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A Not Entirely Secret History of Superinjunctions Against the British Press: When Public Interest Arguments Take Second Place

Abstract

This article revisits the history of judicial pre-publication censorship since the passage of the *1998 Human Rights Act* – mainly non-disclosure injunctions commonly referred to as superinjunctions – through the interplay between three ilities: Practicability, accountability and suitability. The intertwining of these three concepts offers a pathway to explore various strategies of circumvention employed within news organisations, the legislative and the general public, as well as the role of technology in facilitating such tactics, in cases of pre-publication censorship. A qualitative case-study approach is adopted and findings are based on open access archival research for the period since the afore mentioned Act came into effect. This article demonstrates how pressure has been brought to bear on the legislative and judiciary, as the national British press has criticised failure to recognise the significance of public interest in cases of pre-publication censorship. However, it is argued that change has been limited to a slightly greater degree of transparency and that the interplay between the three ilities reinforces calls for an end to this form of prior restraint on freedom of expression as well as improvements to the self-regulatory system in place.

Keywords

Censorship | Freedom of expression | Privacy | Public interest | Superinjunctions

Introduction

The British press has a long history of asserting its right to publish without interference from the State. The industry's self-regulatory model has remained more or less constant since the end of the Second World War. Calls for any substantial changes have been vigorously refuted by large sections of the press and political debate on the issue is well-documented. Since 1947, British governments have commissioned reports regarding concerns about the press on seven separate occasions, the most recent instance being a 2012 report based on a public inquiry into the culture, practices and ethics of the press,

commonly known as the Leveson Inquiry. In the context of this inquiry, several legacy newspapers claimed that three hundred years of press freedom would be under threat if any changes to the self-regulatory system were made.¹ However, this assertion is a myth that does little justice to the complexities of press freedom history. It appears to be a throwback to the Whig interpretation of history, as these newspapers fail to distinguish between the historical context and the present. Thus, the impression is given that a single moment led to the dismantling of state interference. Oft-quoted examples include the abolition of the Court of Star Chamber in 1641, the lapse of the Licensing Act in 1695, the passage of the Libel Act in 1792, as well as the end of so-called taxes on knowledge between 1853 and 1861. According to this same tradition, market competition and the rise of advertising in the nineteenth century also facilitated independence from government control. Yet few historians today would agree with such a simplistic interpretation. As media historian James Curran and others have amply demonstrated, the commercial press of the mid-nineteenth century was not devoid of political influence and market forces also came into play, making it difficult to represent the full spectrum of people's beliefs.²

The democratic function of the news industry was – and continues to be – under strain from the commercial imperatives of the market. Recent figures indicate that just three companies control ninety percent of the UK's national newspaper market and also make up over forty percent of the country's top fifty online news brands. Additionally, ten of the top fifteen online platforms used to access news in the UK are owned by Meta, Google and X Corp.³ This raises questions regarding the impact of such a low level of media plurality on news agenda setting and on press freedom more generally. Indeed, no news organisation has absolute freedom from economic, legal, political or social constraints and the British press has always been subjected to pressures that lead to instances of prior restraint from within and without. The question is rather which bodies are responsible for imposing censorship and to what extent the press may exert pressure in favour of the freedom to publish.

This article focuses on the case of judicial pre-publication censorship – mainly pre-trial non-disclosure injunctions commonly referred to as superinjunctions – through the prism of what shall be referred to herein as the interplay between three ilities: practicability, accountability and suitability. Together, these three concepts offer a pathway to explore various strategies of circumvention employed within news organisations, the legislative and the general public, including the role of technology in facilitating these practices. For the purpose of this study, practicability is to be understood in the

context of failure to enforce secrecy. Accountability points to the role of the press industry in holding individuals and organisations responsible for their actions as per the right to inform and the democratic imperative. Suitability involves rethinking the model of prior restraint of the British press in its current form in light of enforceability issues and the importance of freedom of expression in the public interest when balanced against competing rights. In particular, this paper seeks to demonstrate how these three concepts have come into play when the press has struggled to gain recognition of a public interest defence and what this suggests with respect to influence over the legislative and the judiciary, against the backdrop of long-running weaknesses of self-regulation of the press.

Defining the public interest is fraught with difficulties. The values attributed to this term depend on those of the community and may fluctuate over time. For the purpose of this study in the field of pre-publication injunctions, it should be noted that the relevant courts have been expected to interpret what constitutes the public interest in relation to human rights, as laid down in the European Convention of Human Rights (ECHR). This has been the case since the Human Rights Act 1998 came into effect. There has been much confusion in the media as to the definition of superinjunctions in relation to pre-publication and pre-broadcast censorship. It is therefore worth referring to the definitions provided by the judicial committee on superinjunctions, which was set up in April 2010 due to concern over the *Trafigura* and *John Terry* cases.⁴ The judicial committee's report states that anonymised injunctions are those which prohibit revealing the identity of the parties involved but allow news of the proceedings to be communicated, whilst superinjunctions are those which proscribe reporting the very existence of the injunctions. The said report concludes that anonymised injunctions and superinjunctions can only be granted temporarily as they constitute derogations to the principle of open justice and public scrutiny. It is also important to note from the outset that the UK has three distinct legal systems. There is one for England and Wales, whereas there are separate ones in Scotland and Northern Ireland. This means that if a superinjunction is granted in England, it is enforceable in Wales, but not in Scotland or Northern Ireland. Furthermore, any superinjunction granted within one of these three legal jurisdictions has no legal bearing abroad. In Scots law, the appropriate term is an interdict, which may be interim (limited in duration) or perpetual. It may be issued by either the Sheriff Court or the Court of Session. However, an interdict is personal in nature and can only be directed against specific individuals. This means the Scottish courts cannot grant one against any other persons having knowledge of the said interdict. To date, there are no publicly known cases of superinterdicts having been granted.

