

COUNTERING THE USE OF SLAPPS – MODULE 3

MODULE 3

The Importance of the Right to Freedom of Expression and the Role of the Media and other Public Watchdogs

(Training material to be shared with trainers only)

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COUNTERING THE USE OF SLAPPS – MODULE 3

PRESENTATION OUTLINE

- ▶ International and national sources of the right to freedom of expression
- ▶ The importance of freedom of expression
- ▶ The role of the media, NGOs and other ‘public watchdogs’
- ▶ Definition of the right to freedom of expression (content and form)

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INTERNATIONAL AND NATIONAL SOURCES OF THE RIGHT TO FREEDOM OF EXPRESSION

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FREEDOM OF EXPRESSION IN INTERNATIONAL HUMAN RIGHTS LAW

The right to freedom of expression is guaranteed in the European Convention on Human Rights as well as in other human rights treaties and declarations.

Following the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948, the European Convention, which was drafted in the early 1950s and entered into force in 1953, was the first legally binding human rights treaty.

Other global and regional legal instruments that recognize the right to freedom of expression:

- ▶ Universal Declaration of Human Rights, protects freedom of expression at Article 19
- ▶ International Covenant on Civil and Political Rights, protects freedom of expression in Article 19 and has been ratified by all Council Europe member states
- ▶ African Charter on Human and Peoples' Rights, protects freedom of expression at Article 9
- ▶ American Convention on Human Rights, protects freedom of expression at Article 13
- ▶ the ASEAN Human Rights Declaration, protects freedom of expression at Article 23

Freedom of expression is truly globally recognized.

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EUROPEAN CONVENTION ON HUMAN RIGHTS, ARTICLE 10:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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COUNTERING THE USE OF SLAPPS – MODULE 3

THE IMPORTANCE OF FREEDOM OF EXPRESSION

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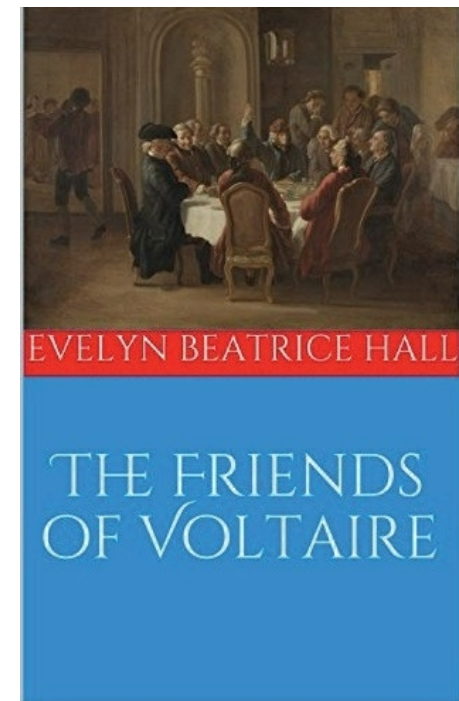
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COUNTERING THE USE OF
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THE IMPORTANCE OF FREEDOM OF EXPRESSION

“I disapprove of what you say, but I will defend to the death your right to say it”

Evelyn Beatrice Hall, The Friends of Voltaire



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THE IMPORTANCE OF FREEDOM OF EXPRESSION

The right to freedom of expression is a cornerstone of democratic society and plays a central role in the protection of other rights.

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.”

Handyside v. the United Kingdom, 7 December 1976

“Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”

Manole and Others v. Moldova, 17 September 2009

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THE IMPORTANCE OF FREEDOM OF EXPRESSION (CONTINUED)

The right to freedom of expression protects all forms of expression. In practice, the Court has distinguished between political speech, discussion on matters of public importance, artistic expression, information of a commercial nature, and entertainment such as music.

