Freedom of Expression

FACULTY HUMAN RIGHTS CONFERENCE :10 December 2015
Lord Hamilton

It is now almost 40 years since the Strasbourg Court (in **Handyside v United Kingdom** (1976) A 24, at para 49-the "Little Red Schoolbook" case) said that a central aim of Article 10 of the European Convention was the furtherance of "pluralism, tolerance and broadmindedness without which there is no democratic society" and thus that ideas or information which "offend, shock or disturb the State or any sector of the population' are as much covered as those "favourably received or regarded as inoffensive or as a matter of indifference". The Court was, however, careful to say that these observations were subject to paragraph 2 of Article 10, which allows for restrictions for, among other things, the protection of the reputation or rights of others. A similar qualification is to be found in paragraph 3 of article 19 of the UN Convention on Civil and Political Rights.

In 1976, while intercommunication among computers had already been achieved and that was the year in which the Apple I was invented, we were still more than a decade short of the World Wide Web. Since then we, or at least some, have come a long way. The expansion in social media communication has, for example, been exponential. That, among other much expanded uses of digital technology, has given rise to fresh challenges in the field of freedom of expression.

What, principally, I would like to do in this address is to consider a recent case from the Court at Strasbourg, which may be controversial but which had to deal with at least one aspect of the modern problem. Before I do so, however, I should explain that, as respects digital technology, I am a dinosaur. While I was a full-time serving judge, my emails were done for me by others; it was only on retirement that I purchased an Apple and began for myself electronic communication and searches. I am not a subscriber to Facebook; nor do I send or receive tweets. So, if in discussing the subject matter to follow I display lamentable technical ignorance, I hope that you will forgive me.

The case I want to focus on is **Delfi AS v Estonia**, a decision of the Grand Chamber delivered on 16 June of this year. For those who may be unfamiliar with it, let me sketch the background.

The essential question before the Grand Chamber was whether the right of Delfi (the applicant company before the Court) to freedom of expression had been violated by a decision of the Supreme Court of Estonia which had affirmed lower court decisions holding Delfi liable in civil damages to an an individual in respect of breach of that individual's personality rights (broadly, in defamation, or possibly, in Scotland, in verbal injury). Delfi owned an Internet news portal company which published up to 330 news articles a day on a commercial basis.

At the material time (as long ago as January 2006) there was posted at the end of the body of each news item an invitation to readers to add their personal comments; there was provision for any commentator to give his or her name or email address but doing so was optional. The comments were uploaded automatically and were not scrutinised, edited or moderated by Delfi prior to their communication on the net. About 10,000 readers' comments were received daily, the majority being anonymous. There was in place a system of notice-and-take-down, wherby anyone could object to a comment as being insulting or as inciting hatred; if that happened, the offending comment was removed expeditiously. There was also a system of automatic deletion of comments which included certain obscene words; and a victim of a defamatory statement could notify Delfi directly, in which event the comment was removed immediately.

In January 2006 Delfi published an article on its portal concerning action taken by an Estonian company which operated a public ferry service between the mainland and certain islands in the Baltic. An individual (identified in the proceedings only as L) was the major shareholder of that ferry company. The action taken involved, it seems, the destruction of certain routes by which citizens could, during the winter months, drive across the frozen sea from the mainland to and from these islands-apparently at lesser cost than paying for the ferry.

The news item published by Delfi was unobjectionable in its content but it attracted some 20 separate and anonymous comments hostile to L. Much of the language used in the comments was of a vulgar and offensive character; some of it went further, suggesting that L should be mortally dispatched (or should so dispatch himself) or that he and others like him were "crooks"; in one instance the expression "sick Jew" was used, which might have amounted (in our jurisprudence) to hate crime.

L's lawyers, some 8 weeks after the appearance of these comments, requested that Delfi take them down from the site; they were taken down by it the same day. However, L also claimed against Delfi compensation for non-pecuniary damage. Proceedings were raised in the County Court in Estonia, where,ultimately, compensation (in a relatively small sum) was awarded against Delfi. The domestic law relied on was legislation protecting honour or "personality rights". The County Court held that the right to freedom of expression did not extend to protection of the comments in question and that L's "personality rights" had been violated by Delfi's disclosure on the net of the offending comments. That decision was upheld in the Tallinn Court of Appeal and thereafter in the Estonian Supreme Court. Delfi then challenged these conclusions at Strasbourg relying on Article 10. The challenge was unsuccessful before a Chamber of the Court and also before the Grand Chamber. It was held in the latter, by a majority of 15 to 2, that there had been no violation of Delfi's right to freedom of expression as guaranteed under the Convention. The dissenting judges were those from Hungary and Georgia; 10 judges subscibed to the opinion of the Court; there was a joint concurring opinion by 4 others and a fifth delivered a separate opinion. The British judge was not a member of the Grand Chamber.

