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# Freedom of Expression in the United Kingdom Under the Human Rights Act 1998

ERIC BARENDT\*

## INTRODUCTION

English law has traditionally taken little or no notice of freedom of speech.<sup>1</sup> A right to free speech (or expression) was not generally recognized by the common law, unlike, for example, the rights to property and reputation, which are strongly protected, respectively, by the laws of trespass and libel. There has been no equivalent in England to the First Amendment to the U.S. Constitution, which prohibits any law that abridges freedom of speech or freedom of the press. There is not even a statute similar to France's 1881 Law of the Press, which expressly declares freedom of the press and proscribes the licensing of newspapers and periodicals. Admittedly, there has been no system of administrative press censorship since 1694, and in practice the media and individual publishers have probably enjoyed greater freedom of expression in England than they have in other European countries. Further, as will be explained in Part II of this Article, the courts in England, particularly in the last thirty years, have sometimes suggested that the common law did recognize freedom of speech, and have also held that the right could be invoked to shape the interpretation and development of both statutory and common law. But the freedom enjoyed no clear constitutional status; it was difficult to predict when courts would recognize it as important to the resolution of particular cases. Consequently, publishers could not rely with any great confidence on a right to freedom of speech.

Now, as a result of the Human Rights Act of 1998 (HRA),<sup>2</sup> the treatment of freedom of expression (and other fundamental rights) in the United Kingdom has changed radically. Rights, which used to be of only uncertain common law status, are explicitly recognized by the HRA. Under this legislation, the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights (ECHR or "Convention")<sup>3</sup> is protected by law in the United Kingdom. Courts are under an obligation to interpret legislation compatibly with the right if possible.<sup>4</sup> Moreover, it is

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\* Goodman Professor of Media Law, University College London. This Article was originally delivered as a conference paper at a symposium held by the Center for American Law of the University of Paris II (Panthéon-Assas) on January 18–19, 2008. For the French version of this Article, see Eric Barendt, *La liberté d'expression au Royaume-Uni et le Human Rights Act de 1998*, in *LA LIBERTÉ D'EXPRESSION AUX ÉTATS-UNIS ET EN EUROPE* 31 (Élisabeth Zoller ed., 2008).

1. This Article is for the most part concerned with the law in England and Wales, not with Scottish law, which in a few material respects differs from English law. However, the Human Rights Act of 1998 applies throughout the United Kingdom.

2. Human Rights Act, 1998, c. 42.

3. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230. "European Convention on Human Rights" is a commonly used alternative title for the Convention and is the name that will be employed throughout this Article.

4. Human Rights Act, 1998, c. 42. § 3(1); see *infra* Part IV.

unlawful for a public authority to act incompatibly with it.<sup>5</sup> A court is a “public authority” for this purpose;<sup>6</sup> it follows from these provisions in the HRA that judges must develop the common law in conformity with Convention rights. The HRA has, therefore, had an impact on the development by the courts of the law of breach of confidence, which has been adapted to protect personal information from unwarranted disclosure, and to some extent on the law of defamation; this topic is discussed below in Part V of this Article.

Another point should be made in this Introduction. When the HRA was proceeding through Parliament as a bill, the press, supported by the Press Complaints Commission, expressed considerable concern that it would introduce a privacy right. The government refused to grant the press or the Commission exemption from the HRA, but it did include a special clause for freedom of expression. Under Section 12 of the HRA, a court must not grant an interim order restraining publication unless it is satisfied that the applicant is likely to establish at full trial that publication should not be allowed,<sup>7</sup> and it must have particular regard to the importance of the right to freedom of expression, the extent to which publication is in the public interest, and any relevant privacy codes.<sup>8</sup> As a result, it has become a little more difficult than it used to be to obtain interim injunctions against the media.

This bare legal account of the HRA suggests it should have significantly strengthened the protection of freedom of expression in English (and Scottish) law. I am not sure that it has had such a radical effect, though it has certainly increased the range of arguments that can be made in support of free speech rights both before the courts and in political debate. Any assessment of the impact of the HRA on freedom of expression depends, to some extent of course, on how that freedom was treated at common law before the HRA came into force. Part I begins with a few remarks on the relationship of the Convention right to the common law. Part II will then briefly discuss recent legislation concerning freedom of expression in the United Kingdom. That topic must be mentioned to give a full picture of the state of free speech law, though it should be remembered that courts are required to interpret statutes, so far as possible, compatibly with the Convention right to freedom of expression. Part III is concerned with two fundamental questions: the scope of the right to freedom of expression and the classification of different types of speech. Parts IV and V discuss, respectively, the courts’ approach to legislation restricting freedom of expression and their approach when they balance the right against other rights or interests, notably the right to privacy, which is also guaranteed by the ECHR (Article 8).

## I. THE CONVENTION RIGHT COMPARED WITH THE COMMON LAW FREEDOM

One view of the common law treated freedom of expression (or speech) merely as a residual liberty; it existed only in the gaps of the criminal and civil laws of, say,

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5. Human Rights Act, 1998, c. 42, § 6(1).

6. *Id.* § 6(3).

7. *Cream Holdings Ltd. v. Banerjee* [2004] UKHL 44, [2005] 1 A.C. 253 (appeal taken from Eng.) (noting that the House of Lords held that generally, but not always, the court must now be satisfied the applicant is more likely than not to win at full trial before it grants an interim injunction).