Political expression and debate on matters of public importance is especially protected:

“freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”

Lingens v. Austria, 8 July 1986

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THE IMPORTANCE OF FREEDOM OF EXPRESSION (CONTINUED)

A high level of protection is afforded to discussion of all matters of public importance:

- ▶ Discussion of historical genocides (*Perinçek v. Switzerland*, 15 October 2015)
- ▶ Criticism of the actions of the police (*Savva Terentyev v. Russia*, 28 August 2018)
- ▶ Criticism of disproportionate pay increases for the director of a large car manufacturer (*Fressoz and Roire v. France*, 21 January 1999)
- ▶ Discussion on the privatization of a major national insurance provider (*Radio Twist a.s. v. Slovakia*, 19 December 2006)
- ▶ Allegations of mis-selling of insurance products (*Haldimann v. Switzerland*, 24 February 2015)
- ▶ Discussion on employment law and policy, aimed at professionals in the human resources sector (*Herbai v. Hungary*, 5 November 2019)



COUNTERING THE USE OF SLAPPS – MODULE 3

THE ROLE OF THE MEDIA, NGOS AND OTHER ‘PUBLIC WATCHDOGS’

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COUNTERING THE USE OF SLAPPS – MODULE 3

THE ESSENTIAL ROLE OF THE MEDIA

The media play a particularly important role in relation to the right to freedom of expression. Whether online, through radio or television or in print, they are the means through which the vast majority of people receive news and information on issues of public interest.

“Although the press must not overstep certain bounds, regarding in particular the protection of the reputation and rights of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”

Pedersen and Baadsgaard v. Denmark, 17 December 2004

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THE ESSENTIAL ROLE OF THE MEDIA (CONTINUED)

This applies to online media, bloggers and particularly popular social media users as well as to ‘traditional’ media:

“Given the important role played by the Internet in enhancing the public’s access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of “public watchdogs” in so far as the protection afforded by Article 10 is concerned.”

Magyar Helsinki Bizottság v. Hungary, 8 November 2016

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NGOS AND OTHER ‘WATCHDOGS’

NGOs inform the public and alert them to issues of public interest.

Like the media, they are therefore also considered ‘public watchdogs’ with an important role in society:

“The function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non- governmental organisations, like the press, may be characterised as social “watchdogs”. In that connection their activities warrant similar Convention protection to that afforded to the press ...”

Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria,
28 November 2013

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COUNTERING THE USE OF SLAPPS – MODULE 3

FREEDOM OF EXPRESSION: CONTENT, FORM, SCOPE

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DEFINITION OF THE RIGHT TO FREEDOM OF EXPRESSION

A careful and precise reading of the text of Article 10 of the European Convention on Human Rights is fundamental to understanding its meaning.

Here is the text of the first sentence again, with key words and phrases separated and in bold:

Everyone has the right to freedom of expression. This right shall include freedom to ***hold opinions*** and to ***receive*** and ***impart* *information*** and ***ideas***
without interference by public authority and ***regardless of frontiers***.

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COUNTERING THE USE OF SLAPPS – MODULE 3

DEFINITION (CONTINUED)

- ▶ Everyone: regardless of age, status, nationality, etc. This includes legal persons as well as non-citizens including migrants and stateless individuals.
- ▶ Freedom to hold opinions is absolute: no-one can restrict another's thoughts
- ▶ Freedom to impart protects the act of providing information and ideas.
- ▶ Freedom to receive protects the act of receiving information.
- ▶ Freedom of expression protects both factual information and ideas.
- ▶ Without interference by public authority: there can be no interference, unless justified under Article 10 (2)
- ▶ Regardless of frontiers: freedom of expression cannot be restricted just because the information or ideas expressed originate from another country.

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FORM AND TECHNICAL MEANS OF EXPRESSION

The right to freedom of expression protects all forms of expressive activity, including but by no means limited to:

- ▶ Speaking
- ▶ Writing
- ▶ Sending someone a text
- ▶ Film, photography, or sound recording and transmission
- ▶ Using the way a person dresses to express something
- ▶ Throwing paint on a statue
- ▶ Setting fire to a national flag

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FORM AND TECHNICAL MEANS OF EXPRESSION (CONTINUED)

The right to freedom of expression also protects interference with equipment, such as:

- ▶ The technical means of communication, such as broadcasting or internet equipment
- ▶ Photo cameras or microphones.

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SCOPE OF EXPRESSION

The European Court has emphasized that the scope of information and ideas protected is extraordinarily broad. The only type of expression that falls outside the scope of the right to freedom of expression is hate speech.

Here are a few examples of what the Court has understood as being part of “information and ideas”:

- ▶ Publication of photographs to illustrate a news story: *Von Hannover v. Germany (2)*
- ▶ Information about abortion: *Open Door and Dublin Well Woman v. Ireland*
- ▶ Criticism of the founder of the state: *Murat Vural v. Turkey*
- ▶ Criticism of religion: *Dubowska and Skup v. Poland*

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LAST BY NO MEANS LEAST

Freedom of expression applies to words that shock, offend or disturb. “What is freedom of expression? Without the freedom to offend, it ceases to exist.”

