The role of human rights in determining whether complainants of a sexual offence and/or defendants charged with an offence under the Sexual Offences Act 2003 should receive anonymity

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By Laura Emily Taylor

ABSTRACT

A 2010 proposal to extend anonymity in rape cases to rape defendants underlined the continuation of a long running, highly politicised debate, centred on whether one or both parties in a rape case should receive anonymity. This research addresses the question of rape case anonymity from a human rights perspective with a rephrasing of the popular arguments enabling a better understanding of where the correct balance should lie.

The specific rights addressed are those arising in the context of rape proceedings. Firstly, Article 3, the right not to be subjected to torture, inhuman or degrading treatment. Analysis concludes that withholding anonymity would not violate the Article 3 right of either party in a rape case. Secondly, Article 8, the right to privacy and a family life. Discussions demonstrate that rape complainants require blanket anonymity to uphold their right to privacy and as an exception to open justice. Rape defendants do not require anonymity to protect their Article 8 rights. Thirdly, Article 10, the right to freedom of expression and how it balances against a rape defendant's Article 6 right to a fair trial. Discussions show that Article 10 will outweigh Article 6 in these circumstances, especially since the media's right to freedom of expression facilitates open justice, and thus a fair trial. Fourthly, the complementary Article 14, the right not to be discriminated against. Analysis concludes that rape complainants, but not rape defendants as a group, face discrimination and thus require blanket anonymity to uphold their Article 14 rights.

In conclusion, rape complainants should continue to have anonymity whilst rape defendants should not be afforded it. A rape complainant's Article 8 and 14 human rights are highly likely to be violated without anonymity. Lack of anonymity would not breach any corresponding human rights of a rape defendant.

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LIST OF ABBREVIATIONS

CDB - Crime and Disorder Bill

CJA - Criminal Justice Act

CJPOA - Criminal Justice and Public Order Act

CJS - Criminal Justice System

CLRC - Criminal Law Revision Committee

CPS - Crown Prosecution Service

ECC - Editors Code of Conduct

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

GBH - Grievous Bodily Harm

HC - House of Commons

HL - House of Lords

HRA -Human Rights Act

LJ - Lord Justice

MoJ - Ministry of Justice

MP - Member of Parliament

MP's - Members of Parliament

POA - Public Order Act

SOA - Sexual Offences Act

SOAA - Sexual Offences (Amendment) Act

SOB - Sexual Offences Bill

YJCEA - Youth Justice and Criminal Evidence Act

YJCEB - Youth Justice and Criminal Evidence Bill

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STATEMENT OF COPYRIGHT

Chapter 1 Introduction

The legal system within the UK is founded upon the principle of open justice.[1] This principle ensures that in all but exceptional circumstances, legal proceedings are conducted in an open arena and that individuals involved in a specific case are publically identifiable.

A rare exception to open justice is the right of complainants in sexual offence cases to have their identity concealed. This confers lifelong protection, commencing once the initial complaint has been made.[2] This right is more commonly known as 'anonymity' and it is anonymity that will be the focus of this thesis.

1.1 Anonymity: the popular debate

In May 2010 the Conservative-Liberal Democrat coalition government announced its intention to extend anonymity in rape cases to defendants.[3] The proposal would have restored the position of rape defendants to that of the 1970's when the Sexual Offences (Amendment) Act (SOAA) 1976[4] first introduced anonymity for both rape complainants and defendants.[5] Currently, only rape complainants have anonymity. The proposals might have received less public attention had their subject matter been on a less emotive topic, but instead they reignited a highly contentious and politically charged debate. Baroness Stern emphasised the reasoning behind this, stating that:

> '[It] should be no surprise since rape is about sex, violence, power, intimate relationships between men and women or between men and men, society's attitudes to what is acceptable behaviour and where blame and responsibility lie for non-consensual sex acts'.[6]

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[1] See chapter 2.3 for further discussion of the principle.
[2] Unless anonymity is withheld from the complainant in accordance with either of the reasons listed in the Sexual Offences (Amendment) Act 1976, s4(2).
[3] Her Majesty's Government, *The Coalition: Our Programme for Governmen*t (2010) 24.
[4] Sexual Offences (Amendment) Act 1976.
[5] Jones. S, 'Rape cases anonymity for defendants would be insult to victims say activists' *The Guardian* (20th May 2010) <http://www.guardian.co.uk/society/2010/may/20/women-against-rape-anonymity-defendants> accessed 30th July 2012.
[6] Home Office, *The Stern Review: A report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* (March 2010)

Specific debates focusing on the relative merits of complainant and defendant anonymity in rape cases ('the anonymity debate') have ensued for over three decades. The underlying reason for the debate's enduring quality has been the continual failure of interested parties to coherently examine the substance behind their arguments. It has therefore been extremely difficult to assess the merits of anonymity provisions in relation to each party in a rape case, with no widely acceptable legal position being reached to date.

The most recent government proposals for rape defendant anonymity were no better reasoned and demonstrated little clear thinking on an issue not contained within either party's pre-election manifestos.[7] There was no elaboration on how the plans would work in practice and the Ministry of Justice (MoJ) abstained from responding to questions about their proposed implementation.[8] Initially some media sources reported that anonymity provisions would be likely to be lifted once a rape suspect was convicted.[9] Other sources suggested anonymity would be implemented on the same terms as awarded to rape complainants (lifetime anonymity from the time the rape complaint was made).[10] Soon after these initial reports were circulated, David Cameron speaking in Prime Ministers Questions, confirmed that the proposed anonymity would only last until the time of conviction.[11] This stance reflected recommendations made in an earlier Select Committee on Home Affairs Report.[12]

The nature of rape anonymity meant that large public debate generated a multitude of arguments both in favour of and against the proposals. It soon became evident that

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<ebarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern_Review_acc_FINAL.pdf> accessed 25th January 2010, 12.

[7] The Liberal Democrats had proposed anonymity for rape defendants until such time as they were convicted. The proposal was intended to help improve rape convictions generally as well as protecting potentially innocent defendants from the stigma associated with being a rape victim. See The Liberal Democrats, 'Trust in People: Making Britain Fairer' Conference Agenda, Liberal Democrat Conference (16th-21st September 2006), F23, Rape Convictions Amendment One, 31-31.

[8] 'Rape defendants to be granted anonymity' *BBC News Channel* (20th May 2010) <http://news.bbc.co.uk/1/hi/uk_politics/8695367.stm> accessed 30th July 2012.

[9] Jones (n5).

[10] Doyle. J, 'Cameron in U-turn on rape cases anonymity which could now only apply until suspects are charged' *Mail Online* (2nd June 2010) <http://www.dailymail.co.uk/news/article-1283435/Cameron-U-turn-rape-case-anonymity-apply-suspects-charged.html> accessed 15th October 2011.

[11] HC Deb 27th May 2010 vol. 510 col. 288.

[12] Home Office (n6).

the government was yielding to pressure to back down on its proposals when Deputy Prime Minister Nick Clegg reportedly said:

> 'I can confirm today that the government will not press ahead with any measure without listening to the full range of views, and if necessary, adapting and changing our approach to make sure we get it right'.[13]

The statement only appeared to confirm that the government had not thought the proposals through adequately.[14]

The Government then changed its position again to preservation of the *status quo,* albeit with a desire that a 'non-statutory solution' be found: no explanation of what the non-statutory solution might be was offered.[15] Whilst the MoJ would not definitively rule out anonymity between arrest and charge, Justice Minster Crispin Blunt said that he would rather put pressure on the media not to name suspects rather than bringing in a new law. He did make one suggestion, which was that current Press Complainants Commission guidance, recommending that the media did not identify someone charged with rape, might be strengthened. [16] Mr Blunt appeared to be trying to justify the government's badly thought out proposals saying:

> 'Given that we had 21 criminal justice acts passed over the 13 years of the last administration, I am sure that Labour [MPs] will

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[13] 'Pressure grows over rape cases anonymity plan', *London Evening Standard'* (8th June 2010) <http: //www.standard.co.uk/news/pressure-grows-over-rape-case-anonymity-plan-6478044.html> accessed 26th October 2011.

[14] The government had previously commissioned Baroness Stern to conduct an independent review into how rape complaints were handled by public authorities in England and Wales. The report acknowledged arguments in favour of defendant anonymity on the basis that it protected innocent individuals from false allegations. The report made no recommendations for defendant anonymity but advised the government that an independent review into levels of false reporting in rape case should be conducted. See Home Office, *'The Stern Review: A report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales'* (March 2010) <ebarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern_Review_acc_FINAL.pdf> accessed 25th January 2010, 41-41.

[15] Hennessey. P, 'Coalition U-turn over plan to ban identification of rape defendants', *The Sunday Telegraph* (24th July 2010) <http://www.telegraph.co.uk/news/uknews/law-and-order/7908485/Coalition-U-turn-over-plan-to-ban-identification-of-rape-defendants.html> accessed 13th October 2011.

[16] 'Rape charge anonymity pledge dropped' BBC News Channel (26th July 2010), <http://www.bbc.co.uk/news/uk-politics-10760239> accessed 31st July 2012.

> understand why we loath to find even more statutes to put on the statute book'.[17]

The opposition were clear to point this out. Acting Labour leader Harriet Harman attacked the coalition's approach labelling it as 'envelope politics'. She stated:

> '[I]t [rape] is a very serious offence and they should not just dream up a proposal and bring it forward without thinking about it. Rape is too serious for that'.[18]

Despite acting retrospectively, having already proposed a legislative change, the government asserted that it was conducting its own research into the need of defendant anonymity in rape cases. The results were to be published in autumn of 2010.[19] When the Government did finally conclude its own research, proposals for defendant anonymity in rape cases were dropped altogether. The report concluded that:

> '[O]verall, this review of evidence on providing anonymity for rape defendants found insufficient reliable empirical findings on which to base an informed decision on the value of providing anonymity to rape defendants'.[20]

The Government's approach to the 2010 rape proposals could be heavily criticised for their hap-hazard, ill-thought out suggestions. Despite their failures they did provide a brief insight into the difficulties of assessing the merits of anonymity for both rape complaints and or defendants. Assessing the merits of anonymity for both rape complainants and or defendants is a key intention of this thesis.

This brief introduction highlights the complex nature of the anonymity debate and the failure to reach popular consensus on whether rape complainants and/or rape defendants should receive anonymity.