The choice of period for scrutiny since the implementation of the Human Rights Act 1998 may be explained by a shift in how rights have been assessed in judicial pre-publication cases against the press. Despite a long history of calls for statutory press regulation, including political threats to establish a statutory press tribunal to rule on individual cases, such change did not materialise in the second half of the twentieth century. This is despite the ebb and flow of public outrage regarding the industry's failure to prevent journalistic malpractice including privacy intrusions.⁵ The well documented ability to stave off statutory regulation over such a long period is indicative of a high degree of influence, as the national press remains a major heavyweight in British media policy. Indeed, alliances between the industry and aspiring political leaders have become common since Margaret Thatcher's rise to power in the late 1970s. Ultimately, the self-regulatory system has changed little and it has been left to judges to balance competing European Convention rights in the absence of a statutory right to privacy in the UK.

The findings of this paper are based on open-access archival research for the period since the Human Rights Act 1998 came into effect and a qualitative case-study approach is adopted. Despite the inherent secrecy surrounding legal proceedings leading to judicial pre-publication censorship, much information has entered the public domain due to strategies of circumvention facilitated by technology. Amongst those cases that have come to light, three stand out due to their role in influencing debate over press freedom and the balance of conflicting rights: *Trafigura's* superinjunction in 2009, John Terry's superinjunction in 2010 and Ryan Giggs' anonymised injunction in 2011. It will be shown how the intervention of Members of Parliament (MPs) during parliamentary debate and support from online bloggers were instrumental in facilitating reporting of these prohibitive injunctions. It will be demonstrated that since superinjunctions have gone from relative obscurity towards greater scrutiny, there has been pressure for the judiciary to evolve towards a more transparent approach and find a better balance between competing rights. It will then be seen to what extent change in favour of transparency has been limited and how the model of prior restraint appears to be unsustainable in the digital era with respect to the three ilities.

From Obscurity to the Spotlight

The first recorded use of the term superinjunction appears to date back to a satirical newspaper article from 2002.⁶ However, the first reference to a superinjunction in a legal context may also be attributed to the press. It seems the term was first employed as such by *The Guardian* in September 2009, with respect

to news of toxic waste dumping in and around Abidjan, which had taken place in August 2006. This was the first case to bring the concept of superinjunctions to the fore. The scandal became known as the Trafigura case with reference to the multinational trading commodity company of the same name.

Waste belonging to Trafigura was shipped from the Netherlands and dumped in and around Abidjan without appropriate treatment. Serious questions of corporate crime ensued. The consequences for the inhabitants and the environment were devastating, with at least seventeen deaths and more than one hundred thousand people seeking medical attention.⁷ United Nations investigators reported more than a dozen deaths and alleged they were connected to fumes from the waste. Trafigura agreed to an out-of-court settlement in London following the High Court of Justice's decision to hear civil action brought by approximately thirty-one thousand Ivorian claimants. The company insisted that this agreement did not equate to acceptance of any liability. On the margin of these proceedings, Trafigura secured a superinjunction on September 11, 2009.⁸ This prevented *The Guardian* from referring to the Minton report. The said report was the result of a Trafigura-commissioned confidential scientific study and pointed to the potentially toxic nature of the waste, as well as the probable impact on victims and the environment.⁹ In his nine-page judgment in favour of Trafigura's request for an injunction, Justice Maddison dedicated less than one page to the freedom of expression in the public interest,¹⁰ which is difficult to comprehend in the context of corporate crime and environmental disaster. He concluded that since the Minton Report was confidential and privileged in nature, it was protected under Article 8 of the ECHR. He granted not only anonymity to the applicant but also proscribed any communication regarding the injunction's existence.

Furthermore, Trafigura applied pressure on other news outlets in the UK and elsewhere. In the case of *The Independent*, the decision was made by the newspaper to remove an article from its website, dated September 17, 2009, due to reference to the Minton Report¹¹. In the case of the *BBC*, the multinational trading commodity company undertook legal proceedings following allegations made in an episode of the news and current affairs programme *Newsnight* on May 13, 2009. This action led the broadcaster to make a statement in open court, which included an apology and a withdrawal of its accusations against Trafigura.¹² The *BBC* also paid costs and damages to the trading commodity company. Trafigura's litigious approach thus served to strengthen fears of a chilling effect as publishers were faced with the threat of soaring legal costs. An Oxford University study from 2008 showed that England and Wales were the most expensive jurisdictions amongst the twelve European countries examined, when comparing legal costs for the losing party and the cost of litigation.¹³

