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## Introduction

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### Journalists and the law

Britain has a tradition of a ‘free press’. In many ways, as this book will show, the phrase is illusory, but even when journalists were less restricted in their work than they are today the words did not mean that they had rights distinct from those of the ordinary citizen – except in a few cases, all of which are explained in the pages that follow.

The journalist has no legal right to go anywhere, do anything, say anything, or publish anything beyond what is the legal right of any private citizen in these matters.

The journalist’s position in relation to the law was summed up by Sir John Donaldson (later Lord Donaldson) when he gave judgment in the *Spycatcher* case in the Court of Appeal in 1988. Sir John, then Master of the Rolls (head of the Court of Appeal), said:

... a free press ... is an essential element in maintaining parliamentary democracy and the British way of life as we know it. But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest, or status enjoyed by proprietors, editors, or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees.

The importance of this role was emphasised in a case in 2000, when the House of Lords, the highest court in the land, ruled that a press conference was a ‘public meeting’ as regards the law of defamation, and therefore a fair and accurate report of what was said there enjoyed qualified privilege, a protection against libel actions.

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The purpose of the press conference was to raise support for a convicted prisoner. The senior law lord, Lord Bingham, said the press representatives could either be regarded as members of the public themselves, or as 'the eyes and ears of the public, to whom they report'. A press conference was 'an important vehicle for promoting the discussion and furtherance of matters of public concern' (*McCarten Turkington Breen v Times Newspapers Ltd* (2000)).

The point that the media's rights are the same as those of the public was emphasised again in a case in the House of Lords in 2006. It concerned the developing defence against libel actions referred to as the *Reynolds* defence, which is available to media defendants if they have practised what the courts refer to as 'responsible journalism' (see chapter 20). In the 2006 case Lord Hoffmann said he would for convenience continue to describe it as 'responsible journalism', but the defence was 'of course' available to anyone who published material of public interest in any medium (*Jameel v Wall Street Journal Europe* [2006] UKHL 44).

The journalist may find he enjoys a number of privileges and facilities which private citizens do not enjoy, extended to him by people or organisations to make it easier for him to do his job. If these are withdrawn, he can and should protest, but these privileges are not rights and unless their withdrawal infringes the law he has no legal redress.

For example, reporting the courts is accepted as an important part of a journalist's work, and a press bench is generally provided for his use, but the journalist is in court, in nearly every case, merely as a member of the public. Normally he has no right to enter, or to remain, when the public has been legally excluded.

The other side of the coin is that the journalist, like any other citizen, may legally go anywhere and report anything provided that in so doing he does not transgress the laws of the land, such laws as those concerning theft, trespass, breach of confidence, and defamation.

The constitutional position of journalism is analysed by Fenwick and Phillipson in *Media Freedom under the Human Rights Act* (Oxford University Press, 2006).

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## Freedom of speech

The Human Rights Act 1998, which came into force on 2 October 2000, in effect incorporating the European Convention on Human Rights into English law, for the first time gave citizens specific legal rights, including the right to 'freedom of expression' (see below and chapter 30). Previously the rights of citizens were not

guaranteed by statements of general principle as they are in some countries that have written constitutions. In Britain the rights were said to be 'residual' – that is, a citizen was allowed to do anything that was not specifically forbidden by law.

As a result, rights and freedoms could be and were whittled away by legislation. Let us consider that statement in relation to freedom of speech, the important right that journalists share with other citizens, and which includes not only the right to comment but the right to communicate information.

Without this freedom, democratic life as it is known in Britain would be impossible, because there would be no public discussion of the issues affecting citizens, and they could have no access to the facts upon which to base their opinions and decisions.

As Lord Bingham said in the House of Lords in 2000, in the case concerning a press conference, referred to above:

*In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on.*

*But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.*

Like other freedoms, however, freedom of speech may be restricted by law, and this book is largely concerned with these restrictions.

Most citizens, including journalists, believe it is reasonable that certain restrictions on their freedom of speech exist. For example, the law must strike a balance between the public interest in exposing wrongdoing and the individual's right to have his reputation defended from malicious and baseless attacks. The law of libel and slander tries to strike that balance.

