**Chapter 1 Freedom of expression**

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Key points

This chapter will cover the following questions:

• How has freedom of speech developed over time?

• What are the philosophical arguments behind the idea of freedom of expression?

• Should freedom of expression be fundamental in a democratic society or limited by the state?

• How has Article 10 ECHR manifested itself in Strasbourg jurisprudence and in UK common law?

• How far should freedom of expression be permitted or censored on the internet?

• Should journalistic sources be protected at all times?

# **1.1 Overview**

This chapter looks at the philosophical foundations and developments of freedom of expression and the struggle of individual writers who fought for such freedoms in their respective societies. The term ‘freedom of expression’ importantly includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used. The right to freedom of expression has been interpreted to include the right to take and publish photographs of strangers in public areas without their permission or knowledge.

After human rights law in form of Article 10 of the European Convention on Human Rights (ECHR) will be explained with its qualified rights and rights which can curtail freedom of expression by the state, we will look at journalists’ confidential sources and whether these can be enforced by the courts? Several journalists have gone to prison or have been fined for refusing to reveal their confidential sources. Journalists have always considered it a fundamental obligation to protect the confidentiality of their sources. Indeed, many know that they would be unable to work effectively without the degree of trust between journalists and sources that this principle provides. But to what extent is this commitment protected by law and in what circumstances will a court order a journalist to break this pledge?

With the arrival of social media and most young citizens now obtaining their news from Facebook as opposed to bona fide news sources, such as the BBC or Reuters, this has meant real and fictional stories are now presented in such a similar way that it can sometimes be difficult to tell the two apart. Currently, nearly three billion people use at least one of the Facebook-owned social media platforms – Facebook, WhatsApp or Instagram. Individuals typically use a combination of Facebook-owned platforms. Socio-demographic research by a team of psychologists found that WhatsApp is the most widely used application and therefore has the strongest reach.[[1]](#footnote-1) The other popular media platforms are Twitter, LinkedIn, Snapchat, TikTok, Pinterest, Reddit and YouTube (owned by Google).

We will then address the subject matter of ‘journalistic sources’. Journalists and war correspondents working in Afghanistan together with interpreters work, for example, work under extremely difficult circumstances and routinely face violence and threats of violence and intimidation that prevent them from doing their job. According to NAI, an organization supporting open media in Afghanistan, there were 130 incidents of violence against the journalists in Afghanistan in 2020 – pre the withdrawal of US troops in September 2021 – a ten per cent increase compared to 2019.

**1.2 Historical development of freedom of expression**

The right to freedom of expression is a natural right that everyone individual in society should have and possibly dates back to the Greek philosopher Socrates (470 bce – c.399 bce). Socrates argued that democracy established in Athens was designed to be impartial and create better citizens, supported by the principle of freedom of speech; a right that confirms one’s value as a human being.[[2]](#footnote-2) Freedom of speech is an acknowledgement of the individual’s *value* as a human being in a democratic society.

Throughout history, the discussion has centred on the balance between the individual’s right to free speech and the state’s intervention when free speech can be harmful to the wellbeing of a country. During the late seventeenth and eighteenth centuries, the Age of the Enlightenment movement (1715 – 1789) in Europe focused on the use of ‘reason’. Some prominent philosophical writers, such as John Locke, Immanuel Kant, Benedict de Spinoza, Voltaire and Charles de Secondat, the Baron de Montesquieu produced key themes, including the belief in progress, tolerance, faith in reason and freedom of expression. They argued that the only grounds for imposing any limitations on these individual freedoms, should be considerations for the right of others to the same freedoms.

Central to Kant’s critical philosophy was the metaphysical assertion of ‘reason’ (*Kritik der reinen Vernunft*, 1787), based on the earlier more ‘rationalist’ philosophers including Leibniz and Descartes. Most important for Kant was ‘communication’ by way of reason (*Vernunft*), in that a member of ‘the society of citizens of the world’ would be able to freely express his thoughts: ‘for the enlightenment of this kind, all that is needed is freedom. And the freedom in question in the most innocuous form of all – freedom to make public use of one’s reason in all matters’, as he famously pointed out in his essay ‘What Is Enlightenment?’ (1781).[[3]](#footnote-3) Importantly, according to Kant, citizens must be able to reason freely, offering critical scrutiny of government policies and religious teachings.

However, during the Enlightenment there also existed strict censorship from both religious and state institutions. This meant that philosophical writers discussed press freedom and censorship, as Jonathan Israel points out: ‘Press freedom … is the foremost instrument of human enlightenment;’ he argues further that, ‘the root of all political and social evil … was lack of freedom of expression and the press’ during the Age of Enlightenment period.[[4]](#footnote-4) The Enlightenment impacted and influenced both the American (1765–1783) and French (1789) Revolutions, resulting in arguments and foundations for a constitution and the American Bill of Rights (1791). The First Amendment of the US Constitution reflects some of these ideas and guarantees freedom of religion, speech and the press and the right to free assembly.[[5]](#footnote-5)

When Irish statesman, intellectual Protestant and Whig, Edmund Burke, published Reflections, a political pamphlet on the Revolution in France in November 1790, he repudiated the belief in divinely appointed monarchic authority and the idea that the people had no right to depose an oppressive government. Burke advocated that citizens should have a stake in their nation’s social order which would aid constitutional reform, rather than by revolution, as in France. Burke advocated specific individual rights such as freedom of speech, including writing and printing – a form of freedom of expression against oppression by government. Burke famously detested injustice and abuse of power.[[6]](#footnote-6)

English philosopher John Stuart Mill fought for freedom of speech in Parliament and in his writings. In his essay *On Liberty* (1859) he argued in favour of tolerance, individuality and freedom of expression.[[7]](#footnote-7) Mill argued in favour of the ‘liberty of the press’ as the paramount safeguard against ‘corrupt or tyrannical government’.[[8]](#footnote-8)

## **1.2.1 Foundations of freedom of speech in Britain**

Magna Carta (‘The Great Charter of Freedoms 1215’), signed into law by King John I of England is held as an icon of democracy for centuries. The charter was used in court to defend not only man’s freedom from illegal detention (*habeas corpus*) but also the liberty of the press. Though Magna Carta did not specifically guarantee freedom of speech, it began a tradition of civil rights in Britain that laid the foundation for the first Bill of Rights some 400 years later which allowed for freedom of speech as a legal right granted by Parliament in 1688 (see below).

One of the key issues of the English Civil War (1642–1649) was freedom of speech. John Milton’s *Areopagitica* (1644) remains the most influential and eloquent philosophical work defending the principle of the right to freedom of speech and embodies the cornerstone of press freedom. He vehemently opposed literary censorship after Parliament had issued the ‘Licensing Order of 16 June 1643’ which was designed to bring publishing under the crown’s control by creating a number of official censors.[[9]](#footnote-9) Crown licensing eventually ended in 1695 when the House of Commons refused to renew the licensing legislation.

The Bill of Rights 1688/1689 significantly established freedom of speech in Parliament relating to debates and proceedings in that they ought not to be questioned in any a court of law. This in essence established parliamentary privilege as a means of stopping a monarch from interfering with the workings of Parliament. To this day, parliamentary privilege means that all parliamentarians have the right to say whatever they like in Parliament without fear of being sued in defamation.

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## **1.2.2 Limitations to freedom of expression and press freedom**

There will be times when a government legislates for limitations and restrictions on press freedom, such as in times of war, where journalists may not be able to report freely on everything a war correspondent may witness in order to protect armed forces and civilians on the ground. Such limitations may be expressed by moral standards in a community or by rules of law established by governmental power. There are plenty of examples in law which limit press and journalistic freedom.

The Defence of the Realm Act 1914 (DORA), enacted by the British Government at the start of World War I, empowered the government to impose all kinds of controls and restrictions on the British population in the interests of keep morale at home high and ultimately winning the war. The law was designed to help prevent invasion and imposed censorship of journalism and of letters coming home from the front line. The press was subject to controls on reporting troop movements, numbers or any other operational information that could be exploited by the enemy.

The Emergency Powers (Defence) Act 1939, passed just before the outbreak of WWII, as a response to Germany and the Soviet Union's non-aggression pact, gave the British Government special powers to take almost any action necessary to carry out the war successfully. This 1939 act in conjunction with secondary-delegated legislation, such as Regulation 2D (still based on DORA), was a measure to stop subversive newspaper propaganda which would impede the war effort. Regulation 2D allowed the government to carry out arrests which would not be legal in peacetime, including the death penalty for breaking through roadblocks and looting. Two communist papers, *The Morning Star* and *The Daily Worker*, were closed down, and the editors of the *Daily Mirror* and the *Sunday Pictorial* were told to cease publishing anti-government war propaganda threatening them with imprisonment. The act was supposed to be in force for only a year but (using extensions) it actually stayed in force until 1964.

In September 1984 the South African regime moved its troops into black townships in an attempt to crush popular resistance to apartheid. Eight months later, having failed to do so, it declared a State of Emergency on 21 July 1985. Since then, apart from three months in early 1986, the country was under continuous rule by emergency powers (‘Emergency’). Legal restrictions included mass detentions and deployment of police and army in townships throughout the country. Part of the process included an extension of restrictions on the media. New emergency legislation was aimed at concealing the repressive activities of the regime’s forces in the townships, police cells and prisons. The restrictions also took the form of controls on the access which journalists had to events and to official information and limited their freedom to publish information or statements which were not in themselves illegal.

In 1987 foreign journalists in South Africa became casualties in the anticipated post-election security clampdown when two correspondents for leading British television networks were given just days to leave the country. Michael Buerk was the BBC’s South Africa correspondent during the dying years of apartheid in South Africa. Buerk’s uncompromising reports on the brutalities of the apartheid regime resulted in the South African Government expelling him from the country after four years in the post. ITN’s Peter Sharp was also expelled, bringing the total number to nine of foreign journalists expelled since the Emergency. The Foreign Correspondents Association called this an attack on press freedom in South Africa. Director-General of Home Affairs at the time, Gerrie van Zyl, gave no reason for the decision. Jon Lewis, the British-born editor of the *SA Labour Bulletin*, was refused permanent residence in South Africa, and told to leave the country within 30 days.[[10]](#footnote-10)

In more recent times, COVID measures were used as the pretext to block media access to some press conferences in Kuala Lumpur, since the unexpected resignation by Prime Minister Mahathir Mohamad (94) in March 2020. After decades of prime ministerial reign, he found himself ousted in a twist of events that saw the collapse of the governing coalition. Since the new leader, Muhyiddin Yassin, was sworn in on 1 March 2020, press freedom has come under attack in Malaysia, with the government relying on pre-existing laws, and a new ‘anti-fake news’ decree targeting journalists and media experts. Only state-owned media and national broadcasters have since been allowed to attend state media briefings.

In May 2021 the French Government proposed a provision for a new security law which inter alia bans the filming or photographing of police.[[11]](#footnote-11) The global security law proposal is intended to grant municipal police departments more autonomy, protect members of the police forces from off-duty attacks by allowing them to bear their service weapon off duty, as well as by restricting naming and photography of policemen and women and their relatives. The provision allows to fine offenders up to 45,000 euros ($53,300) and impose a one-year prison sentence for “disseminating by any means or medium whatsoever . . . the image of the face or any other identifying element of an officer . . . when engaged in a police operation.”

The bill mostly amends other laws, such as the French *Code pénal* and has been seen by the media as the French government’s anti-media campaign as well as undermining President Macron’s attempts to present himself as a global advocate for press freedom. Like the United States, France has experienced large protests related to alleged police brutality and race in recent times. The situation escalated in November 2020 when a journalist from France 3 — a public television channel — was arrested and detained by police for filming a demonstration, even after having presented law enforcement officers with his media credentials. Le Monde reported that the new law “grossly violates a democratic right.”[[12]](#footnote-12)

After the Taliban had seized Kabul in August 2021, their spokesperson Zabihullah Mujahid told a news conference that reporting against Islamic law, or Shariah, would not be allowed, but that media could report critically on the government if they are fair and balanced and promote national values. This news conference gave a first insight into how the Taliban view the media’s role, stating that the media should ‘promote the unity of the nation.’[[13]](#footnote-13) Zabihullah Mujahid told Reporters Without Borders (Reporters Sans Frontières - RSF) that all broadcast media were banned in Afghanistan, except one, *Voice of Sharia*, which broadcast nothing but propaganda and religious programmes. US President Joe Biden called for a special plan for evacuating endangered Afghan journalists and human rights defenders ahead of the complete withdrawal of US military from the country.[[14]](#footnote-14)

When depicting crime, anti-social behaviour or situations of war or natural disasters, the media should balance the need to accurately portray real life with the need to avoid inciting or encouraging such behaviour. This can place a heavy burden on governments and state regulatory bodies given the wide margin of interpretation of press freedom, free speech and protecting people’s privacy as well as the security of a country.

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Perhaps the most difficult balancing for a government is between the right of the public to receive information by a free press and consideration of situations where media freedom must be curtailed by way of legislative control. Is it impossible to provide clear, firm guidance given the almost infinite range of situations with which the media is faced to provide legislation which both protects freedom of expression and safeguards society? Discuss.