All the opinions provide interesting reading. There has been academic commentary, some at least of it supportive of the minority view.

There was no doubt that, under the domestic law of Estonia, the offending comments were unlawful and that, although that law provided for freedom of expression, the authors (the originators of the comments) could, if identified, have been found civilly liable. But, what about Delfi, through whose portal these comments had reached, at least potentially, a wide readership?

Under that domestic law liability for damage to personality rights was, in terms of legislation apparently designed to implement Directive 2000/31/EC, excluded in certain defined circumstances-for example, in the case of mechanical and passive transmission of information digitally. But, a defence based on that law was rejected in the Tallinn Court of Appeal, leave to appeal on that matter to the Estonian Supreme Court being refused. The basis of that rejection is not wholly clear from the Strasbourg judgment but, it being a matter of the interpretation and application of domestic law, it was not challenged before the Grand Chamber. While that Chamber recognised that there were practical differences between print publication on the one hand and the operation of an Internet news portal on the other, particularly as regards the ability effectively to screen objectionable material, it held that each, when they provided for commercial purposes a platform for user-generated comments on previously published content, could, consistently with Article 10, be held civilly liable to the victim of unlawful speech for such comments. The Court sought to draw a distinction between such provision and (? non-commercial) fora such as an Internet discussion forum/ bulletin board or a social media platform. A fair balance, it was held, had to be struck between the right of freedom of expression under Article 10 of the Convention and the right to protection of reputation under Article 8.

The dissenting judges seem to have been particularly exercised by the Court approving what these judges described as "a liability system that imposes a requirement of constuctive knowledge on active Internet intermediaries"; by "active Internet intermediaries" they meant those who provide their own content but also open their digital services for third parties to comment on that content. These judges found the potential consequences of this troubling. They said: "For the sake of preventing defamation of all kinds, and perhaps all "illegal" activities, all comments will have to be monitored from the moment they are posted. As a consequence, active intermediaries and blog operators will have considerable incentives to discontinue offering a comments feature, and the fear of liability may lead to additional self-censorship by operators. This is an invitation to self-censorship at its worst." Later they added: "[The Internet] is a sphere of robust public discourse with novel opportunities for enhanced democracy. Comments are a crucial part of this new enhanced exchange of ideas among citizens."

Academic commentary has included the suggestion that the Court's judgment "involves a potentially controversial departure from the established

understanding of internet intermediary liability". It has also been suggested that the view of the portal as having control over user-generated content seems to overlook the difficulties of information management.

Directive 2000/31/EC, referred to above, was implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002. These regulations were considered judicially by Eady J. in **Bunt v Tilley** [2006] 3 All ER 336 in relation to allegedly defamatory statements on the Internet. His Lordship also made some interesting observations on the position of the communication of such statements at common law. The statutory defence under section 1 of the Defamation Act 1996 (which also applies to Scotland) is also potentially relevant. The UK Electronic Commerce Regulations, like the equivalent provisions in Estonia, provide for exceptions from civil damages and criminal penalties in certain circumstances. Under the UK Regulations these include where the information service provider "hosts" the information (that is, where it stores it for longer than a transitory period) provided, however, that it "does not have actual knowledge of unlawful activity or information and.. is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful..". That provision appears to replicate, with one possibly significant variation, the English language version of the 2000 Directive. The variation is that, in the UK version, the subjunctive "would have been apparent" is used, while in the body of the Directive the indicative "is apparent" is used-as to which, more later.

Some prophets have foretold the demise of the print media, including their letters pages. The latter have long been a mode of expressing views, often controversial views; the expression of such views will, in general, be a healthy activity in a democracy. But, the print media have always had to be careful to avoid printing and disseminating defamatory material in their letters pages, as elsewhere; otherwise, they may be civilly liable as communicators to the person defamed. If the letters pages in the print media are to be superseded, in whole or in part, by commercial news portals of the kind which featured in **Delfi**, how stands the exposure of the operator of such a portal to damages for defamatory material posted by its digital readers?

A feature of internet communication is that it can be, and not infrequently is, anonymous. The writer of a letter designed for publication in a newspaper will, almost certainly, require to provide his or her name; and that name itself will be published, with consequent exposure of the author to proceedings for illegal, including defamatory, material. A facility to comment anonymously, including to so comment in defamatory language, may encourage licence on the part of authors to the detriment of the Article 8 rights of those commented on. It may be that this, consistently with Article 10, justifies the imposition of a duty of care on internet facilitators with respect to what passes through their portals. It should be noted that, although Article 15 of the E-Commerce Directive prohibits Member States from imposing a general obligation on providers to monitor the information they transmit or store, recital (48) of the same Directive envisages the possibility of Member States imposing a duty of reasonable care on

providers. It may be arguable that, although the UK Regulations do not expressly so provide, the use in the Regulation of the subjunctive 'would" (as mentioned above) may import such a duty. That might be the subject of future litigation. If such a duty is inferred, it will be interesting to see how the law develops as regards the content of that duty.