Freedom of speech has been so highly valued in the United Kingdom, and the tradition of freedom has been so strong, that for many years legal restrictions were kept to a minimum. But in the 53 years since the first edition of this book was published, Parliament has made very many inroads into that freedom, passing a number of Acts that restrict the journalist's ability to report, particularly in the area of the courts of law.

For example, before the Contempt of Court Act 1981, it was extremely rare for a judge to use his power, derived from the common law, to order journalists to postpone the reporting of a criminal trial. Once that power had been expressed in the Act, and given for the first time to magistrates, it became a commonplace. The constitutional principle of open justice was thus eroded.

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Many people believe such legislation restricts freedom of speech too severely. Journalists, even more than other citizens, should be alive to the danger that freedoms that have long been enjoyed may be lost if they are not defended with sufficient vigour.

It was assumed that they would receive help from section 19 of the Human Rights Act, which requires that a minister introducing a bill into Parliament must declare that its provisions are compatible with the European Convention, including a commitment to 'freedom of expression'.

But journalists were disappointed to find, after the section was brought into effect in 1998, that the declaration was attached to a number of bills which bore little evidence of having been examined with freedom of expression in mind. In particular, the declaration was attached to the Youth Justice and Criminal Evidence Bill, which was introduced into Parliament in December 1998, providing for wide-ranging reporting restrictions. The bill, as drafted, contained a number of draconian provisions, not all of which were removed during its passage through Parliament.

For individual journalists a practical problem is that too often they are prevented from reporting matters of public interest by courts that make decisions while paying little regard to the judicial principle that justice must not only be done but must be seen to be done.

Some of the actions resulting from these decisions are invalid, and journalists should be alert to challenge such actions when they can. Chapter 12 of this book, 'Challenging the courts', should help them in doing so.

In the absence of a written constitution, freedom of speech in Britain has depended traditionally on two constitutional bulwarks, jury trial and the rule against prior restraint.

### Jury trial

The history of the development of freedom of speech in Britain has several instances of journalists and others being brought before the courts and charged with publishing material which provoked the anger of the government of the day, and then being found not guilty by independently minded juries, sometimes in flagrant disregard of the strict legal position. An example of such a jury decision was seen in the trial of Clive Ponting (see chapter 27, 'Central government').

The jurist Albert Dicey said: 'Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of 12 shopkeepers, think it expedient should be said or written.'

## The rule against prior restraint

But if jury trial is to defend the journalist, there must first be a published story upon which the jury can adjudicate. That cannot happen when there is censorship, because a censor prevents the story going into the paper. Official censorship died out in England in 1695, and in the next century the jurist Sir William Blackstone said: 'The liberty of the press ... consists in laying no previous restraints on publication, and not in freedom from censure for criminal matter when published.'

This 'rule against prior restraint', as it is known, has an important place in the English legal system, but it appeared to be losing its validity in cases affecting the media in the 1980s and 1990s. For example, in the network of cases relating to the book *Spycatcher* the then Government used the law of breach of confidence to prevent publication of stories it disapproved of by means of injunctions granted by judges sitting without juries, and the injunctions were enforced by the use of the law of contempt of court, again dispensed by judges sitting without juries (see chapter 23).

In 1987 the Court of Appeal declared that an injunction against one newspaper restraining it from publishing confidential information about *Spycatcher* caught all the media, even though they had not been named in the injunction and it had not been served upon them. The ruling was confirmed by the House of Lords in 1991. The development gave the Government a very effective means of silencing the entire press.

In 1991 the European Court of Human Rights at Strasbourg considered the use of injunctions in the *Spycatcher* saga and said that although the European Convention did not prohibit the imposition of prior restraints on publication the dangers inherent were such that they called for the most careful scrutiny on the part of the court.

That was especially so with regard to the press, for news was a perishable commodity and to delay its publication even for a short period might well deprive it of all its value and interest.

In the Human Rights Act 1998, the Government acknowledged media concern about the use of pre-trial injunctions by including a provision giving special protection in cases involving freedom of speech issues.

Section 12(3) requires that before issuing an injunction that will affect the right to freedom of expression the court must be 'satisfied that the applicant is likely to establish that publication should not be allowed'.

