ Ltd*, the Arches Court of Canterbury found that the issue may either not engage Article 10 at all or else at such a low level that the chances of free speech being disproportionately limited were highly unlikely:

‘Provided the consistory court follows the correct procedure of balancing the arguments in the case before it, we do not consider that by the attachment of conditions to the grant of a faculty where the question of distribution of pornography arises there will necessarily be any engagement with Article 10. It is not every apparent interference with a person’s rights under

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*, [38].

<sup>115</sup> *In re St Peter and St Paul's Church, Chingford* (2007) 3 WLR 748. The harmful effects were also considered in *ex parte BBFC*, fn. 102.

Article 10 which necessarily amounts to a breach of those rights. Alternatively, in view of the “very low level” of any such engagement a reasoned decision should make any argument of disproportionate limitation on a right to freedom of expression untenable.’<sup>116</sup>

Thus, as with *Miss Behavin’ Ltd*, it may be said that this case does not readily engage with the pornographic expression itself but the distribution of it. Of course, it may be said that this is not much of a distinction. Interferences with the ready availability of specific expression also prevent the expression itself being seen (or heard). Indeed, given the pre-eminence of the consequentialist rationale, it is surprising that their Lordships in *Miss Behavin’ Ltd*. were not clearer about the status of pornography under Article 10 in the UK: since it seems readily accepted in the academic literature that pornography gains little support for protection under the argument from participation in democracy<sup>117</sup> and given that the ECtHR leaves the treatment of pornography to Member States to determine, the Court might have excluded it from protection altogether.<sup>118</sup> Such an approach to pornography is apparent in, for example, the theories advanced by Bork<sup>119</sup> and BeVier<sup>120</sup> who expressly exclude it. Thus, the UK courts’ approach to pornographic expression may be criticised on the basis it lacks real clarity. It is submitted that clarity on this point is important in order to ensure that artistic expression is not prejudiced as a consequence: there is a risk that a dismissive stigmatic approach to pornography unduly harms artistic expression. This point seems to be recognised by Baroness Hale in *Miss Behavin’ Ltd*: having

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<sup>116</sup> *In re St Peter, ibid.*, [37].

<sup>117</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 41, 395.

<sup>118</sup> *Hoare v. UK* (1997) EHRLR 678; *Scherer v. Switzerland* A 287 (1993) Com Rep. See discussion in Helen Fenwick and Gavin Phillipson, *Media Freedom*, fn. 41, of both these cases, 410-422.

<sup>119</sup> Bork, fn. 3, 20.

<sup>120</sup> Lilian BeVier, “The First Amendment and Political Speech: an Inquiry into the Substance and Limits of the Principle,” [1978] 30 *Stan. L. Rev.* 299, 317.

questioned the value of pornography, Baroness Hale goes on to say ‘but there is always room for debate on what constitutes pornography. We can all think of wonderful works of literature which once were banned for their supposed immorality’.<sup>121</sup> Since *Miss Behavin’ Ltd* involved no question of artistic merit the point was not expanded upon.

For this reason, it is important that, once the opportunity arises, the UK court drills down into the deeper issues surrounding pornography as a form of protected expression: *i.e.*, the UK judiciary should engage with the arguments that it destroys morals or family values (the conservative position);<sup>122</sup> is harmful to women (the feminist position);<sup>123</sup> or, conversely, that since censorship could not be limited exclusively to pornography, it may have a chilling effect on other types of expression that ought to be protected<sup>124</sup> or, moreover, that censorship offends against individual autonomy to decide on morality (the liberal position).<sup>125</sup> These differing attitudes toward pornography have been extensively explored in the academic literature<sup>126</sup> and are briefly explored in the following discussion in order to support the argument made: there is an apparent dismissive attitude toward pornography in the UK courts approach however it is important that such an attitude does not cloud the view entirely since the expression at stake may uphold Article 10 values. For example, as seen in the decision in *VBK v. Austria*,<sup>127</sup> although the medium of the expression was

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<sup>121</sup> Fn. 110, [38].

<sup>122</sup> Fenwick and Phillipson, *Media Freedom*, fn. 41, 392-394.

<sup>123</sup> *Ibid.*, 399-407.

<sup>124</sup> *Ibid.*, 395-399.

<sup>125</sup> Ronald Dworkin, ‘Is there a right to pornography?’ (1981) 1 *Oxford J. Legal Stud.* 177, 199.

<sup>126</sup> For a very full discussion of theoretical and comparative approaches to pornography in the context of free speech and indecency/obscenity laws see Fenwick and Phillipson, *Media Freedom*, fn. 41, 385-480.

<sup>127</sup> (2007) ECDR 7.

a pornographic image, the ECtHR was prepared to find that the expression itself had a political context.<sup>128</sup> The UK courts have not had to consider such circumstances. Perhaps the closest so far was the unsuccessful argument made in *Mosley*<sup>129</sup> where a sex video of Max Mosley, engaged in (allegedly) ‘Nazi’ role play with five prostitutes, was posted on the News of the World’s website under the thin pretence that some vague ‘public interest’ was at stake.<sup>130</sup> The dismissive approach taken in *Mosley* was entirely justifiable on the facts. However, given the dismissive approach to pornography so far, would the UK courts have reached a similar decision to the ECtHR if presented with a similar factual matrix as in *VBK*? Would it find that it must ‘mirror’ the decision or would it instead focus on the wide margin of appreciation afforded to Member States to determine moral issues (it will be recalled that the protection of morals was not found to be a reason for interfering with the expression in *VBK*)?

Of course, it is recognised that the argument for a permissive approach to the consumption of pornography is not, necessarily, an argument that pornography is covered by free speech principle. It has been said that the notion of liberty in general requires such permissiveness<sup>131</sup> whilst, in response, it has been said that the causality<sup>132</sup> between pornography and rape, sexual violence or degrading treatment

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<sup>128</sup> See discussion in Chapter Three, at pages 113 to 115.

<sup>129</sup> *Mosley v. News Group Newspapers Ltd* (2008) EWHC 687.

<sup>130</sup> Although note Lord Hoffmann’s comment in *Campbell*, fn. 4, [60] that even where there is a genuine public interest in publication (e.g., between a politician and someone whom she has appointed to public office – see facts of *Browne v. Associated Newspapers Ltd* [2007] EWCA Civ 295 as a case in point) ‘the addition of salacious details or intimate photographs is disproportionate and unacceptable...too intrusive and demeaning’.

<sup>131</sup> See Dworkin, fn. 125, 199.

<sup>132</sup> Dana Fraytak, “The influence of pornography on rape and violence against women: a social science approach,” (2000-2001) 9 *Buffalo Women’s Law Journal* 263.

demands its suppression,<sup>133</sup> and, even, that pornography is both a cause and form of sex trafficking:<sup>134</sup> these issues are beyond the ambit of this thesis. As might be expected, the liberal position on pornography appears to be in the ascendancy in the academic literature. Instead of indignantly asking how pornography could possibly be covered by free speech theory,<sup>135</sup> the question now seems to be more how pornography could not be so covered.<sup>136</sup> Of course, this is not to say that there are not cogent arguments made against the inclusion of pornography within free speech principle. Indeed, an appropriate starting point is the view that pornography, though typically verbal or visual, is not ‘speech’ in the free speech sense. Instead, pornography is said to be images of sexual behaviour in order to stimulate more such sexual behaviour.<sup>137</sup> Equally, it is said pornography is not speech because pornography is what it does, not what it says.<sup>138</sup> Yet whilst there is much to be said for the view that pornography is no more speech than a visit to the prostitute<sup>139</sup> or that

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<sup>133</sup> Catherine MacKinnon, *Only Words*, (Harvard University Press, 1993); Andrea Dworkin, “Against the Male Flood: Censorship, Pornography, and Equality,” (1985) 8 *Harvard Women’s Law Journal* 1. Both have consistently argued that pornography promotes continuing gender segregation in a way which, apparently, female only journals do not.

<sup>134</sup> Catherine MacKinnon, “Pornography as trafficking,” [2005] 26 *Michigan Journal of International Law* 993, 999, ‘The pornography industry, in production, creates demand for prostitution, hence for trafficking, because it is itself a form of prostitution and trafficking’.

<sup>135</sup> Ronald Dworkin said, in 1981, that ‘the majority of people in [the UK and US] would prefer (or so it seems) substantial censorship if not outright prohibition of ‘sexually explicit’ books, magazines, photographs and films,’ (Dworkin, fn. 125, 177); James Weinstein notes that it was not until well into the 1960’s that the US courts treated pornography as covered by the First Amendment, (James Weinstein, *Hate Speech, Pornography and the Radical Attack on Free Speech Doctrine* (Westview Press, 1999), 141).

<sup>136</sup> See, for example, Weinstein, *ibid.*, 51, ‘many radical critics acknowledge that any attempt to...prohibit sexually explicit material demeaning to women is unconstitutional under current free speech doctrine’ though Thomas Scanlon asked in 1979, ‘the question to ask about pornography is, why restrict it?’ (Thomas Scanlon, “Freedom of expression and categories of expression,” [1979] 40 *University of Pittsburgh Law Review* 519, 542).

<sup>137</sup> Kent Greenawalt, *Speech, Crime and the Uses of Language*, (Oxford University Press, 1989), 149.

<sup>138</sup> MacKinnon, fn. 133, 11-19.

<sup>139</sup> Barendt, fn. 81, 356.



it is a sex aid,<sup>140</sup> there is some merit in the argument that it expresses an opinion, no matter how low grade,<sup>141</sup> even if it is to say something about contemporary outlooks on morality<sup>142</sup> or just that ‘sex is fun’.<sup>143</sup> Indeed, it has been said that pornography is a form of political speech: ‘there is no denying that obscene pornography constitutes a political-moral vision. Even obscene pornography communicates, often with implicit approval, certain ideas, values, and sensibilities regarding human sexuality and, usually and particularly, the status of women’.<sup>144</sup> Although this seems to be an exaggerated claim, others have said similarly, including the argument that pornographers are comparable to participants in political activity in that they are ‘entitled to at least a certain degree of access even to unwilling audiences’ *if* it may be said they seek ‘a fair opportunity to influence the sexual mores of the society’.<sup>145</sup> In this limited sense, they may be akin to the political extremist and so difficult questions of how offensive political speech should be handled may be implicated.<sup>146</sup>

Yet these arguments seem to imbue pornography with a level of sophistication that is often unmerited and certainly not apparent on all occasions. As Scanlon admits of his own argument, ‘whilst some publishers of “obscene” materials have this kind of crusading intent, undoubtedly many others do not’.<sup>147</sup> Moreover, without more argument, it is unconvincing that pornographers would have such grand aims:

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<sup>140</sup> MacKinnon, fn. 133, 17, ‘Pornography is masturbation material. It is used as sex. It therefore is sex. Men know this’; Robin West, “The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General’s Commission on Pornography Report,” (1987) *American Bar Foundation Research Journal* 681, ‘whatever else it may be, pornography is an aid to sexual pleasure’.

<sup>141</sup> See Alexander, fn. 7.

<sup>142</sup> Greenawalt, fn. 137, 150.

<sup>143</sup> ‘Does hardcore pornography communicate ideas or thoughts? Well, yes, that sex is fun,’ Tony Martino, “In conversation with Professor Eric Barendt: hatred, ridicule, contempt and plain bigotry,” (2007) *Entertainment Law Review* 48, 51.

<sup>144</sup> Perry, fn. 44, 1182.

<sup>145</sup> Scanlon, fn. 136, 545.

<sup>146</sup> See discussion in Chapter Five.