However, Trafigura's attempts to silence any reference to the Minton Report only fuelled further interest in the scandal and motivated citizens to defy the injunction in accordance with the Streisand effect. For instance, *Wikileaks* published the Minton Report online as of September 14, 2009.¹⁴ In the following weeks and months, the same organisation also revealed details of Trafigura's legal proceedings against UK-based news organisations including *The Independent* and *The Times*.¹⁵ Trafigura's efforts to suppress news of the Minton Report within the UK were also diminished by the intervention of Paul Farrelly, Labour MP for Newcastle-under-Lyne and ex-journalist. On October 12, 2009, Farrelly submitted a written parliamentary question with respect to whistle-blower protection and press freedom.¹⁶ Using the well-established principle of parliamentary privilege, he broke the injunctive relief in place by specifically referring to the multinational trading commodity company's injunction.¹⁷ In doing so, he also went against the *sub judice* rule, which bars discussion of current or impending court cases in Parliament. The said rule exists so as to prevent Parliament from influencing decision-making during legal proceedings but it is not absolute as the Lord Speaker has the power of waiver under certain conditions. Although Trafigura's superinjunction had been broken in Parliament, *The Guardian* was specifically banned from reporting in this particular instance, despite the historic right of the press to report on parliamentary proceedings.¹⁸ This proscription was then almost immediately circumvented by Twitter users and independent bloggers who rapidly found and shared details of Farrelly's parliamentary question.¹⁹

Given the speed of reactions online, as well as *The Guardian*'s planned appeal before the High Court, Carter-Ruck law firm retracted the ban on reporting of Farrelly's parliamentary question. This opened the door for media commentators to debate not only the nature, extent and legitimacy of pre-publication injunctions, but also their feasibility in the digital age, as shall be seen hereafter through the prism of the three ilities. Indeed, the Trafigura scandal marked the beginning of a sustained media campaign against superinjunctions between 2009 and 2011. During this period, there were numerous instances of defiance online and in Parliament, leading to the publication of committee reports by the judiciary and the legislative, in 2010 and 2012 respectively.

Questionable Practicability

The sustained media campaign against superinjunctions between 2009 and 2011 mainly focused on the private lives of the rich and famous. Within this mass coverage by media sources, there was

much confusion between anonymised injunctions and superinjunctions. From April 2011, *The Sun* published numerous articles related to approximately thirty sex-scandals involving supposed superinjunctions over the two previous years.²⁰ This action led to support from other news organisations. Over two hundred articles on the issue were published in the British national press within a single week in April 2011,²¹ thereby demonstrating the high level of pressure the industry was able to exert on Parliament due to the perceived influence on public opinion, with a view to reconsidering prior restraint of the press. Technology came into play as users of websites hosted outside the UK such as Twitter began searching for and sharing the names of celebrities thought to have taken out the injunctions. These news stories were a far cry from holding a multinational trading commodity company to account for a human and environmental disaster. However, the press argued fervently that these revelations were in the public interest, in accordance with the common law Reynolds defence against defamation dating back to a 1999 Law Lords' ruling.²²

During this period, two cases were subjected to public scrutiny and thus played a major role in influencing debate over press freedom and the balance of conflicting rights: England football captain John Terry's superinjunction in 2010 and Manchester United footballer Ryan Giggs' anonymised injunction in 2011. On January 22, 2010, Terry obtained a superinjunction at a special hearing, following revelations regarding an alleged extramarital affair between himself and French model Vanessa Perroncel, ex-girlfriend to one of his teammates.²³ Crucially, no particular defendant was named during these emergency legal proceedings, although News Group Newspapers was mentioned within the evidence presented. Common law does not ordinarily allow for courts to grant injunctions *contra mundum*. However, the judge in this case, Michael Tugendhat, decided to grant an interim injunction against "persons unknown" until the full hearing could take place. This occurred seven days later, at which point the temporary order was discontinued. In his final judgment, Tugendhat concluded that Terry's claim was related to concerns over his reputation, particularly with sponsors, rather than to issues of privacy.²⁴ He considered that the footballer would be unlikely to win any post-publication libel action. This meant that granting a pre-publication injunction was proscribed in accordance with a well-established common law principle dating back to 1891.²⁵ Furthermore, the judge pointed to the absence of counter-arguments. Given that Terry's legal representatives had not contacted the newspapers concerned, they had been deprived of the opportunity to put forward any arguments in favour of the freedom of the press.²⁶

Under these circumstances, it is difficult to understand how an interim injunction could have been granted in the first instance.

Despite the superinjunction being applicable for seven days, news of its existence spread rapidly due to marked defiance from internet users and newspapers alike and aided by technology. This called into question the practicability of such a legal measure. The footballer's identity was shared widely on Twitter and the injunction was often wrongly described as permanent. *The Daily Telegraph* published a story about the existence of the injunction, although the digital version was later deleted from its website. The *Daily Mail* went so far as to publish a short comment piece referring to the existence of the superinjunction and hinting that 'it could be anyone from the captain of the top team in the land to a great player in the twilight of his career.'²⁷

Terry's alleged extra-marital affair was presented by the press in the form of a dramatised narrative portraying the fall from grace and the path to redemption. This is intimately linked to a conception of the press as being free to expose and morally judge wrongdoers, as well as hold them to account in line with readers' expectations. Indeed, this portrayal, which fits into the framework of accountability, has been openly defended by Editor-in-Chiefs such as Paul Dacre from the *Daily Mail* and Piers Morgan from the *Daily Mirror*.²⁸ As with the case of *Trafigura*, the remedy of a superinjunction inadvertently drew attention to the story. Terry's alleged affair was covered in great depth by the press following the decision to discontinue the injunction. Going beyond the narrative of exposing wrongdoers, this decision was presented as marking the beginning of a new era of greater press freedom, in opposition to the pro-privacy judgments of previous years.²⁹ The role of the judiciary was personified through the juxtaposition of two figures: Justices Tugendhat and Eady. The latter had long been criticised for his pro-privacy judgments, particularly in some high-profile media trials. Paul Dacre, then Editor of the *Daily Mail*, went so far as to claim 'This law is not coming from Parliament – no, that would smack of democracy – but from the arrogant and amoral judgements – words I use very deliberately – of one man.'³⁰ Such a personal attack appears to be an attempt to influence legal proceedings. It ignores the fact that judges are required to balance European Convention rights in the absence of a statutory right to privacy in the UK. In any case, the sustained media campaign against superinjunctions between 2009 and 2011 bore fruit as Parliament decided to consider improvements to the law regarding pre-publication injunctions shortly after the furore over Manchester United footballer Ryan Giggs' anonymised injunction in 2011.³¹