8. Human Rights Act, 1998, c. 42, § 12.

obscenity, libel, and contempt of court.<sup>9</sup> There was freedom to express an opinion or disclose information only when the expression was not forbidden by the law. That was the view of Dicey when he wrote, “At no time has there in England been any proclamation of the right to liberty of thought or to freedom of speech.”<sup>10</sup> In fact, judges in England often articulated a common law right to the freedom, for example, when they restrictively interpreted legislation limiting the right to demonstrate,<sup>11</sup> or when they formulated and applied defenses of fair comment or privilege to libel actions.<sup>12</sup> Courts have sometimes refused to grant an injunction to stop the publication of a book or the showing of a television program, however distressing its content to particular readers or viewers, because an injunction would interfere with freedom of speech.<sup>13</sup> In some cases they have even said that the common law extended the same protection to exercise of the freedom as the ECHR. Lord Keith took that view when a unanimous House of Lords held that the common law precluded public authorities from bringing defamation actions, as such actions inhibited the freedom of political speech; it was unnecessary for the courts to invoke the European right to freedom of expression, which at that time had not yet been incorporated into U.K. law.<sup>14</sup>

This more liberal, or sympathetic, approach to freedom of speech (and other rights guaranteed by the Convention) was particularly marked during the passage of the HRA in Parliament and in the period between the dates of its enactment and its coming into effect in October 2000. This is most clearly evidenced in two leading decisions of the House of Lords at that time. In *R v. Secretary of State for the Home Department*,<sup>15</sup> it held that provisions in the Prison Service Standing Orders should not be applied to prevent prisoners giving interviews to journalists unless the latter agreed not to publish the interview. To give effect to the plain meaning of the Orders would infringe the freedom of speech of prisoners publicly to protest their innocence of the charges on which they had been convicted. For Lord Steyn, in the leading speech for the House, “the starting point is the right of freedom of expression,” as strongly protected in the common law as it is under the Convention.<sup>16</sup> In the second case, *Reynolds v. Times Newspapers Ltd.*,<sup>17</sup> Lord Steyn referred to “a constitutional right to freedom of

9. See ERIC BARENDT, *FREEDOM OF SPEECH* 40–42 (2d ed. 2005).

10. A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 239–40 (10th ed. 1960).

11. The classic example is the speech of Lord Reid in *Brutus v. Cozens*, in which the court held that the word “insulting” in the public order legislation should not be construed to penalize the use of offensive language during an anti-apartheid demonstration at Wimbledon. *Brutus v. Cozens* [1972] UKHL 6, [1973] A.C. 854 (appeal taken from Eng.).

12. See, e.g., *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.) (qualified privilege); *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743 (Q.B.) (Diplock, J.) (fair comment).

13. See *R v. Cent. Indep. Television PLC*, [1994] Fam. 192 (A.C.) (television program); *In re X*, [1975] Fam. 47 (A.C.) (book).

14. See *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534 (H.L.) (appeal taken from Eng.). The Court of Appeal had invoked the Convention to develop the common law where there were conflicting first instance precedents. *Derbyshire County Council v. Times Newspapers Ltd.*, [1992] Q.B. 770.

15. [2000] 2 A.C. 115 (H.L.) (appeal taken from Eng.).

16. *Id.*

17. [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.) (qualified privilege).

expression in England,” a description which gave this fundamental right “its higher normative force.”<sup>18</sup> It was the importance of this right which impelled the House of Lords in *Reynolds* to extend the qualified privilege defense to cover the publication by the media to the general public of defamatory allegations, at least where publication was in the public interest and the requirements of responsible journalism had been satisfied. Lord Nicholls also noted that the freedom of expression “will shortly be buttressed by statutory requirements” of the HRA.<sup>19</sup>

It may be that in these decisions the House of Lords was deliberately anticipating the impact of incorporation of the ECHR. Perhaps it was claiming for the common law an attachment to freedom of speech that earlier decisions did not strictly warrant. At any rate, this rosy perspective has enabled the courts to underplay the significance of the HRA. Thus, in the first important free speech case to come to the Lords after incorporation, *R v. Shayler*,<sup>20</sup> concerning the compatibility of provisions of the Official Secrets Act 1989 with freedom of expression, Lord Bingham stated confidently that this fundamental right had been recognized at common law for some time, but was now “underpinned by statute.”<sup>21</sup> As with the common law, the Convention right was not absolute, but allowed for many exceptions. Nevertheless, incorporation of the Convention right did make a difference. Once it had found that the right to freedom of expression was engaged, the House insisted that the Convention requirements for the imposition of a valid limitation on its exercise were satisfied: that it was prescribed by law, that it was imposed in order to satisfy one of the aims set out in Article 10(2) of the Convention, and most importantly that its imposition could be regarded as necessary in a democratic society.<sup>22</sup> With some misgivings, particularly on the part of Lord Hope, the House held the provisions compatible with the Convention right: while an absolute ban on the disclosure of official secrets would not be compatible with the Convention, the legislation did contain provisions enabling the applicant, a former security service agent, to make a limited disclosure to senior authorities if he had serious anxieties about the working of the service, or to seek permission to make a wider disclosure. If an official refused such permission arbitrarily without good justification, the courts could review his refusal and in that way protect freedom of expression.<sup>23</sup> This detailed scrutiny of the legislation would not have been required, or undertaken, before the HRA came into force.

A more explicit acknowledgement of a change of approach was made in the recent *Laporte* case, which concerned the legality of a police order forbidding protestors against the invasion of Iraq to proceed to RAF Fairford to demonstrate against the use of the base by U.S. bombers.<sup>24</sup> Lord Bingham said that the common law’s approach to freedom of expression was “hesitant and negative, permitting that which was not prohibited” and cited passages from Dicey to that effect.<sup>25</sup> The HRA represented a

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18. *Id.* para. 207.

19. *Id.* para. 200.

20. [2002] UKHL 11, [2003] 1 A.C. 247 (appeal taken from Eng.).

21. *Id.* paras. 21–22.

22. *See id.* para. 31.

23. *See id.* paras. 33–36.

24. *See R (on the application of Laporte) v. Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 A.C. 105 (appeal taken from Eng.).