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## **1.2.3 Constitutional rights of freedom of expression**

Most democratic societies enshrine freedom of expression in their constitutions such as the German Basic Constitution (*Grundgesetz*). Article 5 *Grundgesetz* states that

every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

The *Grundgesetz* was formulated in 1949 largely by the allied forces after Germany’s defeat in World War II when the Holocaust and the spectre of Hitler’s Germany were fresh in public memory. The second paragraph of Article 5 restricts freedom of expression ‘in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honor’.

The German Government has made use of this measure, limiting free speech when hate or racist speech is used publicly: for example, when Holocaust denier Ernst Zündel was convicted in 2007. German prosecutors regularly resort to the ‘incitement to hatred’ clause under § 130 of the German Criminal Code (*Strafgetzbuch*, or *StGB*) to convict right-wing leaders using hate speech against refugees in Germany.

German satirical TV show host and comedian Jan Böhmermann recited a satirical poem on his live TV show in 2016, accusing Turkish President Recep Tayyip Erdoğan of suppressing Kurds and targeting Christians ‘while watching child pornography’, among other things. He was charged under § 103 StGB for insulting a foreign head of state. For many months Böhmermann faced up to five years’ imprisonment for the alleged offence; the charge was later dropped. In June 2017 the German Parliament abolished § 103.

On 23 May 1949, Germany's *Grundgesetz* was adopted and became a symbol of a new beginning. Some five decades later, German constitutional experts helped with the formulation of South Africa's post-apartheid constitution. Section 16(1) of South Africa's Constitution states that:

everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.

Given its recent history, freedom of expression is one of the cornerstones of South African constitutional democracy, unquestionably defended by the country’s media. Section 16 contains the following limitation to freedom of expression in in subsection 16 (2), which does not extend to:

a) propaganda for war;

b) incitement of imminent violence; or

c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.

Since the United Kingdom does not have a written constitution, it has to rely on Article 10 ECHR for ‘freedom of expression’, now enshrined in the HRA 1998 Schedule 1 part 1. Worth noting is that Article 10(1) ECHR is a protection for individual rather than corporate freedom of expression and does not expressly refer to media or journalistic (press) freedom.

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In *Centro Europa* (2012),[[15]](#footnote-15) the Grand Chamber of the European Court of Human Rights (ECtHR) re-affirmed the importance of media plurality under Article 10(1) of the Convention. The case concerned an Italian TV company’s inability to broadcast for nearly ten years, despite having a broadcasting licence, due to lack of television frequencies allocated to it. The Court concluded that the Italian legislative framework had lacked clarity and precision and that the authorities had not observed the deadlines set in the licence, thereby frustrating Centro Europa’s expectations. These shortcomings had resulted in reduced competition in the audiovisual sector. The Italian state had failed to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.

The ECtHR held that this amounted to a serious breach of Article 10 (1) and of Article 1 of the First Protocol, noting that

there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.[[16]](#footnote-16)

The Italian state was not allowed to justify their actions under Article 10(2) ECHR and were ordered to pay the TV company €10,000,000 and €100,000 to Mr di Stefano in respect of costs and expenses, plus any tax that may be chargeable in respect of pecuniary and non-pecuniary damage – a substantial fine in 2012.[[17]](#footnote-17)

Freedom of speech is an integral part of democracy. In a democracy, the opinions of the people are the basis for the government’s exercise of power. The opinions and ideas freely expressed by individual citizens ought to be the final authority in a democratic society. Some have argued that the democratic process ought to be limited to decisions that are not incompatible with the proper functioning of the democratic process. As we have already seen above, there may be times when the state finds it necessary to limit freedom of expression as part of the democratic process, as long as these limitations do not extend beyond the requirements for proper democratic functioning.

# **1.3 Theoretical foundations of free speech rights**

The idea that citizens can receive free and objective information and engage in free debate and critical reflection was adopted in the twentieth century by the German philosopher Jürgen Habermas. He believed that the emancipation of the informed citizen could be brought about only by ‘critical communication and analysis of modern institutions’. The only way such informed criticism could take shape was, in his opinion, through a free and uncensored press, which he included in his ‘three normative models of democracy’.[[18]](#footnote-18) During the 1960s Habermas also developed the concept of ‘private and public spheres’.[[19]](#footnote-19) His definition of the ‘public sphere’ had a great impact on privacy and media freedom in relation to the reporting on celebrities, as seen in the *von Hannover no 1* case before the Strasbourg human rights court. (see: *von Hannover v Germany (No 1)* (2005)[[20]](#footnote-20)).

Following the twentieth-century dictatorships of Adolf Hitler[[21]](#footnote-21) in Germany, Benito Mussolini[[22]](#footnote-22) in Italy and Francisco Franco in Spain,[[23]](#footnote-23) freedom of expression was formally identified as a human right under Article 19 of the Universal Declaration of Human Rights of 1948 (UDHR).[[24]](#footnote-24) Article 19 of the UDHR states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Freedom of speech was also recognized as an international human right in the International Covenant on Civil and Political Rights (ICCPR), which amended the version of Article 19 UDHR by stating that the exercise of these rights carries ‘special duties and responsibilities’ and may ‘therefore be subject to certain restrictions’ when necessary ‘[f]or respect of the rights or reputation of others or ‘[f]or the protection of national security or of public order (order public), or of public health or morals’.

Similar to Articles 10(1) and 10(2) of the European Convention, freedom of speech and expression are therefore not absolute in this international instrument. Governments of various states may place common limitations on these freedoms. In the UK these include laws relating to defamation (libel and slander), obscenity, child pornography, incitement to hatred, terrorism, extreme pornography on the internet, copyright breaches and matters of national security – to name but a few. John Stuart Mill called this the ‘harm principle’.

At the beginning of Chapter II of *On Liberty*, Mill makes a strong and bold defence of free speech. Mill tells us that *any* doctrine should be allowed the light of day no matter *how* immoral it may seem to everyone else. Such liberty should exist with every subject matter so that every citizen has ‘absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological’.[[25]](#footnote-25) The ‘Millian Principle’ – as Harvard scholar and philosopher Thomas Scanlon calls it – allows us, even in ‘normal [peace] times’, to consider whether the publication of certain information might present serious hazards to public safety by giving people the capacity to inflict certain harms.[[26]](#footnote-26)

Mill argues that these risks are worth taking in times of peace in order to allow full discussion of certain delicate or problematic questions, which might well be intolerable in wartime. Within the Millian limits governmental policies can then be set by legislation which can affect or restrict opportunities for expression, positively intervene in free speech and thereby justify governmental actions and interventions on these grounds.

## **1.3.1 Freedom of speech fighters**

The fight for freedom of speech continues around the world, and there are numerous examples of writers and journalists who either had to go into exile, went to prison or died for their courage. Here are just a few.

The Russian dissident, Aleksandr Solzhenitsyn, experienced a Siberian labour camp during the Stalinist era in Russia, for publishing his famous autobiographical account *One Day in the Life of Ivan Denisovich*.[[27]](#footnote-27) Solzhenitsyn was imprisoned for eight years in ‘the Gulag’ after 1945 for writing derogatory comments about Joseph Stalin when serving in the Red Army during the Second World War.

On 14 February 1989, British Indian author Salman Rushdie was telephoned by a BBC journalist and told that he had been ‘sentenced to death’ by the Ayatollah Khomeini. For the first time he heard the word *fatwa*. His crime? To have written a novel called *The Satanic Verses* (1988),[[28]](#footnote-28) which was accused of being ‘against Islam, the Prophet and the Qur’an’. Sir Salman Rushdie became another dissident who had to live in exile for his writings. In his memoirs, *Joseph Anton* (2012),[[29]](#footnote-29) Rushdie describes the extraordinary story of his life in exile, forced underground, living with the constant presence of an armed police protection team. He was asked to choose an alias that the police could call him by. He thought of writers he loved and combinations of their names; then it came to him: the first names of Conrad and Chekhov – Joseph Anton. His story is of one of the crucial battles for freedom of speech. In April 1989, two London bookshops – Dillons and Collets – were firebombed for stocking the Rushdie novel. There followed explosions in High Wycombe and London’s King’s Road and a bomb in Liberty’s department store, which had a Penguin bookshop – because Penguin had published *Satanic Verses*. Rushdie lived in secretly guarded exile for ten years until 1998 when the *fatwa* was withdrawn.

In November 2002, Nigerian journalist Isioma Daniel incensed Muslims in her country by writing about the Prophet Mohammed in a newspaper article. In her fashion column for a Lagos newspaper, she commented about the Miss World pageant which was about to be held in Nigeria:

the Muslims thought it was immoral to bring 92 women to Nigeria and ask them to revel in vanity. What would Mohammed think? In all honesty, he would probably have chosen a wife from one of them.[[30]](#footnote-30)

A *fatwa* was issued on Isioma Daniel by the deputy governor of Zamfara state because her article had incited major religious riots for being held a ‘blasphemous’ publication. Information Minister Umar Dangaladima reiterated Zamfara state policy by his public announcement:

it’s a fact that Islam prescribes the death penalty on anybody, no matter his faith, who insults the Prophet.[[31]](#footnote-31)

In August 2012 Russian judge Marina Syrova sentenced three members of the punk band Pussy Riot to two years in a prison labour camp for staging a 40-second punk feminist ‘flash mob’ inside Moscow’s official church as they performed a ‘punk prayer’. One Pussy Riot member, Yekaterina Samutsevich, was set free by a Moscow appeals court in October 2012, leaving Maria Alyokhina and Nadezhda Tolokonnikova – found guilty of hooliganism and blasphemous religious rioting – to serve two years in a Russian labour colony. No doubt the punk band members had offended many Russian Orthodox believers by screaming lyrics such as ‘Shit, shit, the Lord’s shit’ inside the Cathedral of Christ the Saviour, but the trial itself became an old-fashioned Soviet show trial, one of the first criminal crackdowns of President Vladimir Putin’s campaign against political activists.

Russian opposition figurehead and anti-Putin blogger Alexei Navalny and 15 other protesters were arrested in Moscow in January 2018 after Navalny attempted to lead a protest in advance of the Russian presidential election in March 2018, which expected the unchallenged return of Vladimir Putin to power for another six years. On 29 January, 41-year-old Navalny was wrestled to the ground by officers amid chaotic scenes with police wielding truncheons to fight off Navalny supporters. Navalny tweeted from a police van: ‘I have been detained. This means nothing. You are not rallying for me, but for yourselves and your future’. On 18 March, Mr Putin was elected to a fourth term as Russian President, making him the first Kremlin leader to serve two decades in power since Josef Stalin. On 20 August 2020, Alexei Navalny (44) was poisoned with a Novichok nerve agent and was hospitalized in Germany for nearly six months being in serious condition. He returned to Russia in January 2021 and was immediately arrested to serve a two-and-a-half-year sentence on an embezzlement charge from 2013. He went on hunger strike in prison in April 2021.

The murder of investigative journalist Daphne Caruana Galizia sent shock waves through the European media. The journalist who led the Panama Papers investigation into corruption in Malta was killed on 16 October 2017 in a car bomb near her home in Malta. The *Politico* website described her blog posts as a “one-woman WikiLeaks”. At the time of her murder, her revelations pointed the finger at Malta’s then Prime Minister, Joseph Muscat,[[32]](#footnote-32) and two of his closest aides, Keith Schembri and Konrad Mizzi, connecting offshore companies linked to the three men with the sale of Maltese passports and payments from the government of Azerbaijan. In August 2021 the Maltese Attorney General, Victoria Buttigieg, laid formal charges against local gambling and property tycoon, Yorgen Fenech (38), who was arrested in November 2019 trying to leave Malta on his yacht, accused of complicity in the murder and criminal conspiracy. He was charged with participating in a criminal organisation, complicity in causing an explosion, and complicity in the murder of Caruana Galizia. He pleaded not guilty.

An independent inquiry report published in July 2021 into Caruana Galizia’s murder found that the Maltese state had to bear responsibility after creating a “culture of impunity”. In their report, the judges attributed indirect responsibility to Joseph Muscat for the circumstances leading to the murder, citing his failure to act against Keith Schembri, his then chief of staff, and the former energy minister Konrad Mizzi over their secret companies, revealed in the Panama Papers, and their alleged links to 17 Black, a secret company owned by Fenech. Muscat, Schembri and Mizzi have not faced any charges linked to the murder of Caruana Galizia and have publicly denied involvement at the time of publication.

## **1.3.2 Should freedom of expression be curtailed by the state?**

John Locke (1632 – 1704) and Immanuel Kant (1724 – 1804) both advocated freedom of expression but also the duty to respect other people’s rights. Montesquieu (1689 – 1755) stressed that public authorities (such as law enforcement officials) may restrict the right to free speech and free assembly if they can show that their action is lawful, necessary and proportionate in order to protect national security, territorial integrity or public safety. The Police, Crime, Sentencing and Courts Bill 2021 extends police powers to impose conditions on marches, such as start and finish times and maximum noise levels on static protests to prevent and reduce serious violence and maintain public order.

