FREE SPEECH, REPUTATION AND MEDIA INTRUSION

BRITISH LAW REFORM AND ITS IMPLICATIONS FOR HONG KONG AND BEYOND[1]

LORD LESTER OF HERNE HILL QC

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It is a privilege and a particular pleasure to give this lecture in the Hong Kong very special Administrative Region, whose legal system I so much admire, among friends old and new. I am grateful for this opportunity to report on what has been happening in the UK in the hope that it may interest you and be relevant here and beyond.

I first came to Hong Kong a quarter of a century ago, in 1987, to argue on behalf of the *South China Morning Post* against a government injunction forbidding publication of extracts from Peter Wright's book *Spycatcher* alleging misconduct within the Security Service[2]. *Spycatcher* was argued as a common law and equity case before the enactment of Bill of Rights Ordinance in 1991 and coming into effect of the Basic Law in 1997. But the UK and Chinese

* Co-organized by the Journalism and Media Studies Centre and the Centre for Comparative Public Law at the Faculty of Law, The University of Hong Kong.

[1] I am grateful to Joanna Dawson, Parliamentary Legal Officer of the Odysseus Trust for her help in preparing my lecture.

[2] *Her Majesty's AG in and for the UK v South China Morning Post Ltd & Others* [1987] HKLY 495.

Governments had agreed three years before, in 1984, that the provisions of the UN International Covenants on Civil and Political Rights ("ICCPR")and Economic Social and Cultural Rights as applied in Hong Kong should remain in force in the territory after 1997.

The *South China Morning Post* failed by a majority in the High Court and Court of Appeal, but both Courts were willing to have regard to the protection of freedom of expression in Article 19 of the ICCPR even though it had not been incorporated into domestic law, as well as to the jurisprudence of the European Court of Human Rights under Article 10 of the European Convention on Human Rights.

Since 1997 I have been fortunate to act as counsel in several important cases in your courts. Your independent and cosmopolitan judges have developed a rich constitutional jurisprudence within the context of "One Country Two Systems". They have had regard to the decisions of courts elsewhere in the common law world and beyond. They have robustly upheld the rule of law and the separation of the judicial from political powers, and wisely interpreted the fundamental rights and freedoms guaranteed by international and constitutional law. They have adopted a dynamic interpretation of the constitutional norms, taking account of international and comparative law and of economic and social policy, striking a fair balance between individual rights and the rights of others, as well as the general interest of the community. Where legislative or administrative measures have an adverse impact on human rights, your courts have required public authorities to come forward with an objective justification for their actions and omissions.

I have chosen as my subject what is an important current topic in the UK, and which I hope may interest you. I am not an expert in Hong Kong media law, but I have been greatly assisted in my understanding by the excellent "Hong

Kong Media Law: Guide for Journalists and Media Professionals" by Doreen Weisenhaus, with contributions by Jill Cottrell and Mei Ning Yan[3] published by Hong Kong University Press in 2007.

The Guide observes that,[4]

> "Hong Kong's media continue to operate in an environment considered one of the world's freest. Hong Kong is the only part of the PRC with a mostly unfettered press. It is one of the largest centres of international media operations in Asia. And it boasts an extraordinarily large and rambunctious press with more than a dozen local daily newspapers, hundreds of magazines and a growing number of broadcasting outlets with news departments – for a population of nearly 7 million."

In his foreword to the Guide, Mr Justice Michael Hartmann referred to Article 27 of the Basic Law as a constitutional guarantee of freedom of speech, of the press and of publication. He wrote of the "constant tension between guaranteed rights and lawfully imposed obligations."

> "Absolutes are rare. Rights and obligations must be weighed in the scales of law, that is, the common law that Hong Kong has inherited and statute law, the product of Hong Kong's own legislature."

Most of what I have to say is about the law as it restricts or limits freedom of expression of the media, NGOs and citizen critics. But law is no panacea. The real enjoyment in practice of the fundamental right to the free communication of information and ideas must be protected by law and by the practices of each branch of government. There also needs to be a culture of liberty and a strong civil society. To come within the protection of the constitutional right to freedom of speech and of the press, when accused of publishing false and defamatory libels, newspapers and broadcasters have to recognise their responsibilities as well as the rights of others.

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[3] I am grateful to Professor Yan for correcting my errors about Hong Kong and Chinese law. All errors of judgment are my own responsibility.

[4] At page 2.

