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*Lord Lester of Herne Hill QC**

FREE SPEECH TODAY**

INTRODUCTION

It is a great honour to have been invited to give the tenth and final Marek Nowicki Memorial lecture. It is a particular pleasure to do so in the presence of my colleague and friend Professor Wiktor Osiatyński. His study of individual rights and constitutionalism has led him to conclude that the House of Lords is the finest legislative body in the world. I doubt whether that eccentric view is shared by elected British politicians or the British media.

The previous lecturers have been judges, scholars and activists who have worked to protect human rights against the abuse of power. I am proud and honoured to be placed among them. The lecture is a tribute to Marek Nowicki the eminent human rights activist and defender. He co-authored the Polish Charter of Rights and Freedoms and helped shape the Polish Constitution. He supported human rights movements in authoritarian countries and new democracies – especially in Poland and the other post-Soviet states.

Poland's tragic history over the centuries, culminating in the Nazi and Soviet occupations, is happily in the past. But memories of the last World War are still bitter, including the sacrifices of so many during the resistance to Nazi and Soviet occupation, and the destruction and rebirth of this historic city. To remember the heroic contribution of Polish airmen to the Battle of Britain and the Allied cause during the Second World War, the Polish War memorial, near RAF Northolt, designed by a survivor of a Nazi concentration camp, is a reminder, lest we forget, of the brave young Polish airmen who died to defend Europe from barbarous tyranny.

The citizens of my country and of Europe recognize that Poland has been outstandingly successful as a new democracy in giving enlightened leadership in the New Europe, when several former members of the Soviet bloc are succumbing to totalitarian rule, xenophobia and racism.

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I am grateful for the support I have been given by the Helsinki Foundation for Human Rights in Warsaw. The recent decision to establish a Parliamentary Subcommittee on the execution of judgments of the European Court of Human Rights is a matter for celebration. I shall report back about this great advance to the United Kingdom's Joint Parliamentary Committee on Human Rights. I hope its mandate will be broadened to cover human rights in Poland, just as the UK Committee covers human rights in the UK.

In November I gave my other Marek Nowicki lecture in Budapest – on measures to combat racial prejudice and discrimination. Tragically that topic is relevant everywhere, not least in Poland where my wife Katya's Jewish relatives were murdered in Nazi extermination camps.

You have chosen another, happier and equally important subject for this lecture. It is also close to my heart and my life's work – freedom of speech today. I am not an expert in Polish law. If I make mistakes I look forward to being put right. I shall recall basic principles about free speech and its limits, and focus on British experience and European case law of relevance to Poland.

1. THE FUNDAMENTAL RIGHT TO FREE EXPRESSION: A CULTURAL REVOLUTION

Freedom of expression is the touchstone of all human rights. It is the primary right in a democracy, without which effective rule of law is impossible. It is essential to an intellectually healthy society. It promotes individual self-fulfilment and acts as a check on the abuse of power by public officials. It exposes errors in the governance and administration of justice. In the famous words of John Stuart Mill, "the best test of truth is the power of thought to get itself accepted in the competition of the market", though Mill's belief rested on the assumption that the market would not be distorted by the State or media giants.

The UK has a vibrant culture of liberty – a political and philosophical heritage we trace back to British thinkers such as Milton, Wilkes, Paine and Mill. But fifty years ago free speech was not an enforceable right in the UK. From a strictly legal point of view, it was a freedom, not a right. It amounted to what was left over after restraints on free expression had been given effect – the criminal and civil laws regulating defamation, blasphemy, contempt of court, contract, the misuse of private information and official secrets. In the absence of a constitutional code of fundamental rights, our legal system was ethically aimless.

As a result, many judgments of our most senior judges gave too little weight to free speech. I was fortunate to act for the press in successfully challenging unduly restrictive judgments by our then supreme judicial authority – the House of Lords – before the European Commission and Court of Human Rights. Our successes helped to convince a new generation of British judges of the need to take the European Convention and its case law more seriously.

Our legal, cultural and constitutional revolution came when the Convention rights were given direct effect in UK law through the Human Rights Act 1998. Today, freedom of expression is recognised in the UK as a fundamental constitutional right anchored in the Convention and the common law. The right to free expression is – should be – subject only to exceptions that must be prescribed by law; and that must never go further than necessary.

We do not have the benefits or burdens of a written constitution like yours, but our system works well. It is a holistic system because it includes a parliamentary committee of both Houses of Parliament that scrutinises proposed legislation for compatibility with the UK's commitments under human rights treaties. However, the survival of our system is threatened by the politics of Europhobia. Senior members of the ruling Conservative Party have threatened to destroy the Act if they win a majority at the next election. They seek to replace it with a new and weaker British Bill of Rights that will prevent or limit recourse to the Strasbourg Court. That would set a terrible example elsewhere in Europe and would undermine the European rule of law.

With the end of the Cold War, the West no longer competes with Russia as it did, and commitment to the European human rights system has weakened. The Strasbourg Court is overwhelmed and starved of much needed resources. My hope is that you, who have had such tragic experiences of Nazi and Soviet occupation and oppression, will give strong leadership in protecting and building on what we in the West achieved during the first half century of the Convention system.