But this provision did not prevent a judge imposing an injunction preventing the *Liverpool Echo* from publishing confidential information it obtained from the

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former financial controller of events organiser Cream Holdings, making allegations about financial irregularities. The judge's decision was upheld by the Court of Appeal.

The *Liverpool Echo* appealed to the House of Lords, which in 2004 overturned the injunction, allowing the paper to publish the story (*Cream Holdings Ltd v Banerjee* [2004] UKHL 44). The Lords' ruling, which is reported in chapter 30 ('Protection against injunctions') was seen as a victory for the media.

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## Sources of law

The law is the set of rules by which the sovereign authority in a society regulates the conduct of citizens in relation to other citizens and the state.

In the United Kingdom there is no single written set of rules. We say the law in this country is not 'codified'. Whether an action is recognised as being in conformity with the law is determined by a consideration of various authorities. These authorities may be, for example, reports of decided cases ('precedents'), Acts of Parliament and statutory instruments, regulations of the European Community, articles of the European Convention, or byelaws of a local authority. If none of these fits the circumstances, the judge makes his decision by analogy with past decisions made in somewhat similar circumstances.

The main sources of the law have traditionally been custom, precedent, and statute. Now the European Convention on Human Rights and the precedents of the European Court on Human Rights are becoming an increasingly important source.

### Custom

When the English legal system began to take shape in the Middle Ages, royal judges were appointed to administer the 'law and custom of the realm'. This part of the law was called 'common' – that is, common to the whole kingdom – in contrast to that which was particular or special, such as ecclesiastical law or local law.

### Precedent

As judges applied the common law to the cases before them, their decisions were recorded by lawyers. Reports of leading cases give the facts found by the

court, sometimes the arguments put forward, and the reasons given by the judge for coming to his decision. The principles on which these decisions are based are binding on all lower courts. The decisions are known as 'precedents', and the system as 'case law'.

A judgment of the House of Lords is binding on all other United Kingdom courts apart from Scottish criminal courts. The Lords can refuse to follow their earlier decisions in later cases, if circumstances make this desirable. However, if their interpretation of a point of law is contrary to the intentions, policies, or wishes of the Government, it can be reversed only by new legislation.

Below the Lords, decisions of the Court of Appeal bind the High Court and the lower courts. Decisions of High Court judges, though binding on all lesser courts, can be disregarded by other High Court judges – although they do so reluctantly because the tradition of unanimity is strong.

## Equity

The common law is supplemented by the rules of equity. In common speech, equity means fairness and impartiality. In the law, the word refers to a system of doctrines and procedures that developed through the centuries side by side with the common law; historically, the rules of equity were based on considerations of conscience.

Certain 'maxims of equity' are sometimes quoted in courtrooms and express important principles behind equitable doctrines. They include: 'Equitable remedies are discretionary', 'He who comes into equity must do so with clean hands', 'Equity acts on the conscience', and 'Equity regards the balance of convenience'.

## Statutes and statutory instruments

Common law, supplemented by equity, remains the basic law of the land, but increasingly it is being modified or changed by statute, that is, by Acts of Parliament. Their interpretation by the courts gives rise to a great number of new precedents.

Governments are also making increasing use of delegated legislation known as 'statutory instruments'. Parliament frequently legislates on principles, leaving the detailed application of the new measure to be ordained by the Government or the departmental minister concerned, in detailed regulations made under powers given in the main statute. Statutory instruments are also used to bring legislation into force on dates different from those on which it becomes

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law, for administrative reasons. This process often causes uncertainty as to the current law.

As this edition of *McNae* went to press in 2007, sections of the Youth Justice and Criminal Evidence Act 1999, which were due significantly to affect the work of journalists, had still not been brought into effect.

### European Community regulations

Under the European Communities Act 1972, Community treaties and legislation are part of United Kingdom law. In 1981, for example, the British Government banned importation of a German magazine carrying accounts of what the magazine claimed were tapes of telephone conversations between Prince Charles and Lady Diana Spencer (later the Princess of Wales), under article 36 of the Treaty of Rome, which allows prohibition of goods ‘justified on grounds of public morality, public policy, or public security’.