25. *Id.* para. 34. For one of the passages cited from Dicey, see *supra* text accompanying

“constitutional shift.”<sup>26</sup> A prior restraint such as this required most careful scrutiny under the Convention. For Lord Rodger, the police had to pay attention to the “special importance of freedom of peaceful assembly and freedom of expression.”<sup>27</sup> The House of Lords in this case unanimously held that the common law power to arrest or detain people to prevent a breach of the peace could only be exercised when such a breach appeared imminent, a requirement which was not satisfied on the facts. The police interference with the applicant’s rights to freedom of expression and assembly was not, therefore, prescribed by law. The House could in fact have come to the same result under pure common law reasoning—there was no authority conferred either by statute or by common law precedents allowing preventive powers of this kind to be exercised without a reasonable apprehension of an imminent, not just a remote, breach of the peace. But that reasoning would have been quite different from that actually used by the House of Lords with its emphasis on the protestors’ rights to freedom of expression and of assembly.

The HRA therefore does seem to make a significant difference to the general reasoning of the courts in freedom of expression cases. But the concern for freedom shown by the common law had developed appreciably in the decade or so before the Convention right was established in U.K. law, so it is less clear that incorporation of the right necessarily marks an advance in the degree of its legal protection. Indeed, usually the House of Lords and other courts have declined to attach radical importance to the development, although, as the *Laporte* case shows, there are exceptions to that reluctance.

## II. LEGISLATION RESTRICTING FREEDOM OF EXPRESSION

Some general remarks should be made about various statutory restrictions recently imposed on the exercise of freedom of expression and the related right to freedom of assembly. Provisions in the Serious Organised Crime and Police Act of 2005 require anyone organizing a demonstration within a mile of Parliament Square to obtain authorization from the police. The police are required to issue a permit, but they may impose conditions to prevent disorder or damage to property. Additionally, the Act requires a demonstration to cease if it hinders any person wishing to enter or leave the Houses of Parliament or disrupts the life of the community.<sup>28</sup> Many of the most important restrictions are those imposed by the Terrorism Act of 2006 and the Racial and Religious Hatred Act of 2006. Both measures were strongly contested on free speech grounds. The former, enacted after the London bombings in July 2005, makes it an offense to publish material likely to be understood by members of the public who read or hear it as a direct or indirect encouragement of terrorism. There is no need for the prosecution to prove that any *particular* acts of terrorism were encouraged nor that

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note 10.

26. The term “constitutional shift” was used by Sedley, L.J., in *Redmond-Bate v. Director of Public Prosecutions*, [1999] Crim. L.R. 998.

27. *Laporte*, [2006] UKHL 55 at para. 85.

28. See Serious Organised Crime and Police Act, 2005, c.15, §§ 132–138. The measure was intended to limit the scale of Brian Haw’s six-year protest, initially against the sanctions applied to Iraq, and more recently to its invasion. See *R (on the application of Haw) v. Sec’y of State for the Home Dep’t*, [2006] EWCA (Civ) 532, [2006] Q.B. 780 (C.A.) (Eng.).

any person was in fact encouraged to perpetrate such an act.<sup>29</sup> The prosecution need not even show that the publication was *likely* to instigate an *imminent* act; in the absence of these requirements, the legislation would certainly be struck down in the United States for violating the First Amendment.<sup>30</sup> Moreover, there are doubts that it would survive a challenge in the Strasbourg Human Rights Court under the Convention.<sup>31</sup> It could hardly be argued it was *necessary* to limit freedom of expression by this legislation, given that any speech which clearly incited terrorism or other serious violence is already caught by other provisions of English criminal law.

One of the most contested aspects of the Terrorism Act was the introduction of an offense of “glorification of terrorism.” For among the statements likely to be understood as indirectly encouraging terrorism are those that glorify the commission or preparation, whether in the past or in the future, of such acts, at least if members of the public can reasonably be expected to infer from these statements that they should emulate the glorified conduct.<sup>32</sup> The government was unmoved by the argument that a prosecution might be brought in respect of a speech expressing understanding or sympathy for suicide bombers, even though the speaker did not intend his audience to join their ranks. It was also arguable that the new measure might deter some people from saying or publishing what they feel about, say, the war in Iraq or the situation in Palestine because they fear prosecution for this offense—the so-called “chilling effect” of laws restricting the exercise of free speech rights.

The second controversial measure, the Racial and Religious Hatred Act of 2006, extends the proscription of incitement to racial hatred to protect religious groups: “group[s] of persons defined by reference to religious belief or lack of a religious belief.”<sup>33</sup> The government’s concern was primarily to protect Muslims, who, unlike Jews and Sikhs, are not distinct “ethnic” groups protected by the proscription of racial hatred. Christians are no longer protected by the law of blasphemy, which was formerly a common law offense.<sup>34</sup> The House of Lords had resisted earlier attempts by the government to extend the racial hatred law on the ground that this step would mark a significant erosion of freedom of speech. During the passage of the 2006 measure, it used this argument radically to curtail the scope of the new crime so that it is much narrower than the comparable racial hatred offense. It is only an offense to use *threatening* words or behavior, and the prosecution must prove an intent to stir up religious hatred; there is no alternative requirement of publication in circumstances likely to stir it up.<sup>35</sup> Most importantly, there is a broad provision explicitly protecting

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29. See Terrorism Act, 2006, c. 11, § 1 (U.K.).

30. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

31. The Joint House of Lords and House of Commons Committee on Human Rights has doubted whether the new offense is defined precisely enough to meet the ECHR requirement that a restriction on the exercise of freedom of expression must be “prescribed by law.” JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, 2005–6, H.L. 75-I, H.C. 561-I, 21.