2. CRIMINALISING OFFENSIVE SPEECH

Until recently, we British were subject to a wide array of ancient common law speech crimes. They included the crimes of defamation, sedition, obscenity and blasphemy. Designed to protect public order and to deter threatening, abusive and insulting speech, they were vague and broad offences and disproportionate in their impact on free speech. Parliament has recently replaced them with carefully tailored and more legally certain provisions.

The UN Human Rights Committee has rightly recommended that states should consider decriminalising defamation to protect free speech.[1] The UK has abolished the offence;[2] and many other countries have decriminalised it.[3] However, the crimes

[1] CCPR/C/GC/34, para 47. Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2). The European Court of Human Rights has recognised that whilst the use of criminal sanctions in defamation cases is not itself disproportionate, the nature and severity of the penalties imposed are factors to be taken into account because they must not be such as to dissuade the press or others who engage in public debate from taking part in matters of legitimate public concern. *See Lewandowska-Malec v. Poland*, App. 39660/07, para. 69.

[2] The UK abolished the criminal offences of seditious, defamatory and obscene libel through the Coroners and Justice Act 2007.

[3] These include New Zealand, Bulgaria, France, Ghana, Sri Lanka and Bosnia and Herzegovina. Of the member states of the Inter-American Commission on Human Rights, the Office of the Special

of harming reputation, or causing offence, are still alive in many other parts of the world – where they are used to suppress or deter dissent and criticism.[4]

In 2012, the European Court of Human Rights ruled that the Polish Courts had not given enough protection to free political debate. The Polish courts had convicted a local councillor of defamation for alleging that the mayor of her municipality[5] had interfered unlawfully with the prosecution service.[6] The Strasbourg Court recalled that politicians acting in their public capacity "inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large."[7] It pointed out that it is "precisely the task of an elected representative to ask awkward questions about those who hold public office and to be hard-hitting in her criticism of fellow politicians responsible for the management of the public purse."[8]

In another Polish case decided in 2012,[9] a journalist and editor-in-chief of TEMI, a local weekly newspaper in Tarnów, complained that their right to freedom of expression had been violated. The paper had published a series of articles alleging that a local councillor had broken the law and been guilty of offensive conduct. The journalist and editor were convicted for defaming the councillor.

The Strasbourg Court once again emphasised the essential role played by the press in a democratic society, and the duty of the press to impart information and ideas on matters of public interest. It recalled that a degree of exaggeration and immoderation is allowed for those taking part in a public debate on matters of general interest. The Court unanimously found a violation of the right to free expression protected by Article 10.

The Polish government paid damages for violating the applicants' right to free expression in both these cases. What is not apparent to me is what general measures have been taken to prevent similar further violations. Despite amendments to the Criminal Code in October 2010, the offence of defamation through the mass media still carries a prison sentence of up to a year.[10] The Criminal Code still punishes those whose publications insult a public official, the Polish Nation or the President.[11] A number of politicians, including the Prime Minister, have expressed support for amending the Criminal

Rapporteur for Freedom of Expression has commended Jamaica in for decriminalising libel in addition to Mexico, Panama, Brazil, Uruguay, Argentina, Costa Rica, El Salvador, Grenada and Bolivia. Source: Press Release, Office of the Special Rapporteur for Freedom of Expression, 11 November 2013, R78/13.

[4] This was recognised by the Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, CCPR/C/GC/34, para. 38.

[5] Świątniki Górne Municipality.

[6] *Lewandowska-Malec v. Poland*, Application No. 39660/07.

[7] *Ibidem*, para. 66.

[8] *Ibidem*, para. 67.

[9] *Jucha and Zak v. Poland,* Application No. 19127/06.

[10] An amendment to the Criminal Code in October 2010 abolished the penalty of imprisonment for the offence of slander and reduced the penalty for defamation committed through the mass media from two years to one year.

[11] Insult of a public official is an offence under Article 226 of the Criminal Code, as are insult of the Polish nation and of the President under Articles 133 and 135. Insult to another person is an offence under Article 216.

Code[12] – but with two prosecutions brought in the last two years against Polish citizens who mocked the President on the web, these provisions remain very much alive.[13]

In Britain, we no longer believe that the judiciary need special protection of the criminal law against ridicule and insult. Parliament has therefore recently abolished the crime of insulting judges – "scandalising the judiciary"[14] – as our Law Commission had recommended.[15]

In contrast, in 2003, the Strasbourg Court found a breach of the Convention involving a Polish prisoner. He had written a letter of complaint to the authorities, referring to various judges as "irresponsible clowns" and "cretins".[16] He was convicted for the crime of preferring insults against a state authority[17] and given a custodial sentence. The Strasbourg Court did not criticise the nature of the offence but ruled that the sentence was disproportionate to the legitimate aim of protecting the authority of the judiciary.

A further Polish case is now pending before the Strasbourg Court concerning criminal defamation proceedings against a journalist who criticised a judge for alleged abuse of office.[18] I hope that it will cause the Court to reconsider its case law. The Court accepts, in principle, the need to protect the judiciary from unwarranted attacks but it is important that the protection is not excessive.