Over the years parliament also passed several ‘terrorism’ related laws, granting extensive powers to police and security services and therein limiting freedom of expression which now includes online digital hate speech. Whilst the legislation of the 1970s and 1980s was primarily concerned with the ‘Troubles’ in Northern Ireland and related IRA (Irish Republican Army) terrorism attacks on the UK mainland, later acts of Parliament from 2000 onwards had wider aims to curtail and combat global terrorism.

The Prevention of Terrorism (Temporary Provisions) Acts of 1974 and 1989 (later repealed) conferred emergency powers upon police forces in Northern Ireland including the limiting of freedom of speech of members of the republican political party Sinn Féin (the political wing of the IRA) and several other paramilitary organizations. A decree of 19 October 1988 banned 11 loyalist and republican organizations and their leaders from speaking about the conflict in media broadcasts. Prime Minister Margaret Thatcher claimed this would deny terrorists ‘the oxygen of publicity’. Instead of hearing Gerry Adams[[33]](#footnote-33) or Martin McGuinness,[[34]](#footnote-34) BBC viewers and radio listeners would hear an actor’s voice reading a transcript of the individuals’ words. Sanders highlights journalistic coverage of terrorism as being particularly difficult in terms of at that time. She examined broadcast reporting during the Troubles from 1989 to the Belfast (Northern Ireland) Agreement in 1998, looking particularly at interviews with IRA and INLA (Irish National Liberation Army) members, concluding that these were difficult times for press freedom. [[35]](#footnote-35) A BBC documentary by Paul Hamann featuring an extensive interview with Martin McGuinness was banned by the British Government until the start of the peace talks in 1994 when media restrictions in Northern Ireland were gradually lifted. Hamann’s documentary, *Real Lives: At the Edge of the Union*, could finally be shown.

*The Guardian* and *The Observer* newspapers published excerpts from former MI5 spy Peter Wright’s book *Spycatcher*, a memoir that included allegations that the security services had acted unlawfully. The book was published outside the UK in Australia and later in Canada. The Attorney General on behalf of the UK government succeeded in obtaining a court order (interim injunction), preventing the newspapers from printing further material until proceedings relating to a breach of confidence had finished. The newspapers eventually took their complaint to the Strasbourg Human Rights Court (ECtHR), alleging that the continuation of the court order had breached their right to freedom of expression in Article 10(1) ECHR.[[36]](#footnote-36)

The ECtHR held that, although the court order was lawful as it was in the interest of national security, there was insufficient reason for continuing the newspaper publication ban once the book had been published (abroad). The court order should have ended once the information was no longer confidential.[[37]](#footnote-37) That said, the Convention had not yet passed into UK law; the Human Rights Act 1998 (HRA) was still some six years away, though this judgment may well have persuaded Parliament.

Freedom of expression and information and freedom of the media are crucial for the functioning of a democratic society. In times of crisis the media plays a key role, coupled with its responsibility to report accurately, to provide reliable information to the public, but also in preventing panic and fostering people’s understanding, such as during the Coronavirus pandemic from March 2020 onwards. Freedom of expression helps to inform political debate and it is essential that the media reports on government transparency and the checks and balances imposed by Parliament on the executive.

# **1.4 Freedom of expression in human rights law**

In 1948, the Universal Declaration of Human Rights was adopted by the UN General Assembly. Its main aim was to promote human, civil, economic and social rights, including freedom of expression and religion, among all its subscribing nations. There followed the European Convention on Human Rights and Fundamental Freedoms (ECHR), adopted in 1950. The subsequent International Covenant on Civil and Political Rights 1966 (ICCPR) recognized the right to freedom of speech as ‘the right to hold opinions without interference’.[[38]](#footnote-38)

Article 10(1) ECHR gives everyone the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without state interference. The type of expression protected includes:

• political expression (including comment on matters of general public interest);

• artistic expression; and

• commercial expression, particularly when it also raises matters of legitimate public debate and concern.

To ensure that free expression and debate are possible, there must be protection for elements of a free press, including protection of journalistic sources.

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See below 1.7

Box End

Interferences with press freedom usually involve restrictions on publication by way of court injunctions or super injunctions.

Box Start

See Chapter 2.6

Box End

Public authorities in the UK now have extensive legislation to restrict freedom of expression if, for example, an individual expresses their views that encourage racial or religious hatred or incites terrorism offences on the internet. However, the relevant public authority must show that the restriction is ‘proportionate’, in other words that it is appropriate and no more than necessary to address the issue concerned. Article 10(2) ECHR enshrines such restrictions and state powers:

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 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.

Article 10 is a *qualified right*, and as such the right to freedom of expression may be limited by the state and public authorities under Article 10(2) ECHR, which provides that freedom of expression ‘carries with it duties and responsibilities’ and may be limited as long as the limitation:

• is prescribed by law;

• is necessary and proportionate; and

• pursues a legitimate aim.

Such ‘legitimate aim’ might include the interests of national security, territorial integrity or public safety, but can also include the prevention of disorder or crime, the protection of public health or morals, the protection of a person’s reputation or preventing the disclosure of information received in confidence (confidentiality).

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See Chapter 2.2

Box End

Freedom of speech must at times yield to other cogent social interests, such as national security when a state may well derogate under Art 10(2) ECHR or limit freedom of speech under domestic laws. This was recognized in the *Spycatcher*[[39]](#footnote-39) action well before the European Convention entered into UK domestic law. In *Derbyshire County Council v Times Newspapers Ltd*,[[40]](#footnote-40) Lord Keith of Kinkel, speaking for a unanimous HL, observed about Article 10:

As regards the words ‘necessary in a democratic society’ in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that ‘necessary’ requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate.[[41]](#footnote-41)

## **1.4.1 Freedom of expression and the digital age**

If we then translate the Millian Principle into the digital age, the application of freedom of expression becomes rather controversial. Mill argued that those citizens who exhibit cruelty, malice, envy, insincerity, resentment and crass egotism would be open to greater sanctions by the state and forms of punishment should be admonished because these faults are ‘wicked and other-regarding’.[[42]](#footnote-42) Mill called this the ‘harm principle’ as the only legitimate ground for interference with freedom of expression. We could then translate some people’s actions on social media or via mobile phone text messages as acting with malice, harassment, libel, envy or resentment which violates the rights of others. It could then be argued further that restricting means of communication on the internet amounts to a legitimate action by a state in order to prevent harm to its citizens.

One such example is China’s *Golden Shield Project* (Chinese: 金盾工程; pinyin: *jīndùn gōngchéng*), also named *National Public Security Work Informational Project* ( 全国公安工作信息化工程), the Chinese nationwide network-security e-government project of the People’s Republic of China. The Golden Shield Project, also labelled ‘The Great Firewall of China’ is one of the most popular censorship and technology projects that is being used in China since 2008. The Great Firewall prevents internet users in China from visiting many foreign websites or blocks them completely. The Golden Shield Project makes China one of the strictest countries in the world when it comes to internet freedom of ‘netizens’ residing in the mainland. Chandel et al (2019) have researched the development of the Great Firewall that includes the timeline of its development, the censorship policy used for its implementation, its effects and the principles behind the technology used for its application. Their report present a study of techniques, such as using a VPN to circumvent the heavily monitored firewall. These circumvention techniques have become very popular in the mainland because of severe information censorship. The researchers found that there are no signs of it being removed by the Chinese government and that most citizens believe that the Great Firewall contributes to stabilizing Chinese society, both online and offline.[[43]](#footnote-43)

# **1.5 Conceptual differences between freedom of expression and media freedom**

## The European Convention also protects an individual’s freedom to *receive* information from other people by, for example, being part of a social media audience. Freedom of expression can include a number of objectives, such as the power or right to express one’s opinions without censorship, restraint or legal penalty. Article 10 ECHR has enshrined these concepts in law and Strasbourg jurisprudence has further developed this right which, for example, protects an individual’s right to hold their own opinions and to express them freely without government interference. In the Thalidomide case (no. 1) an injunction had been served on the *Sunday Times* restraining publication of news editorial by Harold Evans about the pending civil proceedings brought by parents of children born with severe deformities through the taking of thalidomide by women during pregnancy in the late 1960s early 1970s. The ECtHR found a violation of Article 10 (1) ECHR. This was the first judgment concerning freedom of expression and information via the press.[[44]](#footnote-44)

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See below 1.7

Box End

## **1.5.1 Media freedom and the law**

Media freedom can be defined as the ability and opportunity for journalists to say and write what they want without restriction or interference from the state and elsewhere. Press or media freedom is not expressly defined or mentioned in Article 10 ECHR, and it is therefore important to read the phrasing of Articles 10(1) and (2) ECHR in detail.

For daily practical journalistic and investigative purposes, we need to place our trust in the media and broadcasting institutions. Today press freedom accepts certain restrictions on providing information, such as war reporting,[[45]](#footnote-45) contempt, extreme hate speech, the protection of minors, racial discrimination and national security. Frost (2015) argues that it can be rather confusing that many people in Britain and other Western European countries appear to support media freedom on the one hand while supporting censorship on specific matters on the other, such as the coverage of terrorism or sexually explicit material.[[46]](#footnote-46) Ultimately, there are ethical and moral issues that govern newsgathering, investigative journalism and war reporting. These are usually left to broadcasting organizations’ policy, such as the BBC’s editorial code and the IPSO editors’ code.

Box Start

See Chapter 7.4

Box End

In her biography of war reporter Marie Colvin, Lindsey Hilsum asks important questions about what kind of service war correspondents perform and what ethical codes they should adhere to.[[47]](#footnote-47)

## **1.5.2 Cartoons and the boundaries of press freedom**

In March 2021 a schoolteacher in West Yorkshire was suspended for showing Muhammad cartoons to year 9 pupils during their religious studies lesson, linked to the attacks on the *Charlie Hebdo* offices in Paris in 2015, where two men who claimed affiliation to al-Qaida murdered twelve people, including staff cartoonists and two policemen. The satirical magazine’s offices had been previously firebombed after its depictions of Muhammad. Mufti Mohammed Amin Pandor, one of the community leaders in Batley, Yorkshire tried to calm down protesters outside Batley Grammar School. Headmaster Gary Kibble apologised to parents for the inappropriate use of the cartoons which sparked a parents’ protest outside the school which had been organised on social media amid calls for the teacher’s resignation. In a phonecall to one boy’s angry father the (unnamed) teacher tried to defend his freedom of expression by getting the pupils to discuss whether the cartoonist was to blame or the terrorists who had committed murder over it in France Charlie Hebdo had published it.

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See below 1.5.3

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In *Charleston v News Group Newspapers Ltd* (1995),[[48]](#footnote-48) the House of Lords considered the digitally enhanced photomontage that showed the faces of two famous Australian actors, Anne Charleston (‘Madge’) and Ian Smith (‘Harold’), of the popular TV series *Neighbours*, superimposed on the nearly naked bodies of others in pornographic poses, and agreed with Blofeld J’s order to strike out the libel action against the publishers of the *News of the World*. Their Lordships, applying the ‘bane and antidote’ defence, declined to find defamation in *Charleston*. They further commented if the readers who did not take ‘the trouble to discover what the article was all about, carried away the impression that two well-known actors in legitimate television were also involved in making pornographic films, they could hardly be described as ordinary, reasonable, fair-minded readers’.[[49]](#footnote-49)

## **1.5.3 Prophet Mohammed cartoons controversy**

Cartoonists and caricaturists can often say a great deal more than a journalist can through their visual medium. In Britain, caricatures and satires are generally dealt with by the tort law of defamation.[[50]](#footnote-50)

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See Chapter 3.2

Box End

This section looks at how the cartoons row developed from the Danish newspaper *Jyllands-Posten*’s cartoons depicting the Prophet Mohammed as a terrorist with a bomb in 2005 to the *Charlie Hebdo* killings in Paris. In many Islamic and Roman Catholic countries, blasphemy laws remain rigorous and are strictly enforced, often with austere penalties – even potentially the death penalty. This demonstrates that the extent and scope of national laws protecting religious beliefs remain very culture-specific.

When the Danish newspaper *Jyllands-Posten* published twelve editorial cartoons of the Prophet Mohammed on 30 September 2005. In one cartoon Mohammed was wearing a bomb-shaped turban. The caricatures were accompanied by an article titled ‘The Face of Mohammed’. This caused outrage in the Muslim world, with violent protests erupting across the Middle East. The introduction to the article was headed ‘Freedom of Expression’, making the point that Denmark was not afraid of criticizing Islam, and that ‘some Muslims reject modern, secular society’ and they demand ‘a special position’ in Western society with ‘special consideration for their religious beliefs’. Various Muslim religious leaders demanded the dismissal of the newspaper’s commissioning editor, Flemming Rose and an apology from the editor. Newspapers and magazines around the world subsequently reprinted the Mohammed cartoons, leading to a global wave of protests and riots by Muslims who claimed that the caricatures were just another expression of Western colonialism.

On 31 January 2006 the editor-in-chief of *Jyllands-Posten,* Carsten Juste, admitted that the twelve cartoons, one of which depicted Muhammad, had caused “serious misunderstandings”. In a lengthy statement he said, “The twelve cartoons ... were not intended to be offensive, nor were they at variance with Danish law, but they have indisputably offended many Muslims, for which we apologise.” Anders Fogh Rasmussen, the Danish Prime Minister, welcomed the apology.