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[17] BBC News (n16).
[18] BBC News (n16).
[19] HC Deb 27th July 2010 vol. 514 col. 855.
[20] Ministry of Justice Research Series 20/10, '*Providing anonymity to those accused of rape : An assessment of evidence'* (November 2010) 34 <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/anonymity rape-research-report.pdf> accessed 1st August 2012.

The purpose of this thesis is to consider the arguments in favour of and against anonymity for both parties in sexual offence cases from an alternative perspective, namely human rights. Whist this thesis addresses anonymity in relation to all sexual offences,[21] the majority of public debate refers to the singular offence of rape. For purposes of continuity, this thesis refers to rape as a generic term encompassing all sexual offences. Whilst it is acknowledged that men can also be victims of rape, the majority of rape victims are female and thus for ease, this thesis refers to rape complainants as women and rape defendants as men.

In addressing the anonymity debate from a human rights perspective, a better understanding of where the correct balance of rights should lie will be determinable. Subsequently, a legal stance in relation to anonymity in rape cases that is not widely contested may be able to be reached.

1.2 Why address anonymity in rape cases from a human rights perspective?

The basic principle underpinning the development of human rights is a noble one, because it 'protects all of us, young and old, rich and poor'.[22] That principle is equality, something that is now an integral part of most legal systems and international law.[23] It is also 'one of the building blocks of democracy and necessarily permeates any democratic constitution'.[24]

When the United Kingdom (UK) Government presented the Human Rights Bill to parliament in October 1997,[25] it contended that the reasons for doing so were largely practical in nature. Originally the UK had played an important role in drafting the European Convention on Human Rights (ECHR) several decades earlier. That convention enforced a number of human rights, some of which were absolute, whereas others were qualified (i.e. they had to be balanced against competing human rights). Previously when an individual suffered a violation of their human rights under the convention due to the effect of domestic law, or a decision of a state body, they

[21] As defined by the Sexual Offences Act 2003.
[22] Liberty, 'The Human Rights Act',<http://www.liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/index.php> accessed 11th June 2012.
[23] O'Cinneide. C, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric', *UCL Human Rights Review* [2008] 1(1) UCL Human Rights Review 78.
[24] *Matadeen v Pointu* [1999] 1 AC 98, 109.
[25] The Human Rights HC Bill (1997) [3782].

had to take their case to the European Court of Human Rights (ECtHR). This process was neither speedy nor guaranteed.[26] When a case did reach the ECtHR and the Court also found a violation to have occurred it could choose to award damages and/or costs to the applicant. Alternatively it could decide that a formal declaration of the violation sufficed.[27] More importantly the decision did not technically have binding legal effect.[28]

The purpose of the Human Rights Act (HRA) 1998,[29] which followed the successful passage of the Human Rights Bill through parliament, was twofold. Firstly, it was to cut the time and cost of taking a case to the ECtHR (approximately five years and £30,000), thereby making an individual's access to the Court easier. Secondly and more importantly it was to incorporate the human rights more fully into our legal system. By 'bringing human rights home' and hearing cases in domestic courts, human rights would become more 'real' to individuals.[30] This would be reinforced and reflected through a developing body of domestic human rights jurisprudence.[31] At the same time the domestic courts would look to the decisions of the ECtHR in helping them to decide the outcome. This was ensured by the HRA 1998 s3 requirement that domestic legislation in England and Wales be compatible with. The requirement related to both primary and secondary legislation[32] but notably did not affect the continuing validity or enforcement of any incompatible legislation.[33]

With this in mind, the question asked is, of what use human rights can be in contributing to the rape anonymity debate. On the one hand it could be argued that

[26] An applicant was required to submit a petition to the European Commission of Human Rights who would decide whether the application was admissible or not. If the Commission did not agree with the admissibility of the petition, then cases would go no further. Alternatively where the Commission considered that a case was admissible and that a friendly settlement could not be agreed upon it would send a report to the Committee of Ministers of the Council of Europe, stating its opinion that there had been a violation. The Committee would duly consider the report and *may* decide to refer the case to the European Court of Human Rights for consideration.

[27] '*Rights Brought Home: The Human Rights Bill'*, presented to Parliament by Secretary of State for the Home Department, (October 1997) <http://www.archive.official-documents.co.uk/document/hoffice/rights/chap1.htm> accessed 12th June, para. 1.9.

[28] However under Article 46 of the ECHR the contracting states undertake to abide by the decisions of the European Convention on Human Rights.

[29] HRA 1998

[30] *Rights Brought Home* (n27).

[31] *Rights Brought Home* (n27) para. 1.14.

[32] HRA 1998, s3(2)(a).

[33] Human Rights Act 1998, s3(2)(b), s3(2)(c).

human rights have done nothing to further the anonymity debate in rape cases since they only draw out the same arguments rephrased in different terminology. There is also a train of legal and feminist thought arguing that the effect of 'human rights' with a constitutional basis has had a negative effect on women in the legal process. This fact is attributed to failure of the HRA 1998 to dislodge gender-based disadvantage, politically, culturally, economically and socially: giving rise to arguments that the entrenching of human rights has not benefitted women but rather disadvantaged them further.[34] Additionally, judicial discretion in the interpretation of these human rights has reinforced the gender bias, acting to the further detriment of women in the legal system.[35] If these facts held true, one would assume that analysis from a human rights stance could not further the rape debate.

However this thesis proposes that human rights can be highly valuable in assessing the anonymity debate in rape cases. Firstly it is true that women are disadvantaged in the legal process but the very purpose of human rights is to address inequalities of this nature. Secondly, whilst addressing issues from a human rights perspective, does 'only' seem to reformulate earlier arguments in new terminology, it is this reformulation which allows a clearer balancing of human rights. Such thinking supports the reasoning for addressing the anonymity debate from a human rights perspective.

Not all human rights are relevant to the current discussion and the following chapters reflect this. Analysis focuses on Article 3 [36] 'Prohibition of Torture', Article 8[37] 'Right to Respect for Family and Private Life', Article 10[38] 'Freedom of Expression', and Article 14[39] 'Prohibition from Discrimination'. I also consider Article 6[40] 'Right to a Fair Trial' as it relates to Article 10.[41]

In order to effectively analyse anonymity from the viewpoint of specific human rights, it is important to first fully understand the background to the anonymity debate.

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[34] Conaghan. J, Millns. S, 'Gender Sexuality and Human Rights' [2005] 13 *Feminist Legal Studies* 2.
[35] McColgan. A, 'Women and the Human Rights Act' [2000] 51 *NILQ* 417.
[36] HRA 1998, Schedule 1 Article 3.
[37] HRA 1998, Schedule 1 Article 8.
[38] HRA 1998, Schedule 1 Article 10.
[39] HRA 1998, Schedule 1 Article 14.
[40] HRA 1998, Schedule 1 Article 6.
[41] Contained within the ECHR and enshrined into domestic law by the HRA 1998.

Chapter two begins with a discussion of the public, political and scholarly debates focused on anonymity in rape cases, before considering the difficulties of justifying anonymity provisions in relation to the principle of open justice.

Chapter 2 History and the law: why the need for anonymity?

This chapter demonstrates how anonymity provisions in rape cases have changed during preceding decades and how they have been influenced by associated statutory and/or common-law legal developments. The latter part of the chapter focuses on a discussion of public, political and scholarly debates concerning anonymity in rape cases.

The appropriate point to begin is to look at the 'anonymity timeline', identifying important and influential events that have propelled the current and long running debate on anonymity within rape cases. The debate's catalyst came in the form of a well-known and highly contentious House of Lords (HL) decision.

2.1 The anonymity timeline

2.1.1 *DPP v Morgan 1975*[42]

The House of Lords decision in *DPP v Morgan*, held that a man could not be guilty of rape if he held an honest belief that the complainant was consenting, even if his belief was unreasonable. According to McGlynn 'this judgment crystalised feminist concerns that the legal system did not treat women complainants fairly'.[43]Additionally it is submitted that in passing judgment, their Lordships reinforced judicial ambivalence towards female victims, as well as the notion that the law was made by men for the benefit of men.

One of the presiding judges in the case, Lord Cross referred to the 'definition' of rape, as it then stood under the Sexual Offences Act 1956 (SOA 1956).[44] The Act under s1(1)[45] provided that it was an offence 'for a man to rape a woman' but failed to define rape itself. In the absence of statutory definition it would be the role of judicial

[42] *Director of Public Prosecutions v Morgan* [1975] 2 All ER 347.
[43] McGlynn. C, 'Feminist activism and rape law reform in England and Wales: A Sisyphean struggle?' in McGlynn. C, Munro. V (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, Abingdon, 2010)139.
[44] SOA 1956.
[45] SOA 1956 s1(1).

interpretation in decided cases to provide the answer. Consequently His Lordship stated:

> '[N]o one suggests that rape is an absolute offence to the commission of which the state of mind of the defendant with regard to the woman's consent is wholly irrelevant. The point in dispute is as to the quality of the belief which entitles the defendant to be acquitted and as to the evidential burden of proof with regard to it'.[46]

His Lordship considered the question of whether a man could be found guilty if he believed the woman was consenting. Lord Cross concluded such a defendant could not be guilty in those circumstances because '[R]ape to my mind imports at least indifference to the woman's consent'.[47]Lord Edmund-Davies also voiced a similar opinion arguing:

> '[H]onest belief, however foolishly formed, that the woman was willing seems to me incompatible with an intention to rape her. Here as in any other crime where knowledge is an essential ingredient, this should connote actual knowledge and not merely that the accused *ought* to have known'.[48]

Ultimately all five of judges sitting in the *Morgan* appeal came to a unanimous decision, choosing to dismiss the appeal in light of the specific facts of the case. Notwithstanding this, it was held that a defendant in a rape trial, who held an honest but unreasonable belief in the complainant's consent, could not be found guilty of rape. The precedent set in *Morgan* was to have highly damaging consequences on future rape trials. By requiring defendants to only hold an *honest* (if irrational) belief in a victim's consent, as opposed to a *reasonable* belief, it instantly made a successful prosecution more difficult. The decision would allow more rapists to walk free whilst being highly detrimental towards rape victims. It would discourage rape victims from reporting a crime of a traumatic, invasive, personal nature, when their attacker could be acquitted

[46] *Morgan* (n42) 349.
[47] *Morgan* (n42) 352.
[48] *Morgan* (n42)372.

with comparative ease. It would also be detrimental to women generally because it took responsibility away from men for their own actions.