<sup>147</sup> *Ibid.*, 546.

as Barendt argues, ‘whilst even the shabbiest politician wants his audience to believe what he has to say or to vote for him, a porn merchant simply wants consumers to purchase his wares. As far as he is concerned they can throw them away afterwards’.<sup>148</sup> However, one potential difficulty with this argument is that, if generally applied, it may have a limiting effect on free speech principle: as explored in the previous section, the motive that an individual has in speaking ought to be considered irrelevant. Indeed, in a separate publication, Barendt provides the argument that would caveat his point: ‘the fact that the work is published for a motive that we don’t much like doesn’t mean that the work itself or the ideas implicit or explicit in the work are not of value and shouldn’t be debated’.<sup>149</sup> The point seems equally applicable to the shabby politician who may seek office for the prestige, lifestyle or wealth but not because of any genuine concern about how his/her political ideals contribute to society at large. Furthermore, the requirement that some political intent must be established in order that pornographic expression is protected may be unlikely since ‘expression dealing with sex is particularly likely to be characterized, by those who disapprove of it, as frivolous, unserious and of interest only to dirty minds’.<sup>150</sup> This seems particularly evident in the judgments of the House of Lords in *Miss Behavin’ Ltd.*<sup>151</sup> For this reason it ought not to be ignored that the term ‘pornography’ has stigmatic qualities and may be bestowed on speech that is disliked. In any event, there remains the argument that pornography may also not be protected on the basis that speech seeking to engage debate on sexual mores ‘may be put in a

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<sup>148</sup> Barendt, fn. 81, 360.

<sup>149</sup> Martino, fn. 143, 51.

<sup>150</sup> *Ibid.*, 546.

<sup>151</sup> Fn. 110.

sober and non-offensive manner'<sup>152</sup> if it is a genuine attempt at engaging free speech principle.

The argument against coverage has been developed, though, to say that even if pornography is speech and even if it cannot be said it is not valuable speech<sup>153</sup> exclusion from coverage (or protection) may be justified on the basis of the harm caused by its consumption. The extreme feminist position is that since the harm caused by pornography is severe,<sup>154</sup> invoking dangerous, automatic<sup>155</sup> responses in men who observe it, it is irrelevant whether the consumption is done publicly or privately.<sup>156</sup> This position, though, is not entirely built on solid foundations. To say 'nothing else does what pornography does'<sup>157</sup> is, arguably, too simplistic a view of the harm 'apparent' in pornography compared to other sources. It is unconvincing to suggest men have a mechanical response to pornography that requires them to attack women, physically<sup>158</sup> or mentally,<sup>159</sup> as a consequence. Although the extreme

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<sup>152</sup> *Ibid.*, 547.

<sup>153</sup> Alternatively, even if determination of whether it is valuable is an irrelevant consideration (see Alexander, fn. 7).

<sup>154</sup> Murder, rape, and humiliation of women (for example, see MacKinnon, fn. 133).

<sup>155</sup> 'Sooner or later, in one way or another, the consumers want to live out the pornography further in three dimensions. Sooner or later, in one way or another, they do. *It* makes them want to; when they believe they can, when they feel they can get away with it, *they* do,' MacKinnon, fn. 133, 19 (emphasis in original).

<sup>156</sup> As Scanlon notes, if the issue were simply a matter of being offended, the solution would be obvious: 'restrict what can be displayed on the public streets or otherwise forced on an unwilling audience but place no restrictions whatever on what can be shown in theatres, printed in books or sent through the mails in plain brown wrappers', Scanlon, fn. 136, 542.

<sup>157</sup> MacKinnon, fn. 133, 15.

<sup>158</sup> 'It is only pornography that rapists use to select whom they rape and to get up for their rapes,' MacKinnon, fn. 133, 16; Pauline Bart, "Pornography: Institutionalizing woman-hating and eroticizing dominance and submission for fun and profit," (1985) 2 *Justice Quarterly* 283, 284: interviews of convicted rapists find a parallel between pornography's vision of women and the rapist's articulation of his motives, 'women are sexual commodities to be used or conquered'.

<sup>159</sup> 'Sexualised racism and visual pornography have been integral to sexual harassment all along,' (MacKinnon, fn. 133), 45; likewise see Bart, fn. 158, 284, 'men do not inherently believe that women enjoy forced sex. Like racial and religious prejudice, it has to be learned. Pornography masterfully teaches them not only that women exist simply for men's pleasure, insatiably craving precisely those sexual behaviors that men prefer, but also that women enjoy bondage, battery and torture'.

feminist position, typified by MacKinnon, is said to be built on a number of ‘undeniable truths’, such truths often seem empirically suspect.<sup>160</sup> It is undeniable that pornography, particularly hardcore pornography, has the capacity to shock, offend and degrade in varying degrees, yet these are not compelling criteria to suppress since, as Dworkin puts it, ‘we cannot consider that a sufficient reason for banning it without destroying the principle that the speech we hate is as much entitled to protection as any other’.<sup>161</sup> Further, as Dworkin suggests,<sup>162</sup> the extreme feminist position<sup>163</sup> on harm is most likely damaged by the uncompromising ‘certainties’ they are built on, encapsulated, for example, in this view: ‘what feminists have begun to understand is that not only are the specific victims of criminal sexual violence inspired by pornography harmed, but also all other women who are affected by the sexual reality defined by pornography’.<sup>164</sup> This viewpoint links pornography to harm to women in a way that does not account for harms that would occur without pornography being available.<sup>165</sup> Yet the concerns that pornography has the significant potential to harm women either directly or indirectly should not be ignored or belittled. Fenwick and Phillipson, for example, discuss a number of cases in which women working in the adult entertainment industry have been harmed during the

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<sup>160</sup> That pornography is responsible for rape and degrading treatment of women (MacKinnon, *Only Words*, fn. 133); that ‘society does not think to question the reality that sex is for men; that women serve men; that control is erotic; that force and violence are stimulating; that domination is sexy’ (Bartlett, fn. 167, 73).

<sup>161</sup> Dworkin, fn. 125, 218.

<sup>162</sup> *Ibid.*, 243.

<sup>163</sup> Though it would be a mistake, identical to MacKinnon’s, to suggest that all feminists speak with one voice. See Nadine Strossen, “A feminist critique of “the” feminist critique of pornography,” (1993) 79 *Virginia Law Review* 1099.

<sup>164</sup> Bartlett, fn. 167, 73-74.

<sup>165</sup> Dworkin, fn. 125, 231, notes George Kennan’s observation that rape was also ‘ubiquitous’ in the Balkan wars of 1913, well before any “saturation” by pornography had begun.

production of pornographic films.<sup>166</sup> There is also the broader feminist argument that pornography reduces women to ‘panting playthings’:<sup>167</sup> ‘Pornography is the act, the pain, the harm; it does not “speak” that women are subordinate. It is woman subordinate’.<sup>168</sup>

Fenwick and Phillipson adopt a sensible and pragmatic approach to pornography, arguing that it is important not to confuse ‘shockingly explicit depictions of lawful acts...and depictions of rape, violence and torture’.<sup>169</sup> They suggest fresh legislation is required, orientated around principles of equality and human dignity but not so as to catch material which is ‘a genuine exploration of sexual identity or fantasy and not in fact likely to inculcate damaging sexual attitudes’.<sup>170</sup> Thus whilst it is accepted that the Millian argument might be put that what is required to combat the effects of pornography is not less but more sexual speech, in opposition,<sup>171</sup> it is submitted that such a view may be in danger of underestimating the seriousness of the issue and overestimating the free speech value at stake. Arguably, this is evident in the following commentary. Dworkin argues that

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<sup>166</sup> Fenwick and Phillipson, *Media Freedom*, fn. 41, 391.

<sup>167</sup> Katherine Bartlett, “Porno-symbolism: a response to Professor McConahay,” (1988) 51 *Law and Contemporary Problems* 71, 72, ‘the overwhelming message of this predominant form of pornography...is that women are objects of pleasure for men, to be possessed and violated by them. Pornography constructs the reality of sexual relations so that men expect, and women accept, male domination and female submissiveness’

<sup>168</sup> Kathleen Bean, “A radical feminist view of pornography,” (1987) *J. Contemp. Legal Issues* 19, 22.

<sup>169</sup> *Ibid.*, 435.

<sup>170</sup> Fenwick and Phillipson, *Media Freedom*, fn. 41, 479.

<sup>171</sup> Janis Searles, “Sexually explicit speech and feminism,” (1994) 63 *Revista Juridica U.P.R.* 471, 488-489: ‘women should direct their attention to the social realities that encourage and create a demand for pornography. Sex education and frank discussions about sexuality is one key element to this effort. Another key is working to change the economic and social situation of women. Addressing these fundamental issues instead of trying to eradicate one of their results, pornography, will undermine the demand for sexually explicit speech that is sexist and harmful to women.’

ensorship of pornography violates the individual moral or political rights of citizens who resent the censorship.<sup>172</sup> Emerson, likewise argues that:

‘the values served by a system of free expression – individual self-fulfilment, advancement of knowledge, participation in self-government, and promotion of consensus by non-violent means – form the bedrock of our government. The state must seek to achieve its social goals by methods other than the suppression of expression...Clearly the suppression of pornographic speech, on the ground that it causes or reflects discrimination against women, would run afoul of the basic mandate of the First Amendment’.<sup>173</sup>

Yet this is not a convincing argument. For one, it undervalues the importance of government being able to suppress speech on occasion.<sup>174</sup> Also, it assigns a value to pornography that may be generally misplaced, (as Dworkin notes, ‘it seems implausible that any important human interests are damaged by denying dirty books or films’)<sup>175</sup> or else assigns pornography a significance that it does not deserve (it has been said that protecting pornography within the First Amendment contradicts free speech goals since ‘it fails to take into account the concrete harm of speech to a group

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<sup>172</sup> Dworkin, fn. 125.

<sup>173</sup> Thomas Emerson, ‘Pornography and the First Amendment: A Reply to Professor MacKinnon’ (1984) 3 *Yale L. & Pol’y Rev.* 130, 132-133.

<sup>174</sup> Cass Sunstein, “Low value speech revisited,” (1989) 83 *Northwestern University Law Review* 555, 561, ‘the constitutional commitment to free expression, and to protection of dissent, cannot plausibly be taken to disable the government from controlling all activities that might qualify as speech. If taken to an extreme, the generally salutary antipathy to “censorship” would protect those who defraud consumers; who conspire, threaten, and bribe; who disclose to unfriendly countries plans to develop military technology; who use children to produce pornography; who disclose the names of rape victims; and who spread knowing falsehoods about private citizens’.

<sup>175</sup> Dworkin, fn. 125, 210.

that is powerless' and so, 'effectively silences dissent'<sup>176</sup> – it has been doubted that pornography is so powerful).<sup>177</sup>

The debate in the academic literature on pornography is not only extensive but also well-developed. By tapping into this debate, the judiciary has a ready source of arguments by which to shape its approach to pornography so as to ensure a richer, fully-formed approach emerges. If the dismissive approach to pornography pervades, then the context of the pornographic expression might not be recognised: in other words, any political comment or context may also be dismissed. Moreover, as with artistic expression, close adherence to the democratic process value may miss the broader values that may also be served by the expression, such as self-fulfilment. This is not to ignore the feminist position, which is important, but to safeguard against the stigmatic quality that the label 'pornography' may have on the expression. It may be that in a number of cases, the court can safeguard the artistic expression claim by determining whether the expression is commercial or artistic. Even so, the judiciary must still be cautious and recognise limitations in its competency to decide on matters of artistic merit.

## 5. Conclusion

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<sup>176</sup> Rebecca Benson, "Pornography and the First Amendment: *American Booksellers v. Hudnut*," (1986) 9 *Harvard Women's Law Journal* 153, 160-161.