32. Terrorism Act, 2006, c. 11, § 1(3).

33. Racial and Religious Hatred Act, 2006, c.1, sched. Hatred Against Persons on Religious Grounds § 29A (U.K.).

34. The common law offenses of blasphemy and blasphemous libel have been abolished by the Criminal Justice and Immigration Act, 2008, c. 4, § 79 (U.K.).

35. See Racial and Religious Hatred Act, 2006, c.1, sched. Hatred Against Persons on

freedom of expression, under which the legislation is not to be interpreted as, among other things, restricting discussion, criticism, dislike or ridicule of particular religions, or the beliefs or practice of their adherents.<sup>36</sup> It is in fact unclear in what circumstances, if any, a prosecution could be brought for incitement to religious hatred, where the speech would neither be caught by existing public order law nor covered by the wide freedom of expression provision. In short, the measure looks purely cosmetic. The law seeks both to protect freedom of expression and at the same time to check what some people consider its abuse.

### III. THE SCOPE AND MEANING OF FREEDOM OF EXPRESSION

This Part examines two general freedom of expression questions with which English courts have wrestled in the last few years since incorporation of the right guaranteed by the Convention. Article 10 of the ECHR provides:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requesting the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>37</sup>

English courts normally have had little difficulty in determining whether freedom of expression is at issue, or engaged. If it is, they proceed to determine whether the restrictions on its exercise can be regarded as “necessary in a democratic society” for one of the aims set out in Article 10(2). But occasionally the threshold question—whether freedom of expression is engaged—has created problems. This Part also discusses the increasing tendency of the courts to distinguish among different types of speech—political, commercial, celebrity gossip—giving greater protection to the first type than to the others. This categorization of speech is relevant to the reasoning of the courts on the propriety of statutory and common law restrictions on exercise of the freedom, topics which are discussed in Parts IV and V. But it is also discussed here because of its general importance.

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Religious Grounds §§ 29B–C (U.K.).

36. *See id.* § 29J.

37. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230.



*A. The Scope of Freedom of Expression*

In a handful of cases, the scope of the freedom has given rise to some difficulty. The most important of these is the controversial decision of the House of Lords in the *ProLife Alliance* case, in which it upheld four to one (with Lord Scott dissenting) the British Broadcasting Corporation's (BBC) decision to refuse to transmit an election broadcast by the ProLife Alliance party. The House of Lords reasoned that the broadcast's graphic and repeated images of mutilated fetuses would be highly offensive to many viewers and so would infringe the "taste and decency" rule.<sup>38</sup> Lord Hoffmann, in the leading speech for the majority, did not consider the "primary right" to freedom of expression engaged.<sup>39</sup> In his view, that right entailed only the freedom to speak and write with means at one's own disposal; there was no human right of access to use television to put out a political message. There was only a right not to be denied access on discriminatory grounds and not to have unreasonable conditions applied to any access which was granted.<sup>40</sup>

I have criticized Lord Hoffmann's reasoning, and the decision of the House of Lords, at length elsewhere.<sup>41</sup> He correctly pointed out that the ProLife Alliance party did not have any positive right of access to speak on radio or television. But broadcasters and others permitted to use these media surely enjoy the same freedom of expression as, say, authors and newspaper contributors who equally lack positive access rights. Further, in two other cases the courts have taken a much less limited view of the scope of freedom of expression. In the first, Newman J held that the freedom was engaged when London Transport refused to accept advertisements promoting tourism in North Cyprus on London buses, on the ground that they might be offensive to some people—presumably, Greek Cypriots traveling on them.<sup>42</sup> In effect he recognized a right to advertise on buses operated by transport companies under license from London Transport, which had authority to lay down general rules about advertising. And in a recent case concerning the compatibility of the ban on political advertising on radio and television with freedom of expression, the government accepted that the statutory ban engaged the freedom, but persuaded the House of Lords that it should be upheld as necessary to protect the public interest in a fair political process under which richer pressure groups and parties were denied the right to buy more broadcasting time.<sup>43</sup>

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38. *R (on the application of ProLife Alliance) v. British Broad. Co.* [2003] UKHL 23, [2004] 1 A.C. 185, para. 14 (appeal taken from Eng.). Under the "taste and decency" standards, broadcasters were at that time required not to show material which offended good taste or decency or was likely to be offensive to public feeling. *See* Broadcasting Act, 1990, c. 42, § 6(1) (Eng.). *See* Communications Act, 2003, c. 21, § 319(2)(f) (Eng.) (referring to OFCOM's duty to set "generally accepted standards . . . so as to provide adequate protection for members of the public from the inclusion . . . of offensive and harmful material").

39. *ProLife*, [2003] UKHL 23 at para. 56.

40. *See id.* paras. 57–58.

41. *See* BARENDT, *supra* note 9, at 47; Eric Barendt, *Free Speech and Abortion*, [2003] P.L. 580.

42. *See R (on the application of N. Cyprus Tourism Centre Ltd.) v. Transport for London* [2005] EWHC (Admin) 1698 (Eng.).

