MASTER OF THE ROLLS

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PRIVACY & FREEDOM OF EXPRESSION: A DELICATE BALANCE

ETON

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(1) Introduction

1. We, or most of us, like to think that we live in an open society. Which is a society committed to liberal, democratic principles and the rule of law. An open society has a number of essential features: political institutions accountable through free and fair elections, an independent and impartial judiciary upholding the law, and a free press. Free and fair elections are, it is true, sometimes superficial, spin-obsessed and trivialising: democracy, according to Winston Churchill, is the worst form of government apart from all the rest. An independent judiciary can sometimes seem remote and pompous, but without an independent judiciary, the main ingredient of the rule of law, we are all serfs. And a free press is often not merely truth-seeking and challenging, but strident, biased and shallow; again, however, without a free press we are damned to servitude[1].

2. You are all no doubt familiar with the use of the word 'gate' as a suffix: Dianagate, expensesgate and so on. The suffix originates, as you all no doubt know from, the Watergate scandal, which ultimately resulted in Richard Nixon resigning as President of the United States in the face of impeachment. Watergate was an office complex in Washington DC and housed the headquarters of his rival for the Presidency, George McGovern. It was broken

[1] I wish to thank John Sorabji for all his help in preparing this lecture.

into by a number of men linked to President Nixon's re-election campaign. There was, as there almost always is, an attempted cover-up of Nixon's involvement. The cover-up, and the involvement of senior government and other officials, only came to light because of the work of two Washington Post reporters: Carl Bernstein and Bob Woodward.

3. Their journalistic investigations, and the newspaper's ability to publish the results provide a paradigm example of the benefits and importance of an untrammelled, inquisitive, and thriving press striving to bring hidden truth to light, and the essential part it plays in insuring that a society is and remains free and open. Such reporting ensures that those in authority are held to account and the rule of law does not become something to which those in power simply paid lip service.

4. The ability of journalists such as Woodward and Bernstein, and their English counterparts, to shed light on the use and abuse of power is one facet of our commitment to freedom of expression. Another facet is one I am more closely concerned with as a judge: open justice. Open justice is a fundamental aspect of our commitment to the rule of law. As the great 19th Century philosopher and jurist, Jeremy Bentham put it,

   "*Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.*"[2]

   What is true of the courts is true of all branches of the state. To put it another way, daylight is the best antiseptic.

5. This is a feature which the Freedom of Information Act 2000 goes some way in recognising. The fact that we all accept the general principle that openness is the surest guard against improbity or impropriety does not, of course, mean that there cannot be exceptions to it – provided that those exceptions are kept within proper limits. There are many good reasons in an open society where limits can, in certain circumstances be properly placed on the general principle of openness.

6. For instance, a court hearing must be in private where publicity would defeat the object of the hearing – a trial concerned with protecting commercial secrets – the recipe for *Coca Cola* for instance – would be self-defeating if it enabled the very secret to become public as

[2] Bentham cited in *Home Office v Harman* [1983] 1 AC 280 at 303, per Lord Diplock

part of the process. Other limits are well-accepted too – for instance, where privacy is needed to protect the interests of a child or a mental patient, or where a question of national security is in issue.

7. As so often happens with questions of principle, the ultimate issue is not really about what the principles are or should be; it is how the balance between competing principles is to be struck, or, to put it another way, how the tension between two principles is to be resolved.

8. I have said a bit about the importance of publicity, what we all know as freedom of expression, enshrined in article 10 of the European Convention on Human Rights. But an equally important principle is the individual's right to privacy, not to have the state or the public poking their inquisitive noses into one's family, home, and social activities. That is enshrined in article 8 of the Convention, the right to respect for private and family life.

9. Since 2000, when the Convention became part of our law, the courts have often had to resolve tensions between different human rights. Perhaps the most interesting is that between freedom of expression, in particular the media's rights, to put it shortly if inaccurately, and the right to respect for privacy. Ever topical and rarely out of the media spotlight given the so-called super-injunctions. There are well-known cases such as *LNS v Persons Unknown* – which I'm sure you're all familiar with under its full new name: *John Terry (previously referred to as LNS) v Persons Unknown* [2010] EWHC 119 (QB).