This did not appease the Muslim world and on 6 February 2006, hundreds of Iranians attacked the Danish and Norwegian embassies in Tehran, and Saudi Arabia recalled its ambassador to Denmark, while Libya closed its embassy in Copenhagen, and Lebanese demonstrators set the Danish embassy in Beirut on fire. Eleven Danish newspapers were contacted by the Saudi lawyer Faisal Yamani, representing eight Muslim organizations and some 94,923 descendants of Prophet Mohammed, demanding that *Jyllands-Posten* and the other newspapers remove the cartoons from their websites and print apologies. The violence further escalated as newspapers in France, Germany, Spain and Italy reprinted the cartoons.

On 15 March 2006, the Danish Director of Public Prosecutions (DPP) decided there was no basis for commencing criminal proceedings against the newspaper *Jyllands-Posten* and its editor in chief for publishing the article. The criminal legal issue was whether the article and the cartoons fell within the provisions of section 140[[51]](#footnote-51) and/or 266b[[52]](#footnote-52) of the Danish Criminal Code (*Straffeloven*). The Danish DPP decided not to prosecute, citing the right to freedom of expression as laid down in Article 77 of the Danish Constitution and Article 10(1) ECHR. He further argued that the right to freedom of expression includes statements which may shock, offend or disturb and that this right might only be curtailed by Danish law as is necessary in a democratic society (i.e. proportionate to the legitimate aim pursued). Thereafter, the offices of *Jyllands-Posten* had to be evacuated several times following repeated security threats towards Kurt Westergaard, one of the Danish cartoonists, and the editorial team.

On 26 February 2010, Danish newspaper *Politiken* published an apology to eight Muslim organisations which represent 94,923 of Muhammad's descendants, for the offence it caused by reprinting controversial cartoons depicting the prophet Muhammad, in exchange for their dropping legal action against the newspaper. The cultural and foreign affairs editor of *Jyllands-Posten*, Flemming Rose, who had originally commissioned the Mohammed cartoons, said that its sister paper had failed in the fight for freedom of speech and called it a ‘sad day’ for the Danish press freedom.

On 7 January 2015, gunmen shot dead twelve people at the Paris office of French satirical magazine *Charlie Hebdo* in an apparent militant Islamist attack with the gunmen shouting, ‘We have avenged the Prophet Mohammed’ and ‘God is the Greatest’ in Arabic (‘*Allahu Akbar*’). The attack took place during the magazine’s daily editorial meeting. Cartoonist Philippe Honoré was amongst those killed. He had drawn the last cartoon for the magazine, showing the leader of the self-styled Islamic State, Abu Bakr al-Baghdadi, presenting his New Year message, saying ‘and especially good health!’ Nine months later, French opinion was deeply divided about the controversial Mohammed cartoons in *Charlie Hebdo*. Its senior cartoonist, Luz – the man who designed the famous green cover of the first edition after the attacks – announced his resignation in October 2015; columnist Patrick Pelloux announced the same.

In the same year as the *Charlie Hebdo* attack, gunmen and suicide bombers hit the Bataclan Concert Hall, the Stade de France and restaurants and bars almost simultaneously in Paris on Friday 13 November 2015, leaving 130 people dead and hundreds wounded. The attacks were described by President François Hollande as an ‘act of war’ organized by the Islamic State (IS) militant group.

Box Start

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Description automatically generatedFor thought

Should an editor of a magazine (and its online edition) apologize for a satirical poem which has offended a leader of state? Or does this attack the artist’s freedom of expression? Discuss.

Box End

## **1.5.4 Strasbourg jurisprudence in relation to obscenity and blasphemy laws**

When examining human rights law, it could be argued that the European Court of Human Rights (ECtHR) has – in general – not interfered with a country’s freedom of religion under Article 9 ECHR in favour of Article 10 (‘freedom of expression’) (see: *Murphy v Ireland* (2000)[[53]](#footnote-53)).

Various obscenity and blasphemy laws in mainly Roman Catholic European countries prohibit film and video game releases. Strasbourg jurisprudence remains non-committal in this area of law and generally applies only to anything which might encourage public indecency or glorify criminal activity by those engaging in internet activity, such as watching or uploading extreme sexual violence or torture on YouTube.

The controversial case of *Otto-Preminger*[[54]](#footnote-54)*-Institut v Austria* (1994)[[55]](#footnote-55) concerned the banning and forfeiture of the film *Council of Love* (*Das Liebeskonzil*), based on a nineteenth-century play in which the Eucharist is ridiculed, and God the Father is presented as a senile, impotent idiot, the Virgin Mary as a wanton woman who displays erotic interest in the devil and Jesus Christ as a low-grade mental defective given to fondling his mother’s breasts.

*Das Liebeskonzil* was to be screened at a private film club before an informed adult audience in the Tyrol in 1987, but the Innsbruck district court injuncted the film because of its blasphemous content which, the court reasoned, would shock the predominantly Roman Catholic audience in Tyrol.[[56]](#footnote-56) Preminger opposed the injunction, citing Article 10(1) ECHR as ‘freedom of [artistic] expression’. On appeal, the Austrian Constitutional Court in Vienna held the film to be blasphemous because it contained provocative and offensive portrayals of objects of veneration of the Roman Catholic religion. The Austrian court cited Article 10(2) of the Convention as a reason for derogating against ‘freedom of expression’ and confirmed the injunction as permanent: the court ruled that the Innsbruck court had not overstepped the ‘margin of appreciation’.[[57]](#footnote-57)

Jens Olaf Jersild is a prominent Danish journalist, well-known for his investigative and critical reportage. In 1985 Jersild investigated a group of right-wing racists, called ‘The Greenjackets’ (*grønjakkerne*). He was convicted under the Danish Criminal Code for repeating and using highly racist comments by three members of the Greenjackets, including ‘a nigger is not a human being – it’s an animal’. After a number of unsuccessful appeals, including the regional court (the Østre Landsret) and the Danish Supreme Court, Jersild successfully claimed that the Danish state had breached his Article 10(1) ECHR right. The Human Rights Court in Strasbourg (ECtHR) ruled that he did not intend to spread racist language but merely depicted society as a journalist and public watchdog.

Box Start

❖ Key case

*Jersild v Denmark* (1994) 19 EHRR 1

## Precedent

• A publication or broadcast is justified under Article 10(1) ECHR if – given the margin of appreciation of that country – the article (or broadcast) contributes discussions of matters of public interest.

• A state should not derogate from the freedom of expression and ban a publication or broadcast under Article 10(2) ECHR if the public interest test is satisfied.

## Facts

On 31 May 1985 the Danish Sunday News Magazine (Søndagsavisen) published an article describing the racist attitudes of members of a group of young people, calling themselves ‘The Greenjackets’ at Østerbro in Copenhagen. In the light of this article, the editors of the *Sunday News Magazine* decided to produce a documentary on the Greenjackets. The applicant, Mr Jens Olaf Jersild, a Danish journalist, contacted representatives of the group, inviting three of them, together with Mr Per Axholt, a social worker, to take part in a TV interview. During the interview, the three Greenjackets made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. The edited film – lasting only a few minutes – was broadcast by Danmarks Radio on 21 July 1985 as part of the Sunday news magazine programme. The documentary feature included avowed racist views.

In their statements the youths described black people as belonging to an inferior subhuman race:

the niggers … are not human beings… . Just take a picture of a gorilla … and then look at a nigger, it’s the same body structure… . A nigger is not a human being, it’s an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.

Following the programme, no complaints were made to the Radio Council or to Danmarks Radio, but the Bishop of Ålborg complained to the Minister of Justice. Subsequently, the three youths were convicted for making racist statements and Mr Jersild for aiding and abetting them in making racist comments in a public place.[[58]](#footnote-58) Mr Jersild, but not the three Greenjackets, appealed against the City Court’s judgment to the High Court of Eastern Denmark (*Østre Landsret*), but his appeal was rejected, and his conviction was upheld by the Danish Supreme Court.

## Decision

The ECtHR jointly dissented with the opinion and judgment of the Danish Supreme Court. Judges Gölcüklü, Russo and Valticos stated, ‘We cannot share the opinion of the majority of the Court in the Jersild case’. The ECtHR held that Mr Jersild’s Article 10 right to freedom of expression had been violated and that he was not a racist. He had a valid defence in making the programme. The reasons given by the Danish court in support of Jersild’s conviction and sentence (and derogation under Article 10(2) ECHR) were not sufficient to justify interference with a journalist’s right of free expression in a democratic society.

## Analysis

It is interesting that the Strasbourg Court in *Jersild* did not show any concern or sensibility towards vulnerable groups in the face of racial abuse compared with its judgment in the *Otto Preminger* case, where the Catholic population of the tiny Tyrol region was very much taken into consideration over the offending film. Were the religious sensibilities so fundamentally different in character in the satirical film by Otto Preminger to the ‘nigger’ quote in the Danish documentary by Jersild? Why did the ECtHR not apply the ‘margin of appreciation’ in the *Jersild* case?[[59]](#footnote-59) The Strasbourg Court found it particularly important in *Jersild* to send a message to combat racial discrimination. This, in fact, had been Mr Jersild’s intention when making the Danish TV documentary. The ECtHR stressed that freedom of expression at times constitutes publications (or broadcasts) which may shock or offend but that this is one of the essential underpinnings of a democracy, and the media plays an important role in the duty to inform.

Box End

The ECtHR ruling in *Jersild* provides journalists and media outlets with the protection needed to disseminate controversial opinions; however, it does caution against the dissemination of unbalanced and overly obscene or blasphemous communication.[[60]](#footnote-60)

Box Start

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Islamic tradition or Hadiths, the stories of the words and actions of Muhammad and his companions, prohibits images of Allah, Muhammad and all the major prophets of the Christian and Jewish traditions. Should parliament or press regulators publish national rules for journalists and political cartoonists about using images of the Prophet Muhammad? Discuss.

Box End

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# 1.6 Online censorship and freedom of expression

In June 2021 Facebook announced that former US President, Donald Trump, would be banned from its platform for at least two years. This move did not only inflame tensions with allies of the former US president but also many who support freedom of expression, accusing the company of censoring conservative views. The ban was a revision from a previous indefinite suspension by Facebook, which was criticised by the company’s ‘Oversight Board’. The board upheld the decision to kick Trump off the platform but found fault with the lifetime ban. The new suspension was effective from the date of Trump’s initial suspension on 7 January 2021, the day after the attack by the ex-president’s supporters on the US Capitol building in Washington.

Since 2016, Facebook employs thousands of fact checkers and uses fact-checking algorithms across more than 80 organizations working in over 60 languages globally. The idea is to fight the spread of misinformation and to provide people with more reliable information across Facebook, Instagram and WhatsApp. Facebook’s Oversight Board, created in April 2021, publishes its decisions on a wide range of highly significant content issues, including the 'Zwarte Piet' (Black Pete) decision (Case 2021-002-FB-UA).[[61]](#footnote-61) In this case the Oversight Board upheld Facebook's decision to remove specific content that violated the express prohibition on posting caricatures of black people in the form of blackfaces, contained in its ‘Hate Speech Community Standard’. The Donald Trump and Zwarte Piet decisions came as part of an announcement detailing broader changes to Facebook’s policies in 2021 on how it moderates speech by influential public figures, following criticism from the Oversight Board that its existing approach had created ‘widespread confusion’.

Twitter and Google (YouTube) have similar policies. Videos advocating right wing hate speech by Tommy Robinson, aka Stephen Yaxley-Lennon, have long been blocked by Twitter since 2018. The far-right founder of the English Defence League has now been permanently banned from Facebook and Instagram for repeatedly breaking policies on hate speech.

Media plurality supports democracy by ensuring that people can receive a wide range of viewpoints from a variety of different sources and that no one media owner has too much influence over public opinion and the political agenda. Media companies publish views, news, editorials, and opinions. The BBC, Reuters, The Times, The Daily Mail, The Sun or the Glasgow Herald all make editorial decisions about what news to publish, have editorial boards, publish op-ed pieces, and make every effort possible to fact-check (and fact-check again) about every single item they publish. If they publish a defamatory article about a high-profile individual, such as Johnny Depp[[62]](#footnote-62), they can expect to be sued in court as ample case law tells us.

Box Start

See Chapter 3

Box End

Freedom of expression and media pluralism online have been protected by the UK Government by the *Communications Act 2003*, supported by the courts in common law, believing that people’s rights to participate in society and engage in robust debate online must be safeguarded. The UK Government’s *Online Harms White Paper* (2019) argued that existing regulatory and voluntary initiatives had “not gone far or fast enough” to keep users safe. The Paper proposed a single regulatory framework to tackle a range of harms. At its core would be a duty of care for internet companies, including social media platforms.[[63]](#footnote-63) In the absence of any UK privacy laws, there exists no restraint or protection for an individual other than resorting to court restraining orders against an internet service provider (ISP) or operators of a website – most of these being in the United States or outside the European Union.