Salman Rushdie

“Freedom of expression ... is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”

Handyside v. the United Kingdom, 7 December 1976

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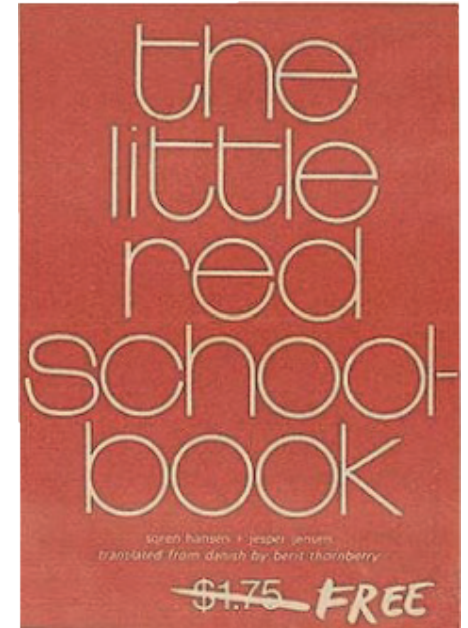


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The “Little Red Schoolbook” was written in the 1960s and included advice on sex, drugs, alcohol and tobacco. It was censored in many countries and subject of the case of *Handyside v. the United Kingdom* before the European Court.

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MODULE 3

Restrictions on the right to freedom of expression

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COUNTERING THE USE OF SLAPPS – MODULE 3

MODULE OUTLINE

- ▶ Permissible restrictions
- ▶ Application of the three-part test

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COUNTERING THE USE OF SLAPPS – MODULE 3

PERMISSIBLE RESTRICTIONS

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COUNTERING THE USE OF SLAPPS – MODULE 3

RESTRICTIONS ON FREEDOM OF EXPRESSION

When a case comes before the Court in which an applicant claims that their right to freedom of expression has been restricted in violation of Article 10, the Court follows a specific logic.

First, it assesses whether there has been an ‘interference’ with the right to freedom of expression.

If the answer is ‘yes’, the Court then moves on to assess whether this interference was justified. This assessment itself consists of three stages, and is often referred to as “the three-part test”.

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COUNTERING THE USE OF SLAPPS – MODULE 3

EUROPEAN CONVENTION ON HUMAN RIGHTS, ARTICLE 10:

The test for restrictions is firmly based on the text of Article 10, which allows for restrictions only under specific circumstances. As highlighted in the text:

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, **may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary** in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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COUNTERING THE USE OF SLAPPS – MODULE 3

APPLICATION OF THE THREE-PART TEST

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THE ‘THREE-PART TEST’

The so-called ‘three-part test’ follows the logic of the text of Article 10(2) :

- (1)The restriction has must have been prescribed by law;
- (2)The restriction must have been imposed in pursuit of a legitimate aim; and
- (3)The restriction must be demonstrated to have been ‘necessary in a democratic society’.

All three parts of this test must be met ; if one or more of these three conditions are not met, then the restriction violates the right to freedom of expression.

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COUNTERING THE USE OF SLAPPS – MODULE 3

1) PRESCRIBED BY LAW

In applying the ‘prescribed by law’ test, the Court uses a substantive test. It considers that the term ‘law’ includes legal provisions passed by parliament, but also ministerial regulations and similar norms, as well as judicial interpretations of the law.

In *Ekin Association v. France* (17 July 2001), it held:

“[T]he concept of ‘law’ must be understood in its ‘substantive’ sense, not its ‘formal’ one. It therefore includes everything that goes to make up the written law, including enactments of lower rank than statutes and the court decisions interpreting them.”

In common law countries, it also includes unwritten common law.

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COUNTERING THE USE OF SLAPPS – MODULE 3

1) PRESCRIBED BY LAW (CONTINUED)

Further requirements include:

The legal measure on which the restriction is based must be ‘adequately accessible’. Unpublished internal regulations cannot provide a basis for a restriction.