On April 13, 2011, *The Sun* published a short article about an alleged extramarital relationship between an unnamed ‘Premier League star’ and the model Imogen Thomas.³² The newspaper had agreed not to reveal the identity of Giggs whilst waiting for the result of the footballer’s legal action.³³ The day after publication of the said article, the footballer was granted a temporary anonymised injunction until the return date on April 20. This was followed by an extension until the trial could take place.³⁴

What made this case so notorious was the inefficiency of Giggs’ non-disclosure injunction. Imogen Thomas’ publicist Max Clifford argued that the general public would not have known about the footballer’s alleged extramarital affair if he had not sought and obtained an injunction to protect his privacy.³⁵ This claim needs to be nuanced though, as *The Sun* was already on the verge of revealing Giggs’ identity in its April 14 publication. As with the cases of Trafigura and John Terry, the Streisand effect came into play. Three factors seem to have contributed heavily to the inefficiency of Giggs’ injunction: Twitter users and independent bloggers rapidly searching for and sharing Giggs’ identity, the inapplicability of the injunction outside of the jurisdictions of England and Wales, the use of parliamentary privilege.

On May 20, 2011, Giggs’ legal team sought a disclosure order from the London High Court in a bid to identify Twitter users who had broken the anonymised injunction and take legal action against them for breach of court. The first Twitter user to have revealed the footballer’s identity appears to have been James Webley who used the alias The Unknown James. However, thousands of Twitter users participated in a campaign known as #IamSpartacus which involved sharing Giggs’ identity, followed by the aforementioned hashtag³⁶. This mass act of civil disobedience made it impossible to take legal action against so many individuals, which led to the footballer abandoning his request. In any case, the disclosure order had no legal bearing in California, where Twitter’s headquarters lay. It is therefore difficult to imagine that the social media website would have complied. Even within the UK, the applicability of Giggs’ anonymised injunction was limited. The footballer’s legal team did not seek the necessary interdict from the High Court in Edinburgh. In this context, the Scottish-based news organisation *The Sunday Herald* published a full-page photograph of the footballer with the word ‘CENSORED’ covering his eyes, in its May 22 edition.³⁷ This led to an increase in sales of over nine percent from April to May, which demonstrates how seeking a superinjunction can inadvertently draw greater attention to the case in question.

With regards to the use of parliamentary privilege, it was John Hemming, Liberal Democrat MP for Birmingham Yardley, who broke the anonymised injunction before the House of Commons on May

23, 2011.³⁸ Hemming was already well known for his defence of free speech and his opposition to non-disclosure injunctions generally.³⁹ He had for instance named former Royal Bank of Scotland Chief Fred Goodwin in March that same year with respect to allegations of sexual relations with a colleague, despite there being an anonymised injunction in place.⁴⁰ In the case of Gigg's anonymised injunction, the MP insisted on related issues of principle, particularly the lack of credibility of an injunction that had been broken by so many Twitter users and thus rendered impracticable. During this same parliamentary debate, Attorney-General Dominic Grieve simply responded 'It is our duty as parliamentarians to uphold the rule of law'.⁴¹ Yet this did not address the question at hand regarding the responsibility of internet users and online platforms as to the rule of law. Nor did this tackle the issue of when it is appropriate for an MP to break an injunction.

The day after Hemming's revelation, the English and Welsh press reported widely on Gigg's anonymised injunction and alleged extramarital affair, in accordance with the qualified right of the press to report on parliamentary proceedings in the public interest. Given the attention drawn to this case, Gigg abandoned his right to anonymity when the injunction was cancelled on March 2 the following year.⁴² Parliamentary consideration of improvements to the law followed shortly after.

The Limits of Accountability and Suitability

In the complex relationship between the judiciary and legislative, judges are not accountable to Parliament for their decisions in individual cases, with the exception that Parliament has the power to pass legislation to reverse the effect of a judge's decision or change the law as established or interpreted by a judicial decision. Yet Prime Minister David Cameron played into negative media portrayals of the judiciary at the height of the media campaign against superinjunctions by openly accusing judges of using the ECHR to deliver what he described as a kind of privacy law without parliamentary approval.⁴³ His strong criticism of the judiciary came during a question and answer session at General Motors in Luton on April 21, 2011. On this same occasion, Cameron admitted that he did not know how the problem could be solved. He failed to make any reference to Parliament's responsibility in deciding against the introduction of legislation to protect privacy in the 1990s. This criticism of the judiciary is all the more surprising in that High Court judge David Eady had already clarified the issue of competing rights and the role of Parliament in a 2008 judgment:

That is because the law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem. It is not simply a matter of "unaccountable" judges running amok. Parliament enacted the 1998 statute which requires these values to be acknowledged and enforced by the courts.⁴⁴