<sup>177</sup> see Marilyn Maag, who argues that pornography has produced a positive effect in the sense that it prompts discussion of social attitudes: 'the process of enabling men to let go of domination and women to break free of subordination happens through the open discussion of ideas, feelings, needs and conflicting views. The first amendment protects this process: new attitudes are being wrenched out of the current battle over violent pornography,' (Marilyn Maag, "The Indianapolis Pornography Ordinance: Does the right to free speech outweigh pornography's harm to women?" (1985) 54 *University of Cincinnati Law Review* 251, 269).

In common with political expression, as the approach toward Article 10 has settled, the glimpses of liberalism shown in respect of non-political speech have hardened into a narrower approach. This is not entirely unsurprising. The notion that free speech clauses should extend beyond political speech is not without controversy. Long before the HRA was conceived, Barendt, for example, argued that all courts ‘are wise to construe a free speech clause fairly narrowly. In particular, they are right to accord political speech a preferred position and not to give any, or any significant degree of, protection to commercial advertising or hard core pornography’.<sup>178</sup> Furthermore, given the pre-eminence of the consequentialist rationale, at Strasbourg and domestic level, it was unlikely that the UK courts would adopt a particularly liberal approach toward the protection of non-political expression. Although there have only been a handful of claims involving non-political expression, there are signs that the courts approach to such speech resembles its approach towards political expression: the level of protection to be afforded such speech depends upon the public interest in such speech. As set out above, such an approach risks overstating the significance of commercial expression – elevating its position at the foot of the hierarchy to something more akin to political speech – whilst understating the importance of artistic expression, particularly that which has aesthetic qualities but only a tenuous connection with the democratic process or other public interest. Closer adherence to the argument from self-fulfilment would safeguard against this risk, as would an approach more closely resembling Meiklejohn’s argument from participation in a democratic society. The UK courts’ approach to pornography,

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<sup>178</sup> Barendt, *Freedom of Speech*, (OUP, 1985, 1<sup>st</sup> edn.), 300.



which seems to be fairly dismissive, is not problematic so long as it does not unduly impact upon artistic expression.

# CHAPTER EIGHT

## Conclusion

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### 1. Introduction

It is important not to exaggerate the negative aspects of the UK courts' approach to Article 10 so far. The common law evidences a rich tradition in protecting freedom of expression so it is hardly the case that the UK judiciary does not recognise its significance at all. Likewise, it has not been the intention of this thesis to suggest that the Human Rights Act 1998 ("HRA") has introduced some novel right that the UK judiciary has no understanding of and has been playing catch up with ever since October 2, 2000. Yet at the same time, it is apparent that in very significant ways the UK judiciary has largely followed the same contours in their treatment of free speech under Article 10 as they did previously with free speech under the common law. As set out in Chapter One, compelling criticisms were made of the common law's approach to free speech pre-HRA. It was argued that the foundations of free speech were insecure<sup>1</sup> and that the law had developed 'in an

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<sup>1</sup> Rabinder Singh, 'The indirect regulation of speech: a time and a place for everything' (1988) *Public Law* 212.

incoherent fashion'.<sup>2</sup> Barendt, in particular, attributed such issues to the absence of an appropriate constitutional measure, which meant the court were 'unable to give adequate weight to the freedom when it conflicts with other public values and interests'.<sup>3</sup> That constitutional measure has now been introduced and yet the foundations of free speech still seem insecure. Recently, Hare commented that 'domestic free speech doctrine remains heavily under-theorised...the United Kingdom is still far from having a philosophically coherent method for dealing with free speech disputes'.<sup>4</sup> This concern is evident in the views of other commentators<sup>5</sup> and has led to 'disappointment'<sup>6</sup> being expressed about several significant free speech decisions. Eric Barendt described the House of Lords decision in *ProLife*<sup>7</sup> as 'a bad day for free speech'<sup>8</sup> whilst, following their decision in *ADI*,<sup>9</sup> Knight accused the House of Lords of 'monkeying around with free speech'.<sup>10</sup> These cases, in particular, have been referred to on several occasions within this thesis because, for a number of reasons, they are very troubling. These are not trivial cases dealing with peripheral or theoretical applications of free speech: they deal with political expression – the very core of the Article 10 right.<sup>11</sup> As the discussion in Chapter Three identified, the Strasbourg approach to Article 10 is firmly consequentialist. It is clear from Chapters

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<sup>2</sup> Helen Fenwick, *Civil Liberties*, (Cavendish Publishing, 1998, 2<sup>nd</sup> edn.), 144.

<sup>3</sup> Eric Barendt, *Freedom of Speech*, (OUP, 1985, 1<sup>st</sup> edn.), 299.

<sup>4</sup> Ivan Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred' (2006) *Public Law* 521, 526.

<sup>5</sup> C. J. S. Knight argues that 'without a convincing jurisprudential underpinning the law begins to appear without foundation' in 'Monkeying around with free speech' (2008) *Law Quarterly Review* 557, 561.

<sup>6</sup> Eric Barendt, 'Free speech and abortion,' (2003) *Public Law* 580.

<sup>7</sup> *R. (ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23.

<sup>8</sup> Barendt, fn. 6, 591; see also full exposition of the *ProLife* decisions in Fenwick and Phillipson, *Media Freedom under the Human Rights Act*, (OUP, 2006), 577-592.

<sup>9</sup> *R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15.

<sup>10</sup> Knight, fn. 5, 561.

<sup>11</sup> *Lingens v. Austria* (1986) 8 EHRR 407.

Five to Seven that the UK judiciary – in keeping with their commitment to ‘mirror’ the Strasbourg jurisprudence<sup>12</sup> – also adopts a consequentialist approach. Yet it has been argued throughout this thesis that there are notable differences between the two approaches. The object of this chapter is to unpack these arguments in order to draw conclusions about the discernible UK judicial approach to Article 10. The first part of this section will discuss the courts’ approach to free speech principle whilst the second seeks to understand what the UK judiciary’s strategy is toward Article 10. Following this discussion, argument will be put forward about the possible causes and consequences of this approach before this thesis concludes by discussing how these issues might be remedied.

## **2. Unpacking the UK judiciary’s consequentialist approach to Article**

### **10**

#### *a) Approach to free speech principle*

As set out in Chapter Two, there are a number of established justificatory theories that would protect a broad range of expression both for its instrumental (short-term and long-term) and intrinsic value, with the aim of maximising the protection afforded to expression. The emergent theme from this critique of UK jurisprudence post-HRA is that, overall, despite the court identifying these

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<sup>12</sup> See discussion in Chapter Four.

established theories in *ex parte Simms*<sup>13</sup> on the basis for protecting speech,<sup>14</sup> the liberal approach to freedom of expression that these theories tend to embody is not readily apparent. There is no real evidence of protection of free speech for its intrinsic worth in the domestic Article 10 jurisprudence. Moreover, the approach to protection on instrumentalist grounds has been fairly narrowly construed, based more on short-term than long-term valuations. Yet there is a certain enigmatic quality to the UK judiciary's approach to Article 10: as argued in Chapter Six, and as other commentators have said, the court may be criticised for having adopted an approach to media expression that is often very liberal.<sup>15</sup> Furthermore, as noted in Chapter Seven, the Court of Appeal, in particular, adopted a liberal stance on the protection of commercial expression under Article 10 in *Boehringer*.<sup>16</sup> The courts' approach to commercial expression is considered in more detail in the following subsection.<sup>17</sup> In relation to the media, it is apparent from the case law that the UK courts readily accept that the press has a vital function to perform in a democratic society<sup>18</sup> (and this principle is also evident in the Strasbourg jurisprudence<sup>19</sup>), which suggests a long-term approach to its instrumental value. However, even the liberalness of the UK courts' approach to media freedom is debatable. For example, as is clear from the discussion in Chapter Six, the decision in *Campbell v. MGN Ltd*<sup>20</sup> denotes a stricter approach to the nature of the media's 'vital role' than was apparent in, say, *A v. B*

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<sup>13</sup> *R. v. Secretary of State for the Home Department ex parte Simms* (2000) 2 AC 115.

<sup>14</sup> See discussion in Chapter Six, in particular.

<sup>15</sup> See further Fenwick and Phillipson, *Media Freedom*, fn. 8, who argue similarly.

<sup>16</sup> *Boehringer Ingelheim Ltd. v. Vetplus Ltd.* (2007) EWCA Civ 583. See discussion in Chapter Five.

<sup>17</sup> At pages 322 to 329.

<sup>18</sup> See, e.g., *Jameel v. Wall Street Journal Europe Sprl* (2007) 1 AC 359 as discussed in Chapter Seven.

<sup>19</sup> *i.e.*, *Jersild v. Denmark* (1995) 19 EHRR 1.

<sup>20</sup> (2004) 2 All ER 995; see also *McKennitt v. Ash* (2006) EWCA Civ 1714.

*plc.*<sup>21</sup> This stricter approach is also apparent in several recent high court decisions, also discussed in Chapter Six.<sup>22</sup> Therefore, whilst in comparative terms, the approach of the UK judiciary toward media freedom seems more liberal than its approach to individual expression, it does not necessarily follow that it is safe to conclude the UK courts' approach to media freedom, overall, is liberal. Indeed, as Chapter Six evidences, it might be said that the courts examine how the media's 'vital role' is borne out on the facts of the case, *i.e.* in the short-term, and therefore that the long-term significance of the media has lesser weight. This point may also be illustrated by comparing two pre-HRA decisions on media freedom compared to a post-HRA decision.

*Re X*,<sup>23</sup> a Court of Appeal decision from 1975, concerned a child who was made a ward of court by her stepfather in the hope that the Court would subsequently issue an injunction to restrain publication of a biography containing graphic and lurid revelations about her deceased father's life. However, in a judgment that is uncompromisingly pro-free speech, the Court dismissed the application because the extension to the wardship jurisdiction which it implicated conflicted with the principle of free speech. Giving the leading judgment, Lord Denning emphasised that freedom of speech did not simply involve a 'balancing act' to be taken in respect of the competing interests at stake in areas beyond the established exceptions to free speech: 'if the function of the judges was simply a balancing function – to balance the competing interests – there would be much to be said for [the view that the book

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<sup>21</sup> (2003) QB 195.

<sup>22</sup> *Green Corns Ltd. v. Claverly Group Ltd* (2005) EWJC 958; *Mosley v. News Group Newspapers Ltd.* (2008) EWHC 687; *Murray v. Express Newspapers Plc* (2008) EWCA Civ 446.

<sup>23</sup> *In Re X (A Minor)(Wardship: Jurisdiction)* (1975) 2 WLR 335

should be banned]’<sup>24</sup> because ‘on the one hand, there is the freedom of the Media to consider; on the other hand, the protection of a young child from harm’.<sup>25</sup> Indeed, his Lordship found it ‘difficult to see there is any public interest to be served by...publication. But this is where freedom of speech comes in. It means freedom, not only for the statements of opinion of which we approve, but also for those of which we most heartily disapprove’.<sup>26</sup> Lord Denning set out the rationale for this decision in the following terms:

‘The reason why...the law gives no remedy is because of the importance it attaches to the freedom of the press; or, better put, the importance in a free society of the circulation of true information. The metres and bounds of this are already staked out by the rules of law...It would be a mistake to extend these so as to give the judges a power to stop publication of true matter whenever the judges -- or any particular judge -- thought that it was in the interests of a child to do so.’<sup>27</sup>

Clearly, such reasoning evidences a principled approach to freedom of speech in refusing to extend the wardship jurisdiction that values the media’s instrumentalist worth on a broad and long-term basis, *i.e.*, that although the expression may cause short-term harm, such harm is outweighed by the long-term importance of such freedom.

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<sup>24</sup> *Ibid.*, [58].