3. HATE SPEECH

In Britain we do not believe in using the criminal law to protect judges against robust criticism, but we do believe in safeguarding vulnerable minorities against hate speech. We strive to maintain a fair balance between freedom of speech, public order and the rights of others. Yet laws against hate speech are difficult to enforce in a way that promotes human dignity and achieves their aims. Consider the supremacist who states that in his opinion, all Jews, or black people, or homosexuals, or women, deserve to die. If the authorities are successful in prosecuting him, the defendant claims that the state has violated his right to free speech. And if the prosecution fails, it is politically

[12] Freedom House Report, Poland, 2013, available at http://www.freedomhouse.org/report/freedom-press/2013/poland.

[13] *Blogger charged with insulting Polish President*, 16 January 2013, Thenews.pl (http://www.thenews.pl/1/9/Artykul/124311,Blogger-charged-with-insulting-Polish-president).

[14] Crime and Courts Act 2013, s. 33 (England and Wales); and Criminal Justice Act (Northern Ireland) 2013, s. 12.

[15] *Contempt of Court: Scandalising the Court*, Law Commission Report No 335, 18 December 2012.

[16] *Skalka v. Poland*, Application no. 43425/98; *contrast* to *Lopuch v. Poland*, Application no 43587/09, where no violation was found.

[17] Article 237 of the Criminal Code of 1969.

[18] *Marzanna Lozowska v. Poland*, Application No. 62716/09. The case of *Maciejewski v. Poland* (Application No. 34447/05) is also pending, which concerns defamation of a prosecutor. The Helsinki Foundation for Human Rights has submitted a third party intervention to the Court in *Lozowska* and will represent the applicant before the Court in *Maciejewski*.

dangerous, as the defendant claims the victory legitimates his hate speech. It is a Catch 22 situation.

The position under the First Amendment to the US Constitution is different. Nothing less than a threat of imminent violence justifies restricting hate speech.[19] Causing gross offence is not enough: life or limb must be at stake.

The European Court of Human Rights, on the other hand is more protective of the right of vulnerable minorities to be protected against hate speech.

British criminal law is unusual in making distinctions between the protection given to different categories of hate speech. Criminalising *race* hate speech is stricter than *religious* hate speech because of their different implications for freedom of debate. We consider that to attack people because they are black is to attack them because of their common humanity, their genetic birthright. To attack the beliefs and practices of a religious organisation and its followers is more similar to attacking a political organisation or politician because of the need to permit freedom of public criticism and debate.

The victims of homophobic hate speech require strong protection. One's sexuality is a characteristic, not a belief – part of an individual's core make-up. However, many people in Britain still refuse to accept this. They view sexuality as a lifestyle choice, ignoring the reality of how little control our hearts have over whom we love. I tried unsuccessfully to argue in the House of Lords that homophobic hate speech should have the same protection as race hate speech. Instead, our legislation treats it as similar to religious hate speech in giving greater scope for public criticism and debate.

Some members of the Strasbourg Court have recently suggested that the old case law on hate speech may be too restrictive of free expression. I agree and hope that it will be reviewed.[20] But that does not mean that there should be no criminal sanctions against extreme forms of hate speech. The UN Human Rights Committee recommended, more than three years ago, that Poland should amend the Criminal Code to include hate speech and hate crimes based on sexual orientation or gender identity.[21] At present, victims of homophobic hate speech can seek redress only on the basis of general laws protecting "personal rights", including reputation, rather than personal safety and public order.[22]

[19] US law gives much wider protection for hate speech. The public appeal to "return the nigger to Africa and the Jew to Israel" at a political rally was not considered imminent enough to negate the protection of the First Amendment *Brandenburg v. Ohio*, 395 US 444 (1969).

[20] In their concurring opinion in *Vejdeland and others v. Sweden* (Application No. 1813/07), Judge Yudkivska and Judge Villiger expressed regret that the Court had missed an opportunity to consolidate an approach to hate speech against homosexuals (para. 2).

[21] Concluding Observation of the Human Rights Committee, Poland, CCPR/C/POL/CO/6, 27 October 2010, para. 8. At present, protection extends only to hate speech affecting national, ethnic, racial and religious minorities.

[22] A. Bodnar, A. Gliszczynska-Grabias, K. Sekowska-Kozlowska & A. Sledzinska-Simon, *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Thematic Study Poland*, April 2008-March 2010, European Union Agency for Fundamental Rights: 2010, pp. 48-55.

Recent efforts by equality advocates[23] have yet to result in changes to the Criminal Code.

Your government has worked to encourage the police service to be more sensitive to lesbian, gay, bisexual and transgender issues.[24] But well-publicised homophobic remarks by holders of public office indicate that cultural change is yet to permeate other spheres of national life.

In Britain, we do not believe that God needs the protection of the criminal law against blasphemy, insult or ridicule. Blasphemy laws forbidding causing offence to religious feelings are still used in Poland, and would seem unnecessarily to restrict the expression of artists, musicians and writers by encouraging self-censorship.[25] Although the Strasbourg Court grants a wide margin of appreciation in this area, it is not unlimited. Britain has abolished blasphemous libel as an undesirable and practically unworkable offence in a multi-faith society.[26] I hope that the Strasbourg Court would come to a similar conclusion and that blasphemy laws will become a thing of the past across Europe.