The media are, or should be, the eyes and ears of the public acting as independent public watchdogs. Journalism is, or should be, a profession with professional standards, and the media should not be merely in the advertising business. Recently,[5] the *Financial Times* published an article by John Lloyd about India's media boom, in which he reported that Justice Markandey, the chairman of the Press Council of India, had criticised a press that he sees "as indifferent to poverty, feeding its audience a diet of entertainment and superstition." It is a warning that applies to much of the British press.

In the UK we do not have the benefit of a constitutional Bill of Rights, but we do have the Human Rights Act 1998 which protects freedom of expression and respect for private life among the rights and freedoms guaranteed by the European Convention on Human Rights. Some sections of the British media have always been implacably opposed to the Human Rights Act. When it was introduced, they attempted unsuccessfully to obtain a complete exemption because they did not wish to be subject to an obligation, derived from the European Convention, to prevent unwarranted media intrusion of private lives. To this day, the *Daily Telegraph* and the *Daily Mail* attack what they describe as "this Human Rights Act farce", undermining public confidence in our charter of fundamental rights and freedoms even though it protects a free press against State control or interference. They are unwise, insular and short-sighted. Many of the landmark cases protecting free speech and a free press have been decided under the European Convention and the Human Rights Act.

Last week, the Rt Hon David Cameron MP declared at Prime Minister's Question Time, in a show of defiance against the European Court of Human Rights' judgment in *Hirst v United Kingdom (No.2)*[6] and the UK's international

[5] 20th October 2012.
[6] (2006) 42 EHRR 41.

legal obligation[7] to abide by the Court's final judgment on the voting rights of prisoners, in these words[8]

> "The House of Commons has voted against prisoners having the vote. I do not want prisoners to have the vote and they should not get the vote – I am very clear about that. If it helps to have another vote in Parliament on another resolution to make it absolutely clear and help put the legal position beyond doubt, I am happy to do that. But no one should be in any doubt: prisoners are not getting the vote under this Government."

Since the Attorney General, the Rt Hon Dominic Grieve QC, MP, advised the House of Commons Justice Committee on the very same day that the UK is indeed obliged to comply with the European Court's judgment, the Prime Minister was perhaps over-optimistic in suggesting that his statement of defiance had helped "to put the legal position beyond doubt." This is the first time that any British Government has refused to comply with a judgment of the Strasbourg Court and it sets a terrible example, enabling totalitarian governments to refuse to comply with the Court's judgments.

In the end the UK will have to comply, but great damage will have been done in the process. If only we had followed the example of the Executive and Legislative Council in amending the law to comply with the judgment of Mr Justice Andrew Cheung in the Court of First Instance declaring[9] the exclusion of prisoners from the right to vote to be unconstitutional.

The Commission on a Bill of Rights for the UK, of which I am a member,[10] will report by the end of the year. Civil society is deeply mistrustful that the

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[7] Under Article 46 of the Convention.

[8] Hansard (HC), 24th October 2012, cols. 922-23.

[9] *Chan Kin Sum v Secretary for Justice and Electoral Affairs Commission,* HCAL 79/2008, judgment of 8th December 2008.

[10] The Commission on a Bill of Rights was established by the Coalition Government on 18th March 2011, following a commitment in the Coalition's Programme for Government. Mark Harper MP, then Parliamentary Secretary for Political and Constitutional Reform announced the Commission's terms of reference in a Ministerial Statement to Parliament:

Commission's recommendations with be used by the Conservative Party to press for a British Bill of Rights that weakens the protection given by the Human Rights Act and breaks the link with the European system. The Prime Minister should heed the legal advice of his Attorney General and ponder the wisdom of John Donne's Meditation XVII:

> "No man is an island, entire of itself: every man is a piece of the Continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friends or of thine own were; any man's death diminishes me, because I am involved in Mankind:
> And therefore never send to know for whom the bell tolls; It tolls for thee"

To return to free speech and its limits, British lawmakers, like Hong Kong's lawmakers, have not kept abreast of the changing world in the field of civil defamation law. Before I explain what we are doing in Britain to reform the *civil* law of defamation, I need to refer to the criminal law.

Section 5 of the Hong Kong Defamation Ordinance makes it an offence to publish a libel known to be false, with liability to imprisonment for two years and an unlimited fine. In New Zealand, criminal libel was repealed by the Defamation Act 1992. In Britain, we have abolished the common law speech offences of criminal libel, seditious libel, blasphemous libel and obscene libel,[11] with their origins in the medieval ecclesiastical courts and the Court of Star

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"The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties.
"It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.
"It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg Court ahead of and following the UK's Chairmanship of the Council of Europe.
"It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012."