43. *See R (on the application of Animal Defenders Int'l) v. Sec'y of State for Culture*,

It was surely right in all these cases to hold that Article 10 was engaged, since the provisions at issue in them had clearly been imposed in order to restrict the dissemination of a particular message or, in the political advertising case, a type of message. Freedom of expression is at issue whenever the object of a law or other rule is to suppress or restrict the dissemination of some idea, rather than to achieve some end divorced from the communication of a particular message, say, to stop the spread of litter or to preserve the peace of a residential neighborhood. A harder case was *Farrakhan*, where the Home Secretary had refused to grant an extremist Islamic preacher from the United States permission to enter the country on the ground that his presence here would be disruptive to race relations. But the decisive factor was that Farrakhan intended to speak at public meetings, so the Court of Appeal held freedom of expression was engaged: "where the authorities of a state refuse entry to an alien solely to prevent his expressing opinions within its territory, art 10 will be engaged."<sup>44</sup> But in the court's view the Home Secretary had shown good reason for excluding Farrakhan; his addresses would have been not merely offensive, but might have led to disorder and might have seriously damaged community relations in the United Kingdom.<sup>45</sup>

On the other hand, two cases show the courts' reluctance to uphold positive access rights under Article 10. The High Court of Justiciary in Scotland held there is no right to televise legal proceedings (in the Lockerbie terrorism trial) under freedom of expression.<sup>46</sup> Additionally, the Divisional Court in England rejected an argument that freedom of expression grants a right of access to information and an obligation to hold open hearings in connection with the public inquiries into the foot and mouth cattle disease that occurred in England six years ago.<sup>47</sup>

### B. The Categories of Speech

In a number of cases, courts have distinguished between various categories or types of speech. It was already clear from the *Shayler* case that the House of Lords considered the role of speech in the working of a participatory democracy the most compelling argument for freedom of expression.<sup>48</sup> The obvious implication was that the expression and dissemination of political opinion and information was fully protected. But it was Baroness Hale in the Naomi Campbell privacy case who first drew distinctions among the different types of speech. *Campbell* concerned the *Daily Mirror*'s publication of information and photographs revealing that the supermodel was attending sessions of Narcotics Anonymous to treat her drug addiction. In evaluating the weight to be attached to freedom of the press when balanced against the claimant's privacy interest, Baroness Hale said that "[t]here are undoubtedly different types of speech . . . some of which are more deserving of protection in a democratic

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Media and Sport [2008] UKHL 15, [2008] 3 All E.R. 193 (appeal taken from Divisional Court).

44. R (on the application of Farrakhan) v. Home Sec'y of State for the Home Dep't, [2002] 4 All E.R. 289, para. 56 (C.A.) (Eng.).

45. See *id.* paras. 61–63.

46. Petition No. 2 of the British Broad. Co. [2000] J.C. 521 (Kirkwood, L.).

47. *No Free Access to Information*, TIMES (London), March 28, 2002 (discussing R (on the application of Persey) v. Sec'y of State for Env't, Food, and Rural Affairs [2002] EWHC (Admin) 371, [2002] 3 W.L.R. 704 (Eng.)).

48. R v. Shayler [2002] UKHL 11, [2003] 1 A.C. 247, para. 21 (appeal taken from Eng.).

society than others.”<sup>49</sup> Political speech is worthy of the strongest protection, while intellectual, educational, and artistic speech are also important. But it is difficult to make such claims of the publication in this case, which Baroness Hale characterized as the product of a “celebrity-exploiting tabloid newspaper.”<sup>50</sup> The disclosure of intimate details of the claimant’s life did not, in her view, contribute either to political life or to anyone’s artistic or personal development. The distinction was restated in 2006 in the important defamation case, *Jameel (Mohammed) v. Wall Street Journal Europe*,<sup>51</sup> where the House of Lords affirmed and extended the new head of qualified privilege formulated in the landmark decision *Reynolds v. Times Newspapers Ltd.*<sup>52</sup> The case concerned the publication of an inaccurate, but responsibly researched, allegation that the Saudi authorities were monitoring the accounts of the claimant’s company to establish whether any payments were used to support terrorist organizations. The Law Lords emphasized the real public interest in the story, an important factor in determining that its publication was covered by *Reynolds* qualified privilege; Baroness Hale drew the familiar contrast with information that is merely interesting to the public, for example, “the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends.”<sup>53</sup>

Two other House of Lords’ decisions on freedom of expression may be contrasted. In the first, the court attached greater importance to an unfettered freedom to report legal proceedings in full than a child’s privacy right not to allow the media to publish photographs of his mother and brother, for whose murder the mother was soon to be tried; Lord Steyn considered fundamental the right comprehensively to report legal proceedings without a restriction of this character.<sup>54</sup> On the other hand, the House of Lords has recently suggested that the freedom to sell pornographic books, videos, and other material lies at the outer edges of freedom of expression; Lord Hoffmann said that if Article 10 was engaged, it operated “at a very low level.”<sup>55</sup> Again, Baroness Hale put it very clearly: “[p]ornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law.”<sup>56</sup> That must indeed be very low-level protection!

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49. *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457, 499 (appeal taken from Eng.).

50. *Id.* at 498, para. 143.

51. [2006] UKHL 44, [2007] 1 A.C. 359 (on appeal from Eng.).

52. *Id.* at 377–78, para. 35; see *Reynolds v. Times Newspapers Ltd.* [1999] UKHL 45, [2001] 2 A.C. 127 (appeal taken from Eng.).

53. *Jameel*, [2007] 1 A.C. 359, at 408, para. 147. The distinction has been applied in a recent breach of confidence/privacy case, in which Justice Eady granted an interim injunction to stop a footballer from disclosing to the media that his wife had been having an affair with another footballer. See *CC v. AB* [2006] EWHC (QB) 3083.

54. *In re S* [2004] UKHL 47, [2005] 1 A.C. 593; see also *Re Webster (A Child)* [2006] EWHC (Fam) 2733 (holding that the media may attend and report on care proceedings for a child).

55. *Belfast City Council v. Miss Behavin’ Ltd.* [2007] UKHL 19, [2002] 1 W.L.R. 1420, 1426, para. 16 (appeal taken from N. Ir.). The House held the decision of Belfast City Council to exclude sex shops from a residential area was compatible with freedom of expression and the right to enjoy possessions guaranteed under Article 1 of Protocol 1 to the ECHR.

56. *Belfast City Council*, [2007] UKHL 19, at 1432, para. 38.