4. PROTECTING A GOOD REPUTATION

The Convention requires State parties to balance the right to protect a good reputation, the right of access to justice, and the right to freedom of expression.

The English civil law of defamation used to give too much protection to reputation and too little to freedom of speech. It was the handiwork of the courts, rather than legislators. It unfairly tilted the balance in favour of wealthy public figures. Libel law was used by rich and powerful and their lawyers against those alleging misconduct. Only

[23] In 2008, the official governmental draft of amendments to the Polish Criminal Code, which was approved by the *Sejm*, omitted amendments grafted by LGBTQ rights organisations to extend the scope of protection provided by hate speech. In 2011, a new bill to combat hate speech was also rejected. Three further draft bills amending the scope of hate crimes were submitted to the *Sejm* in 2012 but at the time of writing, none are yet law.

[24] Poland reports in its country submission to the latest Universal Periodic Review that it has introduced monitoring of police reactions and behaviour at large-scale events attended by representatives of the LGBT community; and also organised meetings to about best practice in other countries in protecting LBGT rights. *See National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, 2012 (A/HRC/WG.6/13/POL/1), paras. 141-142.

[25] *Policing Belief: The Impact of Blasphemy Laws on Human Rights – Poland*, Freedom House Report, 2010. The European Court of Human Rights has clearly ruled the right to freedom of religion does not impose a duty of States to enact laws that protect believers from insult or offence. In *Dubowska & Skup v. Poland*, (Application No. 33490/96) which concerned the publication in a newspaper of a picture of Jesus and Mary with a gas mask over their faces, the Commission found that the publication in question had not prevented anyone from exercising their freedom of religion, and that the decision by the authorities not to prosecute anyone did not, in itself, amount to a failure to protect the applicants' rights.

[26] Criminal Justice and Immigration Act 2008, s. 79. This reform is yet to be applied in Northern Ireland.

they could afford the costs of defending these claims; and they used the law to suppress and punish publications that criticised them. If a citizen critic, newspaper or broadcaster could not prove the truth of an allegation, it was no defence that publication was in the public interest. The law's failure to keep pace with rapidly changing technology added to the case for legislative intervention.

The seriously chilling effect of the English common law of libel became notorious. It led to "libel tourism" – wealthy foreign claimants suing in London for libels that had little connection with the United Kingdom.[27] President Obama and the US Congress enacted legislation to bar English libel judgments from being given effect in the USA.[28]

English courts did their best to alleviate these problems if and when suitable cases came before them, but there was a limit to what they could achieve. Judicial reform is slow and piecemeal. Judges are constrained by precedent and the constitutional limits on their powers. Real change required Parliamentary intervention.

Free speech groups campaigned for reform. By the General Election of 2010, all three main political parties were committed to changing the law. The Coalition Government built on my Private Member's Bill to fashion the Defamation Act 2013, after public consultation and careful Parliamentary scrutiny. It came into force in England and Wales on New Year's Day this year.

The new Act is not a charter for irresponsible journalism. It strikes a fair balance between reputation and free expression:

- no one can bring a claim unless they show they have suffered serious harm; that should weed out trivial cases at the outset.
- companies have to prove serious financial loss before they vindicate their business reputations;
- the defences of truth and honest opinion have been brought up to date and widened; and a key defence of publication on a matter of public interest has been made user-friendly;
- because the right to trial by jury has proved to be an unreliable protector of free speech and has impeded the speedy resolution of disputes, the Act creates a presumption in favour of trial by judge alone;
- libel tourism from outside the EU is discouraged; and
- to enable effective access to justice, new rules on costs are being developed to protect the poor and the not so rich from liability for costs if they do not succeed – whether as claimants or defendants.

[27] One well-known victim of libel tourism was Rachel Ehrenfeld, an American author. She wrote a book arguing that a wealthy Arab businessman was funding terrorism. The businessman and his two sons sued in London. They were awarded GDP 10,000 each, plus legal costs. The case provoked outcry in the United States. *See Bin Mafouz v. Ehrenfeld,* [2005] EWHC 1156 (QB).

[28] Securing the Protection of our Established and Enduring Constitutional Heritage Act ("SPEECH Act").

5. PRIVACY AND PRIOR RESTRAINT ON PUBLISHING

As well as free speech, privacy is a fundamental right. Through the Human Rights Act, Strasbourg's case law provides guidance to our courts in striking the balance between these two values when they come into conflict.[29]

One example occurred when a UK newspaper published a covertly filmed sex tape involving a public figure, alleging that the tape exposed him as a sado-masochistic sex pervert. He applied to the Strasbourg Court. He asked the judges to rule that the right to privacy under Article 8 requires the media to give an individual prior notice of an intention to invade private life, to enable the victim to obtain an injunction to prevent publication pending trial.[30] I intervened on behalf of the media to resist his claim. In a previous case, the Strasbourg Court had cautioned that the dangers inherent in such practices "are such that they call for the most careful scrutiny […] This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."[31]

The Strasbourg Court decided that a rule enabling a potential victim to obtain a prior restraint on publication was unnecessary and would unjustifiably interfere with free expression.[32] Poland is one of a small number of European States that has a rule requiring prior notice, to enable a potential victim to seek an order preventing publication of a threatened invasion of privacy.