It is rather unusual for a judge to refer to media portrayals of the judiciary in a written judgment. Indeed, Eady was often demonised as the enemy of free speech for ruling in favour of the right to privacy in media-related cases.⁴⁵

Following the sustained media campaign against superinjunctions, and in the context of the News International phone hacking scandal, Cameron recommended the creation of a joint committee on privacy and injunctions on May 23, 2011, in order to assess improvements to the law.⁴⁶ In its 2012 report, the committee ultimately rejected the idea of adopting a statutory right to privacy or definition of the public interest for the purposes of publication. This means that the judiciary still has a role to play in interpreting the balance of rights regarding pre-publication injunctions. The report stated its expectation for media regulators to provide a definition of the public interest, develop this concept as needed,⁴⁷ and enhance media regulation. However, doubt remains regarding any meaningful change despite the creation of a press recognition panel⁴⁸ for the purpose of guaranteeing standards by press regulators. The largest industry-run press regulator, the Independent Press Standards Organization, has refused to seek recognition from the said panel and has been the subject of much criticism. It has been described as a 'pointless so-called regulator' by the National Union of Journalists.⁴⁹

The joint committee report on privacy and injunctions also recommended legal clarification on the principle of qualified privilege for the media to report on parliamentary procedures but no such change was brought about within the framework of the 2013 Defamation Act. Additionally, the report stated that the law courts were now finding a better balance, on a case-by-case basis, between the right to privacy and the freedom of expression as guaranteed by Articles 8 and 10 of the ECHR. It highlighted the fact that the judiciary had not invented any privacy law and that Parliament was responsible for the passage of the Human Rights Act 1998. The report also pointed to the need to resolve several weaknesses regarding the impracticability of interim injunctions. In particular, it called for those court orders granted in one UK jurisdiction to be enforceable in the two remaining, to apply to all forms of media including new media and social

media, and to reduce the cost of taking privacy cases forward. Yet there have been no such changes since.

One sign of change has come about, however, with the Ministry of Justice's decision to begin publishing biannual statistics regarding the number of prohibitive injunctions in place at any time, from March 2012 onward, and dating back to August 2011. This appears to be a significant compromise, given that superinjunctions constitute an exception to the common law tradition of hearing most cases in open court and making the corresponding written judgments accessible to the public. The Ministry of Justice's decision seems to be an attempt to quell fears regarding the lack of transparency and negative impact on media scrutiny. This policy change may also be interpreted within the framework of the accountability revolution.⁵⁰ The term accountability is to be comprehended broadly here, as a practice involving dialogue between decision-makers and the general public. Opponents of judicial accountability claim that individual judges as office-holders or courts as institutions cannot be held to account if they are truly independent. Their fears may be better understood in the context of a push towards a greater separation of powers, which came to fruition with the Constitutional Reform Act 2005. However, proponents of accountability practices believe they are essential to all three branches of the state, as well as to informal systems such as media scrutiny. This stems from the idea that it is necessary for the British public to constantly evaluate the judiciary in order to validate its actions and value. As Lord Woolf explained in a 2003 speech:

It is to members of the public that Article 6 [ECHR] gives the entitlement to a hearing before an independent tribunal (that is, a judge). The creation of the right in this way makes the important point that independence of judiciary is not the privilege of the judiciary, but a requirement that exists for the benefit of the citizen.⁵¹

Whether one opposes or supports judicial accountability, it is clear that a lack of transparency with respect to interim privacy injunctions has created distrust from news organisations. Since biannual statistics for the number of new applications have become available to the public, they appear to be relatively stable. According to the provisional data, six applications for interim privacy injunctions were made at the High Court in London during the first six months of 2023.⁵² However, these figures only apply to England and Wales. They do not reflect divergences within the three legal jurisdictions of the UK.

In 2020, it was reported that superinjunctions issued by Belfast High Court stood at a record-high, as seven were active in Northern Ireland.⁵³ The information was only released by Justice Minister Naomi Long following a written Assembly question from Jim Allister, Member of the Northern Ireland Assembly. Additionally, the data was more incomplete than that available for England and Wales, given the refusal to communicate the precise dates when any order was made or discharged by Belfast High Court.

In Scotland, there appears to be only one publicly known attempt to obtain a super interim interdict, as reported by *The Sunday Herald*, and which was refused by the Court of Session judge, Lord Pentland in October 2010.⁵⁴ The newspaper revealed it was Strathclyde University that had made an application to prevent publication in a bid to prevent erosion of a professor's reputation. The case involved a retired academic, Gavin Simpson and his wife, who had both been charged with extortion, but ultimately given a formal warning by the Procurator Fiscal in the context of allegations they had made against Professor Jim McDonald. The judge was quoted as having dismissed the application due to it being an 'unnecessary restriction on responsible journalism.'⁵⁵ However, no further details of the reasoning behind this refusal are available, in the absence of a written judgement.

Conclusion

The history of superinjunctions against the British press is necessarily incomplete, given the requirement for secrecy regarding legal proceedings. In the pre-publication injunction cases discussed in the body of this work, it has been seen how public interest arguments have taken second place when judges have had to weigh confidentiality and privacy rights against competing rights to freedom of expression in the media. This may be due to the perceived intangibility of public interest arguments in such cases, despite political discourse in favour of democratic accountability.