10. So let me put this matter in its context.

(2) Freedom of Expression

11. Freedom of expression, whether by individuals or by the media, and the ability to exercise it, is an essential feature of any open, liberal and democratic society. Lord Bingham described its importance in the following way,

> "*free communication of information, opinions and argument about the laws which a state should enact (and I should add, its courts develop and apply) and the policies its government at all levels should pursue is an essential condition of truly democratic government. These are the values which article 10 [of the European Convention on Human*

Rights] exists to protect, and their importance gives it a central role in the Convention regime, protecting free speech in general and free political speech in particular."[3]

12. Freedom of speech has a central role because – this time in the words of Lord Steyn – it is the '*primary right*' and the '*life blood of democracy*.'[4] It is a right which as Lord Justice Judge, now Lord Judge CJ, put it, is '*bred in the bone of the common law*.'[5] These are powerful statements concerning its central importance to our lives by three of the wisest judges of my lifetime. They are statements with which I am sure we would all unhesitatingly agree.

13. Powerful statements in support of freedom of expression are of course not confined to the judiciary, the common law, or the framers of the European Convention on Human Rights. Equally powerful statements in support of the right are, as we all know, set out in the US Constitution's first amendment, which provides in this respect, that "*Congress shall make no law . . . abridging the freedom of speech, or of the press . . .*". Describing freedom of expression as a primary right, as the life blood of democracy and specifying, as the US Constitution on the face of it does, no lawful basis to abridge it, suggests that as right it is very much first amongst equals: that it is a right which must reign unfettered and unrestricted. That of course is not the case, even if it is only through free expression, free speech, that we can maintain real democratic accountability. It is here then that we must turn to the right to respect for privacy and William Blackstone, the great 18th century codifier of the English common law, that is the law built up and developed by the judges of this country since the 12th century.

(3) The right to respect for privacy

14. Why Blackstone you might ask? Did he engage in activities that gave rise to media interest? If he did I'm not aware of it, but perhaps that's because he managed to obtain an early version of what are now called super-injunctions. But I rather doubt that. I turn to Blackstone because it is likely that James Madison, one of the founding fathers of the US and the first amendment's original draftsman, had his description of the common law right to

[3] *Regina (Animal Defenders International) v Secretary of State for Culture, Media and* Sport [2008] 1 AC 1312] at [27].
[4] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 126.
[5] *R v Central Criminal Court, ex parte Bright* [2001] 2 ALL ER 244 at [87].

freedom of expression in mind when he was drafting the amendment.[6] Blackstone had this to say,

"*The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but . . .*"[7]

15. And here I pause. An untrammelled right permits no 'buts'. Blackstone however understood the common law right to be subject to proper limits. He went on

' *. . .but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity*."

Blackstone had in mind here criminal libel – seditious libel: that is to say a statement which, amongst other things, brings into hatred or contempt the sovereign, government or administration of justice. Seditious libel you may be surprised to know was only abolished as a criminal offence last year through s73 of the Coroners and Justice Bill 2009.

16. The wider point to take from Blackstone is that freedom of expression was never understood by the common law to be an unqualified right. It is a right which has always been regarded as subject to limits: there is the well-known point that freedom of speech does not permit you to shout "fire" in a crowded building with a small exit – unless of course you reasonably believe that there is a fire. This point is reflected in the European Convention. Article 10(1) provides the right to freedom of expression, but article 10(2) sets out some qualifications of that right; qualifications which arise because the right '*carries with it duties and responsibilities*'. One of those qualifications is that the right may be subject to '*formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . .for the protection of the reputation or rights of others. . .*'. One of those rights, in addition to the protection of reputation, is that set out in article 8, the right to respect for privacy. And that right is itself subject to qualification. One of those qualifications is, as you might expect, that it can be qualified on the same basis as the Article 10 right can be qualified in order to protect the '*rights and freedoms of others*'; such as the right to freedom of expression.