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

Similar reasoning is evident in another pre-HRA decision, *R. v. Central Independent Television plc*,<sup>28</sup> which concerned an application for injunction against the broadcasting of a documentary about an individual imprisoned for six years on two charges of indecency involving young boys. The application was brought by the mother of the child whose father was the subject of this documentary. As might be expected, the mother was very concerned about the obvious serious distress and disruption that would be caused to her life and her child's as a result of the broadcast. Yet the application was dismissed, with Lord Justice Hoffmann (as he then was) in the Court of Appeal, in particular, adopting a principled approach to the issue. In a much cited judgment, he notes '...publication may cause *needless* pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom'.<sup>29</sup> In following Lord Denning's approach that the wardship jurisdiction could not be extended, he cited the Article 10 exceptions listed in Article 10(2) but, apparently, found no reason to deny the speech on account of those exceptions, instead commenting that:

'the interests of the individual litigant and the public interest in the freedom of the press are not easily commensurable...but no freedom is without cost and in my view the judiciary should not whittle away freedom of speech with *ad hoc* exceptions. The principle that the press is free from both government and judicial control is more important than the particular case'.<sup>30</sup>

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<sup>28</sup> (1994) 3 All ER 641.

<sup>29</sup> *Ibid.*, 652 (emphasis added).

<sup>30</sup> *Ibid.*, 653.



These decisions may be compared with the post-HRA decision in *Re W*.<sup>31</sup> This case concerned an application by a local authority for an injunction restraining publication of the identity of the parties in a criminal trial. As Chapter Six establishes, the media has a strong and well-established free speech right to uninhibited publication of criminal trials in order to ensure the long-term aim of open justice;<sup>32</sup> indeed, as further reported in that chapter, the UK judiciary has said that ‘it is impossible to over emphasise the importance to be attached to the ability of the media’<sup>33</sup> to freely report such and, therefore, the courts must be ‘vigilant [against] the natural tendency for the general principle to be eroded and for exceptions to grow by accretion’.<sup>34</sup> Clearly, these statements of principle resonate with the approach to freedom of expression in *X* and *Central Independent Television*. *Re W* concerned a criminal trial in which the defendant had pleaded guilty to knowingly infecting the victim with HIV. The defendant and victim had had two children together and the local authority sought an injunction on the basis that disclosure of the parent’s identity would prejudice their attempts to place the children in care either within their extended family or outside because of the stigma attached to HIV. In granting the injunction, Sir Mark Potter in the Divisional Court accepted that suppression of identification would lead to a ‘disembodied trial’ but that since the novelty of the facts gave the case ‘high interest’ in any event such suppression would not render the reporting ‘significantly inhibited’.<sup>35</sup> He considered that ‘naming and shaming’ would occur if uninhibited publication occurred leading to ‘a focus of attention, pressure and

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<sup>31</sup> *Re W (Identification: Restrictions on publication)* (2005) EWHC 1564 (Fam).

<sup>32</sup> *E.g.* see the House of Lords decision in *Re S* (2004) UKHL 47.

<sup>33</sup> *R (on the application of Trinity Mirror plc) v. Croydon Crown Court* (2008) EWCA Crim 50, [17].

<sup>34</sup> *R v. Legal Aid Board ex parte Kaim Todner* (1999) QB 966, 977 *per* Lord Woolf.

<sup>35</sup> *Re W*, fn. 31, [74].

harassment upon the children and the families concerned and potentially concerned with their care of a far higher profile and more intense degree than would be the case if the injunction is not granted'.<sup>36</sup> Thus he concluded that 'in my view it is both necessary and proportionate to protect the children against what I consider is established as a likelihood of harm which will be avoided, or at any rate diminished, if the injunction is granted'.<sup>37</sup> This decision is in stark contrast to both *Re X* and *Central Independent Television plc*: whereas in those cases it was accepted that freedom of speech may cause *needless* pain, distress and damage to individuals, in *Re W* the finding that identification would cause *needless* pain, distress and damage was the reason why the injunction was granted. Naturally, the context of the reasoning in *Re X* and *Central Independent Television plc* should not be overlooked: Lord Denning and Lord Justice Hoffmann do not say that freedom of expression should never be interfered with where it causes needless pain, *etc.* – *i.e.*, their reasoning has no bearing on defamation laws or breach of confidence (misuse of private information)<sup>38</sup> claims – but rather that the judiciary must be careful not to damage the long-term goals of freedom of expression by short-term gains. The decision in *Re W* therefore contrasts with this approach: it appears to assume that no damage to this long-term goal results from this short-term interference. The purpose of this comparison, though, is not to engage in debate on the merits of *Re W* or whether it represents the 'thin end of the wedge' but, instead, to note as a matter of interest that the more liberal approach to media freedom appears in the *pre*-HRA case law (rather

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<sup>36</sup> *Ibid.*, [76].

<sup>37</sup> *Ibid.*, [78].

<sup>38</sup> As Lord Nicholls termed it in *Campbell v. MGN Ltd*, fn. 20, [12]; see use of term in *McKennitt v. Ash*, fn. 20

than post-HRA). In other words, the effect of the HRA in strengthening the right to freedom of expression appears doubtful when comparing these cases.

Of course, it is important to factor into the discussion the fact that the HRA did not just introduce Article 10 into domestic law but rather it introduced a raft of Convention rights including the Article 8 right to respect for privacy. The effect of Article 8 is clearly apparent in *Re W* as compared to *Re X* and *Central Independent Television plc*. Yet what the comparison between these cases also shows is a more pragmatic approach where two Convention rights conflict. As Chapter Five demonstrates, this pragmatic approach is also apparent in cases where non-Convention rights are implicated such as the right not to be offended. However, as discussed in Chapter Six, this more pragmatic approach is noticeably different to a more principled approach. The advantage of the pragmatic approach is that, as in *Re W*, it might allow both competing Convention rights to be preserved, *i.e.*, that by modifying certain aspects of it, the speech may still be made. However, it is important not to assume that such an approach is appropriate in every case. It is often the case that speech can be put more temperately or stripped of hyperbole or offence or, even, the ends achieved by a different constitutional means (*i.e.*, a letter to one's MP or to the editor of *The Times*). Yet this is to miss the point: whilst such interferences may not *prevent* the right to speak, sometimes it is the mere fact of interference – not the extent of it – that conflicts with free speech principle. This point is reflected in the Strasbourg jurisprudence: interferences, however slight, have symbolic value, *e.g.*, fines of any amount, suspended sentences, *etc.*<sup>39</sup>

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<sup>39</sup> *Amihalachioaie v. Moldova* (2005) 40 EHRR 35, [38].

Moreover, the argument was made in Chapter Two, Five, Six and Seven, in particular, that a broader approach to the justificatory theories that underpin Article 10 protection ought to emerge within the UK judiciary's approach. It is submitted that it is insufficient to adopt, as the judges apparently have, a narrow view of the argument from participation in democracy since this seems to reserve strong protection for expression which *actually* influences or affects democracy. This narrowness is particularly evident, for example, in Lord Hoffmann's dismissive approach to the ProLife Alliance Party Election Broadcast that it 'had virtually nothing to do with the fact that a general election was taking place'.<sup>40</sup> As Fenwick and Phillipson comment, on this point 'Lord Hoffmann fell into error...in his dismissal of the speech...as of limited value. It remained a form of highly significant political expression, partly due to its very nature and partly due to the less central election-related values underlying it'.<sup>41</sup> Even if the UK judiciary feel that protection of free speech for its intrinsic value alone would put the UK courts at odds with Strasbourg jurisprudence,<sup>42</sup> a broader approach based on such other instrumentalist grounds as are evident in the arguments from self-fulfilment (or self-realisation)<sup>43</sup> or truth<sup>44</sup> would not. Even Meiklejohn's conception of the argument from participation in democracy<sup>45</sup> might provide a broader system of protection. Of course, it might be

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<sup>40</sup> *ProLife*, fn. 7, [68].

<sup>41</sup> Fenwick and Phillipson, *Media Freedom*, fn. 8, 589.

<sup>42</sup> See discussion in Chapter Three.

<sup>43</sup> Martin Redish, "The Value of Free Speech", (1982) 130 *University of Pennsylvania Law Review* 591; Joseph Raz, "Free Expression and Personal Identification," in *Free Expression: Essays in Law and Philosophy*, (Clarendon Press, Oxford, 1994), 10; C. Edwin Baker, *Human Liberty and Freedom of Speech*, (OUP, 1989); Thomas Emerson, *The System of Freedom of Expression*, (New York: Random House, 1970).

<sup>44</sup> J. S. Mill, *On Liberty*, (London: Routledge, 1991), (1<sup>st</sup>. ed., 1859).

<sup>45</sup> Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper, 1948) and "The First Amendment is an absolute," [1961] *Supreme Court Review* 245

said that the UK judiciary *do* adopt such a principled approach to free speech because there are instances of liberal statements within the case law which clearly recognise the significance of free speech and political speech in particular. Yet the importance of free speech must be recognised in the *outcome* of the case and not just the preamble to it. The UK jurisprudence is littered with hollow sentiments which apparently recognise the importance of free speech.<sup>46</sup> Yet recognition is fairly futile unless a guarantee emerges from it.

As Barendt has long argued, the meaning and scope of freedom of speech can only be properly understood in the context of the theoretical arguments for its protection.<sup>47</sup> This is not a requirement that the judiciary should ‘indulge in philosophical speculations’<sup>48</sup> but rather that since the text of the constitutional document (in this case the European Convention on Human Rights) leaves many questions unanswered (such as the extent to which Article 10 protection should apply equally to commercial, artistic or pornographic expression),<sup>49</sup> judges ‘cannot, in short, avoid, confronting difficult questions of political philosophy’.<sup>50</sup> Thus greater engagement with established theory has practical value. Therefore, given that the concept of freedom of speech is such a minefield,<sup>51</sup> the judiciary’s task must be to map a way through: this can only be achieved by engaging with, not ignoring, the

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<sup>46</sup> *ProLife*, fn. 7; *ADI*, fn. 9; *R. v. Shayler* [2003] 1 AC 247; *Sanders v. Kingston* [2005] EWHC 1145 (Admin); *Reynolds v. Times Newspapers* [2001] 2 AC 127; *Hammond v. DPP* [2004] EWHC 69 (Admin); *Connolly v. DPP* (2007) EWHC 237; *Attorney General v. Scotcher* (2005) UKHL 36.

<sup>47</sup> Barendt, *Freedom of Speech*, (1<sup>st</sup> edn.), fn. 3, 1-8.

<sup>48</sup> *Ibid.*, 2.

<sup>49</sup> See discussion in Chapter Five.

<sup>50</sup> Barendt, *Freedom of Speech*, (OUP, 2005, 2<sup>nd</sup> edn.), 6.

<sup>51</sup> Indeed, for that reason, several commentators have doubted whether a coherent principle of free speech can be elucidated. Paul Horton and Larry Alexander, ‘the Impossibility of a Free Speech Principle,’ (1983) 78 *Northwestern University Law Review* 1319; Larry Alexander, *Is There a Right of Freedom of Expression?*, (Cambridge University Press, 2005); Stanley Fish, “There’s no such thing as free speech, and it’s a good thing, too,” in *There’s no such thing as free speech, and it’s a good thing, too*, (OUP, 1994)

debate. In order to match the pre-HRA expectations discussed in Chapter One, engagement with debate was necessary. Arguably, this dialogue has not occurred. The consequence of this failure is that the courts are not maximising protection. If the UK judiciary is not always matching the Strasbourg jurisprudence<sup>52</sup> nor consulting established theory in order to develop the right to freedom of expression under Article 10 differently to the Strasbourg jurisprudence then what is the UK courts' strategy for Article 10? Is there any discernible strategy? The following subsection addresses this question in more detail.