In its judgment in *Wizerkaniuk v. Poland*,[33] the chief editor and co-owner of a local newspaper, Mr. Wizerkaniuk, published the transcript of an interview with a local MP.

[29] English courts have particular regard to Strasbourg case law in adjudicating claims of misuse of private information. See *Campbell v. MGN Ltd* [2004] 2 WLR 1232, *McKennitt v. Ash* [2006] 3 WLR 194; *Mosley v. News Group Newspapers Ltd* [2008] EMLR 20; *AAA v. Associated Newspapers Ltd* [2013] EMLR 2. We also protect sensitive personal data, through the Data Protection Act, 1998. This statute was enacted in part to implement Council Directive 95/46/EC, which was concerned with the protection of an individual's Convention rights to privacy. Section 13 of the Act grants an individual a statutory right to compensation for damage (including distress, in certain specified circumstances) against a "data controller" who contravenes any of the requirements of the Act, including those relating to the processing of sensitive personal data (sec. 2 and schedule 3). Sec. 13 is subject to exemptions listed in Part IV, including justification for publication on the basis that a publisher reasonably believed that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest (sec. 32.1b).

[30] *Mosley v. UK*, Application No. 48009/08.

[31] *Sunday Times v. United Kingdom (No 2)*, Application No. 13166/87, para. 51.

[32] *Mosley v. UK*, paras. 126-132. The Court had regard to significant doubts as to the effectiveness of any such pre-notification requirement, as well as the chilling effect to which it would give rise. It reasoned that any such requirement must be subject to a public interest exception to be compatible with Article 10; and that the exception could not be narrowly defined without having a seriously chilling effect on free speech. More importantly, for such a requirement to be effective, a regulatory or civil fine for failure to observe it would need to be set at a punitively high level. However, punitive sanctions would also create a chilling effect, which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention.

[33] Application No. 18990/05.

He did not obtain the MP's consent; and was convicted of a criminal offence under the Press Act 1984. The Strasbourg Court decided that the Polish rule requiring consent was incompatible with Article 10 of the Convention. It said the Press Act gave interviewees *carte blanche* to prevent a journalist from publishing any interview they regard as embarrassing or unflattering – regardless of how truthful or accurate it may be.

The Court also made these significant observations:

> the Press Act was adopted in 1984, twenty-seven years ago. It was adopted before the collapse of the communist system in Poland in 1989. Under that system, all media were subjected to preventive censorship. The Press Act 1984 was extensively amended on twelve occasions […] However, the provisions […] on which the applicant's conviction was based were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland's transition to democracy. It is not for the Court to speculate about the reasons why the Polish legislature has chosen not to repeal those provisions. However, the Court cannot but note that as applied to the present case, the provisions cannot be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society.[34]

Poland has submitted an Action Plan to the Committee of Ministers of the Council of Europe that supervises the execution of these judgments,[35] but I gather that the Press Act has yet to be amended.[36]

6. PRESS REGULATION

I turn now to the highly contentious issues about the regulation of the press. It is important to have a fairly balanced legal framework that protects reputation, personal privacy, free speech and access to justice and promotes professional standards of journalism. But law is no panacea. The culture of journalism is vital to a healthy democracy as well. Journalism is, or should be, a profession and not merely a business. The media must maintain high professional standards in communicating information and opinions on matters of public importance. Judges should respect the editorial judgments of publishers, and publishers should do what they can to act fairly and lawfully, so that victims of press misconduct do not need to seek legal redress.

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[34] *Ibidem*, at para. 84.

[35] *Action Plan: Information on measures taken to implement the judgment in Wizerkaniuk v. Poland*, DH-DD(2013)68, 28 January 2013. The Action Plan stated that a draft law repealing the criminal liability of journalists for failure to obtain authorisation had been prepared by a group of Parliamentarians and was under consideration by the Polish Parliament. However, it was not implemented. In 2008, the Polish Constitutional Court ruled that the requirement to obtain prior authorisation complied with the Constitution (Judgement of the Constitutional Court of 29 September 2008, SK 52/05).

[36] At the time of writing, Parliamentarians from the Polskie Stronnictwo Ludowe (Polish People's Party) have prepared a draft law to amend the Press Act 1984, including the abolition of criminal liability for failure to obtain prior authorisation. However, there appears to be an absence of political will to take the bill forward through its legislative stages.

In England, the seventeenth century royal censor, the Court of Star Chamber,[37] was notorious in the way that it licensed the press to suit the Stuart Kings. John Milton famously denounced press licensing as "a dishonour and derogation to the author, to the book, to the privilege and dignity of learning."[38] The failure to renew the Licensing Order[39] has always been regarded as a major triumph for liberty in my country. That view is echoed by the judgement of the Inter-American Court of Human Rights, which decided that licensing of journalists violated the fundamental right to free speech.[40]

In Poland, the criminal offence of failing to register a newspaper or periodical before commencing publication was deemed unconstitutional in 2011.[41] But the registration requirement persists.[42] It remains to be seen whether, as I would expect, the Strasbourg Court will adopt the approach of the Inter-American Court. I understand that the provisions of the Press Act in this regard have caused considerable uncertainty for online publications, unsure of whether they too will face fines for failure to register.