More details of the Commission's work including its two public consultations and other engagement events are available on its website: http://www.justice.gov.uk/about/cbr

[11] Criminal Justice and Immigration Act 2008, section 79, and Coroners and Justice Act 2009, section 73.

Chamber. The Government explained that they were "arcane offences which have largely fallen into disuse"and that they "stem from a bygone age when freedom of expression was not seen as the right that it is today."[12] The Minister expressed the hope that the abolition would help the United Kingdom to take the lead in challenging similar laws in other countries when they are used to suppress free speech.[13]

These reforms to our criminal law accord with the General Comments recently made by the UN Human Rights Committee on Article 19 of the ICCPR.[14] No doubt your legislators will have regard to the HRC's General Comments in considering whether to repeal the common law offence of blasphemous libel.

The Contempt of Court Act 1981 codified much of the law on contempt of court. The Law Reform Commission of Hong Kong recommended in 1986 that there should be a comprehensive Contempt of Court Ordinance containing clear guidelines, including[15] a public interest defence on the lines of section 5 of the UK Act where a publication is made as part of a discussion in good faith of public affairs or other matters of public interest, and the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion. The report does not appear to have been implemented a quarter century later. The British statute did not repeal the archaic crime of scandalising the court. I hope that my Government will agree to repeal this vague and sweepingly broad offence, as recommended by our Law Commission[16] and not replace it with a statutory offence, as suggested by your Law Reform Commission.[17]

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[12] Speech by Lord Bach, Under-Secretary of State, Ministry of Justice, Coroners and Justice Bill, Report Stage, HL Deb. Vol 713, col. 1173, 28th October 2009.
[13] *Ibid*.
[14] General Comment No 34 CCPR/C/GC/34.
[15] Report on Contempt of Court, paragraph 5.38.
[16] Law Commission Consultation Paper 207 *Contempt of Court: Scandalising the Court* (2012).
[17] Report on Contempt of Court, paragraphs 6.5-.9.

It was on the basis of that outmoded common law crime that the Court of Appeal of Singapore upheld the conviction of Alan Shadrake, the veteran journalist, for having insulted Singapore's judiciary in his book "Once a Jolly Hangman: Singapore Justice in the Dock". He received a sentence of six weeks' imprisonment, and a fine and order to pay costs to the Attorney General.[18]

If the British approach were adopted in Hong Kong, the common law could be repealed or perhaps replaced by a narrowly drawn statutory offence to accommodate the extreme facts that resulted in the Court of Appeal's decision in *Wong Yeung Ng v Secretary for Justice*[19] where a media company was fined HK$5 Million and one of its editors was sentenced to four months in prison for contempt of court by publishing articles sharply critical of two judges and for a paparazzi-style campaign against one of the judges.

Blasphemous libel is still unlawful in Hong Kong, as a common law speech crime. It is listed together with "offences against religion" and "publishing blasphemous, seditious or defamatory libels" in the Magistrates Ordinance.[20] Offences protecting against "insult" are used in many parts of the world to suppress or punish political criticism or dissent. I have written recently about "the right to offend"[21] explaining how our Parliament successfully resisted calls by British Muslim leaders to extend blasphemous libel to protect Islam, and ensured that the statutory offence of inciting religious hatred is narrowly defined to protect freedom of speech.

Again I hope that my Government will agree to amend section 5 of the Public Order Act 1986, which makes it an offence to use "threatening, abusive or

[18] *Shadrake Alan v Attorney-General* [2011] SGCA 26.
[19] 2 HKLRD 293.
[20] Chapter 227, Second Schedule, Part III.
[21] In Sir Nicolas Bratza's *liber amicorum* "Freedom of Expression", Wolf Legal Publishers, October 2012.

insulting words or behaviour or disorderly behaviour", by removing "insulting" from the definition of the offence, as we have done in relation to religious hate speech[22] and homophobic hate speech.[23] Section 5 has been used to arrest or prosecute religious campaigners against homosexuality, a British National Party member who displayed anti-Islamic posters in his window, and people who have sworn at the police.