However, strategies of circumvention employed within news organisations, the legislative and the general public, and facilitated by technological tools such as online social networking, have contributed to greater awareness of prior restraint against the press and acted as a powerful call for public policy and law reform. They have shown the impracticability of pre-publication censorship in the digital era, as well as the limits of accountability and suitability. Since the introduction of open-access biannual statistics regarding superinjunctions, available data has remained limited. Politicians have repeatedly failed to bring about meaningful change to stem journalistic malpractice such as

privacy intrusions, against the backdrop of a self-regulatory model that has changed little since the Second World War, thereby leaving it to the judiciary to find a balance between competing rights. It is rather ironic that the judiciary has been so heavily criticised by the press and Parliament for carrying out its role in this context. The ability of the national press industry to apply such pressure is a mark of its enduring influence on policy discussions and reform.

Whether superinjunctions are used to ban news of the private lives of celebrities or the questionable actions of multinational businesses, it is difficult to reconcile the existence of the said injunctions with the principles of open justice and public scrutiny. Secret justice necessarily creates distrust as seen by reactions when details of anonymised injunctions and superinjunctions are leaked. Having recourse to this type of legal remedy is also problematic due to the high cost involved, meaning it is only an option for the wealthiest in society. Additionally, the question of enforcement remains unanswered in the digital era, as demonstrated by the fact that Lord Leveson's 2012 report on the culture, practices and ethics of the press dedicated only a single page to the subject of the Internet, simply referring to an 'ethical vacuum' due to a lack of regulation. Judicial pre-publication injunctions therefore cannot be guaranteed to fulfil their stated purpose and parliamentary reports have recognised their impracticability.

Ultimately, the future of judicial pre-publication censorship in the UK is questionable. In this respect, it is worth comparing with the use of suppression orders in Australia and the first ever instance of one such order being withdrawn due to the inability to enforce it online. Suppression orders are temporary in nature and the grounds for granting them vary between jurisdictions. They may ban revealing individual identities and may specifically proscribe reporting the existence of the said orders. On June 19, 2014, the Department of Foreign Affairs and Trade obtained a limited suppression order in a criminal case before the Supreme Court of Victoria. It involved allegations that two subsidiaries of the Reserve Bank of Australia and some of their former workers had conspired to bribe foreign officials with a view to securing banknote printing contracts abroad. However, the suppression order was breached by Wikileaks on July 29, 2014. The organisation shared the secret order, together with a press release denouncing the national security rationale and insisting on the right of the public to be informed of the investigation into corruption. Following Wikileaks' publication, copies of the suppression order were shared widely and three news organisations applied for the said order to be revoked. This led the Supreme Court of Victoria to issue a summary judgment on June 19, 2015, and which revoked the order as of July 14 that year.

Despite this, pre-publication injunctions remain a form of prior restraint in the UK. Whereas Article 13 of the American Convention on Human Rights prohibits prior restraint except in cases involving the moral protection of children and adolescents, the ECHR has not ruled out the possibility of prior restraint but has insisted on strict limitations. The United Nations Special Rapporteur on Freedom of Opinion and Expression has gone further, stating that ‘any system of prior restraint on freedom of expression carries with it a heavy presumption of invalidity under international human rights law.’ However, this question of invalidity continues to go unanswered in the UK for the time being, as do the inherent failings of the self-regulatory system in place.

Statement

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Notes

1. See for instance: Jason Beattie, “Nick Clegg ‘Ends’ 300 Years of Press Freedom in Private Deal with Queen,” *Mirror*, October 30, 2013, <https://www.mirror.co.uk/news/uk-news/press-freedom-royal-charter-signed-2658096/>; Martyn Brown and Alison Little, “Royal Charter Causes Outrage as Freedom of the Press is Cast Aside after 300 Years,” *Express*, October 31, 2013, <https://www.express.co.uk/news/uk/440257/Royal-Charter-causes-outrage-as-freedom-of-press-is-cast-aside-after-300-years/>.
2. James Curran and Jean Seaton, *Power without Responsibility: Press, Broadcasting and the Internet in Britain* (Routledge, 2018), 3-172.
3. Media Reform Coalition, *Who Owns the UK Media* (Media Reform Coalition, October 2023), 2.
4. David Neuberger, “Master of the Rolls Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice,” *Courts and Tribunals Judiciary*, May 20, 2011, <https://www.judiciary.gov.uk/publications/committee-reports-super-injunctions/>, i, 29.
5. For a detailed discussion of this point, see for example: Adrian Bingham, “‘Drinking in the Last-Chance Saloon’ The British Press and the Crisis of Self-Regulation, 1989-95,” *Media History* 13, no. 1 (2007), 79-92.
6. Tim Dowling, “Things We Can’t Tell You. Court Circular: This Week’s Injunctions,” *The Guardian*, June 17, 2002, <https://www.theguardian.com/media/2002/jun/17/mondaymediasection2/>.