The *Morgan* judgment caused public outrage, following which, the government decided to establish an advisory committee on the law of rape.[49] Whilst the *Morgan* judgment would remain 'good law' for a further two and a half decades, the Advisory Committee's final report, 'The Helibron Report' would make some important recommendations on the law of rape.

2.1.2 The Helibron Report

The Helibron Report[50]was the final report of the Advisory Group on the Law of Rape, published in December 1975. The report advised that rape complainants be provided with anonymity and it is suggested that the proposal's basis was to mitigate the anticipated consequences of *Morgan*. That refers to the potential discouragement of victims from coming forward to report a highly personal crime and endure the harrowing legal process. With this in mind the report stated:

> '[W]e are fully satisfied that if some procedure for keeping the name of the complainant out of the newspapers could be devised, we could rely on more rape cases being reported to the police, as woman would be less unwilling to come forward if they knew there was hardly any risk that the judge would allow their name to be disclosed'.[51]

The report also contended that:

> '[P]ublic knowledge of the indignity which [the complainant] has suffered in being raped may be extremely distressing and even positively harmful and the risk of such public knowledge can operate as a severe deterrent to bringing proceedings. The balance of the

[49] McGlynn. C, 'Feminist activism and rape law reform in England and Wales: A Sisyphean struggle?' in McGlynn. C, Munro. V (eds), *Rethinking Rape Law: International and Comparative Perspectives,* (Routledge, Abingdon, 2010)139-140.
[50] Home Office, Helibron Committee: *Report of the Advisory Group on the Law of Rape* (CMND, December 1975).
[51] Home Office (n50) para. 154.

> argument seems to us to be in favour of anonymity for the complainant other than in quite exceptional circumstances. Nor is it generally the case that the humiliation is anything like as severe in other criminal trials: a reprehensible feature of trials of rape is that the complainant's prior sexual history may be brought out in the trial in a way which is rarely so in other criminal trials'.[52]

The passage suggests the Advisory Group were basing their anonymity recommendations on both the highly personal nature of rape and the social stigma attached to being a rape victim.[53] The implied 'positively harmful' effect primarily alludes to the psychological and emotional impact upon the rape victim. It could also extend to the detrimental effect a lower rape reporting rate would have on the CJS's ability to deal with the crime effectively. There was one overriding principle that could be drawn from the recommendations so far as rape complainant anonymity was concerned: there was something fundamentally distinct about being a rape victim, as opposed to a victim of any other crime. The knock on effect was a structural inequality in rape prosecutions that needed addressing. Seemingly anonymity for rape victims was thought to be able to address both cause and effect.

The Advisory Group had similarly considered the merits of anonymity for defendants in rape trials, but concluded that defendants should not be awarded anonymity. The report stated:

> '[T]he reason why we are recommending anonymity for the complainant is not only to protect victims from hurtful publicity for their sake alone, but in order to encourage them to report crimes of rape so as to ensure that rapists should not escape prosecution. Such reasoning cannot apply to the accused. The reason for giving him anonymity is the argument that he should be treated on an equal basis. We think it erroneous to suppose that the equality should be

[52] Home Office (n50) paras. 153-157.
[53] The social stigma attached to rape is addressed in chapter 2.2.3.

> with her – it should be with other accused persons and an acquittal will give him public vindication'.[54]

Notwithstanding the recommendations of the Helibron Report, the Government chose to grant both parties in rape cases anonymity. When the Bill for the SOAA 1976 was first introduced into Parliament however, it only provided anonymity for rape complainants. At Committee stage, a large majority voted to extend anonymity to defendants as well, a position the government duly adopted.[55]During subsequent Parliamentary debate on the proposed amendment, arguments focused on the effect that a rape accusation had upon an individual, even following their acquittal [56] and that being a rape defendant was indistinct from being a defendant in other crimes. Weight was also placed on the fact that rape complaints were commonly made on uncorroborated evidence, thus it was easy for an individual to make a complaint, but difficult for a rape defendant to prove his innocence.[57]Ultimately the Bill's amendment was accepted by Parliament and the following year, anonymity was placed on a statutory footing in the SOAA 1976.

2.1.3 The Sexual Offences (Amendment) Act 1976

The SOAA 1976 s4[58] prohibited disclosure or publication, within England and Wales, of the name, address or other material, which would lead to the identification of someone who had made a rape allegation. Under strictly limited circumstances, where necessitated in the interest of justice, the trial judge in a rape case had the discretion to remove the complainant's anonymity. Similarly under s6 of the Act, defendants in rape trials were provided with anonymity from the time the accusation was made. The provision would cease to apply either following the defendant's conviction in a crown court, or where the trial judge used his strictly limited discretion to remove a defendant's anonymity where justice so required it.

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[54] Home Office (n50) para. 177.
[55] HC Deb 21st May 1976 vol. 911 cols. 1922-1924.
[56] HC Deb (n55) cols. 1925-1926.
[57] HC Deb (n55) col. 1942.
[58] SO(A)A 1976 s4(2)-s4(4)

The SOAA 1976 also limited the introduction or cross-examination of the rape complainant with regard their sexual history with someone other than the defendant. This was intended to ease the trauma of the courtroom process on rape complainants.

However following a change of government the position relating to defendant anonymity shifted. *Prima facie* the new Conservative Government thought that their predecessors had made a mistake in acting contrary to recommendations of the Advisory Group of the Law on Rape.

Only 12 years after defendant anonymity had been granted, the legal provision would alter again. The recommendations contained within the Fifteenth Report of the Criminal Law Revision Committee[59] were highly influential in this process.

2.1.4 Fifteenth Report of the Criminal Law Revision Committee (CLRC), on Sexual Offences, April 1984

In April 1984 the CLRC, published its recommendations following a review of the law on sexual offences. They made a number of recommendations regarding anonymity provisions for complainants and defendants in rape cases. They also discussed the provisions enacted under the SOAA 1976 s2[60] that had been intended to limit cross-examination of the complainant.

Provisions relating to cross-examination of sexual history, *prima facie* had no direct association with anonymity provisions in rape trials. Their relevance lay in the fact that the restrictions were intended to ease the burden of the trial process on complainants. Restrictions on cross-examination implied the Government's acknowledgement that the burden of the trial process, upon complainants, needed to be eased so far as was reasonably possible. In this way the provision also indirectly reinforced arguments in favour of continued complainant anonymity.

The Committee also reviewed the controversial provisions of the SOAA 1976 that had granted defendants in rape cases anonymity, notwithstanding the Helibron Report's advice against the amendment. Seemingly Parliament had extended anonymity to rape

[59] Fifteenth Report of the Criminal Law Revision Committee, Sexual Offences (Cmnd 9213, April 1984).
[60] Sexual Offences Act 1956 (n44) s2.

defendants by way of 'concessionary amendment'.[61] The Committee made it clear they considered anonymity had been awarded to rape defendants, under the SOAA 1976, without there being adequate justification to do so. The report stated:

> '[W]e endorse the reasoning of the Helibron Committee that led to complaints in rape cases being granted anonymity to encourage them to come forward….. [We] agree too, with the arguments of the Helibron Committee against giving anonymity to defendants in rape cases. We would add that rape is but one of many offences where a defendant who is acquitted may nevertheless suffer damage to his reputation……there is no reason in principle why rape should be distinguished from other offences in this respect. The "tit-for-tat" argument-that the man should be granted anonymity because the woman has it-is not in our opinion valid, despite its superficial attractiveness. We sense, however that as a matter of practical politics anonymity for defendants, introduced as recently as 1976 is unlikely to be abolished, although if it were possible we would for the reasons given by the Helibron Committee, favour its abolition as a matter of principle'.[62]

The Committee pointed to a further difficultly that could be caused by defendant anonymity. It arose where a defendant was acquitted of rape but convicted of a different sexual offence arising from the same circumstances. If the defendant had anonymity resulting from the original rape charge then the newspapers would not be able to report on the other conviction for risk of breaching his anonymity. The Committee did not think that such an outcome should be able to occur.[63]

Unsurprisingly the Committee were firmly of the view that defendants in rape trials should not retain their anonymity, nor should they be treated differently from defendants of other crimes. They should remain subject to the principles of open justice that the legal system values and upholds, in all but exceptional circumstances.

[61] Fifteenth Report (n59) para. 2.92.
[62] Fifteenth Report (n59) para. 2.92.
[63] Fifteenth Report (n59) para. 2.93.

By comparison they considered that the position of rape complainants did fall into the category of exceptional circumstances. Despite an intervening period of several years, it is submitted that the 15th report of the CLRC, *Sexual Offences* Reportwas highly influential in the Conservative government's subsequent proposals to legislate for the removal of defendant anonymity in rape cases.

2.1.5 The Criminal Justice Act 1988[64]

Four years after the CLRC Sexual Offences Report, Parliament passed the Criminal Justice Act (CJA) 1988. The CJA 1988 s158[65]repealed SOAA 1976 s6[66], the provision that had originally granted anonymity to rape defendants. S158 CJA 1988 also upheld anonymity for rape complainants. It meant that the law finally reflected the key recommendations contained within both the Helibron Report and the more recent CLRC Report.

The parliamentary debates that preceded the CJA 1988 were no-less polarised in discussion of rape defendant anonymity. During the passage of the Criminal Justice Bill, Lord Monson, a former cross bench peer proposed an amendment clause that would have seen defendant anonymity remain in the CJA 1988.[67] He based his arguments on the residual stigma faced by rape defendants, notwithstanding acquittal and the potential for every man to be a rapist. He said:

> '[M]en are not generally envisaged by their neighbours as being capable of climbing a drain-pipe and robbing a flat on the tenth floor or forging a £50 note or manufacturing a complex bomb to go off in a public place. But it is acknowledged that most men, theoretically, are capable of committing rape in certain circumstances. Therefore the natural reaction of friends and neighbours when a man is accused of rape is to say there can be no smoke without fire. That is what worries me'.[68]

[64] CJA 1988.
[65] CJA 1988 s158.
[66] SOAA 1976 s6
[67] HL Deb 3rd November 1987 vol. 489 col. 965.
[68] HL Deb (n67).