### *b) Strategy?*

The purpose of this thesis has been to put the UK judiciary's approach to Article 10 under the microscope. If the lens is focussed specifically on the treatment of political expression by the higher courts (particularly), then, as set out in Chapter Five and Six, there does broadly seem to be a strategic approach in place: speech is most likely to be protected if it can be demonstrated that the benefit of the speech to the democratic process outweighs any associated harm it may cause. As noted in previous chapters, this type of narrow approach has strong resemblances with Bork's version of the argument from participation in a democracy.<sup>53</sup> However, if the lens is pulled back to include all types of speech then the nature of this strategy seems more uncertain. The finding that commercial expression implicates 'important issues of

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<sup>52</sup> See discussion about *ADI* set out in Chapters Two and Four.

<sup>53</sup> Robert Bork, "Neutral Principles and Some First Amendment Problems," [1971] 47 *Indiana Law Journal* 1

free speech' and that pornography may be a form of protected expression contradicts the basis of Bork's narrow thesis and is not obviously supported by Meiklejohn's broader thesis<sup>54</sup> without further argument. Although it has been doubted whether the inclusion of commercial speech follows from self-fulfilment,<sup>55</sup> others have argued that protection ought to follow on that basis.<sup>56</sup> The protection of speech based on these broader rationales is, however hardly evident where the speech involved is political, as Chapters Five and Six demonstrate. This suggests some confusion about which justificatory theories are operational and when they should be applied or, alternatively, may also suggest that a deep understanding of the justificatory theories has not yet been applied. Moreover, it suggests that a fully worked out strategy is not yet in place.

However, when the jurisprudence is examined differently – through the lens of s. 2, for example – then a clearer impression of strategy emerges. As discussed in Chapter Four, the UK judiciary has made it clear that they intend to mirror the Strasbourg jurisprudence so as to ensure the UK human rights jurisprudence is neither ahead nor behind. Speaking extra-judicially, Baroness Hale has noted that the *Ullah* principle tends to be made most strongly in cases that would involve instructing Parliament to leap ahead of Strasbourg rather than in cases which would involve the common law leaping ahead.<sup>57</sup> This might explain the judiciary's motivation in wanting to ensure parity with the Strasbourg case law even if it does not resolve the

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<sup>54</sup> Meiklejohn, fn. 45.

<sup>55</sup> Barendt, fn. 50, 400.

<sup>56</sup> See commentators listed at fn. 43.

<sup>57</sup> Baroness Hale of Richmond, 'Law Lords at the Margin: who defines Convention rights?' (Lecture at the JUSTICE Tom Sargant memorial annual lecture 2008, 15 October 2008) <<http://www.justice.org.uk/images/pdfs/annuallecture2008.pdf>> accessed 18 August 2009.

dilemma of why the UK courts ought not to develop human rights beyond the limitations encountered at Strasbourg level.<sup>58</sup> Thus, the strategy of the UK courts' toward Article 10 may be described as an intention to replicate the ECtHR approach but cautiously, especially where conflict with statutory provisions arises. Naturally, this explains the UK courts' basic approach toward coverage, *i.e.*, that Article 10 extends to not only political expression but also artistic, commercial, even pornographic speech. Furthermore, this also explains the UK courts adherence to a consequentialist rationale at the expense of valuing expression for its intrinsic worth. As Chapter Three explains, this consequentialist rationale is a hallmark of the Strasbourg Article 10 jurisprudence. However, this strategy may be criticised on a number of grounds. First, and foremost, it does not sufficiently recognise the effect of the ECtHR's limitations as a court. As noted above, and as discussed in Chapter Three, the strong statements of free speech principle within the Strasbourg jurisprudence are often ultimately undone by the ECtHR's relatively weak position as a human rights tribunal. Thus, the *Ullah* principle lacks clarity on this point: the UK courts should be seeking to 'match' the statements of principle rather than the outcomes. This point has been made above.

Secondly, as discussed in Chapters Five, Six and Seven, the UK courts' approach to expression is largely pragmatic. Consequently, although it is an established principle in theory that political expression enjoys a preferred position in protection terms,<sup>59</sup> this is not necessarily borne out by the case law largely due to this pragmatic approach. Thus, for example, the decision in *ADI* evidences better

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<sup>58</sup> Baroness Hale specifically recognises this issue, *ibid.*

<sup>59</sup> See discussion in Barendt, fn. 50, 155-162.



treatment of commercial expression than political expression.<sup>60</sup> Of course, it is recognised that the prohibition on political expression resulted from a statutory measure rather than the common law yet the judiciary may still be criticised on the basis that the House of Lords refused to issue a declaration of incompatibility in recognition of this principle at least. Moreover, as discussed above, this pragmatic approach is concerning because it tends to undermine the protection of free speech on the basis of its long-term value. In other words, it does not provide much scope the type of uncompromisingly pro-free speech *dicta* seen in decisions such as, for example, *Re X*,<sup>61</sup> *Brutus v. Cozens*,<sup>62</sup> *Central Independent Television*<sup>63</sup> or *Redmond-Bate v. DPP*.<sup>64</sup> To ask, on pragmatic grounds, not what freedom of expression is worth to society but what the disputed expression is worth is a risky strategy: the treatment of each instance of expression says something about the state of freedom of expression overall; it is not possible to disconnect the two as if one does not bear upon the other.

Thirdly, the *Ullah* principle may also be criticised on an additional ground. The UK Article 10 jurisprudence contains examples of free speech claims that are fairly spurious in theoretical terms. Yet since the ECtHR sets a low threshold on expression captured by Article 10,<sup>65</sup> the courts are required to fully engage with Article 10 analysis – albeit often on a fairly shallow basis. For example, the

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<sup>60</sup> *ADI*, fn. 9. See discussion in Chapter Four, section 2, c).

<sup>61</sup> Fn. 23.

<sup>62</sup> *Brutus v. Cozens* (1973) AC 854.

<sup>63</sup> Fn. 28.

<sup>64</sup> *Redmond-Bate v. DPP* (1999) 7 BHRC 375, discussed in Chapter Five, section 2, b).

<sup>65</sup> Thus, for example, pornographic material is covered, see *e.g.*, *Hoare v. UK* (1997) EHRLR 678, *Scherer v. Switzerland* (1994) 18 EHRR 276.

Divisional Court was required to consider an Article 10 claim in *R. v. Debnath*,<sup>66</sup> in which a jilted woman, intent on revenge, had harassed her former lover, Mr A. She had sent a number of vicious e-mails, using a variety of accounts, including some of Mr A's that she had hacked into, as part of a campaign over several years to smear his reputation at work and at home. The court accepted that Article 10 was engaged on account of the communicative activity involved. The court then engaged in a rather superficial analysis of the Article 10(2) exceptions: it is simply stated in the penultimate paragraph of the decision that the interference was prescribed by law, furthered a legitimate aim and was necessary in a democratic society.<sup>67</sup> A greater engagement with established theory would have allowed the court in this particular case to ask whether the activity in question amounted to 'expression' or instead amounted to 'conduct': it is a well-established principle in theory that freedom of speech clauses do not extend to 'conduct'.<sup>68</sup> The court might have found that Debnath's behaviour amounted to conduct rather than expression notwithstanding the use of e-mail, *etc* and, therefore, Article 10 did not apply. The fact that this finding leads to the same result (of finding the action is not protected by Article 10) is irrelevant. The courts' approach, as in *R. v. Debnath*, may be criticised on the basis it tends to undermine the significance of Article 10, particularly if the reasoning in one spurious claim provides grounds to protect expression made in different

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<sup>66</sup> (2005) EWCA Crim 3472.

<sup>67</sup> *Debnath*, *ibid.*, [26].

<sup>68</sup> See, *e.g.*, Thomas Emerson, *The System of Freedom of Expression*, (New York: Random House, 1970); Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, 1982); James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, (Westview Press, 1999), 32-34; Lee Bollinger, *The Tolerant Society*, (Oxford University Press, 1986), 124; Bork, fn. 53; Martin Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591.

circumstances in another spurious claim. For example, in *Livingstone*,<sup>69</sup> which was discussed in Chapter Five in detail, the court found that the abuse directed against the journalist was protected. Consequently, this case provides some level of precedent should abuse be at the centre of another Article 10 claim in a different context.

### *c) Conclusions*

Hare is undoubtedly right; the UK does not have a philosophically coherent free speech principle in place. There are very few cases in which the theoretical underpinnings of the concept are acknowledged let alone explored. The UK judiciary's approach to political expression is particularly concerning. As set out in Chapters Five and Six, the UK judiciary appears to have adopted an unduly narrow view of the argument from participation in democracy in which the strongest protection is reserved for expression that *actually* beneficially influences or affects democracy. This thesis observes that one of the paucities of free speech in the UK particularly, but also at Strasbourg level, is its heavy dependence on the argument from democracy, which neglects a vast array of established literature on free speech theory. It would be a richer free speech right if greater recourse were had to other broader theories of free speech. However, the core argument put forward by this thesis is that, regardless of whether the domestic courts are minded to consult these broader theories, the one theory that has been accepted, the argument from democracy, has been impoverished by the adoption of this narrow view. There is no

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<sup>69</sup> *Livingstone v. The Adjudication Panel for England* (2006) EWHC 2533 (Admin).

need for the judiciary to adopt such a view: the act of participating is the critical factor not the significance of such participation or measure of its beneficial effect. Instead, the UK courts seem to be treating freedom of speech as a right to beneficially influence so that where that influence is uncertain or else not deemed beneficial protection is unlikely.

In critiquing the judiciary's approach to Article 10 since the inception of the HRA, this thesis has covered a broad range of material, including the judiciary's approach to the HRA in more general terms (particularly s. 2) and the operation of Article 10 at Strasbourg level. It is recognised that these areas implicate an array of diverse legal (and non-legal) issues and debates. Consequently, the obvious danger in such a critique is that any conclusion reached is too sweeping or overstated or else based on oversimplified conclusions and so is simplistic itself (*e.g.*, free speech is not protected enough). Furthermore, given the space constraints, there is also the risk that in seeking to argue the point, contradictory evidence has been omitted. Being conscious of these risks, the broad conclusions reached on the UK judiciary's approach to Article 10 so far are that, first, more could have been done to maximise protection by means of greater engagement with theory and that, secondly, in the absence of such, the courts' approach so far causes some concern from a free speech perspective. It is submitted that there are several causes which might explain why this principled approach has not emerged and, furthermore, that a number of adverse consequences follow from this approach not being in place. The following section outlines these potential causes.

### 3. Causes of this approach

#### *a) Introduction*

Having established that the UK judiciary broadly adheres to a particularly narrow conception of the democratic process value when determining Article 10 claims, the purpose of this section is to identify what the causes of this narrow approach might be in order to understand whether – and to what extent – the judiciary might be able to broaden this approach in future. There may be any number of explanations for why the UK courts have developed Article 10 in this way however the following discussion will concentrate on three issues in particular that have featured heavily in the discussion from preceding chapters. First, it will be argued that the UK courts’ approach to the Strasbourg jurisprudence, *i.e.*, the strict adherence to the *Ullah* principle (discussed in Chapter Four), is a significant factor in the UK courts’ limited approach to Article 10: the instruction to ensure parity with Strasbourg jurisprudence does not adequately recognise the dichotomy within the Strasbourg decision-making between free speech principle and the limitations of the ECtHR as a court. In other words, ‘mirroring’ Strasbourg jurisprudence does not sufficiently recognise that the ECtHR and domestic court have diverse roles to perform: *i.e.*, the limitations of the Strasbourg court stem from the fact that it is not a domestic court. Secondly, it will be argued that the reluctance to embrace and apply broader principles to Article 10 may stem not just from the UK courts’ approach to s. 2 but also from previous attitudes toward freedom of speech, evident in the pre-HRA case

law. Thus the judiciary might need to reassess the role of pre-HRA free speech case law on Article 10 decision-making (including the extent to which pre-HRA thinking has already influenced or tainted post-HRA precedent). Thirdly, it will be argued that the development of other Convention rights in the UK jurisprudence also affects the courts' approach to Article 10. In particular, the discussion will focus on the development of Article 8. In developing this right, freedom of expression has been pinned back. Yet, moreover, the courts' approach to Article 8 provides a different comparison. In broad terms, the courts' have used the domestic introduction of Article 8 as an opportunity to look afresh at the question of privacy in the UK and so have assessed the scope and limits of the right in detail in order to develop breach of confidence into the misuse of private information tort.<sup>70</sup> There is not this same sense of revision in the UK Article 10 jurisprudence: the approach to Article 10 appears more staid as if the UK judiciary has concluded that the inclusion of Article 10 in the UK does not require the same overhaul in judicial thinking, *i.e.*, what it means for free speech to be a right not a liberty.