In much of the world, speech crimes for blasphemy and insult have very harsh consequences. Maikel Nabil Sanad recently published a blog entitled "Yes, I'm a blasphemer. Get over it."[24] He is being threatened with prosecution for "insulting Islam" and claims that Egypt has some twenty speech crimes, including criticising the president, parliament, the military or the judiciary, and criticising a foreign president, such as Mahmoud Ahmadinejad or Bashar Al-Assad. Atheists and Christians are being imprisoned in Egypt for blasphemy, and a Shiite, Mohammed Asfour, was sentenced to three years' imprisonment last July for speaking against the crimes committed by followers of the Prophet Mohammed. An investigation is pending against Hisham al-Gokh who is accused of insulting religion in his poetry. And the phenomenon of imprisoning bloggers on charges of insulting religion is becoming widespread in Muslim countries.

I doubt whether your courts would uphold the constitutionality of blasphemous libel if a prosecution were brought. It is an archaic and potentially divisive offence and is incompatible with the fundamental right to freedom of expression.

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[22] Racial and Religious Hatred Act 2006. Debate on the Bill: HL Hansard 25 October 2005, vol 674, Col 1070.

[23] Criminal Justice and Immigration Act 2008, section 74.

[24] http://transitions.foreignpolicy.com/posts/2012/10/19/yes_i_m_a_blasphemer_get_over_it 18th October 2012.

What then of *criminal defamation*? In her comprehensive, scholarly and illuminating article on "Criminal Defamation in the New Media Environment – The Case of the People's Republic of China"[25] Professor Mei Ning Yan[26] has brought home the contemporary importance of this subject. She has observed that[27]

> "Criminal defamation laws are controversial because they are more widely known for their inhibitive effect on freedom of expression, political speech in particular, than for the protection of reputation."

Professor Yan's study of the history and latest developments of criminal defamation in the People's Republic of China shows "an apparent trend of public officials at local levels using criminal defamation charges to stifle online criticism of them."

Professor Yan explains that [28]

> "The new media environment, including the widespread use of mobile-phone text messages and the increasing popularity of online postings and blogging, has induced evident changes. It has become increasingly common for ordinary Chinese to use new media to disseminate criticism of local policies or news of corruption and malpractice by local officials, thus leading to a spectacular rise of online activism in the country. In the past few years, there has been an apparent increase in criminal defamation cases. In particular, a series of highly controversial criminal defamation cases since 2008 involving public prosecutions has aroused immense public and media attention. Commentaries in the traditional media and on the Web came up with a general observation that some senior local officials had brought charges of criminal defamation … to arrest and detain individuals who had used the new media to disseminate criticism of local policies or corruption."

She also explains[29] that there is a common theme running through the 60 highly controversial public prosecutions for criminal defamation in China since 2000 that she has surveyed.

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[25] International Journal of Communications Law and Policy, Spring 2011.
[26] Associate Professor of Cheung Kong School of Journalism and Communication, Shantou University.
[27] Page 4.
[28] Page 5.

> "[S]ome senior local officials have used criminal defamation law to intimidate and punish critics and whistleblowers to protect their vested and often unlawful interest. Indeed, the deployment of criminal defamation law as a handy tool to strengthen local protectionism has become even more obvious in the past few years as more and more Chinese citizens have embraced online activism."

Professor Yan concludes that Chinese criminal defamation law will continue to stay for some time to come and play an important role in policing free speech and warns[30] that

> "The continued existence of criminal defamation laws in China poses constant threats to the country's citizens who wish to express online their opinions about public affairs and may eventually wipe out any expanded scope for freedom of expression accrued to ordinary Chinese because of the emergence of Web 2.0 applications. This kind of chilling effect on online political speech is certainly not unique to the Chinese citizens but to most people in other jurisdictions in which criminal defamation has not been abolished or reformed."

Article 23 of the Basic Law requires the HKSAR "to enact laws on its own to prohibit, among other things, any act of sedition against the Central People's Government". However, I do not read Article 23 as requiring you to maintain what the Guide rightly describes[31] as "a legacy of harsh laws regarding defamation, official secrets, sedition and reporting on court proceedings" bequeathed from British rule. I do not read Article 23 as inhibiting your Legislative Council from repealing section 5 of the Defamation Ordinance as we have done in relation to the common law offence.

I turn to the reform of *civil* defamation law we are currently undertaking in Parliament . The Defamation Bill has completed its passage through the House of Commons and was given a Second Reading in the House of Lords on 9th October. It has been referred to a Grand Committee and will be scrutinised in December. It has as its central aim the need to reform English defamation law so

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[29] Page 60.
[30] Page 61.
[31] At page 2.

that it strikes a fair balance between the fundamental right to freedom of expression and public information and the protection of a good reputation. It is needed to give better protection to free expression, while ensuring fairness and responsibility in journalism, and necessary protection of the right to a good reputation, and access to justice by the weak against the rich and powerful.