By comparison Lord Meston reiterated the view that arguments in favour of rape defendant anonymity on the premise of a need for equality were erroneous. He furthered that the provision contained within the SOAA 1976 was not a recommendation of the Helibron Committee. Rather, with reference to the words of Lord Hailsham, it was decided by a 'chauvinist pig Committee stage in another place'.[69]

The Earl of Caithness defended the Conservative Government's proposal. He pointed out that the SOAA 1976 only correctly followed some of the Helibron Committee's recommendations, of which anonymity for rape defendants was not one. He placed emphasis on the fact that the CLRC also favoured repealing the SOAA 1976, the enabling provision for defendant anonymity. The Earl was pointing out that two consecutive reports had deemed anonymity for rape defendants unnecessary.[70]

Ultimately the stance of the Conservative Government drew enough support to see anonymity for rape defendants removed by virtue of CJA 1988 s158. Unfortunately, despite the recommendations of two successive committees, the removal of defendant anonymity in rape cases did not settle the debate on the topic. The Austen Donnellan case,[71] a few years later would clearly demonstrate this.

2.1.6 The Austen Donnellan acquittal

Calls to provide defendants in rape trial with anonymity were voiced again following the much publicised Austen Donnellan acquittal in 1993. The defendant Mr Donnellan was a 21 year old student at Kings College in London. He was tried for rape following sexual intercourse with a fellow student after a Christmas party the previous year.[72] According to Mr Donnellan, he had kissed and petted the complainant heavily on previous occasions[73] and on the occasion in question. On the night in question a

[69] HL Deb (n67).
[70] HL Deb (n67).
[71] Williams. R, 'Date Rape: Acquittal strokes row: A person who is drunk and because she is drunk consents to an act which she otherwise would not consent when sober, still consents' The Independent (20th Oct 1993) <http://www.independent.co.uk/news/date-rape-acquittal-stokes-row-a-person-who-is-drunk-and-because-she-is-drunk-consents -to-an-act-which-she-would-not-when-sober-still-consents-1511857.html> accessed 18th January 2012.
[72] Williams (n71).
[73] Pook. S, 'Ships that make a pass in the night can end up in dock' *The Telegraph (*7th February 2000) <http://www.telegraph.co.uk/news/uknews/1354370/Ships-that-make-a-pass-in-the-night-can-end-up-in-dock.html> accessed 18th January 2012.

witness reported the complainant having drunk 'a lethal cocktail of cider, vodka and Drambuie'. [74]

Due to her intoxicated state, Mr Donnellan claimed he had taken the complainant outside for fresh air, before escorting to her room in university halls.[75] He maintained that the complainant had proceeded to have sexual intercourse willingly, even having grabbed him by his T-shirt, pulling him on her bed and repeatedly begging him to have sexual intercourse with her[76]. He contended that he had woken later to find the woman stroking his back and body, actions which if true would evidence the complainant's reasonably conscious state. In response to her actions Mr Donnellan had reportedly undone her night clothes and climbed on top of her, but having realised the complainant's eyes had closed, believed she had fallen asleep again. Moments later the complainant sat up saying 'I can't believe you just tried to screw me,' and walked out of the room, following which Mr Donnellan made his own exit a few minutes later.[77]

The complainant in her testimony, alleged having been 'woken from a drunken stupor' to find Mr Donnellan having oral sex with her, followed by sexual intercourse. If the complainant's version of events were true then it is plausible that she was too intoxicated to give her consent and was therefore raped by Mr Donnellan. Nevertheless, Donnellan could still have raised a defence without too much difficulty: arguing that he held an honest belief in the complainant's consent.[78] The trial Judge Geoffrey Grigson acknowledged the complainant's degree of intoxication. In his summing up he emphasised its relevance saying:

> '[A] person who is drunk, and because she is so drunk consents to an act which she would not when sober, still consents. Drunken consent

[74] Williams (n71).
[75] Williams (n71).
[76] Williams (n71).
[77] Williams (n71).
[78] This would be on the basis of the earlier decision in *Morgan.*

> is enough. But a woman who is so drunk that she needs no understanding of what is happening cannot consent'.[79]

Following the incident, the young woman had made a complaint internally to the university disciplinary authorities.[80] Following an investigation within Kings College University, Mr Donnellan was offered the opportunity to plead to a lesser charge in conjunction with dismissal from the University, in return for the original charge against him being dropped.[81] Mr Donnellan, with the backing of his college tutor, insisted on going to the police and ultimately proceeding with the trial to clear his name.[82] Following the trial, on the 19th of October 1993, Mr Donnellan was acquitted by a jury of nine women and three men, at the Old Bailey in London. [83]

The trial's outcome provoked uproar from the public, the legal profession and the government. Ironically, much of the reasoning as to why the trial received so much publicity was not related to anonymity in rape cases. Rather it was that the case involved students at a prestigious university and the fact that the defendant's tutor was a leading Liberal Democrat peer, Conrad Russell.[84]Arguments in favour of re-instating defendant anonymity in rape trials were soon being voiced. Equally, anger was expressed as to the damaging effect that the decision would have upon the ability of future rape victims to come forward and report the crime. There was general discontent as to why the case was allowed to proceed to trial in the first place. One of the most notable calls coming from the then Lord Chief Justice, Lord Taylor, was for reinstatement of defendant anonymity in rape trials, before conviction. It would have amounted to a return to the position prior to the CJA 1988. Lord Justice Taylor was quoted in one newspaper as having said:

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[79] Williams (n71). See *R v Bree* [2007] EWCA Crim 804 for legal authority on the issue of when an individual, who is voluntarily intoxicated, has the capacity to consent to sexual activity.
[80] Gregory. J, Lees. S, *Policing Sexual Assault* (Routledge, London, 1999) 78.
[81] Williams (n71).
[82] Darton. J, 'British Rape Case Stirs Call to Not Identify the Accused' *New York Times* (5th November 1993) <http://www.nytimes.com/1993/11/05/world/british-rape-case-stirs-call-to-not-identify-accused.html> accessed 18th January 2012.
[83] Darton (n82).
[84] Jaconelli. J, *Open Justice: A critique of the Public Trial* (OUP, Oxford, 2002) 181.

> 'I think it is unfair [Austen Donnellan] should be exposed to the same sort of embarrassment women were exposed to that led to anonymity being given to the complainant'.[85]

Additionally, there was widespread support for Mr Donnellan who had been named while his accuser had anonymity throughout the process.[86] In contrast women's groups labelled the acquittal a 'backlash' against women. Siwan Hayward, founder of the 'No Means No Campaign contended that 'Women don't lie about rape'.[87] Concerns were aired that the Donnellan trial starkly illustrated the need to define a woman's right to say no to sexual intercourse, and even more so when the parties are under the influence of alcohol.[88] Gregory and Lees summarised the overall impact of the case as two-fold. Firstly it sent out the message that rape trials generally were unfair to the male defendant. Secondly, it discouraged women from reporting cases and pursuing them, a knock on effect of which would mean increased attrition levels in rape cases.[89]

Nevertheless, the reality of the Donnellan acquittal was that alterations to anonymity provisions for one or both parties in rape cases were debated in Parliament yet again. The then, Home Secretary, Michael Howard, ordered a review of anonymity provisions with view to a possible change in the law. There were a number of proposals made including 'leaving the situation as it is now, lifting the anonymity of the victim, the defendant or both, or granting the trial judge the discretion to make such decisions'.[90]

Following the review, and having had time to consider offered proposals, Mr Howard concluded:

> 'I am satisfied, however, that the present law, that affords anonymity for complainants in sexual offences, but offers no special protection for defendants, strikes a proper balance between the principle of open justice on the one hand and the need to ensure that victims of

[85] Darton (n82).
[86] Gregory (n80).
[87] Darton (n82).
[88] Darton (n82).
[89] Gregory (n80).
[90] Darton (n82).

> sexual offences are encouraged to come forward on the other. I therefore have no plans to alter the law in this area'.[91]

On the issue of providing defendant anonymity, Mr Howard deemed it unnecessary, reporting:

1. '[T]he law already allows for the prosecution of complainants whose accusations amount to perjury or an attempt to pervert the course of justice, and in those circumstances the rules relating to anonymity no longer apply.[92]

2. '[I]n a system of open justice[93] some discomfort for defendants who are subsequently acquitted is inevitable….openness is essential to the maintenance of public confidence in the criminal justice system and ensures that information that might encourage further witness to come forward is publicly available'.[94]

Consequently, following the outcome of the review and Mr Howard's comments, the issue of anonymity was briefly put to rest again.

2.1.7 Criminal Justice and Public Order Act (CJPOA)1994[95]

One of the greatest difficulties in obtaining successful prosecutions in cases of rape has always been the 'rape myths' surrounding the crime. Rape myths are discussed in more detail in chapter2.2.3, however their relevance to legislative change that occurred in 1994, which in turn affected arguments relating to anonymity, requires a brief discussion.

Rape myths are widely held beliefs about rape that ensure gender inequality in the law is maintained, that attrition in rape cases is high and conviction rates low. The effectiveness of rape myths in condemning rape victims to injustice is linked to

[91] HC Deb 18th February 1994 vol. 508 col. 1029.
[92] HC Deb (n91).
[93] The principle of open justice is dealt with in further detail in chapter 2.3.
[94] HC Deb (n91).
[95] CJPOA 1994.

historical attitudes and beliefs that serve only to justify male power and aggression over women.[96] Kennedy summarises, stating that '[Rape] myths are not the same as lies, in that they do not involve deliberate falsification. They endure because they serve social needs'.[97]

A long standing problem in rape cases is the extremely low conviction rate. Arguably 'rape myths' lay down unspoken criteria that should be satisfied in order for an offence to qualify as real rape. The majority of cases that fail to meet these criteria are unlikely to see a conviction in court.[98] Rape myths and the unspoken expectations they place upon rape complainants only adds to a complainant's traumatic courtroom experience. If rape myths were less prevalent, then rape complainants might be more willing to report the crime and endure the courtroom process. *Prima facie* the need for rape complainant anonymity would lessen.

One of the most common myths is that rape complainants commonly make false allegations and therefore cannot be trusted to tell the truth in court.[99] Until 1994 judges had to give a corroboration warning as part of their summing up exercise in court. It included a warning to the jury to be wary before convicting a defendant on the uncorroborated evidence of the complainant.