*b) The Strasbourg dichotomy: principles and limitations*

In general terms, it has been argued that the US approach to freedom of speech is more sophisticated and more principled than either the UK or ECtHR's approach.<sup>71</sup> Barendt argues that the US approach is 'explicable in terms of a strong

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<sup>70</sup> See *Campbell v. MGN Ltd.*, fn 20.

<sup>71</sup> See Barendt, *Freedom of Speech*, fn. 50, in which an overview of the US approach is provided at pages 48 to 55; see also Ian Cram, *Contested Words – Legal Restrictions on Freedom of Expression in*

suspicion of government and its motives for imposing restrictions on speech'<sup>72</sup> and, furthermore, that the US courts 'distrust detailed ad hoc balancing of free speech against other competing rights and interests, fearing that the former will inevitably be given too little weight in the scales'.<sup>73</sup> This distrust thus provides a sturdy platform from which the US court is able to strike down interferences with speech. Of course, whether this leads to a 'better' free speech right in practice is a question that is outside the scope of this enquiry. However, there are two important and broad differences between the European and the US approach to freedom of speech that are particularly relevant to this discussion. First, the US court has had far longer to establish its approach to the right of free speech than either the UK or ECtHR.<sup>74</sup> Secondly, the US court is in a comparatively stronger position to take a principled stance than the UK or ECtHR is. Aside from obvious differences, such as the lack of power in the UK to strike down legislation incompatible with the Constitution, the UK courts seem more reluctant to assume the position of a 'constitutional court' for fear that it will be branded 'unconstitutional'.<sup>75</sup> Furthermore, as Fenwick and Phillipson argue<sup>76</sup> (see discussion in Chapter Three), the limitations of the ECtHR as a court ought to be better recognised: the ECtHR is not a court of appeal; its mandate is limited to reviewing decisions but since it is a supra-national tribunal, it acknowledges that the Member State is better placed to determine certain standards

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*Liberal Democracies* (Ashgate, 2006) and Ian Loveland, ed., *Importing the First Amendment*, (Oxford: Hart Publishing, 1998, 2<sup>nd</sup> edn.).

<sup>72</sup> Barendt, fn. 50, 53. See Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, 1981) which argues that this approach represents the strongest theoretical basis for free speech.

<sup>73</sup> *Ibid.*, 54.

<sup>74</sup> *Ibid.*, 55.

<sup>75</sup> See Jonathan Lewis, 'The European ceiling on human rights' (2007) *Public Law* 720.

<sup>76</sup> Fenwick and Phillipson, *Media Freedom*, fn. 8, 8.

either because there is no common standard across Europe or because the scenario involves particularly sensitive matters.<sup>77</sup> Furthermore, as is well-known, the Convention itself ‘does not in the main set particularly exacting civil liberties standards’.<sup>78</sup> Indeed, it has been suggested that the UK courts might look to US jurisprudence generally when determining rights under the HRA<sup>79</sup> but particularly in order to maximise the protection of political expression.<sup>80</sup>

The point of this first observation is that it would behove the UK court to recognise that it is still ‘finding its feet’ in relation to freedom of speech *as a right*. It is important to recognise that although the UK judiciary protected freedom of speech prior to the inception of the HRA, it did so only to the extent that the common law allowed it to and whilst in some circumstances, as the discussion above shows,<sup>81</sup> the common law was able to afford the type of strong protection expected of ‘rights’ status, freedom of speech was ultimately a liberty. As other commentators have said, in order to fully recognise this, the UK judiciary has to adapt its thinking so as to see freedom of expression as a ‘walled zone of action’.<sup>82</sup> In order to understand what is within this ‘walled area’, the judiciary ought to engage with established theory.<sup>83</sup> Furthermore, as argued in Chapter Three, reference to established theory is also significant in unlocking the strong statements of free speech principle found in ECtHR decisions but not necessarily in their outcomes. This point connects with the

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<sup>77</sup> See discussion in Chapter Four.

<sup>78</sup> Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (OUP, 2006, 4<sup>th</sup> edn.), 688.

<sup>79</sup> Roger Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a “municipal law of human rights” under the Human Rights Act’ (2005) *ICLQ* 907

<sup>80</sup> Ian Loveland, ‘Freedom of political expression: who needs the Human Rights Act?’ (2001) *Public Law* 233

<sup>81</sup> See discussion of *Re X* and *Central Independent Television* above at pages 313 to 316.

<sup>82</sup> Singh, fn. 1.

<sup>83</sup> Barendt, *Freedom of Speech* (1<sup>st</sup> edn.), fn. 3, 1-6.



second observation made above. The nature of the UK judiciary's engagement with the Strasbourg jurisprudence should be guided by its recognition of the limitations of the ECtHR as a court. In other words, the method by which the UK courts ensures it 'mirrors' the Strasbourg jurisprudence should be informed by the dichotomy in the ECtHR's approach to Article 10 claims. There are two levels on which the UK courts could ensure parity with the Strasbourg jurisprudence – at the level of principle or at the level of outcomes. As Chapter Three argues, the Strasbourg jurisprudence contains strong statements of free speech principle yet those principles are not always realised in the final outcome because of the margin of appreciation operating. Thus, the narrower approach in the UK Article 10 jurisprudence compared to either the approach to participation in a democratic society evident in, say, Meiklejohn's theory<sup>84</sup> or the ECtHR's approach to free speech principle may be due to the UK courts' failure to identify this dichotomy and overtly separate principle from limitation.

Of course, recognition that the dichotomy exists in principle is one thing, determining the dividing line in each particular case may be another. The influence of the margin of appreciation may be so deeply ingrained into the decision that it is not possible to extract it from the verdict. Thus Singh, Hunt and Demetriou describe the margin of appreciation as a 'conclusory label' that 'only serves to obscure the true basis' for the decision and 'as such it tends to preclude courts from articulating the justification for and limits of their role as guardians of human rights in a

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<sup>84</sup> Meiklejohn, fn. 45; see discussion in Chapter Two, section 3.

democracy'.<sup>85</sup> Fenwick and Phillipson take *Handyside v. UK* as the paradigm example:<sup>86</sup> the decision contains some of the strongest statements made about the significance and type of speech that Article 10 protects, including that which shocks, offends or disturbs. Yet because the ECtHR recognises a broad margin of appreciation in areas where the protection of morals is implicated, the decision to suppress the speech was not interfered with. Thus Fenwick and Phillipson concede that it is difficult to 'strip away' the margin of appreciation aspects: 'the effect of the doctrine on the reasoning was so pervasive that this would have been difficult. Most of the reasoning was directed to refuting the arguments that the interference was disproportionate to the aim pursued'.<sup>87</sup> Consequently, there can be no sharp criticism made of the UK courts in every case where the margin of appreciation has not been disapplied because of this difficulty; *however* that does not prevent the judiciary from acknowledging that the margin of appreciation is at work in the final decision. Indeed, in such circumstances the UK court could decide that the Strasbourg case is so heavily influenced by the doctrine that it cannot be meaningfully applied by the domestic courts (the margin of appreciation cannot be applied domestically).<sup>88</sup> By more closely adhering to the principle rather than the outcome, the UK judiciary might step closer to realising the 'rights culture' that Lord Irvine envisaged: that the HRA would engender a 'culture in judicial decision making where there will be a greater concentration on substance rather than form'.<sup>89</sup>

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<sup>85</sup> Singh, Hunt and Demetriou, 'Is there a role for the Margin of Appreciation in national law after the Human Rights Act?' (1999) *EHRLR* 15, 20-21.

<sup>86</sup> Fenwick and Phillipson, *Media Freedom*, fn. 8, 590-591.

<sup>87</sup> *Ibid.*, 590.

<sup>88</sup> As Fenwick and Phillipson argue, *ibid.*, 591.

<sup>89</sup> Lord Irvine of Lairg, 'The development of human rights in Britain under an incorporated Convention on Human Rights' (1998) *Public Law* 221, 236.

### *c) The influence of pre-HRA thinking*

The reluctance to embrace and apply broader principles to Article 10 may also be explainable by reference to the pre-HRA approach to freedom of speech. As discussed in Chapter One, the pre-HRA case law evidences an uneven approach to freedom of speech. Of course, this is explainable by reference to limitations placed on the court with regard to civil liberties: the common law could only develop human rights so far as the system of negative liberty would allow. Yet, as also noted in Chapter One, commentators had criticised the UK courts' general approach to freedom of speech as inconsistent, sometimes restricting protection 'on uncertain or flimsy grounds'.<sup>90</sup> Thus, for example, the mysterious finding in *Home Office v. Harman*<sup>91</sup> that the disclosure of sensitive information to a journalist ostensibly on public interest grounds had nothing to do with freedom of speech.<sup>92</sup> Elsewhere, however, the case law contains very strong attachments to free speech such as in *Re X* and *Central Independent Television plc*, discussed above, or, on the cusp of the HRA's inception, *ex parte Simms*<sup>93</sup> and *Reynolds*.<sup>94</sup> In Chapter Six, it was argued that, post-HRA, the UK courts have demonstrated greater receptivity to free speech claims of certain speakers over others, particularly the media. Thus it may be that the UK courts' differential approach to freedom of expression represents a hangover from the pre-HRA approach to freedom of speech; that the UK courts have not yet fully

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<sup>90</sup> Helen Fenwick, *Civil Liberties*, (Cavendish Publishing, 1998, 2<sup>nd</sup> edn.), 144.

<sup>91</sup> (1983) 1 AC 280.

<sup>92</sup> *Ibid.*, 294 *per* Lord Diplock.

<sup>93</sup> Fn. 13.

<sup>94</sup> Fn. 46.

made the transition from a liberty-based to rights-based system. Of course, there is a deeper philosophical debate about the nature of rights as compared to liberties.<sup>95</sup> Yet that debate is not central to the point being made. The relevance of the pre-HRA case law in determining Article 10 cases has not been explicitly questioned in the post-HRA case law and presently remains unresolved. As mentioned in Chapter One, it had been said on several occasions that the UK case law was compliant with Article 10.<sup>96</sup> However, since Article 10 was not directly enforceable at that time (although ‘if there [was] any ambiguity in our statutes or uncertainty in our law’ the courts ‘[could] look to the Convention as an aid to clear up the ambiguity and uncertainty’)<sup>97</sup> that proposition was never fully tested because it did not need to be. Thus, where pre-HRA principles of uncertain compliance with Article 10 influence the outcomes of post-HRA decisions, the transition from a liberty-based to a right-based system may be stunted.

In real terms, this may explain the more dismissive attitude to individual expression compared to media expression<sup>98</sup> since this theme was apparent pre-HRA, as outlined in Chapter One.<sup>99</sup> Given the argument made in Chapter Six that the media still seem to enjoy preferential treatment, it is submitted that the UK judiciary has followed the contours established pre-HRA of favouring the media over ‘non-media’<sup>100</sup> speakers when determining free speech cases. The lesser protection afforded to ‘non-media’ speakers was criticised pre-HRA by Fenwick, amongst

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<sup>95</sup> See e.g., Ronald Dworkin, *Taking Rights Seriously*, (Duckworth, 1977).