In 2008, the UN Human Rights Committee expressed its concern that:

> "The practical application of the [English] law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as 'libel tourism.' The advent of the internet and the international distribution of foreign media also creates the danger that [an] … unduly restrictive libel law will affect freedom of expression world-wide on matters of valid public interest."[32]

In 2009, a number of controversial and high profile media law cases – including the exposé of former Formula One President Max Mosley's unusual private activities with prostitutes, and the repeated allegations that the parents of Madeleine McCann, a young child who went missing on holiday in Portugal, were responsible for her death - prompted the House of Commons Culture, Media and Sport Select Committee to inquire into the balance of the freedom of the press against the rights of citizens to privacy. The Committee published their report, *Press Standards, Privacy and Libel* in February 2010[33].

Also in 2009, the free speech NGOs *English PEN* and *Index on Censorship*, along with *Sense About Science*, published a joint report on the impact of English

[32] CCPR/C/GBR/CO/6 at para 25

[33] HC 362-I Second Report of Session 2009–10. Their report made various recommendations with respect to libel, including that the defences should be strengthened and clarified; that the burden of proof in libel should remain on the defendant; and that additional hurdles should be put in place to prevent libel tourism. With respect to privacy and press regulation they concluded that privacy legislation was unnecessary, but that the Press Complaints Commission should do more to uphold standards and to protect people from press intrusion; and that there should be an incentive for newspapers to comply with self-regulation, perhaps through reductions in the costs burden in defamation cases.

libel law on freedom of expression, entitled *Free Speech is not for Sale*.[34] The report concluded that English libel law has a negative impact on freedom of expression, both in the UK and around the world by imposing unnecessary and disproportionate restrictions on free speech. It made recommendations for reform and suggested that these should be incorporated in a Libel Bill, which would simplify the existing law, restore the balance between free speech and the protection of reputation, and reflect the impact of the internet on the circulation of ideas and information.

With expert help,[35] I prepared a Private Member's Bill to strike a better balance between the right to reputation and the right to freedom of expression. It was given a Second Reading on 9th July 2010, and the Coalition Government undertook, by way of response, to introduce their own Bill.[36]

There was pre-legislative scrutiny by a Joint Parliamentary Committee,[37] and a public consultation.[38] The actual Bill followed and was scrutinised in the House of Commons.[39] Following the Second Reading debate in the House of Lords last month,[40] it will now be scrutinised in Grand Committee.

The unsatisfactory state of English defamation law is notorious and well recognised both in the UK and abroad. It is mainly based on the common law and has had very limited scrutiny by Parliament until now. The common law has filled in the gaps left by Parliament. But the subject-matter of defamation law is

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[34] www.libelreform.org/our-report/download-the-report
[35] From Sir Brian Neill and Heather Rogers QC.
[36] HL Hansard 9 July 2010 , vol 720, Col 477.
[37] Report of the Joint Committee on the Draft Defamation Bill, Session 2012-2012: HL203 HC 930-I.
[38] Draft Defamation Bill Consultation CP3/11, March 2011.
[39] Second Reading Debate: HC Hansard 12th June 2012, Col 177. Committee Debate: HC Hansard 19th, 21st & 26th June 2012. Report and Third Reading Debate: HC Hansard 12th September 2012, Col 309.
[40] HL Hansard 9th October 2012, Col 932.

too important to be left to the courts to reform on a piecemeal basis. All the main political parties agree that the legal principles need to be prescribed by Parliament, guiding the courts to interpret and apply the law on a case-by-case basis.

Because of the unique characteristics of the tort of defamation, English libel law does not strike a fair balance between free speech and reputation. It has these characteristics:

(i) The claimant is presumed to have and to enjoy an unblemished reputation. Once the claimant has proved publication and that the words are defamatory, the law presumes in the claimant's favour that the words are false. As falsity and damage are presumed, it is then for the defendant to establish a defence.

(ii) Anyone who takes part in the process of publication can be liable for defamatory statements made in that publication. Liability does not depend on the intention of the publisher, but on the fact that defamatory material has been published. Nor does liability depend on how the words were actually understood: the law proceeds on the basis that a publication has a 'single meaning', worked out by reference to what the ordinary person would, reasonably, have understood the publication to mean.

(iii) Traditionally, the media have not been regarded as having any special duty to inform the public so as to create a separate head of common law qualified privilege.

(iv) While the common law defence of so-called '*Reynolds* privilege', developed by the House of Lords and Supreme Court, has been useful to the media, it has been difficult to apply in practice and has led to a number of costly appeals; it lacks legal certainty.