The warning was telling the courtroom that women are prone to lie about rape in a way that men are not. Jurors were to look for some supporting evidence such as physical injury, which may or may not have been present. This made it extremely difficult for a jury to convict the defendant. The outcomes also perpetuated a long-standing rape myth, making the legal process more traumatic and fortifying the need to mitigate the effect on rape complainants through anonymity.[100]

The Public Order Act (POA) 1994 s33 removed the requirement of judges to give a corroboration warning. *Prima facie* the development was a welcome one and could be said to mitigate the need for complainant anonymity to some extent. Unfortunately

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[96] Temkin. J, Krahe. B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) 34.
[97] Kennedy. H, Eve *Was Framed: Women and British Justice* (Vintage Books, London, 2005) 31.
[98] Temkin (n96) 31-32.
[99] Lees. S, *Carnal Knowledge: Rape On Trial* (2nd edn, The Woman's Press Ltd, London, 2002) 126-127.
[100] Bourne, J. Derry, C. *Women and the Law* (Old Bailey Press, London, 2005) 128.

judges still retained discretion to give a corroboration warning in cases where they consider it appropriate: confirmed in *R v Makanjuola*.[101] Thus the Act didn't actively better the position of the rape complainant. Providing the trial judge with discretion still leaves residual doubt in the minds of the jury and the public that rape complainants are lying about being raped. Consequently, the arguments voicing the need for continued rape complainant anonymity were not countered to any significant extent by the POA 1994 s33.

2.1.8 Crime and Disorder Bill (CDB) 1998

During the passing of the CDB in 1998, it was the Liberal Democrats who next proposed defendant anonymity in rape trials. An amendment was also moved, which it is submitted, if accepted would have altered sexual history evidence in favour of the complainant.[102] Despite the proposed amendments it was acknowledged by Lord Goodhart that the purpose of the debate was principally to raise the issue rather than to seek to immediate change.[103]

The amendment proposed two alterations that were directly applicable to anonymity provisions. The first was based on removing the notion of an unreasonable but honest belief, as a defence to a rape charge.[104] It would have been a welcome alteration but Lord Acker later refuted the proposal, contending that the SOAA 1976 s1(2)[105] rectified the issue.[106] It would appear that Lord Acker's belief was erroneous because s1(2) states:

> 'when considering whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for belief is matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed'.

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[101] *R v Makanjuola* [1995] 3 ALL ER 730.
[102] An amendment was also proposed which would have altered the use of sexual history evidence in favour of rape complainants. See HL Deb 19th March 1998 vol. 587 col. 854.
[103] HL Deb 19th March 1998 vol. 560 col. 853.
[104] The principle was established in *Morgan* (n42).
[105] SOAA 1976 s1(2).
[106] HL Deb (n103) col. 856.

It has been suggested that the *Morgan* 'unreasonable but honest' belief did not impact negatively upon the law since a jury was unlikely to believe a defendant's alleged mistake was genuine unless there were reasonable grounds for believing it. The Law Commission was even purported to have said that '*Morgan* is not, in practice, a problem'.[107] However both these arguments are flawed because whether following the SOAA 1976 s1(2) or *Morgan,* it remained open to the jury to acquit a defendant that held an honest, but unreasonable belief, if they so chose.

In response to the proposals the Solicitor-General, Lord Falconer agreed the amendments were 'a valiant attempt to deal with a number of difficult problems in the law of rape'.[108] He was not convinced they would provide a better alternative to the law as it then stood. Alterations to the defendant's belief in consent would 'mark a fundamental change in the law on rape'.[109] His Lordship furthered:

> '[A]t present a man can be convicted only if he has intercourse knowing or being reckless as to whether the alleged victim consented. The proposal would allow the jury to say subsequently that such a person did not have reasonable grounds for the actual belief that he had, and was therefore guilty'.[110]

Most significantly in the context of the anonymity debate was the proposal under subsection four of the amendment (CDB 1998), providing anonymity for defendants once more. This anonymity would include protection of defendants from identification by the press and from broadcasting in the media, prior to and unless the defendant was convicted of the crime. [111]

Earl Russell supported the amendment and justified the proposals as a whole on the principle of 'a level playing field'.[112] The Earl contended that this was true for both sexual history evidence and anonymity. His focus was on a defendant's right to anonymity and stated:

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[107] Card. R, Gillespie. A, Hurst. M, *Sexual Offences* (Jordan Publishing, London, 2009) 72-73.
[108] HL Deb (n103) col. 857.
[109] HL Deb (n103) col. 858.
[110] HL Deb (n103) col. 858.
[111] HL Deb (n103) col. 854.
[112] HL Deb (n103) col. 855.

> 'Where you face a charge of this kind, the mere publicity itself is a severe penalty. You are recognised on buses. Your relations find out about the case from finding your face pictured on paper used to wrap kippers. These penalties are severe. The recognition may continue for years. It is a severe handicap to normal human relations. It is the contention of the amendment that punishment should not be inflicted on those who are found innocent. If you are innocent you should not be punished. I think that is only justice'.[113]

Undoubtedly there was substantial truth in this statement and there will always be sympathy for the wrongly accused defendant. Even so, discussions will analyse the merits of arguments such as this in more detail and will demonstrate that the simple 'level playing field' arguments do not represent the complexity of the debate. For the purposes of discussing the historical and legislative developments, it suffices that Lord Falconer agreed that society did attach a stigma to those accused of rape and that those individuals would have had anonymity in a previous decade.

Lord Falconer further asserted why anonymity was removed, contending that:

> '[O]penness is a fundamental principle, defendants are generally named, even in the case of murder and other reprehensible crimes. Why should defendants in rape cases receive special protection?'[114]

His Lordship argued that anonymity for complainants was not only given to complainants in order to protect them from embarrassing publicity but rather to ensure that reporting takes place and rapists do not escape prosecution. The same argument could not be applied to the defendant because 'the arguments are about preventing personal hurt and embarrassment rather than improving justice'.[115] He contended that defendant anonymity in order to promote a 'level playing field' was an erroneous argument since the defendant's equality lies with other accused persons(

[113] HL Deb (n103) col. 855.
[114] HL Deb (n103) col. 859.
[115] HL Deb (n103) col. 859.

rather that the complainant) and it is an acquittal which will give him public vindication'.[116]

His Lordship pointed out that whilst anonymity might help to ease the stressful consequences of a rape charge, some defendants would still experience the same difficulties even if anonymity were provided. This was because a rape defendant might still be identified by his local community,[117]although no further detail was provided as to under what circumstances that could occur. Furthermore, providing defendants with anonymity would do nothing to address problems surrounding the low rape conviction rates. His Lordship concluded that:

> '[O]ften the naming of the accused can be used to provide the public with information they can pass onto the police. This can be vital in obtaining the necessary evidence against the accused'.[118]

As Lord Goodhart had anticipated, following parliamentary deliberations the amendment was withdrawn[119] and the anonymity debate was temporarily removed from the parliamentary arena. Even so, Lord Goodhart fulfilled the intended purpose of introducing the amendment: to rekindle active debate on the subject and ensure that deliberations would not lie dormant for long.

2.1.9 Youth Justice and Criminal Evidence Bill (YJCEB) 1999

Before long, the anonymity debate did return to Parliament. It was during the passage of the YJCEB in 1999, where a proposed new clause, to provide anonymity to rape defendants, was discussed. The clause would have restricted any reporting about persons accused or suspected of committing a sexual offence that would have resulted in the public identifying them prior to conviction. The only exceptions would be where the identity of the defendant was needed in order to secure their arrest or 'is otherwise in the interests of justice'.[120]

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[116] HL Deb (n103) col. 859.
[117] HL Deb (n103) col. 854.
[118] HL Deb (n103) col. 854.
[119] HL Deb (n103) col. 860.
[120] HC Deb 8th July 1999 vol. 334 col. 1258.

Conservative MP Mr Greenwood urged the clause be taken to second reading whilst acknowledging the polarity of opinion on the matter. Some individual lawyers believed that the Government should extend anonymity provisions others including legal bodies such as the Law Society considered it to be the wrong move. Opinion was divided even within individual political parties.[121] Mr Greenwood, without expanding, believed that the interests of rape victims were being provided for by the Bill: he may have been referring to proposed clauses restricting the cross-examination of victims in sexual offence cases.[122] His concerns lay with the corresponding lack of provisions to protect the interests of rape defendants.[123]

Supporting his argument Mr Greenwood made reference to the reasoning behind removing defendant anonymity in the CJA 1988: the most prevalent being that it encouraged victims to come forward. He referred to a number of incidents that he found disturbing and had led to a questioning of whether 'in the interests of fairness and natural justice' the 'balance' should be restored. The first incident concerned the suicide of a 21 year old man, Mark Jackson, who hanged himself following an accusation of rape by his former girlfriend. Despite his acquittal in Exeter Crown Court, the newspaper headlines in his home town of Wigan read 'Jilted man, 21, raped ex-girlfriend'. [124] The second incident involved the suicide of Dennis Proudfoot. He had inhaled exhaust fumes in the car following a charge of rape by his ex-girlfriend, reportedly through fear of the publicity it would attract. After the man's death his parents received correspondence from the ex-girlfriend admitting the accusation was false.[125] Mr Greenwood also pointed out that the discussion extended to female defendants, giving the example of a female doctor, who in 1997 was found not guilty of indecently assaulting a female patient. She received a verdict of 'not guilty' of

[121] HC Deb (n120).
[122] YJCEB (1998-99) 74 cl 33 and cl 37: It is arguable that even when these clauses would supposedly apply the defendant would not be prejudiced. If a judge was concerned as to the risk of prejudice then in accordance with YJCEB (1998-99) 74 cl 38 he must give the jury such warning as he deems necessary to prevent that prejudice arising.
[123] HC Deb (n120) 1258-1259.
[124] HC Deb (n120).
[125] HC Deb (n120) col. 1259-1260.

indecent assault but was nevertheless subjected to public scrutiny. Neither her career nor her private life ever recovered.[126]

Mr Greenwood argued that, whilst there has been a significant reduction in the number of rape complaints that were later 'no crimed'[127], approximately 25% of crimes were still recorded as such. The most common reason cited was that the complaint was believed to be false or malicious, and in a third of such cases the complainant withdrew the allegation. The suggestion being that in such cases it is quite possible the defendant would have had their identity made public and would have been subjected to all the ramifications that that caused for themselves and their families.[128]

Mr Beith MP was equally supportive of the new clause being taken to a second reading but based his argument on a less cited concept but one underpinned by good reasoning. He asserted that 'the anonymity of the victim can be undermined when the defendant is known'. He correctly argued that the reality, in a number of rape cases, was that the identity of defendant and complainant are known to one another in some form. Through identifying one, it is feasible that the public could come to identify the other. Mr Beith reinforced his thoughts arguing that '[L]ack of anonymity for the defendant undermines our ability to protect the complainant'. He also raised his concerns over the more commonly cited social stigma and ramifications that could occur as a result of the rape allegation that lasted long after acquittal.[129]

Mr Beth referred to an earlier House of Lords discussion that took place during the passage of the CDB and the amendment proposed by Lord Goodhart to restore anonymity to defendants in rape cases. He referred to the arguments that the then, Solicitor General, Lord Falconer had made for withholding anonymity for rape defendants and maintained the reasoning was not substantial enough to counter the reasoning he set out.[130]

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[126] HC Deb (n120) col. 1260.
[127] No criming an offence means that the incident is recorded as no offence having been committed.
[128] HC Deb (n120) col. 1256-1261.
[129] HC Deb (n120) col. 1261.
[130] HC Deb (n120) col. 1261.