As with compulsory registration, laws that threaten the press with punitive sanctions for bad journalistic conduct chill the free exchange of information and ideas. The provisions of the Polish Press Act reached the Strasbourg Court again in a case decided in 2012.[43] The editor of a local independent weekly newspaper published an article about the local authority's failure to tackle the public health risks of an insanitary sewage system. He was criminally sanctioned for failure to publish the mayor's reply to the article. But Strasbourg ruled the conviction was not necessary in a democratic society. The Court described the Press Act provisions as having an "enormous dissuasive effect" for open and unhindered public debate.[44] The Polish Constitutional Court had by this time also ruled the relevant provisions incompatible with the constitution; and I understand that they are no longer in force.[45]

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[37] Initially a court of appeal, the power of the Court of Star Chamber grew considerably under the Stuarts, and by the time of Charles I it had become a byword for misuse and abuse of power by the king and his circle. It was used to suppress opposition to royal policies. Court sessions were held in secret, with no right of appeal, and punishment was swift and severe to any enemy of the crown. It was eventually abolished in 1641 by the Long Parliament.

[38] *Areopagitica: A speech of Mr. John Milton for the Liberty of Unlicenced Printing, to the Parliament of England*, 1644.

[39] Of 1643.

[40] *Compulsory Membership in an Association Prescribed by law for the practice of journalism,* Advisory Opinion OC-5/85, November 13, 1985, Inter-Am Ct HR (Ser A) No 5 (1985).

[41] Case SK 42/09, 14 December 2011. The ruling was restricted to the registration of printed periodicals.

[42] Failure to register has since been reduced to a minor offence (governed by the Minor Offences Code rather than the criminal code) and the maximum penalty for failure to register has been reduced to a fine.

[43] *Kaperzynski v. Poland*, Application No. 43206/07, 3 April 2012. Provisions setting out a right of reply remain part of the Press Act but are now governed by civil rather than criminal law.

[44] At para. 74.

[45] *See Action Report: Information measures to comply with the judgment in the case of Kaperzynski v. Poland*, DH-DD(2013)1251, 19 November 2013, para. 2.1a, "Legislative Changes".

In Britain, we too have been wrestling with how to improve press regulation without state control. The print media used to regulate itself ineffectively through the Press Complaints Commission (PPC), a voluntary body funded and controlled by the press themselves. It was widely criticised for lacking independence from newspaper proprietors and editors, and for failing to provide effective remedies for victims of press malpractice. In 2009, a disgraceful example of press abuse emerged. *The News of the World* had illegally hacked phones on a huge scale to retrieve private information for news stories. The scandal resulted in prosecutions and one national title being closed down.

Our existing criminal law is adequate to prosecute and convict those involved in such conduct. Several trials are well underway. However, the scale of the scandal – which led to more than 100 arrests – exposed the shortcomings of self-regulation by the toothless PCC. The Prime Minister set up a public inquiry chaired by a judge, Sir Brian Leveson. His report diagnosed the problems of abuse by the media – but his recommendations for a new regulatory system were more controversial. He proposed a voluntary system backed by the threat of punitive damages for newspapers that fail to join the scheme.

The three main parties agreed to create a Royal Charter to give legal recognition to an independent regulator fulfilling Leveson's criteria. The Royal Charter model is a convoluted way of avoiding direct statutory underpinning. It is backed by statutory provisions providing for a punitive regime of costs and damages for newspapers unwilling to comply with the scheme.[46] Punitive damages offend the right to free expression and their use has been criticised across the free world.

The Charter will not become operative unless some or all of the Press agree to join the scheme. Instead of doing so, the newspaper industry has boycotted the scheme by pushing ahead with their own plans for a regulator independent of politics. The government indicated last November that it would suspend its plans for the Charter to give the Press time to establish their own scheme, the Independent Press Standards Organisation (IPSO). The new Chair and Board of IPSO has been appointed; and it is expected that the regulator will become fully operational by the end of the summer.

One radical journalist has observed[47] that the Leveson inquiry into the phone-hacking scandal of the late *News of the World* "has been a pretext for a mission to purge the entire 'popular' press, using high-profile victims as human shields, high-ranking celebrities as voice-over artists, and high-minded talk of 'ethics' as a code for advancing an elitist political and cultural agenda […] Far from needing more regulation and regimentation, what the press needs is greater freedom and openness."

I do not go so far but am closer to his views than to those who support coercive measures to regulate the print media. I believe in independent self-regulation to provide

[46] Enterprise and Regulatory Reform Act 2013, section 96; Crime and Courts Act 2013, sections 34-42. The Crime and Courts Act 2013 provides for a punitive regime of costs and damages for newspapers unwilling to comply with the scheme, and the Enterprise and Regulatory Reform Act provides that any future attempt to amend the Royal Charter must have parliamentary approval.

[47] M. Hume, *There is No Such Thing as a Free Press*, Imprint Academic, Exeter: 2012.

effective remedies and promote professional standards, with the courts intervening only where the press has abused its powers.