## 1.6.1 How are individuals legally protected against online harm?

In February 2018 then Prime Minister Theresa May ordered a review of British laws governing online communications and abuse. The *Online Harms Regulator (Report) Bill*, first proposed by Mrs May’s Government in April 2019, introduced by Lord McNally as a Private Members Bill in the House of Lords in January 2020, assigned functions to the UK communications regulator Ofcom in relation to online harms’ regulation and set out strict new guidelines governing removal of illegal content such as child sexual abuse, terrorist material and social media that promotes suicide, which sites must obey, or face being blocked in the UK. The bill stalled due to the Covid pandemic in 2020/21. Should the bill become law it would apply to all companies that host user-generated content such as images, videos and comments, or allow UK users to talk with other people online through messaging, comments and forums. It would also apply to search engines because they play a significant role in enabling individuals to access harmful content online. The proposed legislation envisages safeguards for freedom of expression and pluralism online - protecting people’s rights to participate in society and engage in robust debate.

law tells us.

Box Start

See Chapter 8.4

Box End

*The Digital Economy Act 2017 Part 3 Enforcement Bill*, introduced in the HL by Baroness Howe of Idlicote in June 2021, sought to enforce the remaining sections of Part 3 of the Digital Economy Act 2017 that deal with pornographic material on internet services. It would give Ofcom the power to require internet service providers to block access to pornographic material.

The EU Commission’s Paper ‘Shaping Europe’s Digital Future’ of February 2020 outlined the EU’s digital future strategy and a commitment to invest in digital competences for all European member states, including: protecting its citizens from cyber threats, such as hacking, ransomware and identity theft and ensuring Artificial Intelligence is developed in ways that respect people’s rights.

Current UK legislation can be invoked in instances relating to online harassment and sexual and racial abuse thereby providing relevant measures to law enforcement agencies:

• Obscene Publications Act 1959 and 1965;

• Protection of Children Act 1978 (England and Wales);

• Civic Government (Scotland) Act 1982;

• Malicious Communications Act 1988;

• Protection from Harassment Act 1997;

• Sexual Offences Act 2003;

• Communications Act 2003 (sections 125–130[[64]](#footnote-64));

• Police and Justice Act 2006 (sections 35–40[[65]](#footnote-65));

• Criminal Justice and Immigration Act 2008 (section 63[[66]](#footnote-66));

• Coroner’s and Justice Act 2009 (section 62;[[67]](#footnote-67) section 69[[68]](#footnote-68));

• Sexual Offences (Scotland) Act 2009;

• Criminal Justice and Licensing (Scotland) Act 2010 (sections 40–44);

• Criminal Justice and Courts Act 2015 (section 33[[69]](#footnote-69) – see below).

## 

## 1.6.2 Trolls and hate speech

What is ‘trolling’? The term ‘troll’ or ‘trolling’ has become a catch-all term for everything from minor disagreements through to annoying incivility through to criminal behaviour such as death threats. So, is trolling a criminal offence? Yes and no. It is a criminal offence under section 127 of the Communications Act 2003 if a profile is created under the name of the victim with fake information uploaded which, if believed, could damage their reputation and humiliate them. This piece of legislation creates an offence of ‘sending’, or ‘causing to be sent, by means of a public electronic communications network, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character’.

Trolling is usually done under a false identity or pseudonym and has become a social media phenomenon, including online forums and microblogging sites where offensive or inflammatory comments are posted. Trolls have become an increasing threat to a person’s reputation and can destroy businesses.

The first conviction for trolling abusive, life-threatening and hate speech came in January 2014 when Isabella Sorley, 23, from Newcastle-upon-Tyne, and her co-defendant John Nimmo, 25, from South Shields, Tyne and Wear, received 12-week and 8-week prison sentences, respectively, at Westminster Magistrates’ Court. The subject of their hate speech campaign was feminist Caroline Criado-Perez after her successful campaign to feature Jane Austen on the (then new) £10 note. Sorley’s Twitter trolls included death threats and Nimmo’s trolls, using five different Twitter accounts, involved rape. Sentencing judge Howard Riddle J referred to the trolls as ‘life threatening’ and ‘extreme’ when he read out all trolls in open court.

The parents of missing Madeleine McCann, Doctors Kate and Gerry McCann, were trolled by Brenda Leyland and featured on Sky News. Using the Twitter ID @sweepyface, Leyland had tweeted or retweeted 2,210 posts, of which 424 mentioned the McCanns between November 2013 and September 2014. By the time Sky News reporter, Martin Brunt, had tracked down the 63-year-old to her home in Burton Overy, Leicestershire, exposing Brenda Leyland as one of the internet trolls responsible for the hate campaign directed at the McCanns, Mrs Leyland had committed suicide in a Marriott Hotel in Leicester on 4 October 2014.[[70]](#footnote-70)

Online communications or text messages which constitute ‘credible threats’ of violence to the person or damage to property are also regularly prosecuted under section 2A(3) of the Protection from Harassment Act 1997, often falling under the label of ‘stalking’. Section 7(3) of the 1997 ‘stalking’ Act makes clear that a ‘course of conduct’ must involve conduct on at least *two* occasions. Credible threats to kill are prosecuted under section 16 Offences Against the Person Act 1861. Furthermore, sections 32–35 of the Criminal Justice and Courts Act 2015 (‘Offences involving intent to cause distress etc.’) together with CPS social media guidelines provide further criminal legislation for online abuse on social media platforms.

Context and circumstances are highly relevant in these cases, though the accused may always raise an Article 10(1) ECHR defence, relying on the precedent set in *Handyside v UK* (1976),[[71]](#footnote-71) where the court held that ‘freedom of expression’ also included the right to ‘offend, shock or disturb’.

Hate speech and trolling via social media have increased enormously embracing nationality, race or religion – aimed to shock, offend or disturb, often hiding behind ‘freedom of expression’. Both Facebook and Twitter have rules on what can and cannot be posted on their sites, and the social media giants will now take down postings and videos that violate them or block people’s accounts completely.

Box Start

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Would you agree with some proponents of internet free speech that any proposed regulation of social media and online content would “choke new innovations and freedom of expression”? Discuss.

Box End

# 1.7 Protecting Journalistic Sources

Journalist and former MP Chris Mullin, 74, won his legal battle against West Midlands Police in March 2022, who had forced him to hand over material that would identify confidential sources relating to his investigations into the 1974 IRA Birmingham pub bombings. Old Bailey Recorder Judge Mark Lucraft ruled that Mullin would not have to disclose his sources and notes dating back to 1985 and 1986 despite West Midlands Police’s application for a production order under the Terrorism Act 2000 for ‘excluded material’.[[72]](#footnote-72) The force maintained Mr Mullin’s historical notes could solve the case by identifying those responsible.[[73]](#footnote-73)

Mullin helped expose the innocence of the so-called Birmingham Six, the men freed from prison in 1991, when their convictions over the deaths of 21 people were quashed following the Birmingham pub bombings. The Birmingham Six were sentenced to life imprisonment in 1975. Mullin’s book, *Error of Judgement: the Truth About the Birmingham Bombing*[[74]](#footnote-74)*,* presents his meticulous investigation into the way the West Midlands Police obtained evidence in this case, including faulty forensic evidence and how he tracked down the real perpetrators, known in the court judgment as only AB and CD.[[75]](#footnote-75)

In 2019, an inquest jury found an ‘inadequate’ IRA warning call on the night of the bombings caused or contributed to the deaths. No other persons have been brought to justice for the blasts at the Mulberry Bush and Tavern in the Town pubs in Birmingham, and the force says its investigation has remained active. Chris Mullin was supported by the National Union of Journalists (NUJ) in his legal action. Speaking outside the Old Bailey, Mullin said:

The right of a journalist to protect his or her sources is fundamental to a free press in a democracy. My actions in this case were overwhelmingly in the public interest. They led to the release of six innocent men after 17 years in prison, the winding up of the notorious West Midlands Serious Crimes Squad and the quashing of a further 30 or so wrongful convictions. This case also resulted in the setting up a Royal Commission which, among other reforms, led to the setting up of the Criminal Cases Review Commission and the quashing of another 500 or more wrongful convictions.[[76]](#footnote-76)

Many reporters have risked prison for contempt of court in the past rather than reveal their sources, for protection of journalistic sources is one of the basic conditions for press freedom. Without such protection in law for journalists, informant sources may be deterred from assisting the media in informing the public on matters of public interest and, at times, endanger journalists’ lives. Journalists are professionally bound to maintain the confidentiality of sources and Chris Mullin has refused to disclose the requested material on the basis that it would represent a fundamental breach of this principle. He was supported by the National Union of Journalists (NUJ) in this case.

In a significant case, that of *Goodwin v UK* (1996)[[77]](#footnote-77) (see below), the European Court of Human Rights (ECtHR) backed a journalist from the *Engineer* magazine, Bill Goodwin, after a court in Britain tried to force him to reveal a source. The ECtHR held that the protection of journalistic sources supports press freedom in a democratic society. Any measures law enforcement agencies or the courts may impose on a journalist to disclose their confidential sources, may well have a chilling effect and cannot be compatible with Article 10 ECHR *unless* it is justified by an overriding requirement by the state in matters of national security. War correspondents, for example, must be aware of ethical issues when reporting from war zones, such as Afghanistan, when their reporting involves loss of life, human suffering or distress. At the very least they may well put civilian lives in danger.[[78]](#footnote-78)

However, in some decisions since the *Goodwin* case, UK courts have ruled that the need for disclosure outweighed the public interest in a journalist being entitled to protect their sources.

There have been several incidents where journalists have been ordered by a court to reveal their sources of information.[[79]](#footnote-79) There then exists the potential for conflict between a judicial order either prohibiting the publication of details relating to a matter before the courts in the form of super injunctions or a journalist having to disclose his vital source of information in the absence of any privacy law protection in the UK (confirmed in *Kaye v Robertson* (1991)[[80]](#footnote-80) and *Wainwright v The Home Office* (2003)[[81]](#footnote-81)).

Section 10 of the Contempt of Court Act 1981 deals with the protection of journalistic sources. Section 10 provides:

No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

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See Chapter 5.3

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Section 10 CCA was put to the test in the *Goodwin* case.

Box Start

❖ Key case

*Goodwin (William) v United Kingdom* (1996) 22 EHRR 123 (ECtHR).

## Precedent

• No journalist should have to disclose his sources of information unless disclosure is necessary in the interests of justice (s 10 Contempt of Court Act 1981 – CCA).

• Section 10 CCA is not an absolute mandate to the judiciary to order journalists to disclose their sources purely on a complaint by an aggrieved private party.

• Courts should balance the journalist’s confidentiality of his sources with the interests and administration of justice whether disclosure of the source is ‘necessary’.

• Limitations on the confidentiality of journalistic sources call for careful scrutiny by the courts.

## Facts

William Goodwin joined *The Engineer* magazine as a trainee journalist on 3 August 1989. The magazine was published by Morgan-Grampian Ltd. On 2 November 1989 Mr Goodwin was telephoned by a bona fide source, giving him information about ‘Tetra Ltd’ and that the company was in financial difficulties: Tetra was trying to obtain a £5m loan as a result of an expected loss of £2.1m for 1989 on a turnover of £20.3m. Mr Goodwin had received no payment, and it was the strict understanding that his source was to remain confidential. Intending to write an article, Mr Goodwin telephoned Tetra to check the facts and seek its comments on the information (7 November). The same day, Tetra applied for an *ex parte* interim injunction to restrain the publishers of *The Engineer* from publishing any information derived from the corporate plan which had come into the possession of Mr Goodwin. Mr Justice Hoffmann granted the injunction (Chancery Div of the High Court). Tetra’s reasons were, if the company’s financial plan was to be made public, it could result in a complete loss of confidence in the company on the part of its actual and potential creditors, its customers and in particular its suppliers, with a risk of loss of orders and of a refusal to supply the company with goods and services. This would inevitably lead to problems with Tetra’s refinancing negotiations. If the company went into liquidation, there would be approximately 400 redundancies.