### European Convention on Human Rights

As stated above, Britain has no legally binding written constitution guaranteeing rights but by the Human Rights Act 1998, which came into force on 2 October 2000, the European Convention on Human Rights was in effect incorporated into British law, providing a guarantee of specific rights.

For journalists, the most important part of the Convention is article 10, which says in part: ‘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 ...’.

Restrictions on this right have to be justified. They must be ‘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 ...’.

They must also be ‘prescribed by law’.

Other important rights guaranteed by the Convention are fair trial (article 6) and privacy (article 8). (The full wording of articles 8 and 10, and an extract from article 6, are given in chapter 30.)

Even before incorporation, Britain was a party to the Convention, and UK courts were increasingly taking its principles into account in their decision-making. The 1998 Act says that a court determining a question in connection with a Convention right *must* take account of decisions of the European Court

of Human Rights, which adjudicates on matters affecting the Convention – although UK courts will not necessarily be bound by those decisions. As stated above, new legislation must be compatible with the Convention rights.

Under the 1998 Act courts must, as far as possible, interpret existing legislation in a way that is compatible with the Convention. Lawyers defending people accused of criminal offences frequently cited the Act, particularly article 8, when arguing for identification bans, and such bans were sometimes imposed. In 2004, however, the House of Lords, considering such an application, declared that courts had no power to create new exceptions to the general principle of open justice and the right of the press to report criminal trials except in the most compelling circumstances (*Re S (A Child) (Identification: Restrictions on Publication)* [2004] 3 WLR 1129). See also chapters 6: Juveniles in the news, and 30: Human Rights Act 1998.

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## Divisions of the law

There are two main divisions of the law: criminal law and civil law.

Criminal law deals with offences that are deemed to harm the whole community and thus to be an offence against the sovereign.

A lawyer writing about a crown court case in which John Smith is accused of an offence will name it *R v Smith*. ‘R’ stands for Regina (the Queen) or Rex (the King), depending on who is reigning at the time.

When speaking about this case, however, he will generally refer to it as ‘The Queen (or the King) *against* Smith’.

Civil law concerns the maintenance of private claims and the redress of private wrongs.

A case in which John Smith is sued by Mary Brown will be known in writing as *Brown v Smith*. Lawyers will speak of the case as ‘Brown *and* Smith’ (our italics).

In practice, the two divisions overlap to some degree. Many acts or omissions are not only ‘wrongs’ for which the injured party may recover compensation, but also ‘offences’ for which the offender may be prosecuted and punished. A road accident may lead to a claim for damages and also to a prosecution for dangerous driving. Similarly, defamation and breach of copyright, usually dealt with in the civil courts, may in certain circumstances be regarded as criminal matters, and dealt with in the criminal courts.

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In spite of this overlap, the issues will generally be considered in different courts, depending upon whether the action is a criminal or a civil one. Young reporters must be careful to remember the basic differences in the nature of the actions.

It would be wrong, for example, to say that a defendant in a county court action is being 'prosecuted'. That is the language of the criminal courts.

In civil courts the person taking legal action, normally known formerly as the *plaintiff* and after 1999 as the *claimant*, is said to sue the other. The person sued is known as the *defendant* – the same term as in the criminal courts – but if he loses the case it is wrong to say that he has been 'found guilty': he is 'held liable'.

You should not describe the civil court's order in terms of punishment, as is generally the case with the *sentence* in a criminal court.

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## The legal profession

Lawyers adopt one of two branches of the profession: they become either solicitors or barristers.

By tradition and practice, solicitors are the lawyers who deal directly with lay clients. They advise the client. They prepare the client's case, taking advice, when necessary, from a barrister specialising in a particular branch of the law – although solicitors themselves increasingly specialise.

Solicitors may represent their clients in court, but in the past have generally been allowed to do so only in the lower courts – that is, the magistrates courts and the county courts. From 1993, solicitors with a record of experience as advocates and who have gained a higher courts qualification have been allowed to appear in the higher courts, where they compete with barristers in representing clients.