A few cases have concerned commercial speech and advertising. A free speech challenge to the regulations permitting limited tobacco advertising only at the place of sale was dismissed, with the observation that commercial speech was not entitled to the same level of protection as political or artistic expression.<sup>57</sup> In contrast, in the *North Cyprus Tourism* case, Newman J held that commercial advertising is protected by Article 10 of the ECHR, and applied without modification the normal tests to determine whether the restrictions imposed by London Transport could be justified; there was no suggestion that it was entitled to a lower degree of protection than a political notice or advertisement.<sup>58</sup> The Court of Appeal has recently held that freedom of expression covers comparative advertising, although that does not raise “a question of ‘pure’ free speech,” in view of the advertiser’s commercial interests.<sup>59</sup>

The classification of types of speech is controversial, particularly in the United States, where the courts normally invalidate content-based restrictions on freedom of speech.<sup>60</sup> That is the explanation for their strong hostility to the proscription of hate speech. Restrictions typically ban the dissemination of hate speech directed against groups on the basis of race, ethnic or national origin, religion, or gender. But hate speech targeted at groups such as the poor, the elderly, or the physically or mentally handicapped is not caught by these laws, so this type of legislation is categorized as a content-based restriction on speech and is therefore incompatible with the First Amendment.<sup>61</sup> But even in the United States, pornography may receive a lower level of protection than political speech and other contributions to public discourse.<sup>62</sup> The treatment of commercial speech is also not as generous as that of political expression.<sup>63</sup> I have no quarrel with this development in English free speech jurisprudence. When courts balance freedom of speech against competing rights or interests, such as personal privacy or public order, it is inevitable that they must take account of the type of speech at issue in the case, just as they must consider how its dissemination may infringe privacy or endanger public order. It is impossible to avoid some classification of speech on this approach. But the approach should not be applied inflexibly. Courts should be open to arguments that, for example, contend that what appears to be pornographic art should be treated as generously as traditional or conventional types of artistic expression, or that the publication of celebrity gossip might on a particular occasion be relevant to a serious public debate and should be given more protection than it usually enjoys.

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57. See *R (on the application of British American Tobacco UK Ltd.) v. Sec’y of State for Health*, [2004] EWHC (Admin) 2493.

58. See *R (on the application of N. Cyprus Tourism Centre Ltd.) v. Transport for London*, [2005] EWHC (Admin.)1698, [75]–[81].

59. *Boehringer Ingelheim Ltd. v. Vetplus Ltd.*, [2007] EWCA (Civ) 583, [41] (Jacob, L.J.).

60. See *BARENDT*, *supra* note 9, at 51–53.

61. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

62. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (holding that restrictions on the location of a theatre showing pornographic films do not violate the First Amendment).

63. See *BARENDT*, *supra* note 9, at 406–09, 412.

## IV. THE TREATMENT OF LEGISLATION RESTRICTING FREEDOM OF EXPRESSION

Under the HRA, legislation “must be read and given effect” so far as possible compatibly with Convention rights.<sup>64</sup> Alternatively, superior courts may declare a provision in an Act of Parliament incompatible with the Convention.<sup>65</sup> In principle, a court should first determine whether the right to freedom of expression is at issue, or to use the usual term, is “engaged,” in the case before it. Secondly, it should examine whether the restriction imposed by the U.K. statute meets the conditions required under ECHR, Article 10(2) for a valid limit on exercise of the right. According to Article 10(2), the limit must be prescribed by law and be imposed for a legitimate aim under the Convention to prevent disorder or to protect health, morals, or the reputation or rights of others, and it must be necessary for that purpose, that is, not disproportionate and justified by relevant and sufficient reasons.<sup>66</sup> If the restriction does not meet these conditions, the applicant’s right to freedom of expression (or other right at issue) is fully engaged; there is then a strong presumption that it should be protected.

Finally, the U.K. legislation at issue in the case should be interpreted and applied, so far as possible, compatibly with the right. This requirement enables a court to depart from the plain meaning of the legislation and uphold a Convention right;<sup>67</sup> it should apply the legislation only when it would be incompatible with its overall purpose to enforce the right.<sup>68</sup> It is in these latter circumstances that the court may make a declaration of incompatibility. For example, a court in England could not interpret the Obscene Publications Act of 1959 so as to allow the publication of hardcore pornography; that would make nonsense of the whole point of that statute. But a court might declare it incompatible with the Convention right to freedom of expression, though that result is very unlikely given the low value attached to sexually explicit speech. The important point is that it would be wrong for a court simply to accept the argument that a statute amounts to a proportionate restriction on exercise of the free expression right, without carefully examining whether the restriction is really necessary to achieve one of the objectives set out in Article 10(2) of the Convention.

Sometimes the courts do take this rigorous approach, particularly when a challenge is made to the compatibility of the legislation with the Convention. The speeches of the Lords in the *Shayler* official secrets case are good examples of it; they show a careful and detailed examination of the legislative restrictions as well as of the European Human Rights Court precedents. But more usually, judges prefer to ask whether, on an interpretation of the relevant statute in the light of the English precedents, it was right

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64. Human Rights Act, 1998, c. 42, § 3(1).

65. *See id.* § 4. In practice courts prefer, if at all possible, to interpret legislation compatibly with the Convention, as the declaration of incompatibility does not benefit the party asserting the Convention right; the provision restricting the right remains in force, until the government has amended the provision. *See id.* § 10.

66. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230. When they interpret the scope of the Convention rights, English courts are required to take into account rulings of the Strasbourg Court, but are not bound by them. *See* Human Rights Act, 1998, c. 42, § 2(1).

67. *See* Ghaidan v. Godin-Mendoza [2004] UKHL 30, [2004] 2 A.C. 557.