7. See for example: International Federation of Human Rights League, “Affaire du Probo Koala : Les victimes privées de recours pour obtenir justice,” April 19, 2011, <https://www.fidh.org/fr/themes/actions-judiciaires/actions-judiciaires-contre-des-etats/Affaire-Cote-d-Ivoire-dechets/Affaire-du-Probo-Koala-Les/>; United Nations Human Rights Office of the High Commissioner, “Ten Years On, the Survivors of Illegal Toxic Waste Dumping in Côte d’Ivoire Remain in the Dark,” August 17, 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20384&LangID=E/>.
8. (1) *RJW (2) SJW v (1) Guardian News and Media Limited (2) The Person or Persons* [2009] EWHC 2540 (QB), <https://inforrm.files.wordpress.com/2011/10/justice-maddison-judgment-transcript-6.pdf/>.
9. “Minton Report: Trafigura Toxic Dumping Along the Ivory Coast Broke EU Regulations,” Wikileaks, September 14, 2016, latest update October 15, 2009, https://wikileaks.org/wiki/Minton_report:_Trafigura_toxic_dumping_along_the_Ivory_Coast_broke_EU_regulations,_14_Sep_2006/.
10. (1) *RJW (2) SJW v (1) Guardian News and Media Limited (2) The Person or Persons*, 3-6, 9.
11. “The Independent: Toxic Shame: Thousands Injured in African City: 17 September 2009,” Wikileaks, October 13, 2009, https://www.wikileaks.org/wiki/The_Independent:_Toxic_Shame:_Thousands_injured_in_African_city,_17_Sep_2009/.
12. The full transcript is available at: “Trafigura v BBC: Statement in Open Court,” latest update December 17, 2009, <http://news.bbc.co.uk/2/hi/programmes/newsnight/8417913.stm/>.
13. Programme in Comparative Media Law and Policy Centre for Socio-Legal Studies, *A Comparative Study of Costs in Defamation Proceedings Across Europe* (University of Oxford, 2008), <http://pcmlp.socleg.ox.ac.uk/wp-content/uploads/2014/12/defamationreport.pdf/>, 181.
14. Wikileaks, “Minton Report: Trafigura Toxic Dumping.”
15. Wikileaks, “The Independent: Toxic Shame”; “Updated Secret Gag on UK Times Preventing Publication of Minton Report into Toxic Waste Dumping, 16 October 2009,” Wikileaks, October 16, 2009, https://wikileaks.org/wiki/Updated_secret_gag_on_UK_Times_preventing_publication_of_Minton_report_into_toxic_waste_dumping,_16_Oct_2009/.
16. House of Commons Hansard Archives, “Injunctions,” October 19, 2009, <https://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091019/text/91019w0006.htm#0910197000895/>, column 1234W.
17. The principal of parliamentary privilege as laid down in the *Bill of Rights 1688: An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown*, article 9, and in the *Parliamentary Papers Act 1840*, capitulus 9, section 3.

18. Select Committee on Culture, Media and Sport, "Written evidence from the Guardian News and Media Ltd (PS158)," <https://publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/memo/press/uc15802.htm/>.
19. David Leigh, "Trafigura Drops Bid to Gag Guardian Over MP's Question," *The Guardian*, October 13, 2009, <https://www.theguardian.com/media/2009/oct/13/trafigura-drops-gag-guardian-oil/>.
20. Dominic Ponsford, "Injunction Change Gives *Sun* Half of Kiss-and-Tell Actor Tale," *Society of Editors*, April 14, 2011, <https://www.societyofeditors.org/parliamentary-and-legal/14-april-2011/Injunction-change-gives-Sun-half-of-kiss-and-tell-actor-tale/>.
21. Julian Petley, "Public Interest or Public Shaming," in *Media and Public Shaming: Drawing the Boundaries of Disclosure*, ed. Julian Petley (Reuters Institute for the Study of Journalism and University of Oxford, 2013), 19.
22. Abolished and replaced by a statutory defence of publication on a matter of public interest by way of the *Defamation Act 2013*.
23. Tugendhat J, "John Terry (previously referred to as 'LNS') and Persons Unknown," January 30, 2010, reference [2010] EWHC 119 (QB), *5RB*, <http://www.5rb.com/case/terry-previously-lns-v-persons-unknown/>.
24. Tugendhat J, "John Terry," 36.
25. *Bonnard v Perryman* 1891 2 Ch. 269.
26. Tugendhat J, "John Terry," 36.
27. Daily Mail Comment, "Justice Veering in a Dangerous Direction," *The Mail Online*, January 29, 2010, <http://www.dailymail.co.uk/debate/article-1246933/MAIL-COMMENT-Privacy-law-dangerous-direction.html/>.
28. Paul Dacre, "Annual conference speech to the Society of Editors," *Press Gazette*, November 9, 2008, <https://pressgazette.co.uk/publishers/nationals/society-of-editors-paul-dacres-speech-in-full/>; Owen Gibson, "Campbell Wins Privacy Case Against Mirror," *The Guardian*, May 6, 2004, <https://www.theguardian.com/media/2004/may/06/mirror.pressandpublishing1/>.
29. See for example: Steve Doughty, Sam Greenhill and Christian Gysin, "England Captain John Terry Jeered on the Pitch as Affair with Team Mate's Girlfriend is Revealed," *Mail Online*, January 30, 2010, <http://www.dailymail.co.uk/news/article-1247042/John-Terry-Married-England-captain-affair-team-mate-Wayne-Bridges-partner--launched-legal-cover-up.html/>; Gordon Rayner, "Judge Lifts Super Injunction over John Terry Affair with Team-Mate's Girlfriend," *The Telegraph*, January 29, 2010, <http://www.telegraph.co.uk/sport/7102733/Judge-lifts-super-injunction-over-John-Terry-affair-with-team-mates-girlfriend.html/>.
30. Paul Dacre, "Annual conference."

