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The common law cannot adapt to modern ideas of democracy

Intense media interest in so-called super-injunctions over the past few weeks has coincided with the judgment of the European Court of Human Rights in the colourful case of *Mosley v United Kingdom* (Application No 48009/08) on 10 May 2011.

The controversy may appear to have more to do with the intrinsic news value of celebrity and the special interest of the media in their own freedom than the significance of the legal issues for most of the population. There is, however, more at stake.

In 1998, parliament passed the Human Rights Act, which gave effect to the European Convention on Human Rights. At first sight, the broad principles of the convention are not controversial.

Article 8, for example, guarantees a right to the protection of private and family life, article 13 provides that rights should be accompanied by effective remedies (without which rights may have only theoretical value), and article 10 guarantees freedom of expression.

The justification for these protections from a century in which states often trampled over the rights of not only their own citizens but also thereby created the conditions for aggressive war are not hard to find; the journey, however, from repressive states to "F1 boss has sick orgy with 5 hookers" must have been an interesting one.

The courts must do their best to apply English law in a way which is consistent with the convention. Where the convention rights of individuals conflict, they must try to strike the correct balance between the conflicting rights. They must provide effective remedies.

Existing law is to be interpreted so as to be consistent with the convention. Where there was no directly relevant existing law, the courts have attempted to frame the historic judge-made or common law to fill the gap.

There is not and has never been a distinct law of personal privacy as such created by act of parliament. This has led to the criticism that judges have gone beyond the previous boundaries of the common law and become legislators in the field of privacy protection. The common law has always been open to this criticism, although whether it is a strength or a weakness depends upon your point of view.

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In its approach to the human rights act, parliament chose to increase the constitutional role of the common law and thereby the courts dramatically. It is a little late now to realise that the common law is not democratic.

This criticism has particular force where the 'legal' question (as it was in Mosley) is the right balance between Mosley's right to privacy for his sexual activities and the rights of newspapers to express themselves freely by reporting them. Given the context of rapidly changing social conditions within which the question must be answered, it seems more like a question to be answered by democratic process than legal expertise.

Mosley succeeded in the UK courts and recovered damages. His submission to the ECHR was that in the absence of a way of stopping publication in the first place, he had no sufficiently effective remedy because money alone couldn't make good the harm he had suffered. He sought a decision that the convention required newspapers to give individuals notice of stories in advance of publication to allow an opportunity to apply to the court for an injunction. He failed.

This leaves the position unchanged, and it is an uncomfortable position for the courts. If there is an opportunity before publication and an arguable case that, in the language of the ECHR, freedom of expression must cede to privacy on the facts, the court could grant a temporary injunction restraining publication until the case could be decided.

Anyone with notice of the injunction must not break it, as to do so would show contempt of the court and make the injunction ineffective. It is this very long established effect beyond the parties to the case that has fuelled controversy, although it is obviously necessary and no more than common sense.

A 'super' injunction is one which forbids the disclosure of its own existence. Perhaps in the end, the answer will have to be that damages rather than injunctions will just have to do.

The judges are caught in a democratic vacuum not of their own making. A major problem now is that the press generally have sought to establish a consensus that the injunctions are not only wrong as a matter of high principle but also ridiculous and even reprehensible. They have thereby created conditions by which the highest of all principles – the rule of law – is now threatened by internet revelations and the misuse of parliamentary privilege.

The courts may not have effective methods to deal with either. The report by Lord Neuberger's Committee is sensible but, by its nature, of limited relevance to the fundamental issues.

Following the legal difficulties faced by parliamentarians over expenses, there may be a not entirely rational wish to reassert prestige and push back against the courts. Much of the media (both new and old) may now be too powerful and global to play any responsible constitutional role in the affairs of one country. Perhaps even the common law has reached the limit of its adaptability within modern ideas of democracy. mp

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