Between 14 and 22 November 1989, Hoffmann J ordered the publishers (and therein Mr Goodman) to disclose all the journalist’s notes and to identify his source on the grounds that it was necessary ‘in the interests of justice’ under section 10 of the Contempt of Court Act 1981 (CCA). Tetra could then bring proceedings against the source to recover the documents and to obtain an injunction preventing further publication. Following Mr Goodman’s appeal, the CA rejected his appeal on 12 December 1989. The CA referred to the balancing exercise it had to undertake regarding the interests of justice test: on the one hand maintaining the confidentiality of journalistic sources (the reason why section 10 CCA was enacted), and on the other whereby disclosure was necessary in the general interests of the administration of justice (i.e. if information disclosed about a public company where shareholders were unjustifiably being kept in ignorance of information vital to their making a sensible decision on whether or not to sell their shares). The CA held that publication of the article on Tetra would amount to an unjustified intrusion into the company’s privacy and that the balance would be in favour of disclosure of the journalist’s sources. The House of Lords upheld the CA’s decision on 4 April 1990. A *Norwich Pharmacal* order[[82]](#footnote-82) was applied for, seizing all information and therein the source from Mr Goodwin’s property. Mr Goodwin had been served with contempt of court proceedings for disobeying the court orders to disclose his source (an offence punishable by an unlimited fine or up to two years’ imprisonment under s 14 CCA). Following the HL’s dismissal of his appeal, Mr Goodwin was fined £5,000 for contempt of court at the High Court on 10 April 1990. He applied to the Strasbourg Human Rights Court (ECtHR) arguing that the *Norwich Pharmacal* disclosure order requiring him to reveal the identity of a source violated his right to freedom of expression under Article 10 ECHR.[[83]](#footnote-83)

## Decision (ECtHR)

The court opined that Mr Goodwin’s Article 10 right had been breached by the UK (courts). Furthermore, that the disclosure order (*Norwich Pharmacal*) was an interference with prescribed law and that the section 10 Contempt of Court Act 1984 (CCA) had failed to satisfy the interests-of-justice exception to the protection of journalistic sources.[[84]](#footnote-84)

## Analysis

The Goodwin case is fundamentally important to the issue of disclosure of journalistic sources. The Strasbourg Human Rights Court ruling criticized the UK Contempt of Court Act 1981 (CCA) in that Parliament had not sufficiently and precisely worded section 10: the legislator had not foreseen the circumstances in which such a disclosure order could be made against journalists to protect a private company. Therefore, the foreseeability requirement which flows from the expression prescribed by law had failed. Regarding the balancing exercise in relation to ‘the interests of justice’, introduced by Lord Bridge in the HL in this case, had amounted to ‘subjective judicial assessment’ of factors based on retrospective evidence presented by the party seeking to discover the identity of the source (Tetra). The ECtHR opined that the journalist Mr Goodwin could not possibly have known whether Tetra’s ‘livelihood’ was at stake at the time his source had provided the information; he certainly believed that the information about the company’s demise was in the public interest and therefore publishable in the magazine. The ECtHR commented that s 10 CCA was not an absolute mandate for the judiciary to order journalists to disclose their sources purely on a complaint of an aggrieved private party. The court noted, however, that there is a general public interest in the free flow of information to journalists; both sources and journalists must recognize that a journalist’s express promise of confidentiality or his implicit undertaking of non-attributability may have to yield to a greater public interest and the administration of justice if ordered by a court.

Box End

In *Nagla v Latvia* (2013) the Strasbourg Court found a violation of Article 10, emphasising that the right of journalists not to disclose their sources could not be considered a privilege, dependent on the lawfulness or unlawfulness of their sources, but rather as an intrinsic part of the right to information.[[85]](#footnote-85)

Ilze Nagla, previously hosted a well-known prime-time programme a on national Latvian television (Latvijas televīzijā - LTV). As an investigative journalist she had discovered and broadcast information leaked from the State Revenue Service (Valsts ieņēmumu dienests - VID) database. Almost three months after the broadcast of the programme on LTV, Ms Nagla’s home was raided by the police and searched. A laptop, an external hard drive, a memory card, and four flash drives were seized with the aim of collecting information concerning the data leaks at VID. A search warrant had been drawn up by the police investigator and authorised by a public prosecutor. Relying on Article 10 of the Convention, Ms Nagla complained to the ECtHR (after exhausting the Latvian courts) that the search of her home meant that she had been compelled to disclose information that had enabled a journalistic source to be identified, violating her right to receive and impart information.

The Court opined that the Latvian investigating authorities failed to adequately protect the sources of a journalist of the national television broadcaster Latvijas televīzijā (LTV). According to the ECtHR, the concept of journalistic ‘source’ refers to “any person who provides information to a journalist”, while “information identifying a source” includes, as insofar as they are likely to lead to the identification of a source, both “the factual circumstances of acquiring information from a source by a journalist” and “the unpublished content of the information provided by a source to a journalist”.

While recognizing the importance of securing evidence in criminal proceedings, the Court emphasises that a chilling effect would arise wherever journalists are seen to assist in the identification of anonymous sources. The Court confirmed that a search conducted with a view to identifying a journalist’s source is a more drastic measure than an order to divulge the source’s identity, and it considers that it is even more so in the circumstances of the present case, where the search warrant was drafted in such vague terms as to allow the seizure of “any information” pertaining to the crime under investigation allegedly committed by the journalist’s source, irrespective of whether or not his identity had already been known to the investigating authorities.

The Court reiterated that limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the (domestic) courts. Any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist’s freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse.

The ECtHR found that the investigating judge in Latvia failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist’s freedom of expression, including source protection. Because of the lack of relevant and sufficient reasons, the interference with Ms Nagla’s freedom to impart and receive information did *not* correspond to a ‘pressing social need’, hence there was a violation of Article 10(1) ECHR.

While recognising the importance of securing evidence in criminal proceedings, the Court in *Nagla* emphasised that a chilling effect would arise wherever journalists are seen to assist in the identification of anonymous sources. This was the case in *Man v Romania* (2020).[[86]](#footnote-86) In this case the ECtHR reiterated that the protection afforded to journalists by Article 10 is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism (see also: *Pentikäinen v Finland (2017*)[[87]](#footnote-87)). Furthermore, the concept of ‘responsible journalism’ was not confined to the contents of information which is collected and/or disseminated by journalistic means. The term also embraces, inter alia, the lawfulness of journalists’ conduct, including their public interaction with the authorities when exercising journalistic functions (see: *Brambilla v Italy* (2016)[[88]](#footnote-88)).

*Man* and *Nagla* involved search warrants, drafted in vague terms to allow the seizure of ‘any information’ pertaining to the crime under investigation, allegedly committed by the journalist’s source, irrespective of whether or not his or her identity had already been known to the investigating authorities. The ECtHR held that limitations on the confidentiality of journalistic sources call for scrutiny by the presiding domestic court (here Latvia and Romania). It also emphasised that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist’s freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse. The Strasbourg court in *Nagla* found that the investigating magistrate failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist’s freedom of expression, including source protection.

As a matter of general principle, the ‘necessity’ for any restriction on freedom of expression must be convincingly established (see: *Sunday Times v UK (no. 2)* (1991).[[89]](#footnote-89) The ECtHR in *Goodwin* stated that public authorities must assess whether there is a ‘pressing social need’ for applying any derogation under national law – in the UK this would be s 10 CCA and Art 10(2) ECHR. Given the development in common law, the courts now enjoy a certain margin of appreciation, balancing the public interest of democratic society, state interest, press freedom and the protection of confidential journalistic sources. Domestic courts would then decide whether the restriction is proportionate to the legitimate aim pursued.

The need to protect the privacy of a suspect whose name may be mentioned in court who has not been charged now appears to be safeguarded, following the decision in the recent *Bloomberg* case (2022)[[90]](#footnote-90) at the Supreme Court which protects such suspects.

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See Chapter 2.7.3

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## 1.8 Fake news and disinformation

How did the term ‘fake news’ evolve? One definition is the deliberate making up of news stories to fool or entertain. Gelfert (2018) offers a variety of meanings, including a description of any statement that is not liked or agreed with by the reader.[[91]](#footnote-91) Fake news it not new and has been bandied around for decades. One historical example is the ‘Great Moon Hoax’ of 1835, in which the *New York Sun* published a series of six long articles about the discovery of life on the moon made by a famous astronomer, Sir John Herschel. The public was entranced by stories of how Herschel had built a powerful new telescope and how he had observed fantastic living creatures on the moon from the Cape of Good Hope. *The Sun* reported on plants and animals, including herds of bison, blue unicorn, birds, other horned animals and what looked like sheep. Herschel’s most interesting discovery was furry bat people ‘with short and flossy copper-colored hair and wings composed of a thin membrane’. *The Sun* admitted, soon after the six articles were published, that it was a hoax.[[92]](#footnote-92)

When Donald Trump beat Hillary Clinton in November 2016 to become the 45th US president, ‘fake news’ became his buzzword. In record time, the phrase morphed from a description of a social media phenomenon into a journalistic cliché and an angry political slur. During the Trump election campaign in 2016, *BuzzFeed News* identified more than a hundred pro-Trump websites being run from a single town in the former Yugoslav Republic of Macedonia.

Over the last few years, there have been rising concerns about the perceived trend for the public to distrust traditional sources of news, such as newspapers and broadcasters, and instead to turn to the internet and social media (such as Facebook or Google News), even though the source of the stories is often unclear, and it is not known whether the reports are factually accurate. The fear that this might lead to the public being fed propaganda and untruths has been increased by the suggestions that electors in the 2016 US presidential election were subjected to possibly unprecedented amounts of ‘fake news’ and concerns that this may have had a significant impact on democratic processes.

## 1.8.1 Propaganda and untruths: what impact does fake news have on public understanding of the world?

# ‘Fake news’ has become a force of enormous reach and influence within the news media environment. There is now substantial research in this area – for example, there is said to be clear evidence of Russian state-sponsored attempts to influence elections in the US (Donald Trump versus Hilary Clinton in November 2016) and the UK’s EU (Brexit) Referendum in June 2016 by using social media and spreading rumours and fake news.[[93]](#footnote-93) It is evident that social network sites play an enormous role in generating traffic to fake news, and the democratic implications of fake news have been described by many as a ‘news crisis’.

For a journalist, it is an essential means of enabling the media to perform its important function of public watchdog which should not be interfered with (by the state) unless in exceptional circumstances where vital public or individual interests are at stake. But in the era of fake news, why should the public trust journalists and their news sources, who offer so much information without any meaningful indication of where the information came from? Some anonymous source may not be a whistle-blower but rather a manipulating spin doctor working for the rich and powerful and hiding behind a journalist’s promise of anonymity?

With the arrival of social media and the majority of citizens now obtaining their news from Facebook as opposed to bona fide news sources, such as the BBC or Reuters, this has meant real and fictional stories are now presented in such a similar way that it can sometimes be difficult to tell the two apart. Populist politics and shifts in media consumption via social networking sites such as Facebook and Twitter mean that it is harder than ever to be sure about the quality of the news and information we consume. Coupled with citizen journalism and increasing public debate via social media, it is difficult to discern what is deliberate misinformation (for advertising, commercial or political reasons) and what amounts to ‘the truth’ in media reporting. Waisbord (2018) argues that the phenomenon ‘fake news’ is indicative of the contested position of news and the dynamics of belief formation in contemporary societies. It is symptomatic of the collapse of the old news order and the chaos of contemporary public communication. This new ‘communication chaos’ makes it necessary to revisit normative arguments about journalism, democracy and truth, and journalistic practices and standards are now harder to achieve and to maintain amid the destabilization through fake news.[[94]](#footnote-94)

How impartial should the media be? What is the difference between comment, conjecture, fact or fiction, and what are the boundaries of a free press? One of the few certainties in the world of journalism and editorial policy is that the age-old tension between freedom of expression and the right to robust and occasionally rude debate will, from time to time, come into conflict with the sensibilities of those who feel insulted or abused and minorities who can feel oppressed by the slights, real or imagined, of the majority. Whilst traditional journalism has been based on researching the facts, evidence and reliance on journalistic sources, the complexities of communicating objective news have become scarce, particularly with the decline of newspapers.

Freedom of expression and freedom of the press do not always go hand in hand: there can be abuses by powerful media moguls which threaten media pluralism, as the Leveson Inquiry has shown.

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See Chapter 7.4

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There are increasing challenges facing the use of new technologies, and there is an urgent need for more stringent compliance with international legislation that protects both freedom of expression and an individual’s right to privacy. Certainly, there needs to be clarification as to how human rights are to be protected if there is to be freedom of expression in electronic media.

# 1.8.2 Regulating fake news?

In December 2018, Germany’s most famous political magazine, *Der Spiegel*, was faced with the biggest fake news scandal in its 70-year history. Claas Relotius, 33, a high-flying journalist, acclaimed for writing very readable personal news reportage from across the world, having won a string of awards, was uncovered as to having invented most of his stories. Spiegel’s editor had to apologize to its loyal readership which thereafter took the bosses and publishers of the magazine several months to regain credibility. In a special ‘apology’ edition, *Der Spiegel* wrote in a 23-page account how a long-standing reporter, such as Relotius fooled his colleagues and the publishers over several years with ‘fake’ and completely made-up stories.[[95]](#footnote-95)

‘Spiegelgate’ was embarrassing for the hard-hitting, left-leaning German magazine with a print circulation of more than 800,000 copies a week. Some readers praised the magazine for its honesty and commendable apology edition. Others demanded to know how so many fake news stories and disinformation could have found their way through the army of fact checkers meant to go through every piece it publishes.[[96]](#footnote-96) Comparisons were drawn with the case of Jayson Blair, a then 27-year-old reporter with *Time* magazine, who resigned in 2003 over claims he had plagiarized and made up fake news stories, and with Janet Cooke, a reporter for *The Washington Post* who won a Pulitzer Prize in 1981 for an article later found to be fabricated.