31. “CTB and (1) News Group Newspapers Limited (2) Imogen Thomas,” England and Wales High Court (Queen’s Bench Division) Decisions, reference [2011] EWHC 1232 (QB), May 16, 2011, <http://www.bailii.org/ew/cases/EWHC/QB/2011/1232.html/>.
32. Gary O’Shea, “Footie Star’s Affair with Big Brother’s Imogen Thomas,” *The Sun*, April 13, 2011, <https://www.thesun.co.uk/archives/news/488299/footie-stars-affair-with-big-brothers-imogen-thomas/>.
33. England and Wales High Court, “CTB and (1) News Group.”
34. “Ryan Giggs v News Group Newspapers Ltd and Imogen Thomas,” Courts and Tribunals Judiciary, reference [2012] EWHC 431 (QB), <https://www.judiciary.gov.uk/judgments/ryan-giggs-ngn-judgment-02032012/>, 5, 24.
35. “Ryan Giggs ‘Only Exposed Because He Took On Twitter,’” *Channel 4*, May 24, 2011, <https://www.channel4.com/news/ryan-giggs-only-exposed-because-he-took-on-twitter/>.
36. See for example: Charles Arthur, “Twitter Traffic Sees 22% Spike in Rush to Find Identity of Injunction Footballer,” *The Guardian*, May 23, 2011, <https://www.theguardian.com/technology/2011/may/23/twitter-traffic-injunction-footballer/>.
37. Herald View, “Defending the Scots Legal System,” *The Sunday Herald*, April 1, 2012, http://www.heraldscotland.com/opinion/13052696.Defending_the_Scots_legal_system/.
38. House of Commons Hansard Archives, “Injunctions,” May 23, 2011, <https://hansard.parliament.uk/Commons/2011-05-23/debates/1105237000004/Injunctions#contribution-1105237000250/>, column 638; Dan Sabbagh and Patrick Wintour, “Ryan Giggs Named by MP Over Injunction,” *The Guardian*, May 23, 2011, <https://www.theguardian.com/media/2011/may/23/ryan-giggs-mp-injunction/>.
39. House of Commons Hansard Archives, “Bill of Rights,” March 17, 2011, <https://publications.parliament.uk/pa/cm201011/cmhansrd/cm110317/halltext/110317h0001.htm/>, column 139WH.
40. Tugendhat J, “Goodwin v News Group Newspapers Ltd,” England and Wales High Court (Queen’s Bench Division) Decisions, May 19, 2011, reference [2011] EWHC 1309 (QB), <http://www.bailii.org/ew/cases/EWHC/QB/2011/1309.html/>; House of Commons Hansard Archives, “Business of the House,” March 10, 2011, <https://publications.parliament.uk/pa/cm201011/cmhansrd/cm110310/debtext/110310-0001.htm#11031052001448/>, column 1069.
41. House of Commons Hansard Archives, “Injunctions,” column 633.
42. “Ryan Giggs v News Group Newspapers,” 20.
43. David Cameron, question and answer session, “What’s happening here is that judges are basically using the European Convention of Human Rights to deliver a sort of privacy law without Parliament saying so,” *BBC* [video recording], April 21, 2011, <http://www.bbc.com/news/uk-13158087/>.

44. David Eady, "Max Mosley v News Group Newspapers Ltd," July 30, 2008, reference [2008] EWHC 1777 (QB), <http://www.5rb.com/case/mosley-v-news-group-newspapers-ltd-no-3/>, 3.
45. See for instance: Paul Dacre, annual conference speech.
46. Joint Committee on Privacy and Injunctions, "Privacy and Injunctions," HL Paper 273/HC 1443 (The Stationery Office Limited), March 27, 2012, <https://publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf/>, 28.
47. This same conclusion was also drawn by Lord Leveson in his report on the culture, ethics and practices of the British press. See: Brian Leveson, "An Inquiry into the Culture, Practices and Ethics of the Press," HC 780 (The Stationery Office Limited), November 29, 2012, <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press/>, Executive Summary, 15.
48. This followed the establishment of the 2013 Royal Charter on Self-Regulation of the Press.
49. John Reynolds, "NUJ Gives Official Backing to Alternative Press Watchdog Impress rather than 'Pointless' IPSO," *Press Gazette*, May 3, 2016, https://pressgazette.co.uk/media_law/nuj-gives-official-backing-to-alternative-press-watchdog-impress-rather-than-pointless-ipso/.
50. Andrew Le Sueur, "Developing Mechanisms for Judicial Accountability in the UK," *Legal Studies*, vol. 24, no.1-2 (March 2004): 73-98.
51. Lord Woolf, "Should the Media and the Judiciary be on Speaking Terms?" *Irish Jurist*, New Series, vol. 38 (2003): 25-33, 27.
52. Ministry of Justice, "Civil Justice Statistics Quarterly: April to June 2023," <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2023/civil-justice-statistics-quarterly-april-to-june-2023/>.
53. Sam McBride, "Record Number of Super-Injunctions in Northern Ireland Revealed," *Newsletter*, January 31, 2020, <https://www.newsletter.co.uk/news/politics/record-number-of-super-injunctions-in-northern-ireland-revealed-1380519/>.
54. "Sunday Herald Beats off Super-Injunction Bid," *Allmediascotland.com*, October 3, 2010, <http://www.allmediascotland.com/press/18558/sunday-herald-beats-off-super-injunction-bid/>; The Herald, "Pair Warned in University Blackmail Case," *Herald Scotland*, October 3, 2010, https://www.heraldsotland.com/news/12592920.Pair_warned_in_university_blackmail_case/; The Herald, "Principal Cleared after Inquiry Finds Claims 'Unfounded'," *Herald Scotland*, November 15, 2009, https://www.heraldsotland.com/default_content/12606379.principal-cleared-inquiry-finds-claims-unfounded/.
55. "Sunday Herald."

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