68. *See In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 A.C. 291.

to hold the speaker guilty, for example, of an offense under the public order legislation, and only then ask whether that interpretation is incompatible with freedom of expression. The freedom is not on this standard approach the starting point, as it should be. Further—and this is a crucial point—the courts often accept the legislative judgment concerning the appropriate balance between the requirements of freedom of expression and the protection of, for example, public order or the rights of others, without really determining whether that protection was necessary in order to safeguard that objective.<sup>69</sup>

The adoption of this second approach explains why the courts have sometimes failed to give effect to legislation compatibly with freedom of expression when they could have done so. In the *ProLife Alliance* case,<sup>70</sup> for instance, the House of Lords held that Parliament (or the government in negotiating its Agreement with the BBC) was entitled to formulate standards of “taste and decency,” and the BBC had wide discretion in applying them, without independently determining whether it was necessary to apply them in this particular context. Only Lord Scott in his dissenting speech asked whether it was really necessary to protect viewers from any offense they might feel from the contents of political speech. In his view the “taste and decency” standards should be applied less strictly to an election broadcast in which the pictures, though distressing, were factually accurate and not sensationalized, than they should be to the gratuitous portrayal of sex or violence.<sup>71</sup> The “taste and decency” rule could have been interpreted compatibly with the ECHR right to freedom of expression.

Equally, the approach of the Administrative Court in two cases when protestors challenged the application of public order legislation on freedom of expression grounds is open to criticism.<sup>72</sup> Instead of asking whether it was necessary to apply the law in order to preserve public order, the court denied the relevance of the Convention right to such issues as whether the defendant’s speech was “insulting,” whether it was published with intent to insult or with awareness that it might be insulting, and whether it was likely to cause “harassment, alarm, or distress.”<sup>73</sup> Freedom of expression, in the court’s view, was relevant only to the question whether the protestor could take advantage of the defense of reasonable conduct provided by the U.K. statute.<sup>74</sup> Indeed, once the court had found the speech insulting, it was almost impossible to persuade the court that the protestor’s conduct was reasonable as an exercise of his right to freedom

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69. In addition to the cases discussed in the following two paragraphs, see *R (on the application of Animal Defenders Int’l) v. Sec’y of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 3 All E.R. 193 (appeal taken from Divisional Court).

70. *R (on the application of ProLife Alliance) v. British Broad. Co.* [2003] UKHL 23, [2004] 1 A.C. 185 (appeal taken from Eng.).

71. *Id.* at 244–45, paras. 95–100 (Scott, L., dissenting).

72. See *Hammond v. Dir. of Pub. Prosecutions*, [2004] EWHC (Admin) 69 (Eng.) (finding defendant guilty of public order offense for preaching with sign “Stop Immorality” and “Stop Homosexuality”); *Norwood v. Dir. of Pub. Prosecutions*, [2003] EWHC (Admin) 1564 (finding defendant guilty of public order offense for display of poster with words “Islam out of Britain” and “Protect the British people”). For commentary on these cases, see Andrew Geddis, *Free Speech Martyrs or Unreasonable Threats to Social Peace?—“Insulting” Expression and Section 5 of the Public Order Act 1986*, 2004 PUB L. 853, 862–65.

73. Public Order Act, 1986, c. 64, § 5.

74. See *id.* § 5(3)(c).

of expression. The correct approach would surely have been for the court first to have found whether the applicant's right to freedom of expression was engaged, and secondly, to consider whether it was possible to interpret and apply the legislation compatibly with the exercise of that right. For instance, it is wrong to consider whether, say, a protest is "insulting" in isolation from freedom of expression principles, as articulated by both the European Court and English precedents.

In *Connolly v. Director of Public Prosecutions*, the Administrative Court took a line similar to that advocated in these paragraphs.<sup>75</sup> The defendant, who posted close-up photographs of aborted fetuses to pharmacists who stocked "morning after" contraceptive pills, was convicted under the Malicious Communications Act of 1988 for sending an indecent or grossly offensive article. The court ruled that it was possible to interpret the legislation compatibly with the Convention right to freedom of expression. It could give "a heightened meaning to the words 'grossly offensive' and 'indecent,'" or it could read into Section 1 of the Malicious Communications Act of 1988 a provision to the effect that the section does not apply to allow "a breach of a person's [C]onvention rights,"<sup>76</sup> in this case a breach of Article 10(1) which is not justified under Article 10(2). On this basis the court considered the conviction breached the defendant's right to freedom of expression, unless that breach could be justified under Article 10(2) as a proportionate restriction on exercise of the freedom. The court held that it was. It was clearly prescribed by law and was imposed to protect the "rights of others," in this case the right of pharmacy employees not to be exposed to distress at their place of work, a distress moreover which was inflicted deliberately by the defendant. The court concluded that the restriction was necessary and not disproportionate; disseminating offensive material of this kind hardly contributed to public debate about abortion.

The impact of the HRA has been considered in contexts other than the familiar ones of disturbances to public order and of the offense occasioned by abortion photographs. The novel question whether the HRA had any impact on copyright legislation was considered by the Court of Appeal in *Ashdown v. Telegraph Group Ltd.*<sup>77</sup> Paddy Ashdown, then the leader of the Liberal Democrat political party, claimed copyright infringement when the *Daily Telegraph* published substantial extracts from minutes detailing his confidential discussions with Prime Minister Tony Blair concerning possible political cooperation between the Liberal Democrats and the Labour government after the 1997 general election. In addition to an unsuccessful argument that the extracts were covered by the statutory defense of fair dealing for the purpose of reporting current events, provided by the Copyright, Designs, and Patents Act of 1988, the newspaper asserted that its right to freedom of expression under the Human Rights Act limited the claimant's copyright. The Court of Appeal held that in exceptional circumstances freedom of expression might trump copyright; indeed, the Copyright, Designs and Patents Act of 1988 itself could be interpreted to allow this possibility with its provision of an undefined public interest defense.<sup>78</sup> But on the facts of this case

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75. [2007] EWHC (Admin) 237.