The law must be foreseeable, meaning ‘formulated with sufficient precision to enable the citizen to regulate their conduct’ (*Sunday Times v. the United Kingdom*, 26 April 1979). Journalists and other professionals are expected to take special care and, if necessary, to seek legal advice (see, in particular, *Delfi v. Estonia (GC)*, 16 June 2015)

The law must afford protection against abuse and arbitrary or excessive use of the law (*Centro Europa 7 S.R.L. and Di Stefano v. Italy (GC)*, 7 June 2012)

The law must provide for the possibility of judicial review (*Ahmet Yildirim v. Turkey*, 18 December 2012)

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2) A LEGITIMATE AIM

There must be a realistic link between the expression that is restricted and the legitimate aim pursued; there cannot just be a hypothetical or uncertain possibility.

The legitimate aims are:

- ▶ **National security:** e.g. *Hadjianastassiou v. Greece* (16 December 1992): conviction of a military engineer who had sold classified military information to a private company pursued the legitimate aim of protecting national security.
- ▶ **Territorial integrity or public safety:** e.g. *Sürek v. Turkey* (No. 3) (8 July 1999): the publication of separatist propaganda which advocated recourse to violence could be legitimately restricted in order to protect territorial integrity and public safety
- ▶ **The prevention of disorder or crime:** e.g. *Rekvényi v. Hungary* (20 May 1999): political activities of police officers could be legitimately restricted in order to prevent disorder

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- ▶ **The protection of health or morals:** e.g. *Müller and Others v. Switzerland* (24 May 1988): paintings showing explicit sex acts could be temporarily removed from a public gallery that was accessible to children
- ▶ **The protection of the reputation or rights of others:** e.g. *MGN v. the United Kingdom* (18 January 2011): a newspaper was found to have violated the right to privacy of a well-known model by publishing about her treatment for drug addiction
- ▶ **Preventing the disclosure of information received in confidence:** e.g. *Stoll v. Switzerland* (10 December 2007): conviction for publishing “secret official deliberations” concerning compensation due to Holocaust victims for unclaimed assets justified to prevent the disclosure of information received in confidence
- ▶ **Maintaining the authority and impartiality of the judiciary:** e.g. *Worm v. Austria* (29 August 1997): conviction of a journalist who had written an article which was extremely critical of a defendant in a criminal trial, and which the Austrian courts had decided could influence the outcome of a criminal trial, was justified.

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COUNTERING THE USE OF SLAPPS – MODULE 3

3) NECESSARY IN A DEMOCRATIC SOCIETY

Exceptions to the right to freedom of expression “must be narrowly interpreted and the necessity for any restrictions must be convincingly established” (*Observer and Guardian v. the United Kingdom*, 26 November 1991)

In the case of *Sunday Times v. the United Kingdom* (No. 1), (26 April 1979), the Court elaborated on the strict meaning of the word, “necessary”:

“[W]hilst the adjective ‘necessary’, within the meaning of Article 10 (2), is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ ... it implies the existence of a ‘pressing social need’.”

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COUNTERING THE USE OF SLAPPS – MODULE 3

3) NECESSARY IN A DEMOCRATIC SOCIETY: ELEMENTS OF THE TEST

In determining whether there is a ‘pressing social need’ that would justify a restriction as being ‘necessary in a democratic society’, the Court requires that the following questions are addressed:

1. Are the reasons given for the restriction ‘relevant and sufficient’? As part of this, it needs to be assessed whether the authorities based themselves on an acceptable assessment of the relevant facts; and whether they applied standards that were in conformity with the principles embodied in Article 10?
2. Is the restriction proportionate to the legitimate aim pursued?

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COUNTERING THE USE OF SLAPs – MODULE 3

3) NECESSARY IN A DEMOCRATIC SOCIETY: PROPORTIONALITY

Various factors are taken into consideration to assess whether or not a restriction is proportionate to the aim pursued, including:

- ▶ The nature and severity of the restriction, and how long it was imposed for (see, for example, *Sunday Times v. United Kingdom* (No. 1))
- ▶ The position of the applicant and his/her role in the public debate
- ▶ The impact of the expression in question: how many individuals have read, seen or heard it (for example, in *Tamiz v. the United Kingdom* (19 September 2017) only a limited number of people had accessed an impugned blog post and so it had limited impact)

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3) NECESSARY IN A DEMOCRATIC SOCIETY: PROPORTIONALITY (CONTINUED)