By contrast Mr Boateng was in opposition to a re-introduction of anonymity, summarising the reasoning provided by the CLRC in 1988, before the CJA 1988 repealed rape defendant anonymity.[131] He acknowledged that '[B]alancing stigma and post-acquittal consequences [in a rape cases] involves arguments that are by no means clear-cut' and that those proposing a return to the law prior 1988 lacked a convincing argument. Mr Boateng supported comments made by Lord Falconer, during the earlier deliberations that referred to the right of the general public to know what goes on in court. In his opinion the 'public interest' weighed heavily in the anonymity debate but:

> '[T]he present law strikes a proper balance between the principle of open justice, in which the public has a wider interest, and the very important need to ensure that victims of sexual offences are encouraged to report such crimes'.[132]

Mr Boateng said that while some argued sexual offences were particularly heinous, the same could be said for defendants of other serious crimes like murder. To give anonymity to rape defendants would pave the way for others to argue that they also suffer and therefore need protection from press and publicity.[133] In agreement it is asserted that providing rape defendants with anonymity would be putting them at an advantageous position to defendants of other crimes: an outcome that would not promote a system of open and fair justice for all.

Mr Boateng rightly acknowledged that under the Contempt of Court Act 1981,[134] the court could order postponement of publications or legal proceedings for any period it deemed necessary. Where a court chose to withhold a name from the public during a trial, it also had the power to prohibit publication completely,[135] thus if defendant anonymity were truly required then the court had the power to enforce it.[136]

In counter support, Mr Heald MP contended that:

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[131] HC Deb (n120) col. 1262.
[132] HC Deb (n120) col. 1262-1263.
[133] The argument has been made that all defendants should receive anonymity: See Bohlander. M, 'Open Justice or Open Season? Should the media report the names of suspects and defendants?' [2010] 74(4) J.C.L. 321-338.
[134] Contempt of Court Act 1981.
[135] HC Deb (n120) col. 1263.
[136] HC Deb (n120) col. 1264.

> 'Since anonymity for the defendant has been scrapped, the suggestion has been lurking in the courtroom, in almost every rape case, that a false allegation may have been made under the cloak of anonymity. A man's life may be ruined because of that anonymity. If both parties have anonymity, that suggestion cannot lurk in the background of the court. I suggest that that would make a difference'.[137]

Interestingly, the suggestion was that by providing defendant anonymity, complainants were also protected from the stigma that they commonly make false complainants. There may be some truth in Mr Heald's view. Some have noted that popular belief of false allegations would have been better dealt with through public education and accurate false allegation statistics. Providing defendant anonymity could come at the expense of higher attrition rates by complainants feeling less able to come forward and report their crime: an outcome wanted even less. Mr Heald reinforced his thinking, stating:

> '[I]t is noticeable that since the scrapping of the anonymity of the defendant, the number of rape cases that have been successfully pursued and have resulted in conviction have fallen dramatically. Might not one reason for that be that the point is not lost on the jury that the person making the complaint is doing so anonymously, and is risking nothing?'[138]

Yet the belief that by having anonymity the rape complainant loses nothing, seems to have been an ill-though-out response, made from a male perspective. As Caroline Flint MP reminded the House, a rape victim (who might be making a false complaint) has to stand up in court, facing the person she has accused of raping her, in front of judge, jury, and court officials and give evidence.[139]

Once again parliamentary deliberations did nothing to provide any clarity on the anonymity debate but again demonstrated how divided opinion. Ultimately defendant

[137] HC Deb (n120) col. 1264.
[138] HC Deb (n120) col. 1265.
[139] HC Deb (n120) col. 1265.

anonymity provisions were not included in the Youth Justice and Criminal Evidence Act (YJCEA) 1999 when it received royal assent later the same year.

2.1.10 Youth Justice and Criminal Evidence Act 1999

Notwithstanding a lack of defendant anonymity provisions, the YJCEA did include a new provision intended to restrict the use of sexual history evidence in sexual offence cases. YJCEA s41 prevented a defendant who was charged with an offence from cross-examining the complainant[140] about their sexual history,[141] or from adducing evidence of that type without leave to do so from the trial judge.[142]

The new limitation was a welcome change for rape victims and those seeking to ease the courtroom pressure upon them. It would also make victims feel more able to come forward and report the crime in the first instance, knowing that the defendant could not simply cross-examine them or adduce any evidence he wished. In theory an indirect consequence of s41 was that it would also mitigate the need for complainant anonymity to some degree. Unfortunately any benefits achieved for rape complainants, by virtue of s41 were short lived. Only two years after the YJCEA was passed a landmark House of Lords decision in *R v A (No 2)*[143] rendered the provision almost irrelevant.

A (No 2) was a criminal appeal concerning the admissibility of sexual history evidence, or cross-examination of the complainant under YJCEA s41. The question posed was whether or not restricting a rape defendant's right to cross-examine the complainant about their sexual history breached his right to a fair trial under Article 6 of the ECHR. According to Lord Steyn, s41 was most problematic when it prohibited cross-examination of the complainant's previous sexual relationship with the defendant. His Lordship reasoned that this was because:

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[140] YJCEA 1999 s41(1)(b).
[141] YJCEA 1999 s41(1)(a).
[142] YJCEA s41(2): the act also stated that leave of the trial judge should only be granted in limited circumstances, as detailed by YJCEA s41(3) or s41(5), or under YJCEA 41(2)(b) when refusal of leave could result in either the jury or the court coming to an unsafe conclusion.
[143] *R v A (No 2)* [2001] UKHL 25.

> '[A]s a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent'.[144]

Lord Steyn provides no explanation of precisely where the causal link between consent during previous sexual relations and consent given during the sexual relations of the alleged rape lay. Without such an explanation the relevance of a prior sexual relationship evidently cannot be 'common sense'. By contrast some onlookers would consider this statement to be entirely nonsensical and irrelevant to the *actus reus* of the crime in question.[145]

Following their deliberations the five presiding judges answered the question unanimously. In future rape cases a test of admissibility should be applied. Where evidence, and the questions related to it are so integral to the question of consent, that to exclude it would endanger the fairness of the trial under Article 6, then that evidence should not be excluded.[146]

Following *A (no.2)* judges are unlikely to refuse applications by the defendant to cross examine the complainant, or adduce evidence regarding previous sexual relations where it may be at all relevant to the case. To refuse permission would mean a potential onslaught of appeals based on a breach of the defendant's right to a fair trial under Article 6 ECHR. When ascertaining what might be considered 'potentially relevant' evidence or past experiences, one only has to look to follow the 'common sense' approach employed by Lord Steyn. Doing so allows one to conclude that most evidence would fall within the ambit of potentially relevant evidence.

The result was that complainants in rape cases were once again faced with a potential onslaught of potentially irrelevant questioning by the defendant regarding their previous sexual experiences. Such questioning implies to the jury that the complainant

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[144] *R v A (No 2*) [2001] UKHL 25 para. 11.
[145] See for example McGlynn. C, 'Feminist judgment: *R v A (No 2)* [2001] UKHL 25' *The Guardian* (11th November 2010) <http://www.guardian.co.uk/law/2010/nov/10/rape-juries-feminist-judgment, (accessed 26th January 2012)>.
[146] *R v A (No 2*) [2001] UKHL 25 para. 18.

is lying, making the courtroom process more traumatic for the victim and correspondingly increasing the need to protect rape complainants with anonymity.

2.1.11 Proposed Amendment to the Sexual Offence Bill (SOB) 2003 by Lord Ackner

The next call for statutory changes to the anonymity provisions in rape cases came during the passage of the SOB 2003. Lord Ackner moved a clause that would have provided anonymity for defendants in rape cases once again. The provision would read '[A]nonymity of Defendants in Rape etc. cases shall enjoy the same right to anonymity as is enjoyed by the complainant'.[147]

His Lordship explained this initial reasoning for proposing the clause, referring to a local GP, who had a one-man practice, and who was charged by the police of raping a girl under the age of 16. He was arrested in front of his family, and remanded in custody for over a week. He was later released on bail with the conditions that he left the country and went to live with his father, only able to return home for the purposes of gaining legal advice. Shortly before being due to return to court he was informed that all charges against him had been dropped. [148] Lord Akner turned the House's attention to CJA 1988 s158, which had withdrawn anonymity provisions from defendants in rape cases, and consequently left an imbalance which 'calls vociferously for an adjustment.' He questioned the damage that must have been done to the reputation of the general practitioner and acknowledged that the man had not been able to commence practice once more. Lord Akner questioned why this protection has been removed. '[F]rom such enquires I have made, I can find no sensible justification for doing so'.[149]

In answer to this question Baroness Kennedy contended that withholding defendant anonymity was based on the principle of open justice in our legal system. Anonymity provisions needed to be reserved for exceptional circumstances: a category that rape complainants fell into, due to the crime's stigma and the difficulty of getting woman to come forward and report rape. She did accept the need to provide defendants with anonymity up to the point of charge, when high levels of speculation were involved

[147] HL Deb 2nd June 2003 vol. 648 col. 1084.
[148] HL Deb (n147).
[149] HL Deb (n147) col. 1085.

that would damage lives. A 'compromise' of this sort would have been supported by a number of peers including Lord Cambell, Baroness Mallalieu and Baroness Blatch.[150] Baroness Kennedy also pointed out that in reality, particularly when serial rapists were involved, publication of the defendant's details resulted in other victims coming forward to accuse the same man. Often this helped to secure a conviction,[151] and it was important that this continued.

It became evident from the House of Lords debate on defendant anonymity provisions that there was a firm level of support for the amendment from all sides of the House. Lord Bishop of Chester referred to the 'issue of emotional frailty [which] cuts across both the accused and the victim',[152] whilst others highlighted the need to balance the rights of the defendant *vis-à-vis* the rights of the complainant.[153]

On conclusion of the debates, Lord Akner remained certain that his proposed amendment should be voted upon. In reaffirming his favourable position to defendant anonymity in rape cases he said:

> '[F]or 12 years this anonymity was enjoyed. I have heard nothing to suggest that during those 12 years there were occasions when it worked to the disadvantage of justice'.[154]

The amendment was subsequently voted on in the House of Lords and then passed in favour of defendant anonymity: although the majority was marginal with those in favour only exceeding those against the amendment by 109 votes to 105 votes.