(v) There is uncertainty about the effects of the advent of the wide range of means of electronic communication on liability for defamatory publication, and a failure to reformulate the relevant principles or to recognise technology-specific exceptions.

(vi) The principle that each communication is a separate publication means that for limitation purposes, time starts to run again whenever the defamatory matter is communicated afresh. This gives rise to special difficulties for defendants who publish material on the Internet, which may remain easily accessible many years after it was first made available.

(vii) There is uncertainty about the scope of the defence of fair comment which has a chilling effect on freedom of speech, including academic and scientific discussion and debate. Despite the valuable contribution made by the Court of Final Appeal in *Cheng v Tse*,[41] the case law has developed a defence beset by onerous and unnecessary technicalities, including the relationship between fact and comment.

(viii) The statutory defences of qualified privilege for reports of various proceedings and matters are out-of-date and far too restrictive.

(ix) The chilling effect has been increased not only by uncertainty about the state of the law, but also by the ability of claimants to bring cases even where a publication has caused no significant harm, and the reluctance of claimants and their lawyers to settle cases expeditiously and at low cost.

(x) There are too few incentives to avoid litigation, for example by alternative dispute resolution or mediation.

[41] [2000] 3 HKLRD 418.

The aims of sensible civil defamation reform should be:

i. to strike a fair balance between private reputation and public information as protected by the common law and the common law constitutional right to freedom of expression;
ii. to simplify and clarify the law so as to assist the claimant whose reputation has been significantly and unjustifiably damaged in having effective access to justice;
iii. to require claimants to demonstrate that they have suffered or are likely to suffer real harm as a result of the defamatory publication of which they complain;
iv. to modernise the defences to defamation proceedings in accordance with the overriding requirements of the public interest so that freedom of expression is not chilled by self-censorship and coercive litigation;
v. to discourage so-called 'libel tourism' to the extent permitted by European law;
vi. to encourage the speedy resolution of disputes, including the use of mediation and alternative dispute resolution, and wise, firm and early case-management by the courts;
vii. to make the normal mode of trial, trial by judge alone rather than by judge and jury;
viii. to modernise statutory privilege; and
ix. to operate a costs regime that ensures a level playing field between the strong and the weak.

The Defamation Bill together with accompanying regulations and procedural reforms should achieve most of these aims. It introduces a new "serious harm" test in order to weed out trivial claims at an early stage. It replaces the defences of "justification" and "fair comment" with clearer and workable defences of "truth" and "honest opinion", stripping away complex

technicalities in the case law. It updates the provisions of the Defamation Act 1996 on statutory qualified privilege, removing unnecessary restrictions, as well as providing additional protection for articles in peer-reviewed academic publications. It introduces a single publication rule, preventing perpetual liability for internet publications. It introduces measures to protect foreign defendants from inappropriate actions brought in London. And it restricts the use of juries in most cases.

But important issues will need to be considered during the coming debates in the House of Lords:-

(i) Is the "serious harm" threshold test set at the right level?

(ii) How can we ensure effective case management at the outset, including the power to strike out claims that do not satisfy the serious harm test?

(iii) Should the defence of truth be widened to include proof of secondary meanings?

(iv) Is the new defence of responsible publication satisfactory?

(v) What regulations should govern ISP liability for defamation via the Web?

(vi) Should commercial companies be prevented from bringing libel proceedings?

(vii) Should companies performing functions of a public nature be prevented from using libel proceedings to vindicate their "governing reputation", in accordance with the *Derbyshire* principle?[42]

(viii) Should the courts be empowered, when giving judgment for the claimant to order the defendant to publish a summary of the

[42] *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534.

judgment, and, if the parties cannot agree on the time, manner, form or place of publication, to give directions?

(ix) What changes are needed to the Civil Procedure and Costs Rules to enhance access to justice and create a level playing field between the strong and the weak?

As counsel in *Reynolds v Times Newspapers*,[43] I failed to persuade the Law Lords to develop a workable public interest defence for responsible publication by the media. Instead, they adopted a list of factors relevant in determining whether the publisher had acted responsibly. This has made the defence useful to the investigative media but expensive and unpredictable, and especially unworkable for those publishing outside the mainstream media, such as NGOs and bloggers.