Even before 1993, solicitors could represent an accused person in the crown court in an appeal from a magistrates court or in a committal for sentence when they had represented the person in the lower court. They can also appear in the High Court in formal or unopposed proceedings, and in proceedings when judgment is delivered in open court following a hearing in chambers (in the judge's private room) at which they conducted the case for their client. In court, a solicitor wears a gown but no wig.

In other cases, the solicitor 'briefs' (instructs) a barrister to conduct the case. The title 'solicitor' derives from this procedure: on behalf of their clients, solicitors 'solicit' the services of a barrister.

Solicitors are officers of the Supreme Court and for misconduct may be struck off the roll or suspended for a period. In that case, they are unable to practise.

Barristers are so called because they practise at the 'bar' of the court. Originally, the bar was a partition or barrier separating the judges from laymen attending court. Nowadays, there is no physical barrier in most courts.

Barristers are known, singly or collectively, as 'counsel'. In court reporting, it is a common error to apply the word to solicitors, but this is incorrect.

Except for certain conveyancing matters counsel have hitherto not been allowed to accept instructions directly from lay clients. They had to be instructed by solicitors. Now, however, there is limited direct access for other professions such as surveyors, accountants, and town planners seeking advice on the legal aspects of the disciplines.

Barristers wear a wig and gown in the higher courts, the crown courts and in the county courts, but not in the magistrates courts.

Successful barristers who have been practising for at least 10 years may apply to the Lord Chancellor for appointment as a Queen's Counsel. If this application is successful, they are said to 'take silk' because henceforth they will wear a gown of silk instead of cotton. They use the letters QC after their names.

The terms Queen's Counsel and King's Counsel are interchangeable: which is used depends on whether the reigning monarch is a queen or king.

For unprofessional conduct, barristers may be censured, suspended, or disbarred – that is, deprived of their standing as a barrister and therefore unable to practise.

There are three senior government posts that have traditionally been held by lawyers – the Lord Chancellor, the Attorney-General, and the Solicitor-General. Until the passage of the Constitutional Reform Act 2005, the Lord Chancellor was head of the judiciary; the senior judge in the House of Lords and titular head of the Appellate Committee (the highest court of appeal); and Speaker of the House of Lords. He was also responsible for the administration of the justice system.

Following the passage of the 2005 Act, the Lord Chancellor has ceased to be a judge, head of the judiciary, and a member of the House of Lords Appellate Committee or Speaker of the House of Lords. His functions as head of the judiciary in England and Wales have passed to the Lord Chief Justice. The Act also creates a Judicial Appointments Commission to take on the work of identifying candidates for judicial appointment. Under the Act, the Lord Chancellor retains a statutory duty to protect the independence of the judiciary and to uphold the rule of law. As well as his roles in relation to judicial appointments and the courts system, the Lord Chancellor is also responsible for the custody and

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exercise of the Great Seal; legal aid; regulation of the legal professions; the Tribunals service; the Land Registry; the Law Commission; and the National Archives.

The Lord Chancellor as this edition of *McNae* went to press in 2007 is Lord Falconer of Thoroton, who was also Secretary of State for Constitutional Affairs. In that capacity, he was responsible for devolution, data protection, freedom of information, human rights, and electoral law. There is no legal reason why the two offices should not be separated in the future.

The main duty of the Attorney-General and the Solicitor-General, the two law officers, is to advise the government of the day on legal matters. Some holders of the post are ministers of cabinet rank. The Attorney-General or, in his absence, the Solicitor-General, conducts the prosecution in certain important types of cases. The Lord Chancellor and the law officers change with a change of government.

### Key points

- The media are the eyes and ears of the general public.
- A judge has said that a free press is an essential element in maintaining parliamentary democracy and the British way of life.
- But in general the media have no special status; no legal rights to know or to publish greater than that of the general public.
- The Human Rights Act 1998 gives all citizens the right to freedom of expression.
- This right can be restricted by law, as by the law of libel.
- Journalists must be alert to challenge unreasonable or unlawful restrictions.
- Two constitutional bulwarks protect freedom of speech, jury trial and the rule against prior restraint.
- Sources of law include custom, precedent, equity, statutes and statutory instruments, European Community regulations, and the European Convention on Human Rights.
- The two main divisions of the law are criminal law and civil law, and journalists need to use the right wording depending upon which type of court they are reporting.