<sup>96</sup> *AG v. Guardian Newspapers (No. 2)* (1990) 1 AC 109; *Derbyshire County Council v. Times Newspapers Ltd.* (1993) AC 534

<sup>97</sup> Per Lord Denning, *R. v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* (1976) 1 WLR 979, 984.

<sup>98</sup> See discussion of *ProLife*, fn. 7 and *Connolly v. DPP* (2007) EWHC 237 in Chapter Seven.

<sup>99</sup> See discussion in Chapter One, section 3(a).

<sup>100</sup> *i.e.*, those speakers who are not (or not treated as) members of the press.

others, for treating individual dissenters as exercising a form of civil disobedience rather than freedom of speech.<sup>101</sup> In particular, it seems that the UK judiciary has not yet made the transition to affording individual dissenters greater free speech protection<sup>102</sup> and so in that sense perhaps the courts should view the HRA as a ‘decisive break from the past’.<sup>103</sup> Of course, it has been said that the Strasbourg jurisprudence also favour media expression over individual expression.<sup>104</sup> As discussed in Chapter Three, this view is debatable: certainly the ECtHR has made no overt assessment of media expression to this effect. Indeed, the ECtHR’s view in *Steel & Morris v. UK*<sup>105</sup> suggests the opposite: that the claims of individuals to freedom of expression should be taken no less seriously than the media’s claim where political expression is at stake. The ECtHR justified this view on the basis that ‘in a democratic society even small and informal campaign groups...must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate’.<sup>106</sup> Thus the fact that the speaker may not be a journalist is irrelevant in determining the level of protection to be afforded to the speech. Assuming the *Ullah* principle remains unaltered, this principle must be incorporated into the UK jurisprudence if the position at Strasbourg is to be ‘mirrored’. Moreover, it is important that this principle is recognised in the outcome of the claim, not just the

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<sup>101</sup> Helen Fenwick, ‘The Right to Protest, the Human Rights Act and the Margin of Appreciation’ (1999) 62(4) *MLR* 491.

<sup>102</sup> Andrew Geddis, “Free Speech Martyrs or Unreasonable Threats to Social Peace? – ‘Insulting’ Expression and s. 5 of the Public Order Act 1986,” [2004] *PL* 853.

<sup>103</sup> Helen Fenwick and Gavin Phillipson, ‘Public protest, the Human Rights Act and judicial responses to political expression,’ (2000) *Public Law* 627, 645.

<sup>104</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 8.

<sup>105</sup> *Steel & Morris v. UK* (2005) EMLR 15

<sup>106</sup> *Ibid.*, [89].

preamble to the decision. In *Connolly v. DPP*,<sup>107</sup> Lord Justice Dyson found that the sending of the photographs was ‘not the mere sending of an offensive article: the article contained a message, namely that abortion involves the destruction of life and should be prohibited’.<sup>108</sup> Consequently, ‘since it related to political issues, it was an expression of the kind that is regarded as particularly entitled to protection by Article 10’<sup>109</sup> yet the ultimate reasoning in the case did not reflect this principle.<sup>110</sup>

Thus, in very broad terms, it is arguable that the HRA has not resulted in a noticeable sea-change in the manner in which the UK courts approach freedom of speech. It may be said that this was because the UK enjoyed a favourable free speech right prior to the HRA, *i.e.*, that freedom of speech was protected by the courts. Indeed, it has been argued that the right to freedom of expression ‘exists quite apart from the HRA’;<sup>111</sup> that the common law ‘has come to recognise and endorse the notion of constitutional or fundamental rights. These are broadly the rights given expression in the Convention for the Protection of Human Rights and Fundamental Freedoms, but their recognition in the common law is autonomous’.<sup>112</sup> However, whilst there is something to this claim, it risks overlooking the serious concerns raised about the state of free speech in the pre-HRA case law. Yet it is not far-fetched to conclude that there has been a general lacklustre approach to the development of Article 10 as if the judiciary has concluded the introduction of Article 10 did not necessitate much change in judicial thinking post-HRA. If this is the case,

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<sup>107</sup> Fn. 98.

<sup>108</sup> *Ibid.*, [14].

<sup>109</sup> *Ibid.*

<sup>110</sup> See discussion in Chapter Six.

<sup>111</sup> Lord Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 *ICLQ* 273, 276-7.

<sup>112</sup> *International Transport Roth GmbH v. Secretary of State for the Home Department* (2003) QB 728, [71] *per* Lord Justice Laws.

then it is particularly disappointing and overlooks the concern expressed by, for example, Fenwick and Phillipson that the Strasbourg jurisprudence is not a ‘cure all [for] our current speech ills’.<sup>113</sup> ‘the Convention cannot be seen as the equivalent of a domestic Bill of Rights – the judges have to construct one out of it, if so minded’.<sup>114</sup> In other words, both unquestioning adherence to Strasbourg jurisprudence and pre-HRA thinking risks the realisation of an effective free speech right.

#### *d) Development of other Rights*

The comparative lack of judicial activism in developing Article 10 in the UK is also apparent when examining the courts’ approach to other Convention rights, such as the Article 8 right to respect to privacy. It is well-established that the common law’s treatment of privacy issues prior to the HRA was woefully inadequate.<sup>115</sup> This is clear, for example, from the well-known decision in *Kaye v. Robertson*<sup>116</sup> in which the actor Gordon Kaye had no right of action against a journalist who had harassed him in his hospital bed following a serious car accident. Although deficiencies in the state of privacy laws in the UK were recognised prior to the HRA,<sup>117</sup> such deficiencies were not meaningfully addressed until after the HRA was enacted. Indeed, the case of *A v. B plc*<sup>118</sup> confirms the shortfalls in the level of protection afforded privacy that still existed. Since then, the UK judiciary has

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<sup>113</sup> Fenwick and Phillipson, *Media Freedom*, fn. 8, 8.

<sup>114</sup> *Ibid.*, 6.

<sup>115</sup> See discussion in Fenwick, *Civil Liberties*, (2<sup>nd</sup> edn.), fn. 2, 323-362.

<sup>116</sup> (1991) FSR 62.

<sup>117</sup> See also Law Commission report: *Breach of Confidence* (Law Com. No. 110).

<sup>118</sup> Fn. 147.

discernibly and proactively improved that level of protection. Fenwick and Phillipson argue that the House of Lords decision in *Campbell*<sup>119</sup> ‘has given English law a privacy tort’.<sup>120</sup> The greater recognition for privacy in English law is discernable by comparing the decision in *Kaye v. Robertson* to *Mosley*<sup>121</sup> and *Murray*<sup>122</sup> in particular.<sup>123</sup> It is clear from recent case law on Article 8, that there is an impetus to map out the scope and limits of this new right encompassed within the misuse of personal information tort.<sup>124</sup> As discussed above, that same impetus is not apparent in the UK Article 10 jurisprudence.

Moreover, this impetus to map out the limits of these other Convention rights, directly impacts upon the scope of Article 10. This is particularly apparent in relation to Article 8 and the cases discussed above: the growth of Article 8 protection has meant proportionate restrictions of Article 10 in these areas. This is not to say that this growth represents an unwelcome development: curbs on media freedom, in particular, to expose private lives is not necessarily lamentable. However, it does have the potential to affect the rationales underpinning freedom of expression. For example, as discussed in Chapter Two, the argument from truth, self-realisation and participation in democracy place great emphasis on freedom to disseminate information that is true whereas the Article 8 right so developed would interfere with the right to speak precisely because the information is true. Where the information has no conceivable bearing on the public interest, this suppression is not problematic

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<sup>119</sup> Fn. 20.

<sup>120</sup> Fenwick and Phillipson, *Media Freedom*, fn. 8, 769.

<sup>121</sup> Fn. 22.

<sup>122</sup> Fn. 22.

<sup>123</sup> See discussion in Chapter Six on these cases, at pages 243 to 245.

<sup>124</sup> See further *HRH Prince of Wales v. Associated Newspapers* (2006) All ER 276 and *McKennitt v. Ash*, fn. 20.



(i.e., Naomi Campbell attending narcotics anonymous meetings,<sup>125</sup> Max Mosley having sex with prostitutes,<sup>126</sup> J.K. Rowling walking down an Edinburgh street with her son<sup>127</sup>). However, difficulties arise where the question of public interest is more uncertain. For example, in *Tonsbergs Blad as and Haukom v. Norway*,<sup>128</sup> it will be recalled from Chapter Three that the Norwegian government had strongly argued that there was no public interest in discussing the holiday home of a prominent businessman and also that of a well-known singer. The ECtHR disagreed with this assessment.<sup>129</sup> In this context, the recent judicial finding that Prince Charles' view on Hong Kong was not in the public interest is contentious.<sup>130</sup>

The development of other rights under the HRA is significant in another respect. Where Convention rights conflict, the courts' approach is to balance the two rights.<sup>131</sup> Thus this might lead to the type of pragmatic assessment outlined above in relation to *Re W*, i.e., that both rights in conflict might be preserved with some modification of the manner in which the free speech right is exercised. Additionally, this approach may explain why certain types of speech – such as individual expression – are more at risk than others: where the speech in question is not perceived as particularly valuable, the reason why it should impinge upon another right may not seem pressing. In this way, artistic expression may be particularly

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<sup>125</sup> *Campbell*, fn. 20.

<sup>126</sup> *Mosley*, fn. 22.

<sup>127</sup> *Murray*, fn. 22.

<sup>128</sup> (2008) 46 EHRR 40.

<sup>129</sup> *Ibid.*, [87].

<sup>130</sup> Fn. 124; For example, David Pannick QC condemned the decision on the basis that 'public figures who wish to involve themselves in politics should not expect the courts to prevent publication of their views on matters of public interest'. 'The Prince of Wales and rights to free speech', *The Times*, January 16, 2007.

<sup>131</sup> *Campbell*, fn. 20. See also Helen Fenwick, 'Clashing Rights, the Welfare of the Child and the HRA' (2004) 67(6) *MLR* 889

vulnerable since the value of such cannot be meaningfully quantified.<sup>132</sup> Although it has been said that where art depicts a moral vision it is a form of political expression since morality is political,<sup>133</sup> demonstrating that the art should be protected as a form of political expression may be treated as a weak proposition, particularly given that the opposing right is unlikely to contain any such conceptual uncertainty and, further, that the court may decide that even *if* it is a form of political expression, the speaker is not prevented from putting that expression in a different or less objectionable form that would not interfere with the rights of others.<sup>134</sup>

#### **4. Consequences of this approach**

Having set out in greater detail what may be the causes of the UK courts' approach to Article 10, this section makes the case for why this approach has adverse consequences. It is recognised that it is not enough to conclude that any mismatch between free speech in theory and free speech in practice settles the argument. It is also realised that some of the cases in which free speech protection has been denied so far do not readily inspire much sympathy. Perhaps *Connolly v. DPP*,<sup>135</sup> which has been cited many times throughout this thesis, is the paradigm example of this. Mrs Connolly had sent photographs depicting a dead 21-week-old foetus whose face and limbs were clearly visible. Another photograph showed an abortion taking place. It is no wonder that the pharmacist employees who opened her letters were distraught.

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<sup>132</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 8, 50-72.

<sup>133</sup> Michael J. Perry, "Freedom of expression: an essay on theory and doctrine," (1983) 78 *Northwestern University Law Review* 1139, 1149.

<sup>134</sup> *Otto-Preminger-Institut v. Austria* [1995] 19 EHRR 34.

<sup>135</sup> Fn. 46.