So how do readers and consumers know to distinguish between accurate and fake content? What are the possible solutions? In its 5th Report (2019), ‘Disinformation and “fake news”’, the House of Commons Digital, Culture, Media and Sport Committee recommended that the term ‘fake news’ should be replaced by the terms ‘misinformation’ and ‘disinformation’. Furthermore, that the government should provide clear guidelines for companies and media organizations on these definitions, underpinned by regulation and enforcement.[[97]](#footnote-97)

There is no regulatory body that oversees social media platforms and written content including printed news content online since, all the main five companies are located in the United States (Facebook, Twitter, Google, LinkedIn, Pinterest – plus now Tik Tok).  Arguably, the potential of fake news can pose a threat to democracy and social values. Deliberately distorted facts can now be easily disseminated through state-sponsored programmes by groups with a particular political agenda, including the desire to affect political elections.

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See Chapter 8.9

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Facebook, Twitter and Google are now removing fake news sites from their advertising platforms on the grounds that they violate policies against misleading content. Furthermore, Facebook has taken steps to identify fake news articles, flag false articles as ‘disputed by 3rd party fact-checkers’, show fewer potentially false articles in users’ news feeds and help users avoid accidentally sharing false articles by notifying them that a story is ‘disputed by 3rd parties’ before they share it.[[98]](#footnote-98) These actions by the main social network providers may increase social welfare, but identifying fake news sites and articles also raises important questions about who becomes the arbiter of truth.

There are now millions of amateurs who blog or tweet, share photos via Instagram or Snapchat or upload some of their most intimate details on Facebook or YouTube. Most of these individuals will be ignorant of the law in this area, such as defamation, hate speech and harassment.

Does the regulation of online services amount to a breach freedom of expression? Should the big tech companies – all located in the United States - be able to self-regulate content on their platforms or has the time come for legislation by governments? The best deal these IT firms can strike with governments is to have clear and verifiable rules on how they publish and moderate content, helping users own, control and profit from their own data.

The EU Commission is taking steps to regulate social media companies and their platforms. In its communication of September 2017 on tackling illegal content online, the European Commission promised to monitor progress in tackling illegal content online and assess whether additional measures were needed to ensure the swift and proactive detection and removal of illegal content online, including possible legislative measures to complement the existing regulatory framework. In 2021, the EU Commission has recommended a set of operational measures to be taken by companies and Member States to determine and propose future legislation. These recommendations apply to all forms of illegal content ranging from terrorist content, incitement to hatred and violence, child sexual abuse material, counterfeit products and copyright infringement.[[99]](#footnote-99)

EU governments will be judged on how they deal with media plurality, freedom of expression, balancing the right to speak up online versus the spread of misinformation and hate speech on their platforms. We are left with uncertainty in the global laws. Is it right that social network providers are self-regulating content on their platforms by blocking and deleting offensive posts and individuals’ accounts which may well amounts to online censorship?

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Does the regulation of online services by big American tech companies, such as Twitter and Facebook, amount to a breach freedom of expression? Discuss.

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Several EU Member States have already adopted legislation to counter hate speech and fake news. Section 1(1) of Germany’s Network Enforcement Act 2017 (*Netzwerkdurchsetzungsgesetz* – NetzDG) provides that,

telemedia service providers which operate a platform over the internet, with the intention of generating profit from it, which follows the purpose to enable its users to share any content with other users or to make it accessible to the public (social network).

Section 1(2) NetzDG qualifies this broad definition and sets out an exemption from the review and reporting requirements if the social network has fewer than two million registered users in Germany. The German legislation takes a unique approach in that it shifts the responsibility to assess and determine any unlawful or ‘fake’ content to the social media provider.

The European Commission’s current approach regarding fake news, media plurality and freedom of speech is based on voluntary self-regulation by social media companies in line with the Commission’s code of conduct.[[100]](#footnote-100)

The UK press regulator IPSO proposes an external set of standards, such as the IPSO Editors’ Code, which can assist readers and consumers to identify truth from fiction.

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See Chapter 7.2

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We conclude this first chapter with the question ‘does the regulation of online services amount to a breach freedom of expression’? Freedom of expression under Article 10 ECHR includes not only the inoffensive, but also the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence. Should the big tech companies be able to self-regulate content on their platforms or has the time come for legislation by governments, such as the proposed UK statutory regulation?

The best deal the big US IT firms can strike with governments is to have clear and verifiable rules on how they publish and moderate content, helping users own, control and profit from their own data; as well as fair treatment of competitors that use their platforms. Governments will then be judged on how they deal with media plurality, freedom of expression, balancing the right to speak out online versus the spread of misinformation and hate speech on their platforms.

We are then left with the age-old question: can the internet be regulated at all? Is it right that social network providers are self-regulating content on their platforms by blocking and deleting offensive posts and individuals’ accounts which may well amount to online censorship?

# A picture containing helmet Description automatically generated1.9 Further reading

Barendt, E. (2016) Anonymous Speech: Literature, Law and Politics. Oxford: Hart. Eric Barendt raises the question in this thought-provoking book: should rights of free expression include anonymous speech? He discusses topical questions such as ‘fake news’ and internet trolls and engages in the general discussion about free speech. Barendt discusses forms and degrees of anonymity ranging from the non-disclosure of one’s officially registered name to unnamed sources only known to journalists or whistle-blowers who operate under fake names, where anonymity merges with confidentiality. Barendt sees a stronger case for anonymity when a third party can be held responsible. Authors, whistle-blowers, journalists’ sources, and even internet trolls can more credibly claim legal protection once publishers, human resources officials, journalists or website managers assume vicarious liability. The author accepts compulsory disclosure when, for example, defamatory material or hate speech are published on websites that assume no responsibility for their content. For Barendt, content-based restrictions may impede the expression of ideas and information; bans on anonymity do not. As new electronic media continue to confront legislatures and courts with difficult problems of anonymity, this book looks to the future with great concern for democratic legitimacy.

Hameleers, M, Brosius, A. and de Vreese, C. H. (2022) ‘Whom to trust? Media exposure patterns of citizens with perceptions of misinformation and disinformation related to the news media’. In: *European Journal of Communication* 1–32. Sage Publication research article: [https://doi.org/10.1177/02673231211072667](https://doi.org/10.1177%2F02673231211072667)

This study tests how perceptions of misinformation and disinformation in one’s general news media environment relate to media trust and media consumption patterns, relying on survey data from 10 European countries. Michael Hameleers , Anna Brosius and Claes H de Vreese evaluated the results, demonstrating that perceptions of misinformation and disinformation are both related to reduced trust in the news media. Furthermore, they go hand in hand with reduced consumption of traditional TV news, but with no changes in newspaper and (mainstream) online news use. Finally, the researchers found that those with stronger perceptions of misinformation and disinformation are more likely to consume news on social media and alternative, non-mainstream outlets. These findings indicate that news users who distrust the veracity and honesty of the news media may turn to alternative outlets that reflect anti-establishment worldview.

Hilsum, L. (2019) In Extremis: The Life and Death of the War Correspondent Marie Colvin. New York: Picador.  In her biography of war reporter Marie Colvin, Lindsey Hilsum asks important questions about what kind of service war correspondents perform and what ethical codes they should adhere to. One of the modern world’s most experienced and admired foreign correspondents, Hilsum has written a riveting, intimate, and deeply moving account of the epic life of her late friend and colleague, Marie Colvin. Colvin sought to bear witness and write well about the world’s most troubled places, and for twenty-five years she did just that, over and over again, going in deep and staying too long in a dozen conflicts from Libya and Lebanon to Kosovo, and from Iraq to Afghanistan and East Timor. She lost an eye in Sri Lanka, and eventually her life in Syria, and she will be long remembered―not least because of Hilsum’s fine work in this book― as one of the great war reporters of her generation.

Frosio, G. F. (2018) ‘Why keep a dog and bark yourself? From intermediary liability to responsibility’, International Journal of Law and Information Technology, 26(1), 1. Giancarlo Frosio contextualizes the recent developments in intermediary liability theory and policy within a broader move towards privacy online. The author argues that online intermediaries’ governance could move away from a well-established utilitarian approach and towards a moral approach by rejecting negligence-based intermediary liability arrangements. He examines various policy tools, such as monitoring and filtering obligations, blocking orders, graduated response, payment blockades and follow-the-money strategies, private domain name system content regulation, online search manipulation or administrative enforcement – in particular, intellectual property rights holders who are trying to coerce online intermediaries into implementing these policy strategies through voluntary measures and self-regulation, in addition to validly enacted obligations. The author argues that the intermediary liability discourse is shifting towards an intermediary responsibility discourse. Frosio proposes that by enlisting online intermediaries as watchdogs, governments would de facto delegate online enforcement to algorithmic tools. Due process and fundamental guarantees get mauled by technological enforcement, curbing fair uses of content online and silencing speech according to the mainstream ethical discourse.

Mostert, F. (2019) ‘Free speech and internet regulation’. *Journal of Intellectual Property Law and Practice*. J.I.P.L.P. 2019, 14(8), 607-612. Frederick Mostert discusses the trend for social media, although privately controlled, to provide the main forum for individuals' communication, the public function of social media, risks to free speech, and proposed regulation. The author examines the need for collaboration to prevent internet harms while protecting free speech.

Nelson, L. S. (2018) Social Media and Morality: Losing Our Self Control. Cambridge: Cambridge University Press. This book is intended for anyone seeking to understand the moral significance of social media and provides an explanation of how our current legal and policy approach is lacking and in need of modification. Lisa Nelson lays bare a new space for reflection and critique in our digital culture. The author suggests a new methodological approach to understanding social networking cultures and technologies as well as new moral frameworks. She takes the current discussion on digital technologies beyond issues of privacy and control. The book presents an ethical discussion of our digital society.

Scanlon, T. (1972) ‘A theory of freedom of expression’, Philosophy and Public Affairs, 1(2), 204–226.This essay on ‘freedom of expression’ will never date. Harvard philosopher T. M. (Tim) Scanlon explains the doctrine of freedom of expression in general terms, thought of as a class of ‘protected acts’ which it holds to be immune from restrictions to which other acts are subject. He argues by singling out the ‘harm principle’ of John Stuart Mill’s theory expressed in *On Liberty* that governments may have to justify coercive or punitive authority by limiting or curtailing free speech in times of extreme peril or war. The ‘Millian Principle’ is then a necessary limitation or even undermining of freedom of expression whereby governments may rule by virtue of complete authority, controlling their citizens in the ways that the Millian Principle was intended to exclude. Such actions, Scanlon argues, would have to be justified on some other ground (e.g. utilitarian), and the claim of their agents to be obeyed would not be that of a legitimate government in ‘the usual (democratic) sense’. In those circumstances, he argues, citizens will normally obey the laws.

1. See: Marengo, D., Sindermann C., Elhai J.D. and Montag, C. (2020) ‘One Social Media Company to Rule Them All: Associations Between Use of Facebook-Owned Social Media Platforms, Sociodemographic Characteristics, and the Big Five Personality Traits’. *Front. Psychol.* 11:936. doi: 10.3389/fpsyg.2020.00936: <https://www.frontiersin.org/articles/10.3389/fpsyg.2020.00936/full> [↑](#footnote-ref-1)
2. Isocrates (Norton, G.) (1980). [↑](#footnote-ref-2)
3. Immanuel Kant, ‘What Is Enlightenment?’ Königsberg, Prussia, 30 September, 1781. [↑](#footnote-ref-3)
4. Israel, J. (2006) pp. 338–339. [↑](#footnote-ref-4)
5. The first ten amendments to the US Constitution are collectively known as the ‘Bill of Rights’; there are five freedoms guaranteed by the First Amendment, the fifth being the right ‘to petition the government for a redress of grievances’. [↑](#footnote-ref-5)
6. Burke, E. (1790) [↑](#footnote-ref-6)
7. Mill, J. S. (1859), Introduction, p. 26. [↑](#footnote-ref-7)
8. For further discussion see: Wragg, P. (2013b). [↑](#footnote-ref-8)
9. Milton, J. (1644) at p. 41. [↑](#footnote-ref-9)
10. Source: ‘Pretoria to the BBC: GET OUT!’, by Jo-Ann Becker, *Mail & Guardian* 15 May 1987. [↑](#footnote-ref-10)
11. # Loi du 25 mai 2021 pour une sécurité globale préservant les libertés.