[6] Cf http://www.law.cornell.edu/anncon/html/amdt1bfrag1_user.html#amdt1b_hd2
[7] Blackstone's Commentaries on the Laws of England, Vol. 2 at 152.

17. Freedom of expression can therefore be qualified by a need to protect the right to respect for privacy. Note the nuance here. It's the right to respect for privacy, rather than a right to privacy. There is no general right to privacy in English law. This point was resoundingly affirmed in the famous case of *Kaye v Robertson* from 1991. Gordon Kaye – an actor and the star of the BBC comedy series *'Allo 'Allo!* – was recovering in a private hospital room from brain surgery. A journalist crept into his room, photographed him and claimed to have interviewed him notwithstanding his medical condition. You would have thought perhaps that here was a clear case of invasion of privacy. Not so. As the Court of Appeal put it in clear terms [(1991) FSR 62 at (66)], "*in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy*."

18. You may well think that the Human Rights Act 1998 has changed all that. It hasn't; a point resoundingly made by the House of Lords in *Wainwright v Home Office*. In that case the Lords were invited to find that the Human Rights Act 1998 had introduced a right to privacy into English law. The invitation was flatly rejected. The Lords would not declare that there was as a consequence of the 1998 Act '*a previously unknown tort of invasion of privacy*" in English law.[8] In doing so they were acting, as Lord Hoffmann had it, consistently with the jurisprudence emanating from Strasbourg. How? Because as he put it, Strasbourg has held that the article 8 right to respect for privacy does not require a State to provide a high level, general, privacy law.[9]

19. We may have no general right to privacy, but the article 8 right has provided the impetus for the development of a number of discrete rights; the most obvious of which used to be known as the action for breach of confidence. Article 8's influence has seen that action develop beyond its traditional bounds so that there no longer needs to be a confidential relationship between the parties to any dispute. This development has led the action to be renamed the tort of misuse of private information. When assessing such a claim a court must first decide whether the claimant has established whether there is a reasonable expectation of privacy in respect of the information of which disclosure is threatened.

[8] [2004] 2 AC 406 at [35].
[9] Ibid at [32].

20. If there's a reasonable expectation, the next issue is whether disclosure can be justified. Is disclosure in the public interest for instance? Is the information already in the public domain? Would an order barring disclosure be both necessary and proportionate? That is where the considerations set out in article 8(2) and 10 come into play. And where they are both in play neither as precedence over the other. When considering the conflict between the two the court is required to do three things: first, it must intensely scrutinise the comparative importance of the specific rights claimed in the particular case; it must then consider the justifications set out for interfering with or restricting each right; and finally, the court must consider the proportionality of the proposed interference or restriction.

21. These are all difficult questions. They require the court to carefully weigh evidence; to carefully consider competing rights. Where does freedom of expression begin and respect for privacy end? In answering these questions the courts have to consider a wide range of factors and circumstances. Decisions will necessarily be case-sensitive. You might want to consider whether and to what extent any general principles can be established in this area? A general policy decision has been taken by Parliament to introduce article 8 through the Human Rights Act. That policy decision now requires the courts to balance competing rights; and to do so where neither has precedence.

22. An example of the balancing exercise can be found in the House of Lords decision in Naomi Campbell's case against the Daily Mirror. She had announced that she did not take drugs; Mirror reporters and photographers caught her going into a drug-rehabilitation unit, and the newspaper published the story and photographs. All five members of the House considered that Ms Campbell's article 8 rights and the Mirror's article 10 rights were engaged. The question was how to balance them. All five Law Lords thought that, because she was a public figure who had publicly lied about her drug usage, Ms Campbell's rights were overridden by the Mirror's article 10 rights, but only to the extent of the published story. Three of the five thought, however, that the publication of photographs was a different matter, and held that they did infringe Ms Campbell's article 8 rights. A picture was worth more than a thousand words. The case shows the potential subtlety, or sensitivity, of the balancing exercise: for the written newspaper story, Ms Campbell's article 8 privacy right was outweighed by the Mirror's article 10 freedom of speech right. But the balance went the other way round when it came to publication of the photographs.