Despite a favourable vote in the House of Lords, the amendment was removed by the House of Commons, following a vote whereby a far more substantial majority (338 votes to 173) rejected the change.[155] When the Bill was returned to the Lords once more Liberal Democrat peers made it clear that they would have proposed anonymity

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[150] HL Deb (n147) cols. 1087-1088.
[151] HL Deb (n147) col. 1085.
[152] HL Deb (n147) col. 1089.
[153] HL Deb (n147) col. 1089.
[154] HL Deb (n147) col. 1095.
[155] Almandras.S, Anonymity *in Rape Cases*, (House of Commons Library, London, SN/HA/4746 11th June 2010) 7.

once again, if it were not for fear that the entire Bill might fall apart.[156] In asserting as much Baroness Noakes said:

> 'There have been many attempts to find a good legislative solution to the problem. All attempts have been comprehensively rejected by the Government. We continue to believe these issues are important. Defendant anonymity is important, especially in cases of sexual offences. We are genuinely disappointed that the Government have failed to find a solution with us to those very real issues. If the government had wanted to find a technically competent solution one could have been found, but they did not'. [157]

Despite intense discussions that took place during the passage of the SOB 2003 and the substantial support for Lord Akner's proposed amendment for rape defendant anonymity, when the Sexual Offences Act (S0A) 2003 was eventually passed there would no anonymity provisions for rape defendants within it.

2.1.12 Select Committee on Home Affairs Fifth Report, June 24th 2003[158]

The SOB was entered into the House of Lords in early 2003, its purpose being to reform and modernise law on sexual offences that was considered out of date.[159] In addition to the Bill's standard passage through both Houses of Parliament, the Home Affairs Select Committee produced a report on the Bill, focusing on its most controversial provisions, making recommendations accordingly. Lord Akner's proposed amendment was one of the issues upon which the report focused.

The Committee began by comparing the lack of defendant anonymity in rape cases, compared with the anonymity provision for complainants and asked 'whether this was a significant omission from the Bill?' It was acknowledged that at the time, the Government was planning to reverse the amendment proposed by Lord Akner.[160]

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[156] Almandras (n155).
[157] HL Deb 18th November 2003 vol. 641 col. 1916.
[158] Select Committee on Home Affairs Fifth Report, *Sexual Offences Bill* (HC 2002-03, 639) <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/639/63902.htm> accessed 3rd January 2012.
[159] Select Committee (n158) 5.
[160] Select Committee (n158) 20.

Taking these factors into account, the Committee proceeded to analyse arguments for and against providing defendant anonymity in rape cases and sexual offences more generally. [161]

The Committee identified four main arguments against the extension of anonymity provisions to defendants. The first was the commonly cited principle of open justice 'with free and full reporting of what goes on in our criminal courts', meaning that anonymity should be the exception and not the general rule. Secondly, whilst the reasons for complainant anonymity were compelling enough to require an exception to the rule, the same could not be said for defendants.[162] Thirdly there was a need to treat defendants of sexual offence crimes in the same way as defendants of all other crimes. Finally it was contended that defendant anonymity hampered the police's ability to investigate sexual crimes.[163] On the latter point, reference was made to the successful conviction of serial rapist John Worboys, arguably only possible following public disclosure of his details which resulted in a number of other victims coming forward.[164]

Notwithstanding the reasons as to why defendant anonymity should be withheld, the Committee also identified a number of counter arguments. It was noted that the Metropolitan Police were supportive of a limited anonymity for defendants in cases involving young children.[165] The first argument was based on equality and the fact that only the complainant had anonymity, created an uneven playing field.[166] Secondly, reference was made to the particularly devastating nature of being accused of a sexual offence such as rape, even when the defendant was found to be innocent.[167] The suggestion being made was that being a rape or sexual offence defendant *did* amount to an exception to the principle of open justice. Thirdly, the Committee made reference to the Metropolitan Police who stated that 'current research indicates that between 5% and 7% of persons arrested for child abuse related offences commit

[161] Select Committee (n158) 20.
[162] Select Committee (n158) 22.
[163] Select Committee (n158) 22.
[164] Select Committee (n158) 23.
[165] Select Committee (n158) 23.
[166] Select Committee (n158) 22.
[167] Select Committee (n158) 22.

suicide'. The accuracy of that statement cannot be confirmed as no further explanation was given.[168] Finally, the Committee considered whether complainant anonymity increased the risk of false allegations, and therefore merited protecting rape defendants with anonymity as well. Following consideration of the competing arguments the Committee concluded:

> 'On balance, we are persuaded by the arguments in favour of extending anonymity to the accused. Although there are valid concerns about the implications for the free reporting of criminal proceedings, we believe that sex crimes do fall "within an entirely different order" to most other crimes. In our view, the stigma that attaches to sexual offences-particularly those involving children-is enormous and the accusation alone can be devastating. If the accused is never charged, there is no possibility of the individual being publicly vindicated by an acquittal'.[169]

The Committee also assessed, from when and until when the anonymity should operate. The options set out were firstly to restrict the provision to the pre-charge period (as suggested by the Metropolitan Police), secondly to apply the provision from charge to conviction (as had been the position following the SOA 1976, or thirdly it could apply from when the allegation was made until the time of conviction.[170] Only the third option would provide the defendant with the adequate level of protection. However the Committee also acknowledged that this would restrict the principle of free reporting upon which our legal system is based.[171] The extent to which the public had a right to know that an individual had been charged, but not convicted of any crime was also questioned.[172]

Thus having taken all the competing arguments into account the Committee concluded that rape defendants should only be protected for a limited time between the allegation and official charge. This would allow 'an appropriate balance between the

[168] Select Committee (n158) 22.
[169] Select Committee (n158) 23.
[170] Select Committee (n158) 24.
[171] Select Committee (n158) 24.
[172] Select Committee (n158) 24.

need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings'.[173]

The Committee provided a generally detailed and coherent explanation as to why rape defendants should have limited anonymity but the government still chose not to accept its findings. The SOA 2003 would still receive royal assent later the same year, however it would not contain a section providing anonymity to rape or sexual offence defendants.

2.1.13 The Sexual Offences Act 2003

Whilst the SOA 2003 did not alter anonymity provisions in rape cases, it did reform the law on sexual offences in various ways. The majority of changes require no elaboration for the purposes of the current discussion. There was one reform that could be said to have eased the trial process for rape complainants to some degree: thus technically mitigating their need for anonymity. Following the earlier decision in *Morgan,* a defendant could raise a defence to rape if he was able to demonstrate that he held an honest, if irrational belief in the complainant's consent. The belief was based on the defendant's subjective viewpoint rather than what a reasonable person would objectively think in the same circumstances. The subjective nature of the defence meant it was difficult for prosecuting counsel to prove what the defendant claimed to have believed. The effect *prima facie* was that securing convictions became more difficult.

The SOA 2003 s1(2) altered subjective belief in consent. The provision stated that that '[W]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents'.[174] The outcome of s1(2) is that belief now has to be based on an objective test, the theoretical benefits of which are twofold. Firstly it removes the possibility of a rape defendant successfully raising a defence to a rape charge based on his own subjective belief in the complainants consent, making it more difficult for a rape defendant to successfully raise a defence to a rape charge. Secondly, it eased the traumatic trial

[173] Select Committee (n158) 24.
[174] SOA 2003 s1(2).

experience on rape complainants to a small degree through the knowledge that there was an increased chance of seeing a guilty rapist convicted. Additionally, as suggested above, while SOA 2003 s1(2) only has a very limited impact on the anonymity debate, it does lower the merits in favour of rape complainant anonymity, if only to a negligible degree.

2.1.14 The Independent Stern Report: A report of how rape complainants are handled by public authorities in England and Wales

In March 2010 the Government commissioned Baroness Stern to report into how rape complainants were handled by public authorities in England and Wales. This was in response to on-going concern over the percentage of rape cases resulting in convictions.[175] The report did not contain a section dedicated to the subject of complainant and/or defendant anonymity in rape cases, but did discuss matters relevant to anonymity of each party.

The Stern Report did not specifically discuss, review, or recommend any changes for complainant anonymity. Even so the report highlighted some important points which echoed and reaffirmed earlier concerns as to the vulnerability of complainants. By doing so it is argued that the Report highlighted the need to continue to maintain complainant anonymity in rape cases.

The report stated that '[W]e heard from a wide range of experts that many of the victims of rape come from the most vulnerable groups in society'.[176] It continued that:

> '[I]n dealing with rape there is a range of priorities that needs to be balanced. Support and care for victims should be a high priority. The obligations the State has to those who have suffered a violent crime, and a crime that strikes at the whole concept of human dignity and bodily integrity, are much wider than working for the conviction of a perpetrator'.[177]

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[175] Williams. R, 'Focus on rape conviction rates stopping women coming forward, warns Stern' *The Guardian* (15th March 2010)<http://www.guardian.co.uk/society/2010/mar/15/stern-review-rape-less-focus-convictions> accessed 25th January 2012.

[176] Home Office (n6) 116.

[177] Home Office (n6) 118.

These statements were important since they focus on the need to protect vulnerable rape victims as a priority. One of the ways by which the complainant can be protected is through anonymity provisions which facilitate a more bearable journey through the court process. It therefore provides support for the continuing need to maintain complainant anonymity in rape cases.

The subject of defendant anonymity arose during the Report in the context of complainants who made false rape allegations. Reference was made to a Court of Appeal decision where an appeal by a former nurse was dismissed. The sentence was passed after the defendant had falsely accused a man she met online of raping her. The Court of Appeal had rightly said that false allegations 'damage conviction rates and are "terrifying" for innocent victims'.[178] The Court had also referred to the speech of Lord Chief Justice Judge, in an earlier case involving a false rape allegation:

> 'It makes the offence harder to prove and, rightly concerned to avoid the conviction of an innocent man, a jury may find itself unable to be sufficiently sure to return a guilty verdict'.[179]

Having acknowledged that false allegations of rape do exist, the report returned to an analysis of precisely how prevalent false allegations were. It was accepted that establishing an exact figure on the percentage of false allegations was extremely difficult due to discrepancies between data sets. Some research, suggested that around 8% to 10% of rape allegations were false. The legal profession was generally of the opinion that false allegations were very few. The Report quoted a Crown Prosecution Service (CPS) lawyer who said 'I have been prosecuting for 20 years, and have prosecuted for a false allegation once'. The judiciary reported a similar very low frequency of cases occurring, whilst one senior police officer was said to have had come across two cases of false allegations in 15 years.[180]

[178] Home Office (n6) 40.
[179] Home Office (n6) 40.
[180] Home Office (n6) 40.