7. THE INTERNET

The Internet vastly increases free expression. It allows two billion people to communicate with each other across the world, more rapidly and more frequently than ever before. Mobile phones connect millions more.[48] Previously marginalised voices are now heard and their stories circulated. The web's anonymity provides a cloak for whistle-blowers to publish secrets. New navigation tools, like hyperlinks and RSS feeds, take power away from those who used to set the ranking of the news agenda for everyone else.

But the Internet also creates new problems. Content can be republished easily worldwide. It may cause great harm to the privacy and reputation of others. Publishers may face criminal and civil liability in some 190 countries across the world, each with their own laws regulating privacy, confidentiality and defamation. At the same time, those harmed by the postings of anonymous users may find it impossible to identify them and hold them to account. Law enforcement agencies face new challenges in chasing irresponsible whistle-blowers, paedophile rings, cybercriminals and internet trolls. The web generates a footprint of data about every user, much of it accessible by hugely powerful search engines. This raises questions about how to protect users' privacy from those who would access that data for their own purposes – whether commercial advertising companies or state-employed spies.

Over-centralised regulation brings its own fears, many of them Orwellian. But it is unachievable whilst national governments have such different perspectives on the web. Take the example of the legal liability of internet service providers. At one extreme, there is the United States and the First Amendment, which confers virtual immunity on internet service providers. At the other extreme is China, Russia and Iran, struggling to censor through national intranets and firewalls.[49] In the middle, we have the European position, where the E-Commerce Directive imposes limited liability on internet service providers by means of a so-called 'notice and takedown' system.[50]

[48] At the end of 2013, 1.5 billion people own smartphones. It is predicted that mobile Internet use will increase at a rate of 66 percent each year over the next five years (source: Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2013–2018, summary available at: http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.html).

[49] They will not succeed because their people already know how to circumvent these restrictions. *See generally* Mei Ling Yan, *The Impact of New Media on Freedom of Expression in China and the Regulatory Responses*, chapter in forthcoming book (on file with the author).

[50] 2000/31/EC. Regrettably, the philosophy underpinning that approach was not given sufficient weight by the Strasbourg Court in the recent judgment of *Delfi v. Estonia* (Application No. 64569/09). An Estonian news website was held liable for defamatory comments posted by its readers underneath an article. The newspaper argued this ruling was incompatible with its right to free expression but the Strasbourg Court found no violation of Article 10. The Court stated the site host should have expected

8. BALANCING PRIVACY AND NATIONAL SECURITY

In January, a two-year inquiry by an independent international commission, headed by the Swedish Foreign Minister, Carl Bildt, was launched.[51] It will focus on state censorship of the internet, as well as issues of privacy and surveillance raised by the Snowden leaks about America's NSA and Britain's GCHQ spy agencies. The European Commission has also undertaken to develop a set of principles for internet governance designed to safeguard the open nature of the Internet.[52]

The Strasbourg Court has the opportunity to consider these issues. After the UK Joint Parliamentary Select Committee on Intelligence and Security concluded that GCHQ had not violated the law,[53] three advocacy groups for privacy and free expression – Big Brother Watch, Open Rights Group and English PEN – complained to the Strasbourg Court. They argue that GCHQ's surveillance activities fail the first test of any interference with a Convention right: they are not "prescribed by law".[54] The Court has given the case priority.[55]

In previous cases, the Strasbourg Court has recognised that the principle of legal certainty, in the context of secret measures of surveillance, cannot require that individual should be able to foresee *when* the authorities are likely to intercept his communications.[56] Threats to national security may vary in character and may be unanticipated or difficult to

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offensive posts given the nature of the article – and taken a more cautious attitude to avoiding liability. This is wrong. The news site took down the two defamatory comments as soon as it received notice of them. That is all it is required to do under the E-Commerce Directive. And that is all it ought to have done. To go further would have involved moderating comments before publication. This takes manpower and resources that many website operators do not have. It would lead them to closing their comment sections to avoid liability. That would deprive Internet users of a valuable means of engaging in public debate. And it would deprive websites of revenue at a time when their business models are threatened. At the time of writing, the Grand Chamber has accepted referral of the judgment. I hope that the ruling will be overturned.

[51] *Independent commission to investigate future of internet after NSA revelations*, The Guardian, 23 January 2014, available at http://www.theguardian.com/world/2014/jan/22/independent-commission-future-internet-nsa-revelations-davos. The investigation will be conducted by a 25-member panel of politicians, academics, former intelligence officials and others from around the world.

[52] Source: *Commission to pursue role as honest broker in future global negotiations on Internet Governance*, Commission Press Release, 12 February 2014, available at: http://europa.eu/rapid/press-release_IP-14-142_en.htm?locale=en.

[53] Intelligence and Security Committee Statement on GCHQ's Alleged Interception of Communications under the US Prism Programme, 17 July 2013, para. 6, available at http://isc.independent.gov.uk/news-archive/17july2013.

[54] Application No. 58170/13. The applicants argue that the legal framework underpinning the surveillance fails to provide a check against the arbitrary use of state power intruding into many aspects of private life and correspondence; and that it does not enable citizens to foresee sufficiently the circumstances under which their communications may be monitored.

[55] The government now has until 2nd May to respond, after which the case will move into the final stages before judgment. Source: *Spying Questioned*, The Guardian, 24 January 2014.