Further factors are taken into consideration to assess whether or not a restriction is proportionate to the aim pursued:

- ▶ The right of the public to be informed on matters of general importance
- ▶ Whether the authorities have struck a fair balance between the right to freedom of expression and other rights (see, for example, *Cumpănă and Mazăre v. Romania* (17 December 2004))
- ▶ Whether the authorities have applied the least restrictive means possible to achieve the legitimate aim (see, for example, *Ürper and Others v. Turkey* (20 October 2009))

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COUNTERING THE USE OF SLAPPS – MODULE 3

PROCEDURAL FAIRNESS AND LEGAL COSTS

National courts need to ensure procedural fairness in all cases before them.

This may require taking steps to ensure equality of arms between parties. In *Steel and Morris v. the United Kingdom* (15 February 2005), the Court found that a defamation case taken by McDonalds against two individuals of whom one was unemployed and the other earned £65 a week, and who were unable to afford lawyers to represent them, violated the right to freedom of expression.

States must ensure that legal costs for are not excessive. In *MGN v. the United Kingdom* (18 January 2011), the Court found that a large award of legal costs against a newspaper constituted a violation of the right to freedom of expression.

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COUNTERING THE USE OF
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MODULE 3

The Sunday Times v. the United Kingdom
(No. 1)

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COUNTERING THE USE OF SLAPPS – MODULE 3

FACTS

Between 1962 and 1966 the parents of seventy of the children sued the company for negligence; most of these cases were settled in 1968. Following the settlement, nearly four hundred other suits were filed by other parents and their children and the company said that it would establish a charitable trust fund for all children and parents who had been affected. Eventually, a settlement involving the setting up of a significant trust fund was worked out and was expected to be submitted for court approval.

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COUNTERING THE USE OF SLAPPS – MODULE 3

FACTS (CONTINUED)

A newspaper had reported on the ‘thalidomide children’ throughout the proceedings, and it had criticised the 1968 settlement. In 1972, it published an article examining the settlement proposal and described it as “grotesquely out of proportion to the injuries suffered”, criticising various aspects of domestic law in personal injury cases, and complaining of the delay that had elapsed since the births. A footnote to the article announced that a future article would trace how the tragedy occurred, including an investigation into whether the drug company had carried out proper tests on the drug, and whether it had been aware that thalidomide could have a negative impact on the unborn foetus.

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COUNTERING THE USE OF SLAPPS – MODULE 3

FACTS (CONTINUED)

The government applied for and was granted an injunction prohibiting publication of this future article on the grounds that it would constitute ‘contempt of court’. ‘Contempt of court’ is a legal process that is well-known in the United Kingdom to protect the administration of justice but which was not based in written law. The injunction was granted.

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FACTS (CONTINUED)

The applicant applied for the injunction to be lifted but was ultimately unsuccessful. Parallel to the appeal proceedings, a public debate on the issue ensued, including a debate in Parliament and articles in other newspapers referring to issues similar to those the future article in the applicant's newspaper would have addressed. The injunction was finally lifted in 1976, after a settlement had been reached and approved by the courts. The contentious article was eventually published, four years after its intended publication.

The publishers launched a case at the European Court of Human Rights.

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

45. It is clear that there was an “interference by public authority” in the exercise of the applicants’ freedom of expression, which is guaranteed by paragraph 1 of Article 10 (art. 10-1). Such an interference entails a “violation” of Article 10 (art. 10) if it does not fall within one of the exceptions provided for in paragraph 2 (art. 10-2). The Court therefore has to examine in turn whether the interference in the present case was “prescribed by law”, whether it had an aim or aims that is or are legitimate under Article 10 (2) (art. 10-2) and whether it was “necessary in a democratic society” for the aforesaid aim or aims.

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COUNTERING THE USE OF SLAPPs – MODULE 3

ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

49. In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

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COUNTERING THE USE OF SLAPPs – MODULE 3

ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

52.... the Court does not consider that the applicants were without an indication that was adequate in the circumstances of the existence of the “prejudgment principle”. Even if the Court does have certain doubts concerning the precision with which that principle was formulated at the relevant time, it considers that the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the draft article might fall foul of the principle.

53.The interference with the applicants’ freedom of expression was thus “prescribed by law” within the meaning of Article 10 (2) (art. 10-2).