76. *Id.* para.18 (Dyson, L.J.).

77. [2001] EWCA (Civ) 1142.

78. *See id.* para. 45. Copyright law provides that the legislation is not to affect any rule of law preventing the enforcement of copyright on grounds of public interest. Copyright, Designs and Patents Act, 1988, c. 48, § 171(3).

freedom of expression could not justify the newspaper's extensive reproduction of the claimant's own language.<sup>79</sup>

#### V. BALANCING FREEDOM OF EXPRESSION AGAINST OTHER RIGHTS

The courts have balanced the right to freedom of expression against other Convention and common law rights in a number of cases. I will mention a few of them. In *Venables v. News Group Newspapers Ltd.*, one of the first cases on freedom of expression after the HRA came into force, the President of the Family Division imposed a permanent injunction binding on all media to prevent disclosure of the new names and whereabouts of two young men who were about to be released following their detention for the murder of a two-year-old boy.<sup>80</sup> There was evidence that vigilante groups would use the revelation to attack or kill the young men, so the President issued the injunction to safeguard their Convention right to life rather than their privacy. The right to life was clearly of greater weight than the right of newspapers to reveal the names and addresses of the young men. In the Naomi Campbell case,<sup>81</sup> however, the House of Lords balanced the Convention right to freedom of expression against the claimant's right to respect for her private life, guaranteed by Article 8 of the Convention. By a three-to-two majority, the House held that on the facts the privacy right had greater weight in view of the trivial importance of the publication of the information and photographs<sup>82</sup> and the vital importance to the claimant of this aspect of her privacy. The information related to Naomi Campbell's physical and mental health, which has always been regarded as private and confidential. She might well abandon her treatment as a result of the publication. So much more importance should be attributed to her privacy than to the defendant's freedom to publish gossip about her. However, in another House of Lords decision, when the privacy right of a young boy was weighed against the freedom of the press to report fully the trial of his mother for the murder of her other son, the latter right had priority. It followed that the press could not be stopped from publishing photographs of the boy and his mother, even though publication might be very distressing or psychologically damaging to him.<sup>83</sup>

The recent decision of the House of Lords in *Jameel v. Wall Street Journal Europe* illustrates the weight which may now be given to freedom of expression and freedom of the press in defamation cases.<sup>84</sup> The particular question addressed in *Jameel* was whether the defendant could claim qualified privilege for an inaccurate, but carefully researched, story concerning the monitoring of the claimant's company accounts by the Saudi banking authorities. All the Law Lords emphasised the great public interest of the story in the context of the current political climate and the widespread concern about terrorism. Stress was also placed on the value of editorial freedom. An editor could properly choose to name the claimant, even if that entailed publishing a

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79. See *Ashdown*, [2001] EWCA (Civ) 1142, at paras. 79–82.

80. [2001] 1 All E.R. 908 (Dame Elizabeth Butler-Sloss, P.).

81. *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457, 499 (appeal taken from Eng.).

82. See *supra* Part III.B.

83. See *In re S* [2004] UKHL 47, [2005] 1 A.C. 593.

84. [2006] UKHL 44, [2007] 1 A.C. 359 (on appeal from Eng.).



defamatory allegation about him. But qualified privilege could not be claimed if the naming of the claimant was purely gratuitous and had not been done, as in this case, to strengthen the credibility of the story. Two points emerge from these cases. First, under *Venables*, the right to life and other absolute rights under the Convention will trump freedom of expression. Secondly, *Campbell* and *In re S* show that there is no presumption that either freedom of expression or privacy will prevail over the other. Everything depends on the comparative importance of the rights on the facts of the case. English courts, like the European Court of Human Rights, but not the United States Supreme Court, engage in ad hoc, rather than definitional balancing when weighing freedom of speech against competing interests and rights.<sup>85</sup>

#### CONCLUSION

As I said at the beginning of this Article, I doubt whether the HRA has had a very radical impact on the legal protection of freedom of expression. Indeed, in terms of the decided court cases I do not think it has been as substantial as it might have been. The important *ProLife Alliance* case should certainly have been decided in favor of the applicant. More generally, the courts have not always treated freedom of expression as the starting point; they have not always asked whether the restrictions on its exercise were necessary to safeguard public order or the other end for which they were imposed. On the other hand, freedom of expression arguments have been taken seriously in circumstances when I doubt they would even have been raised before the enactment of the HRA: *Farrakhan*, *Ashdown*, and *Shayler* are perhaps the best, though certainly not the only, examples of this point.

The freedom of expression guarantee has also had real impact on political and parliamentary debate: the new encouragement and glorification of terrorism offenses, and even more clearly the extension of the racial hatred offense to cover religious groups, were strongly resisted by reference to general free speech principles. And, as I have explained, the opposition was largely successful in the case of the latter measure. Pressure groups such as Liberty and International PEN, an international writers' organization, have effectively defended freedom of expression in these contexts. The House of Lords and House of Commons Joint Committee on Human Rights have produced powerful reports when the government has introduced measures which have repercussions for freedom of expression. The Human Rights Act has changed the climate of public discussion; more people think about their right to freedom of expression than was the case twenty years ago. This development to some extent compensates for the patchy judicial performance in this area of human rights law. It is perhaps a surprising consequence of a measure which was intended to strengthen the legal protection of fundamental rights by enabling them to be asserted in the English courts rather than by resort to Strasbourg. But we know that legislation rarely brings about the consequences it intends to achieve.

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85. See BARENDT, *supra* note 9, at 205, 225–26. The merits of definitional balancing are explained in Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).