[56] *Weber and Saravia v. Germany*, Application No. 54934/00.

define in advance.[57] However, the Court has acknowledged that it is essential in the context of secret intelligence work that the rules on interception are clear and detailed[58] and it has set out the minimum legal safeguards against abuses of power in secret surveillance.[59] In light of these considerations, there is a strong case for reconsidering the adequacy of the legal framework governing access to private communications in the UK. This debate is relevant to the rest of Europe as well. Last year, Polish Law Enforcement made 70 requests to Microsoft and more than 1,000 requests to Google for data stored about individuals.[60]

9. WHISTLEBLOWING

The Snowden affair also raises important and difficult questions about the limits of free speech. Indiscriminate leaking, of the kind associated with *Wikileaks* and Julian Assange, is unjustifiable. However, one of our national newspapers that broke the story, *The Guardian*, behaved responsibly in its reporting of privacy intrusion in the public interest. The journalists involved were careful to avoid revelations that could give terrorist networks an advantage. *The Guardian* published only general information about the surveillance programs and cooperated with government requests to destroy sensitive material in its possession.

As part of the government's response to *The Guardian's* reporting, GCHQ officials oversaw the destruction of computer hardware in the Paper's offices. I do not regard it as unreasonable that that the government control access to sensitive files in the interests of national security. What undermines the justification for their destruction, however, is that copies of these files were already in the possession of two media outlets across the Atlantic. There was no reasonable expectation of continuing secrecy at the time the files were destroyed.

There are similarities to the *Spycatcher* case in the 1990s,[61] where the UK's ban on publication of a book was held by the Strasbourg Court to be unnecessary in a demo-

[57] *Kennedy v. United Kingdom,* [2011] 52 EHRR 4, para. 159. The applicant business owner was unsuccessful in alleging breach of Article 10 on the basis that the police and security services were continually and unlawfully renewing an interception warrant originally authorised for the criminal proceedings against him – in order to intimidate him and undermine his business activities. In its final judgment, however, the Court expressed the view that the relevant UK legislation did not allow the indiscriminate capturing of vast amounts of information (at para. 160).

[58] *Kennedy v. United Kingdom*, at para. 93. The court also observed that an unfettered power of interception would be contrary to the rule of law (at para. 94).

[59] *Ibidem*, paras. 93-95 – in particular "Legislation must specify the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed."

[60] Google Transparency Report, Poland, available at http://www.google.com/transparencyreport/removals/government/PL/.

[61] *Sunday Times v. UK* (1992) 14 EHRR 229.

cratic society because the memoir could easily be obtained from abroad; and because the government had made no attempt to impose a ban on importation.

There is an on-going police investigation into whether *The Guardian* has breached anti-terrorism laws by sharing material with the *New York Times*.[62] In addition, in August last year, the Metropolitan Police detained David Miranda, the partner of Glenn Greenwald, who first reported the story. Miranda had assisted Greenwald by agreeing to carry encrypted material leaked by Snowden to another journalist involved in breaking the story, who was based in Berlin. Under broad powers to establish whether a person is involved in terrorism, the police questioned Miranda at Heathrow Airport for nine hours and seized his mobile phone, laptop and DVDs.

Given the chilling effect the events will have on investigative journalism and the public's right to be well informed on matters of legitimate public concern, any such interference requires objective justification in accordance with the principles of necessity and proportionality.[63] If a person travelling as part of journalistic work can be lawfully detained for nine hours on the basis of the protection of national security, without requiring any suspicion of wrongdoing – without a lawyer present, at an interrogation that lead to the confiscation of his equipment – this indicates that the powers conferred need to be matched by adequate safeguards against abuse.

In June 1935, as Hitler became evermore threatening to democracy and human rights, the English novelist, E.M. Forster, spoke at the International Congress of Writers in Paris. His subject was "Liberty in England". His warning should be recalled today. He said this:

> Our danger from Fascism – unless a war starts, when anything may happen – is negligible. We are menaced by something much more insidious – by what I might call Fabio-Fascism,[64] by the dictator-spirit working quietly away behind the façade of constitutional forms, passing a little law […] here, endorsing a departmental tyranny there, emphasising the national need of secrecy everywhere, and whispering and cooing the so-called "news" every evening over the wireless until opposition is tamed and gulled. Fabio-Fascism is what I am afraid of, for it is the traditional method by which liberty has been attacked in England.[65]

For "England", read "Europe and beyond".

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[62] S58A of the Terrorism Act 2000 makes it illegal to "elicit, publish or communicate" information about members of the intelligence services.

[63] However, a few days after I gave this lecture the High Court decided in favour of the government and rejected the claim that the police had used their powers improperly, disproportionately or in breach of the right to free expression: *see R (Miranda) v. Secretary of State for the Home Department [2014] EWHC 255*. At the time of writing, the case has been granted permission for consideration by the Court of Appeal.

[64] Quintus Fabius Maximus Verrucosus, the dictator of the Roman Republic, used a war of attrition to defeat Hannibal during the Second Punic War (218-202 BC).

[65] E.M. Forster, *Abinger Harvest*, Edward Arnold & Co, 1936, pp. 62-78.