The responsible publication provision in clause 4 as it stands rightly abolishes the common law *Reynolds* defence[44], but it does so without expressly reflecting the importance of editorial discretion emphasised by the Supreme Court's recent enlightened decision in *Flood v Times Newspapers*[45]. This needs to be clearly recognised in clause 4. Instead of a statutory list of factors that may be under-inclusive or over-inclusive, we need a broad public interest defence which will be interpreted and applied by the courts on a case-by-case basis. During the Second Reading debate, I set out[46] the approach suggested by a very experienced

[43] *Reynolds v Times Newspapers Ltd* [2001]2 AC 127.
[44] www.publications.parliament.uk/pa/bills/lbill/2012-2013/0041/20130041.pdf
[45] *Flood v Times Newspapers Ltd* [2012] UKSC11.
[46] HL Hansard 9th October 2012, Col 954: "[I]t is a defence in an action for defamation (a) for the defendant to show that the statement complained of was on, or formed part of a publication on, a matter of public interest, and (b) if the defendant honestly and reasonably believed at the time of publication that the making of the statement was in the public interest. Secondly, in the case of publication for the purposes of journalism, the court shall, in determining whether the requirements of (a) and (b) are satisfied, give a wide discretion to the editor or other person responsible for the publication as to the content of the statement, the form in which the statement was made and the timing of the publication. That really comes from Lord Dyson in *Flood*. Thirdly, for the avoidance of doubt, the defence under this section may be relied upon

and wise authority, Sir Brian Neill, and I hope that the Government will accept a provision along those lines.

Another important issue concerns the proper extent of State regulation of the Internet, and the scope of liability of website hosts for material posted by third parties. At one end of the spectrum is the immunity provided by United States law. At the other end, is the extreme regulation and censorship of the Internet and other new media by the PRC by creating the "Great Firewall" as a content barrier to control the flow of information and ideas from overseas jurisdictions, including Hong Kong, shutting out the world's Internet and creating a Chinese Intranet.[47] China is not the only country to have increased Internet regulation in recent years.

As a Member State of the European Union we are governed by the E-Commerce Directive, with which our domestic law must comply, and which avoids either extreme.[48]

The US-based Media Law Resource Center[49] noted, in a letter to the Justice Secretary,[50] that

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irrespective of whether the statement complained of is a statement of fact or a statement of opinion. Fourthly, a defence under this section shall not succeed-I repeat: shall not succeed-if the claimant shows that he asked the defendant for the publication of a correction of the statement complained of and that the request was unreasonably refused or granted subject to unreasonable conditions."

[47] See generally, Mei Ling Yan, "The Impact of New Media on Freedom of Expression in China and the Regulatory Responses", Chapter in forthcoming book. Article 36 of the Chinese Tort Liability Code provides that, if an ISP knows that its user has used the ISP's network to infringe rights protected by civil law and fails to take appropriate action, the ISP is jointly liable for any damage. Where an Internet user uses the network to engage in infringing activity, the infringed party has the right to give notice to the ISP to take the necessary measures, such as deletion, blocking or termination of the service. After receiving notice, in the absence of immediate remedial action, the ISP is jointly liable.

[48] Directive 2000/31/EC.

[49] 520 Eighth Avenue, North Tower, - 20th Floor, New York Y, NY 10018. 212 337 0200. Email: dheller@medialaw.org

[50] Letter of 5th July 2012 to the Rt. Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice.

> "Under current [UK] law, websites and ISPs face considerable uncertainty as to whether and in what circumstances they are legally responsible for statements made by their users. The all too common response is to remove content upon complaint regardless of validity, thereby enshrining a 'heckler's veto' and culture of self-censorship. Moreover, current law discourages many websites from moderating user content for fear that if they do so imperfectly they will be deemed the responsible publisher.
>
> "A notice and takedown regime has the potential to provide more clarity and fairness in balancing the interests of free expression and reputation on the Internet. As Section 5 will be implemented by separate Regulations, much will depend upon the specifics of the Regulations when they are published. The definition of 'website' should be broad and encompass existing and future digital publishing platforms. In addition, we would hope, and would urge, that details such as length of time to respond and disclosure of identifying information be drafted with input from publishers and the online sector to reflect their practical business and technology concerns. The Regulations should also give due regard to the rights of whistleblowers reporting misconduct."

I agree and hope my Government will publish draft Regulations for consultation in the near future.

Defamation law reform is taking place at a time when the British print and electronic media are mired in controversy, which has led to Lord Justice Leveson's inquiry into the culture, practice and ethics of the press.[51] The Prime Minister, the Rt Hon David Cameron MP, ordered the Inquiry in the wake of the revelations of the 'phone hacking scandal, when it emerged that *The News of the World* had engaged in illegal 'phone hacking on an industrial scale for many years. There is compelling evidence that senior employees of News International were involved in a cover-up when *The Guardian* began an investigation into these activities and a number of current and former News International staff now await trial on criminal charges.