23. So, in a way, the ultimate policy decision on the balance between freedom of expression and respect for privacy appears to have been left in the hands of judges rather than Parliament. A better analysis in my view, is that, as often happens, Parliament has enacted the general policy, and has left the application of that policy to particular cases in the hands of the judiciary. Nonetheless, are we judges enforcing the law or creating it? That is one of the questions which is likely to be discussed in the coming years by policy-makers, by Parliament, even by you.

24. But I did promise to talk a little about John Terry and super-injunctions.

(4) John Terry and Super-Injunctions

25. John Terry is, of course, a very well known football player: captain of Chelsea and former England captain. As we all now know, he was at one time involved in an extra-marital relationship with the former partner of a former team-mate and friend. In January this year he became concerned that rumours about that relationship were circulated and might become public. He applied to the court for an injunction barring publication of that information. He also wanted the very fact that the injunction had been granted to be secret. He wanted what has become known in the press as a super-injunction – one which prohibits publication of the very existence of proceedings.

26. Mr Terry's application was made without notice; that is to say the individuals who might have had the information or who might have been considering publishing it were not cited as respondents to the application and, as a consequence, were given no notice of it. The application was simply made against '*persons unknown*'.

27. Mr Terry put his case on two footings. First, that publication of the information would amount to an actionable breach of confidence. Secondly, that publication of the information would be a misuse of private information. The Judge didn't think much his case on breach of confidence, but he considered the misuse of private information argument was stronger. While he accepted that there was a real risk that some information about the relationship would be published, he did not think that there was a real threat that intrusive details or photographs would be published. So, he did not accept that Terry was likely to succeed in establishing that publication should be prohibited. You might want to note though that the Judge said that *if* he had been satisfied that there was a real risk of publication of intrusive

details of the relationship of photographs he would have been satisfied that publication should be prohibited.

28. What of the clash between open justice and super-injunctions? It is suggested by some that over 200 super-injunctions have been granted. It is probably inevitable that one cannot know how many have been granted, given that it is, or at least should be, of the essence of a super-injunction that nobody knows about it. An instance perhaps of what one commentator has referred to as the Kafkaesque nature of this type of court order.

29. But what of the substantive issue? How do we reconcile such injunctions with the principle of open justice? The first thing we could say is, as Mr Justice Tugendhat, the judge in the *Terry* case, pointed out, where such an issue is raised it requires intense scrutiny by the court. It does so because openness is one of the means by which public confidence in the proper administration of justice is maintained. Where justice is carried out in secret, away from public scrutiny, bad habits can develop. Even if they don't develop, the impression may arise that they have done so. Neither reality nor suspicion are an acceptable feature of any open society.

30. There is another issue that needs to be considered: what about the rights of third parties? The right to open justice, as part of the right to fair trial, is an indivisible right. It is a right applicable equally to claimants and defendants. How is this principle squared with, as in the John Terry case, the fact that no named individual is before the court or named as a respondent? Where the respondent is genuinely unknown the court must of course rely on the applicant disclosing the issues both in favour and against granting the order. But what of the situation where the applicant does not know who the respondent is but has in mind a number of other individuals who they intend to serve with the order? Should they be required to ensure that those individuals are given a proper opportunity to make submissions to the court? And how? At the time the initial without notice application is made? Or at a later on notice hearing after the order has been made?

31. These are all important issues; and difficult ones which a committee which I'm chairing will be looking at over the coming weeks. But what do you think? Are such orders acceptable in certain cases? If so, in what circumstances and what safeguards might be required? Or do they smack of Kafka? I leave you to think about that and look forward to your questions – on this, or on any other topic whatever which you wish to raise.

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