In a recent BBC radio broadcast in the "A Point of View" series Professor Roger Scruton, in his usual forceful way, has criticised some modern legislation designed to curb the expression of certain views. In his sights were the Communications Act 2003 (which applies throughout the UK) and the Racial and Religious Hatred Act 2006 (which applies to England and Wales only). He might have added references to the Criminal Justice and Licensing (Scotland) Act 2010 and the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. All in substance provide criminal sanctions against, among other things, the incitement of racial and religious hatred and of serious violence.

Most people would, I think, deplore the incitement of racial or religious hatred and, **pace** Professor Scruton, consider it justifiable (and consistent with the due scope of freedom of expression) for the State to provide for sanctions, including in some cases criminal sanctions, against such behaviour. The same, I think, would be true of threats of, or incitement to, serious violence. The target, or at least the primary target, of such sanctions one would expect to be the originator of such abusive conduct. But what, in this digital age, of such bodies as facilitate the conveyance of such abuse? For example, section 6(1) of the above-mentioned 2012 Act provides:

"A person commits an offence if-

(a) the person communicates material to another person, and

(b) either Condition A or Condition B is satisfied."

"Communicates" is defined very broadly.

Each of Conditions A and B is hedged by a mental element: as to Condition B, which concerns stirring up hatred on religious grounds, the person communicating the material must intend to stir up hatred on those grounds; but, as to Condition A, which concerns threats of, or incitement to, serious violence, it is sufficient if the communicator is reckless as to whether the communication of the material would cause fear or alarm. How, then, stands the provider of a digital portal, whether commercial or social, through whose portal such material is communicated?

Roger Scruton, in a later piece in the same radio series, deplores in particular "self-censorship", contending that it is even more harmful than censorship by the State. Self-censorship in this context can take various forms. Roger Scruton's example was of the reluctance of local councillors and officials in Rotherham to speak out against sexual abuse, of which they were aware, being perpetrated against young people by adults from ethnic minorities. The chilling factor leading to self-censorship on the part of digital news providers was, as you will recall, a concern of the minority judges in **Delfi**. Is there, then, a risk that the providers of digital portals on the Internet will, against the risk of civil liability or criminal

conviction, feel compelled to delete or to edit material coming to their portals from members of the public, with a concerning risk to freedom of expression? How practical is such deletion and editing, involving as it might tens of thousands of items? Is there a valid distinction between a portal operator who provides initial content and then hosts comment thereon and a portal operator (again usually a commercial company) who, while providing no content, hosts and so for some time at least disseminates the comments of others? Is there a proper place in a liberal democracy for anonymous comment on the Internet, even if on occasion it may descend into infringement of the rights of others? Would a requirement that commentators provide their identities to the portal provider and the release of that information to an aggrieved third party relieve the provider of liability as disseminator?

So, the increasing use of the Internet in various forms as a means of communication raises many interesting and, as yet, judicially unresolved questions about the scope and the control of freedom of expression in the modern age.

In conclusion, let me briefly respond to some of the points made by Sir Stephen in his excellent address. First, the matter of lying, by which I understand is meant the deliberate statement of what is known to be false. For my part, I would not acknowledge a right to lie, though I would concede a freedom or liberty in certain circumstances to do so. Leaving aside any nice jurisprudential distinction between a right and a liberty, I think that to acknowledge a right to lie is to give to lying a status it does not deserve. On the other hand, I concede a freedom or liberty to lie where that does not materially damage the rights of others and is not otherwise intolerable in a liberal democracy. To have the benefits, for example, of good investigative journalism (and there are many such benefits) one must be prepared to suffer the mendacity as well as the absurdity of some elements of the press. The same may be true of political speech. The alternative is the Orwellian horror of a Ministry of Truth.

Secondly, a troubling feature of our modern society has been the “no platform” policies (mentioned by Sir Stephen) of some tertiary education institutions. Very recently we had the instance of the attempt to deny a platform to Germaine Greer because of certain views she had earlier expressed on transgender issues. In the event Greer gave her lecture at Cardiff University, which lecture was in fact unconnected to transgender issues. Worryingly, however, she found it necessary to have security provided for her. Another troubling and related concern is the “safe spaces” and “trigger warning” policies apparently adopted by some American universities, designed to protect young persons being exposed to controversial public communication. Such institutions ought to be the guardians of free speech, however unpopular or even offensive that speech may be. It is only by hearing the misguided and publicly and rationally challenging their statements that democracy can flourish.

Lord Hamilton
10 December 2015