[51] www.levesoninquiry.org.uk

Public outrage at the scale of the disgraceful and unlawful activities of newspaper staff in pursuit of salacious stories about celebrities; the targeting of the families of victims of terrible tragedies; and the apparent complicity or wilful blindness by the police and politicians, has led some to call for a statutory system of regulation of the print media, similar to the OFCOM system of regulation of the broadcast media.[52]

Lord Justice Leveson faces a difficult decision. As Caroline Thomson, the former chief operating officer of the BBC, said a few weeks ago, Lord Justice Leveson may feel that that "one too many shots has been fired in the 'last chance saloon' of voluntary press regulation."[53] But Lord Justice Leveson has often reiterated[54] his determination not to be consigned to "the second shelf of a journalism professor's study".

The existing scheme operated by the Press Complaints Commission does not command public confidence. On the other hand, a system of State regulation of the print media would rightly be rejected as incompatible with freedom of speech and freedom of the press. The current chairman of the Press Complaints Commission, Lord Hunt of Wirral, has given extensive evidence to the Leveson Inquiry recognising the need for a new regulator, with an independent chairman who would also be the chief ombudsman on complaints and the principle arbiter of standards. The complaints arm would be complemented by a new standards arm. The emphasis would be on prevention not cure and the really effective policing of self-regulation through enforceable commercial contracts, and commitments:

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[52] Ofcom is the communications regulator, established by the Communications Act 2003, with responsibility for regulating television and radio, telecoms, and postal services. www.ofcom.org.uk

[53] Speech at the Church and Media conference, September 2012, cited by *The Guardian* 25th September 2012

[54] For example during evidence given by the broadcaster Jeremy Paxman on 23rd May 2012: www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-23-May-2012.pdf

- to support a new independent, self-regulatory structure;
- to fund the regulator according to an agreed formula;
- to undertake to abide by the Code and relevant laws;
- to respond positively to individual complaints;
- to support clearly defined compliance and standards mechanisms audited by the regulator; and
- to accept proportionate financial sanctions should serious or systemic standards breaches be found.

Lord Hunt's proposals have the support of most editors of national newspapers who strongly oppose any statutory regulation.[55] Everyone is waiting for Lord Justice Leveson's report expected next month. It may be that he will recommend something on the lines of the Hong Kong Law Reform Commission's report on Privacy and Media Intrusion published in December 2004. It will then be necessary to see how the Coalition Government responds and whether any amendments are needed to the Defamation Bill to underpin a voluntary contractual scheme.

The Defamation Bill does not cover personal privacy, in my view, with good reason. The Joint Parliamentary Committee on Culture Media and Sport concluded in 2009[56] that too few privacy cases had yet been decided from which to conclude that the law was not operating satisfactorily, and that the law of privacy would become clearer as the case law developed. And earlier this year, the Parliamentary Joint Committee on Privacy and Injunctions concluded that the courts are now striking a better balance between the right to privacy and the right to freedom of expression, and that any statutory definition of privacy

[55] See eg, *The Sunday Times* editorial, 21st October 2012, "A Free Society Needs a Free Press".
[56] *Press Standards, Privacy and Libel* Second Report of Session 2009-10, Vol 1, HC 362-I, paragraph 66.

would risk becoming outdated quickly, would not allow for flexibility on a case-by-case basis and would lead to even more litigation over its interpretation.[57]

A Privacy Act could do little more than codify the existing Convention and UK legal criteria as to how the balance should be struck between free speech and personal privacy. It would therefore make little difference as far as the courts are concerned, because it would necessarily remain their task to weigh and balance the public interest in particular cases. As at present, it would have to comply with the European Convention criteria on the right to free expression and the right to respect for personal privacy and the striking of a fair balance between these competing rights.

The Defamation Bill provides a once-in-a-generation opportunity to reform this area of our law. As an editorial in *The Guardian* observed

> "The better free expression is protected, the better the UK can argue internationally against oppression and persecution."[58]

Our two islands and our citizens and institutions have so much in common and so much we may achieve together.

[57] Report of the Joint Committee on Privacy and Injunctions, Session 2012-2012 HL Paper 273/HC 1443, paragraphs 32 and 37.
[58] *The Guardian*, 9th October 2012.