    [↑](#footnote-ref-11)
12. Source: ‘Filmer des policiers, un droit démocratique. Une disposition du projet de loi de « sécurité globale » visant à limiter la diffusion d’images des forces de l’ordre sur le terrain provoque de vifs débats. Contrevenant à un droit démocratique, elle risque d’envenimer un peu plus les rapports entre policiers et citoyens’, editorial, *Le Monde,* 7 Novembre 2020. [↑](#footnote-ref-12)
13. *BBC News Online* Live from Kabul, 17 August 2021. [↑](#footnote-ref-13)
14. Source: ‘US must plan evacuation of Afghan journalists’, RSF August 21, 2021: <https://rsf.org/en/news/us-must-plan-evacuation-afghan-journalists-delay-troop-pull-out-rsf-says> [↑](#footnote-ref-14)
15. *Centro Europa 7 S.R.L. and Di Stefano v Italy (Application No 38433/09)*, [2012] ECHR 974 (ECtHR). Grand Chamber judgment of 7 June 2012. The applicants were Centro Europa 7 S.R.L., an Italian analog TV company based in Rome, and Francescantonio Di Stefano, its statutory representative. [↑](#footnote-ref-15)
16. Ibid. at para. 129 (Françoise Tulkens, President, Grand Chamber, ECtHR). [↑](#footnote-ref-16)
17. Ibid. at paras 214–227. [↑](#footnote-ref-17)
18. Habermas, J. (1994). [↑](#footnote-ref-18)
19. Habermas, J. (1962, translation 1989). [↑](#footnote-ref-19)
20. (2005) 40 EHRR 1. [↑](#footnote-ref-20)
21. Chancellor of Nazi Germany, 1933–1945. [↑](#footnote-ref-21)
22. Italian Fascist dictator and founder of the Organizzazione per la Vigilanza e la Repressione dell’Antifascismo (OVRA) (Organization for Vigilance and Repression of Anti-Fascism), 1927–1945. [↑](#footnote-ref-22)
23. The military head of Spain from 1936 to 1975. [↑](#footnote-ref-23)
24. The Universal Declaration of Human Rights (UDHR) was drafted by representatives with different legal and cultural backgrounds from all regions of the world. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (Resolution 217 A III). [↑](#footnote-ref-24)
25. Mill, J. S. (1859), *On Liberty*, Chapter II, p. 15. [↑](#footnote-ref-25)
26. Scanlon, T. (1972), pp. 204–226. [↑](#footnote-ref-26)
27. Aleksandr Solzhenitsyn, *One Day in the Life of Ivan Denisovich* (first published in the Soviet literary magazine *Noviy Mir* (New World) in November 1962). [↑](#footnote-ref-27)
28. The title refers to a group of Qur’anic verses that allow for prayers of intercession to be made to three pagan goddesses in Mecca. See: Rushdie, S. (1989; new edition 1998). [↑](#footnote-ref-28)
29. Rushdie, S. (2012). [↑](#footnote-ref-29)
30. Source: Thisday press office release, Kaduna, 27 November 2002. [↑](#footnote-ref-30)
31. Source: ‘Fatwa is issued against Nigerian journalist’, by James Astill and Owen Bowcott, *Guardian*, 27 November 2002. [↑](#footnote-ref-31)
32. Joseph Muscat KUOM served as the Prime Minister of Malta from 2013 to 2020, and as the leader of the Labour Party from June 2008 to January 2020. Previously he was a member of the European Parliament from 2004 to 2008. [↑](#footnote-ref-32)
33. Gerard (‘Gerry’) Adams (born 1948), an Irish republican politician and former leader of Sinn Féin from 1983 to 2018. [↑](#footnote-ref-33)
34. Martin McGuinness (1970–2017) was an Irish republican and Sinn Féin politician who was the deputy First Minister of Northern Ireland from May 2007 to January 2017. [↑](#footnote-ref-34)
35. Sanders, K. (2003), p. 71. [↑](#footnote-ref-35)
36. *A-G v Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109 (*Spycatcher No 2*). [↑](#footnote-ref-36)
37. *Observer and Guardian v UK* (1992) 14 EHRR 153 (*Spycatcher no. 1*) (ECtHR). [↑](#footnote-ref-37)
38. International Covenant on Civil and Political Rights (ICCPR), United Nations Treaty, New York, 16 December 1966. UN Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407 (procès-verbal of rectification of the authentic Spanish text); depositary notification C.N. 782.2001. [↑](#footnote-ref-38)
39. *AG v Guardian Newspapers Ltd (No 1); AG v Observer Ltd; AG v Times Newspapers Ltd* [1987] 1 WLR 1248 (Spycatcher case); also: AG v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 (Spycatcher No 2). [↑](#footnote-ref-39)
40. *Derbyshire County Council v Times Newspapers Ltd and Others* [1993] AC 534. [↑](#footnote-ref-40)
41. Ibid. at 550H–551A. [↑](#footnote-ref-41)
42. Mill, J. S. (1859), *On Liberty*, p. 55. [↑](#footnote-ref-42)
43. Chandel, Sonali & Jingji, Zang & Yunnan, Yu & Jingyao, Sun. (2019) ‘The Golden Shield Project of China: A Decade Later—An in-Depth Study of the Great Firewall’. 111-119. 10.1109/CyberC.2019.00027. [↑](#footnote-ref-43)
44. *Sunday Times v United Kingdom (No. 1)* (1980) 2 EHRR 245 (ECtHR) (‘Thalidomide’ No 1) (ECtHR). [↑](#footnote-ref-44)
45. For further discussion see: Burchill, R., White N. D. and Morris, J. (2005). [↑](#footnote-ref-45)
46. Frost, C. (2015). [↑](#footnote-ref-46)
47. Hilsum, L. (2019) In Extremis: The Life and Death of the War Correspondent Marie Colvin. [↑](#footnote-ref-47)
48. [1995] 2 AC 65. [↑](#footnote-ref-48)
49. Ibid. at 76 (Lord Bridge of Harwich). [↑](#footnote-ref-49)
50. (2021) *Gatley on Libel and Slander* 13ed. [↑](#footnote-ref-50)
51. § 140“Any person who, in public, ridicules or insults the dogmas or worship of any lawfully existing religious community in this country shall be liable to a fine or to imprisonment for any term not exceeding four months.” [↑](#footnote-ref-51)
52. § 266 b (1) “Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years. (2) In determining the punishment, it shall be considered a particularly aggravating circumstance if the conduct is of a propagandistic nature. [↑](#footnote-ref-52)
53. (2000) 38 EHRR 13 (ECtHR). [↑](#footnote-ref-53)
54. Otto Ludwig Preminger (1905–1986) was a famous Austro-Hungarian film director. Living mostly in the United States, he directed over 35 Hollywood movies which tended to be of the film noir genre. Topics were intentionally blasphemous and provocative, e.g. Fallen Angel (1945), The Moon is Blue (1953), The Man with the Golden Arm (1955), Anatomy of a Murder (1959) and Advise and Consent (1962). [↑](#footnote-ref-54)
55. (1995) 19 EHRR 34 (Case No 13470/87) 20 September 1994 (ECtHR). [↑](#footnote-ref-55)
56. Contrary to s 188 (‘insult’) of the Austrian Criminal Code as promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322) (*Strafgesetzbuch*). [↑](#footnote-ref-56)
57. Judgment by the ECtHR of 20 September 1994 with the result of the immediate withdrawal of the movie by the Austrian Constitutional Court (Urteil vom 20. September 1994, A/295-A EGMR Einziehung des Films ‘Das Liebeskonzil’, verstößt nicht gegen Art 10(1) EMRK). [↑](#footnote-ref-57)
58. Under Article 266(b) of the Danish Penal Code. [↑](#footnote-ref-58)
59. For further discussion see: Mahoney, P. (1997), pp. 364–379. [↑](#footnote-ref-59)
60. For further discussion see: Council of Europe (2010) ‘Blasphemy, insult and hatred: Finding answers in a democratic society’, *Science and Technique of Democracy* 47. Brussels: Council of Europe Publication. [↑](#footnote-ref-60)
61. FB-S6NRTDAJ Case decision 2021-002-FB-UA Zwarte Piet (originally in Dutch) of April 2021:<https://www.oversightboard.com/decision/FB-S6NRTDAJ> [↑](#footnote-ref-61)
62. Depp (John Christopher) v (1) News Group Newspapers Ltd (2) Dan Wootton [2020] EWHC 2911 (QB). [↑](#footnote-ref-62)
63. House of Commons (2019b). [↑](#footnote-ref-63)
64. ‘Offences relating to networks and services’. [↑](#footnote-ref-64)
65. ‘Computer misuse’ and ‘indecent images of children’. [↑](#footnote-ref-65)
66. ‘Possession of extreme pornographic images’. [↑](#footnote-ref-66)
67. ‘Possession of prohibited images of children’. [↑](#footnote-ref-67)
68. ‘Indecent pseudo-photographs of children: marriage etc’. [↑](#footnote-ref-68)
69. ‘Disclosing private sexual photographs and films with intent to cause distress’, ‘revenge pornography’ or ‘revenge porn’. [↑](#footnote-ref-69)
70. Source: ‘Brenda Leyland inquest: McCann “Twitter troll” overdosed on helium after Sky News confrontation’, by Yasmin Duffin, *Leicester Mercury*, 20 March 2015. [↑](#footnote-ref-70)
71. 1 EHRR 737 (ECtHR). A prosecution was brought against the publisher based on the Obscene Publications Act 1959. [↑](#footnote-ref-71)
72. under paragraph 5 of Schedule 5 of the Terrorism Act 2000 [TACT]. [↑](#footnote-ref-72)
73. Mullin (John) application for a production order under the Terrorism Act 2000. Ruling by His Honour Judge Mark Lucraft QC Recorder of London Central Criminal Court London EC4M 7EH March 22nd 2022. [↑](#footnote-ref-73)
74. Mullin, C. (1986). [↑](#footnote-ref-74)
75. Ruling on TACT production order - Recorder of London – March 22nd 2022 para. 4. [↑](#footnote-ref-75)
76. # Source: ‘Former MP can protect Birmingham bombings source’, by Sam Tobin *Law Gazette* 22 March 2022.

    [↑](#footnote-ref-76)
77. *Goodwin (William) v United Kingdom* (1996) 22 EHRR 123 (ECtHR). [↑](#footnote-ref-77)
78. For further discussion see: Allan, S. and Zelizer, B.(eds) (2004) *Reporting War: Journalism in Wartime.* [↑](#footnote-ref-78)
79. For further discussion see: Geddis, A. (2010). [↑](#footnote-ref-79)
80. [1991] FSR 62. [↑](#footnote-ref-80)
81. [2003] UKHL 53 (HL). [↑](#footnote-ref-81)
82. *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. [↑](#footnote-ref-82)
83. Application no. 17488/90. [↑](#footnote-ref-83)
84. See: Opinion of 7 September 1993, Commission Report of 1 March 1994 (art. 31), violation of Article 10 by 11 votes to 6 (re: *Goodwin v UK*). [↑](#footnote-ref-84)
85. *Nagla v Latvia* (2013) (Application No. 73469/10) 16 July 2013; [2013] ECHR 781 (ECtHR). [↑](#footnote-ref-85)
86. (Application No.39273/07) (2020) 70 EHRR SE7 (ECtHR) 19 November 2019 (ECtHR). [↑](#footnote-ref-86)
87. (2017) 65 EHRR 21 (ECtHR). [↑](#footnote-ref-87)
88. (2016) (application No. 22567/09) 23 June 2016 (ECtHR). [↑](#footnote-ref-88)
89. *Sunday Times v United Kingdom (No. 2)* (13166/87) (1991) [1991] ECHR 26 pp. 28–29, para. 50. [↑](#footnote-ref-89)
90. *Bloomberg LP v ZXC* [2022] UKSC 5. [↑](#footnote-ref-90)
91. For further discussion see: Gelfert, A. (2018) ‘Fake News: A Definition’, *Informal Logic*, Vol. 38, No.1, pp. 84–117. [↑](#footnote-ref-91)
92. Source: ‘Remembering the Great Moon Hoax of 1835’, by Gabe Pressman, *NBC News*, 20 August 2012: [www.nbcnewyork.com/news/local/moon-hoax-166810096.html](http://www.nbcnewyork.com/news/local/moon-hoax-166810096.html) [↑](#footnote-ref-92)
93. For further discussion see: Allcott, H. and Gentzkow, M. (2017) pp. 211–236. [↑](#footnote-ref-93)
94. Waisbord, S. (2018) pp. 1866–1878. [↑](#footnote-ref-94)
95. Source: *Der Spiegel*, Nr 52 of 22 December 2018: ‘We’re saying it how it is: how one of our own reporters faked his stories and why he got away with it’ (‘Sagen was ist: Wie einer unserer Reporter seine Geschichten fälschte und warum er damit durchkam’). [↑](#footnote-ref-95)
96. Ibid., ‘The fake news stories at Spiegel have resulted in substantial debates in other media sources and amongst its readership’ (‘Die Fälschungen beim Spiegel haben heftige Diskissionen in den Medien und unter den Lesern ausgelöst’) at pp. 52–55. [↑](#footnote-ref-96)
97. House of Commons (2019a). [↑](#footnote-ref-97)
98. Source: ‘Working to Stop Misinformation and False News’, by Adam Mosseri, *Facebook News Feed*, 7 April 2017: [www.facebook.com/facebookmedia/blog/working-to-stop-misinformation-and-false-news](http://www.facebook.com/facebookmedia/blog/working-to-stop-misinformation-and-false-news) [↑](#footnote-ref-98)
99. ## European Commission (2021) State of the Union: Commission proposes a Path to the Digital Decade to deliver the EU's digital transformation by 2030: <https://digital-strategy.ec.europa.eu/en>

    [↑](#footnote-ref-99)
100. Source: European Parliament Report ‘On media pluralism and media freedom in the European Union (2017/2209(INI)) 12 April 2018: <https://www.europarl.europa.eu/doceo/document/A-8-2018-0144_EN.html?redirect> [↑](#footnote-ref-100)