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COUNTERING THE USE OF SLAPPS – MODULE 3

ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

57. It remains to be examined whether the aim of the interference with the applicants' freedom of expression was the maintenance of the authority and impartiality of the judiciary ...The reasons why the draft article was regarded as objectionable by the House of Lords (see paragraphs 29 to 33 above) may be briefly summarised as follows:

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

- ▶ by «prejudging» the issue of negligence, it would have led to disrespect for the processes of the law or interfered with the administration of justice;
- ▶ it was of a kind that would expose Distillers to public and prejudicial discussion of the merits of their case, such exposure being objectionable... as it inhibits suitors generally from having recourse to the courts;
- ▶ it would subject Distillers to pressure and to the prejudices of prejudgment of the issues in the litigation, and the law of contempt was designed to prevent interference with recourse to the courts

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COUNTERING THE USE OF SLAPPS – MODULE 3

ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

- ▶ prejudgment by the press would have led inevitably in this case to replies by the parties, thereby creating the danger of a “trial by newspaper” incompatible with the proper administration of justice;
- ▶ the courts owe it to the parties to protect them from the prejudices of prejudgment which involves their having to participate in the flurries of pre-trial publicity.

The Court regards all these various reasons as falling within the aim of maintaining the “authority ... of the judiciary” as interpreted by the Court in the second sub-paragraph of paragraph 55 above.

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COUNTERING THE USE OF
SLAPPS – MODULE 3

**ECTHR JUDGMENT
(EXCERPTS, REFERENCES
OMITTED):**

Was the interference “necessary in a democratic society” for maintaining the authority of the judiciary?

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COUNTERING THE USE OF SLAPPS – MODULE 3

ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

59. The Court has already had the occasion in its above-mentioned Handyside judgment to state its understanding of the phrase “necessary in a democratic society”, the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions.

The Court has noted that, whilst the adjective “necessary”, within the meaning of Article 10 (2) (art. 10-2), is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable” and that it implies the existence of a “pressing social need” (p. 22, para. 48).

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COUNTERING THE USE OF SLAPPS – MODULE 3

ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

62. It must now be decided whether the “interference” complained of corresponded to a “pressing social need”, whether it was “proportionate to the legitimate aim pursued”, whether the reasons given by the national authorities to justify it are relevant and sufficient under Article 10 (2).

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

The proposed Sunday Times article was couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a court could arrive; although it analysed in detail evidence against Distillers, it also summarised arguments in their favour and closed with the words: “There appears to be no neat set of answers ...”. In the Court’s opinion, the effect of the article, if published, would therefore have varied from reader to reader. Accordingly, even to the extent that the article might have led some readers to form an opinion on the negligence issue, this would not have had adverse consequences for the “authority of the judiciary”, especially since, as noted above, there had been a nationwide campaign in the meantime.

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

On the other hand, publication of the proposed article might well have provoked replies. However, the same is true, to a greater or lesser extent, of any publication that refers to the facts underlying or the issues arising in litigation. As items in that category do not inevitably impinge on the “authority of the judiciary”, the Convention cannot have been intended to permit the banning of all of them. Moreover, although this particular reason for the injunction might possibly have been “relevant” under Article 10 (2) (art. 10-2), the Court cannot decide whether it was “sufficient” without examining all the surrounding circumstances.

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

As the Court remarked in its Handyside judgment, freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (p. 23, para. 49).

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

To assess whether the interference complained of was based on “sufficient” reasons which rendered it “necessary in a democratic society”, account must thus be taken of any public interest aspect of the case.

66. The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal tragedy or whether the victims could demand or hope for indemnification only from the community as a whole; fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised and many facets of the existing law on these subjects were called in question.

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

As the Court has already observed, Article 10 (art. 10) guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed (see paragraph 65 above).

In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the “authority of the judiciary”.

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

In September 1972, the case had, in the words of the applicants, been in a “legal cocoon” for several years and it was, at the very least, far from certain that the parents’ actions would have come on for trial. There had also been no public enquiry.

It is true that, if the Sunday Times article had appeared at the intended time, Distillers might have felt obliged to develop in public, and in advance of any trial, their arguments on the facts of the case (see paragraph 63 above); however, those facts did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion.

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ECTHR JUDGMENT (EXCERPTS, REFERENCES OMITTED):

67. Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2) (art. 10-2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.

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