It may be said that this is hardly valuable speech deserving of special treatment. Yet the use of the word 'valuable' encapsulates the issue. Why should only valuable speech be protected? It is freedom of speech that is valued but this is not realised if only valued speech is free. Thus, as Chapter Five establishes, the key issue with the decision in *Connolly*, is not the outcome so much as the court's reasoning in that case, in particular the suggestion that the speech was unimportant. To reserve the highest Article 10 weight only to speech that shows great consequential value to society at large is an elitist betrayal of freedom of speech's essential premise. Singh has previously argued that the courts should treat freedom of speech as 'a zone of action protected by a high wall...that the state may not enter...even when it is enforcing an otherwise legitimate rule';<sup>136</sup> the present approach to Article 10 in the UK does not equate to this vision.

The court's approach to the 'balancing act' is largely responsible for the invasions into this walled zone. By treating societal interests and non-Convention rights as of apparently equivalent weight to the Article 10 right, there is a significant risk that this zone of protected action may be infringed whenever an audience member is shocked, upset or insulted by the speech. Thus Mill's principle that since an individual dissenter cannot silence the masses so the masses cannot silence him/her is not recognised by the present law in the UK.<sup>137</sup> Geddis argues that the treatment of individual dissenters acts as 'a canary in a coal mine': 'the overall health of our body politic may be judged by how far our legal ordering provides her with the

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<sup>136</sup> Singh, fn. 1, 215.

<sup>137</sup> See discussion in Chapter Two.

space to make her opinions known to the public.’<sup>138</sup> In finding Mrs Connolly’s conviction was ‘convincingly shown [to be] necessary’, Lord Justice Dyson summed up in the following terms:

‘Her right to express her views about abortion does not justify the distress and anxiety that she intended to cause those who received the photographs. Of particular significance is the fact that those who work in the three pharmacies were not targeted because they were in a position to influence a public debate on abortion. The most that Mrs Connolly could have hoped to achieve was to persuade those responsible in the pharmacies for their purchasing policies to stop selling the ‘morning after pill’...In any event, even if the three pharmacies were persuaded to stop selling the pill, it is difficult to see what contribution this would make to any public debate about abortion generally and how that would increase the likelihood that abortion would be prohibited.’<sup>139</sup>

His last sentence is unconvincing. If Mrs Connolly had convinced three pharmacies to stop selling the ‘morning after pill’ on the strength of her speech then that would represent an enormous victory for her cause. It takes very little imagination to see that there would be media interest in such a coup or that it would have provided a platform for an organisation like ProLife Alliance to springboard a campaign from, encouraging other like-minded individuals to follow her example. Of course, it is the photographs that are the main issue in this case. They were shocking and distressing and sent to people who were not in a position to influence a public debate on it. This finding, whilst sensible in isolation, does not ring true when one considers the bigger picture. For example, national media events such as *Red Nose Day* or *Children in*

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<sup>138</sup> Geddis, fn. 102.

<sup>139</sup> *Connolly*, fn. 46, [32].

*Need Day* depict shocking images of, typically, children in squalid conditions who are dying from starvation in the former or suffering from abuse in the latter. These images are transmitted directly into the homes of people who may have no means of directly influencing a debate on preventing this horrible treatment or, even, no financial means by which to contribute to the cause. Yet the abortion context looms large in *Connolly*. Abortion is a sensitive subject and the anti-abortion position is unattractive to many people who find it unpersuasive or are uncomfortable about it or offended because they have undertaken an abortion themselves (a decision which they are likely not to have taken lightly). All these reactions are both understandable and available to anyone who hears an anti-abortionist speak but these are not convincing reasons to suppress that speech: as Barendt argues, ‘free speech is of value precisely because it enables radicals to challenge established orthodoxies and received wisdom, including our conventional understandings of what is tasteful and decent’.<sup>140</sup>

Furthermore, the differential treatment between the individual dissenter and the media ought to be re-evaluated. As set out in Chapter Six, the media is afforded high levels of protection, as it should be. The conceptual device that seems to separate the media and ‘non-media’ is the ‘public watchdog function’, which has been used in a number of Strasbourg cases to justify Article 10 protection,<sup>141</sup> the essential premise of which is that the media deserve special protection because of the valuable contribution it makes to society in acting as a public watchdog: in other

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<sup>140</sup> Barendt, ‘Free speech and abortion’, fn. 6, 591.

<sup>141</sup> See *Jersild v. Denmark* (1995) 19 EHRR 1 and such cases.

words, the idea that the media is the fourth estate.<sup>142</sup> Yet the individual dissenter may also occupy this role. As noted above, the Strasbourg jurisprudence recognises ‘the legitimate and important role that campaign groups can play in stimulating public discussion’.<sup>143</sup> The UK judiciary should follow suit. It might be thought that the ‘public watchdog function’ device should be reserved for the media because differences exist between them and the ‘non-media’. The two advantages that the media might be perceived to have over individual dissenters is a greater strength in reaching its audience and greater credibility. Admittedly, the media has a natural advantage in being able to reach its audience and it may be also be a more trusted source of information for certain individuals (and these are reasons for protecting the media). Yet the definition of the media is highly unstable<sup>144</sup> and it is important the judiciary are alive to this issue. Since it describes the delivery vehicle rather than the actor it encompasses all forms of communication. Of course, the term resonates most with traditional forms of information: newspaper, radio and television. Yet to this must now be added the internet. As Fenwick and Phillipson recognise, the internet is ‘the first democratic mass communications media’,<sup>145</sup> which, with very little effort or resources, allows individual dissenters ready access to a worldwide audience. Furthermore, as Fenwick and Phillipson also recognise, the rise of Google and other

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<sup>142</sup> See Louis Blom-Cooper, ‘Press freedom: constitutional right or cultural assumption?’ (2008) *Public Law* 260.

<sup>143</sup> *Steel & Morris*, fn. 106, [95].

<sup>144</sup> See Fenwick and Phillipson, *Media Freedom*, fn. 8, 2-4.

<sup>145</sup> *Ibid.*, 3.

search engines allows that audience to find speech it wants to receive, enabling some websites to obtain greater viewing figures than some magazines or newspapers do.<sup>146</sup>

In fact, the survival of, particularly, the print media is under threat due to the advent of the internet and 24-hour broadcast news channels. As set out in Chapter Six, it has been said by the judiciary that the survival of the print media is a reason to protect such speech:<sup>147</sup> ‘the courts must not ignore the fact that if newspaper do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest’.<sup>148</sup> Of course, this smacks of Barnum: give the people what they want. This argument has been resisted in other decisions.<sup>149</sup> Yet the observation is important since it demonstrates judicial recognition that the traditional print media must have regard to commercial interests in order to secure its future, including increasing resort to celebrity gossip<sup>150</sup> and this may impinge upon the capacity to devote resources to serious investigative journalism. Into this gap may step the non-traditional journalist who may discover stories of public interest that regular journalists miss.<sup>151</sup> Of course, this is not an argument to say that non-journalists should *replace* traditional journalists as the Fourth Estate, it is instead to say that they should not be excluded: it should be better recognised that non-journalists serve an important purpose as well. This would better

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<sup>146</sup> *Ibid.* Although see Rowbottom, who argues that this type of point should not be overstated: Jacob Rowbottom, ‘Media Freedom and Political Debate in the Digital Era,’ (2006) 69(4) *Modern Law Review* 489.

<sup>147</sup> *Campbell*, fn. 20, [77] *per* Lord Hoffmann, [143] *per* Baroness Hale; *A v. B plc* [2003] QB 195

<sup>148</sup> *A v. B plc*, *ibid.*, 208 *per* Lord Woolf.

<sup>149</sup> *McKennitt v. Ash* (2006) fn. 20, [66] *per* Lord Justice Buxton; see also *Mosley*, fn. 22.

<sup>150</sup> See discussion in Chapter Six.

<sup>151</sup> *E.g.*, Mayhill Fowler who, ‘blogging’ on the ‘Huffington Post’, published Barack Obama’s campaign comment from a fund-raiser that neglected, small town working-class communities are “bitter” and “cling to guns and religion”.

[http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha\\_b\\_96188.html](http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html)

realise the word ‘everyone’ within Article 10: everyone has the right to freedom of expression.

## **5. Towards a remedy?**

Since the issues highlighted in this thesis are wide-ranging, the ‘remedy’, such as it is, cannot be put in simple terms without seriously risking its usefulness. Yet if the solution to the challenge of maximising free speech protection under Article 10 is a jigsaw puzzle then some of the pieces may clearly be identified. First, a shift in judicial attitude is critical if these issues are to be addressed, including the cultivation of the rights culture that Lord Irvine promised.<sup>152</sup> It is asserted that the opportunity to establish a more principled approach has been missed but it has not been lost. The opportunity still exists should the judiciary wish to take it. Realisation of this shift in judicial attitude need not be radical and it need not, necessarily, conflict with the Court’s conclusions about their obligations under s. 2. A critical aspect of this realisation would be to recognise that the democratic process value can be broader than the Court currently acknowledges so that broader conceptions of the argument from participation in democracy and the arguments from self-fulfilment and truth are included. Furthermore, the Court should address its own competence to determine what speech is valuable and what speech is not: presently this approach conflicts with the strong principle that government should distrust its own capacity to make such

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<sup>152</sup> Lord Irvine, fn. 89.



judgments.<sup>153</sup> Should the judiciary realise this, a broader free speech right might emerge. Another significant piece of the jigsaw would be for the courts to dispense with the apparent current approach of treating societal interests and non-Convention rights as ‘equal’ in the balancing process.<sup>154</sup> Of course, in order for these changes to be realised then a champion for a more principled approach to free speech must emerge in the House of Lords and there are a few candidates who might fill this role. Lord Scott,<sup>155</sup> Baroness Hale<sup>156</sup> and Lord Hoffmann<sup>157</sup> have all demonstrated this principled approach to free speech before.

## 6. Conclusion

A.V. Dicey wrote that ‘freedom of discussion is in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written’.<sup>158</sup> Aside from relocating the decision from jurors to judges, Dicey’s statement of the law is eerily familiar. It captures two concerns in particular: that a narrow consequentialist approach dominates (‘what should be said or written’ will be protected) and the centrality of the judge to

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<sup>153</sup> See Schauer, fn. 72.

<sup>154</sup> See Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge University Press, 2006), 259.

<sup>155</sup> *R. (on the application of Rusbridger) v. Attorney General* (2003) 3 WLR 232, [46]; his dissent in *ProLife*, fn. 7.

<sup>156</sup> *Belfast City Council v. Miss Behavin’ Ltd* (2007) UKHL 19; *Campbell*, fn. 20; *Jameel*, fn. 18. See also, Baroness Hale of Richmond, ‘Law Lords at the Margin: who defines Convention rights?’, fn. 57.

<sup>157</sup> In addition to the cases cited for Baroness Hale, *ibid.*, his view in *Central Independent Television plc*, fn. 28 in particular. Of course, his connection to Greenpeace may act as a double-edged sword: *McGovern v. Attorney General* (1982) Ch. 321; *R v. Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No. 3)* (2000) 1 AC 147.

<sup>158</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, (London: Macmillan, 1915, 8<sup>th</sup> edn.).

determining this assessment. Whilst it is important not to exaggerate these concerns about how freedom of expression is treated, it is likewise important not to be complacent. The media seems to be strongly protected and it should not be forgotten that Members of Parliament have a near absolute right to freedom of speech in Parliament<sup>159</sup> yet the principle of free speech extends beyond these sources. It resides in the principle that every citizen is entitled to express their opinion and that all forms of government should distrust its ability to know what ‘should be said or written’ and what should not. The goal of the HRA was to create a rights based culture<sup>160</sup> in which the effective enjoyment of free speech would be realised.<sup>161</sup> There is still some work to be done before that goal is realised.

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<sup>159</sup> *A v. UK* (2003) 36 EHRR 51

<sup>160</sup> Lord Irvine, fn. 89

<sup>161</sup> Lord Lester of Herne Hill, ‘Developing constitutional principles of public law’ (2001) *Public Law* 684

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