The Stern Report examined the issue of false allegations and the need to provide rape defendants with anonymity in order to protect them.[181] It was acknowledged that there had been calls to provide defendants in rape cases with anonymity until conviction[182], and that the proposal was supported by the Home Affairs Select Committee in 2003. The most compelling reason the Report published was that if a defendant's details were made public at the beginning of a trial, but upon completion of that trial the defendant was acquitted, then the case was considered no longer worthy of reporting.[183] In such a case the defendant's reputation was publicly tarnished at the outset, but he would not receive the public vindication at the end of the trial. On the other hand, it was suggested by those against awarding defendants anonymity, that acquittal at the end of the trial was vindication enough and that defendants of other crimes do not receive anonymity.

Following a review of the arguments the Stern Report refrained from recommending rape defendant anonymity but did recommend that a full examination of the issues would be helpful. The Report suggested that the MoJ should publish an independent report detailing the frequency of false rape allegations in comparison to the prevalence of other false allegations in other crimes.[184]

2.1.15 The Coalition Government proposed to extend anonymity in rape cases, May 2010

It is following the Stern Report that one arrives back at the most recent coalition proposals for defendant anonymity in rape cases in 2010. As the introductory analysis demonstrated, these proposals lacked well thought out reasoning by the Government. They also came before the Government had conducted the research into false allegations as recommended by Baroness Stern. Ultimately they offered no more clarity on the subject than any earlier proposals or deliberations and were duly dropped. The debate as to whether complainants and or defendants in rape cases (and potentially sexual offences more generally) should be provided with anonymity remains one of the most prevalent in recent decades. There are valid arguments both

[181] Home Office (n6) 41.
[182] Home Office (n6) 41.
[183] Home Office (n6) 41.
[184] Home Office (n6) 119.

in favour of and against anonymity for both parties. Some of these arguments were highlighted within the anonymity time-line.

In the next section, the popular arguments pertaining to anonymity for rape complainants and defendants is clarified. Arguments in favour of rape complainant anonymity are given more discussion that those relating to defendant anonymity, due to their complexity. This does not necessitate that the arguments in favour of defendant anonymity, are of less merit. It will be this thesis submission that the crucial issue comes down to the need to balance the rights of each party. Until the Government, the legal profession, and society as a whole are able to reach a consensus on precisely where that balance should be, the topic of anonymity will repeatedly reappear as a contentious and unsolved legal problem. In order to address these difficulties a different approach must be taken when assessing the merits of party anonymity in rape cases.

2.2 Rape anonymity: the arguments examined

2.2.1 Complainant Anonymity

Rape is a particularly heinous crime and the stigma attached to public knowledge of being a rape victim discourages women from reporting the offence and conviction rates are low. The argument of 'making women feel more able to report the crime' has often been cited during parliamentary debate by those in favour of rape complainant anonymity. Recent MoJ statistics also show that the number of rapes recorded has increased significantly during the last decade, a rise that some will attribute directly to complainant anonymity.[185] Yet notably there has been no corresponding rise in conviction rates. Evidence shows that conviction rates for rape have fallen significantly, from a conviction rate of 33% in 1977.[186] They now remain exceptionally low despite an increase in rape allegations year on year.[187] In 2009 conviction rates for rape were

[185] There were 7,636 recorded rapes in the 1998-99 year compared with 13,104 recorded rapes in the 2008-09 year. Data tables at available at Ministry of Justice *'Providing Anonymity to those accused of Rape: an assessment of the Evidence* (12th November 2010) <http://www.justice.gov.uk/publications/research-and-analysis/moj/2010/anonymity-rape-assessment-evidence> accessed 1st August 2012.

[186] Larcombe. W, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' [2011] 19 *Feminist Legal Studies* 27, 30.

[187] Temkin. J, *'Rape and the Legal Process'* (2nd edn, OUP Oxford, 2005) 1.

found to be the lowest in Europe,[188] or to emphasise the gravity of this statistic, bottom of 33 states.[189] Conviction rates stood at 5.6% in England and Wales and 2.9% in Scotland,[190] whereas by comparison France had a conviction rate of 25%.[191]

These figures suggest that the arguments in favour of complainant anonymity are considerably more complex than simply 'encouraging rape complainants to report the crime'. Arguments favouring rape complainant anonymity is actually based on a number of interrelated factors, with historical roots, but which continue to discriminate against rape complainants and women more generally today. Seemingly, the most damaging of these factors is the existence of 'rape myths'. Rape myths are widely held societal expectations as to what is considered appropriate behaviour for women, what type of woman is capable of being a real rape victim and in what circumstances the rape should occur to be classed as rape. Temkin notes:

> '[T]here is probably no other criminal offence that is intricately related to broader social attitudes and evaluation of the victim's conduct as sexual assault. When confronted with an account of an alleged rape, individuals tend to respond to it against the backdrop of their personal beliefs and understandings about gender relationships in general, appropriate behaviour for men and women, and the rules and rituals of consensual interactions'.[192]

With this in mind arguments are grouped in favour of rape complainant anonymity into two groups. The first focuses on the historical developments that have taken place and effected gender relations, whilst the second focuses on the rape myths.

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[188] 'Britain has the lowest rape conviction rate in Europe, study finds', *The Telegraph* (14th May 2009) <http://www.telegraph.co.uk/news/uknews/law-and-order/5321555/Britain-has-lowest-rape-conviction-rate-in-Europe-study-finds.html> accessed 18th October 2010; Hickley. M, 'Rape audit ordered as figures show Britain to have the "lowest conviction rates in Europe"' *Mail Online* (15th May 2009) <http://www.dailymail.co.uk/news/article-1181468/Britain-lowest-conviction-rates-rape-Europe.html> accessed 8th July 2012.

[189] Hickley (n188).

[190] Kelly. L, Lovett. J, Regan. L, 'A gap or chasm?Attrition in Reported Rape Cases', *Home Office Research, Development and Statistics Directorate* Study 293 (February 2005) 11.

[191] Hickley (n188).

[192] Temkin (n187).

2.2.2 Rape as violence and male power

According to Brownmiller, the human species have developed a complex psychological system structured around the experience of pleasure.[193] A man can potentially arouse the sexual interest of a woman at any time since his 'psychological (sexual) urge' is not dependent on her physiological readiness to mate. Brownmiller furthers that '[W]hat it all boils down to is that the human male can rape'.[194] When a man realised his own ability to rape, his penis was established as a potent weapon of force against women.[195]Additionally a new power relationship, defined by sexuality was established between the sexes, where the male was dominant sex.[196]

Rape and sexual violence have therefore reinforced gender inequality more generally.[197] Rape is 'nurtured' in societies where the power struggle between the sexes remains prevalent.[198] Biological differences, exemplified by man's superior size and strength have only compounded the effect. To protect themselves from a man's weapon of rape, women have been forced to submit to a male family member for protection and to guard her chastity.[199]

A second consequence of men's dominant position is that patriarchal legal systems have emerged. Laws were designed by men in the interests of men: the early law of rape being one example. Rape of a woman was considered a violation of her chastity and monogamy and an offence against the estate of the man whose charge she was under.[200]

Today, the UK's legal system has progressed beyond many such archaic laws, yet it is no less patriarchal or discriminatory towards women. Kennedy contends that the debate surrounding anonymity for rape defendants is one stark example of women's

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[193] By comparison, the sexual reproductive system of animals is linked to their female oestrus system, and therefore animals produce physical signs to demonstrate their readiness to mate and engage in sexual intercourse. See Brownmiller. S, *'Against Our Will: Men, Women and Rape'* (Penguin Books Ltd, England 1975) 13.
[194] Brownmiller (n193) 13.
[195] Brownmiller (n193) 14.
[196] Toner.B, '*The Facts of Rape'* (2nd edn, Arrow Books, London, 1982) 49.
[197] Miranda. H, Brown. J, (Eds), '*Rape: Challenging Contemporary Thinking'* (Willan Publishing, Collompton, 2009) 17.
[198] Toner (n196) 50-51.
[199] Brownmiller (n193) 16.
[200] Brownmiller (n193) 16-17.

current legal inequality. She argues that whilst society would like to think that our law is a neutral set of rules, the reality is that the law is made by men and therefore could only ever become gender neutral if revised.[201] Revision would need to include substantive equality, entailing treating people as equals while taking individual differences into account. Kennedy is implying that it is incorrect to base calls for defendant anonymity on the basis of a neutral legal system where parties receive equal treatment. This is because rape complainant anonymity does not place rape complainants in an advantageous position to rape defendants but only makes them substantially equal. This will be explained in more detail when arguments in favour of defendant anonymity are addressed.

The link as to why gender discrimination and sexual violence *per se* amounts to an argument in favour of rape complainant anonymity may appear tenuous. A valid counter argument, often cited during the course of the anonymity debate is that many crimes are committed on the basis, of violence, discrimination and inequality.[202] Why provide anonymity for rape victims but not victims of other crimes? It is conceded that the gender inequality and discrimination factors alone do not set rape complainants apart from victims of other crimes. However the distinction is made by the effect that the aforementioned factors have had in cultivating the rape myths that are so prevalent. Women become seen as subordinate, chaste beings, who are the objects of male sexual desire. In particular, rape myths lay down unspoken criteria which must be satisfied in order for an offence to qualify as real rape.[203]

2.2.3 Rape myths

The effects of rape myths are multi-fold. Society stigmatises the majority of rape victims who do not conform to a given myth, degenerating and blaming them for what has happened.[204] The victim's behaviour before, during, and after the assault is analysed in order to evaluate her responsibility.[205] A 2005 report prepared for Amnesty

[201] Kennedy (n97).
[202] Examples would include murder, other serious crimes under the Offences against the Person Act 186,4 crimes based on a racial or sexual orientation prejudice.
[203] Ward. C, *Attitudes Toward Rape: Feminist and Psychological Perspective* (SAGE Publications, London, 1995) 38.
[204] Ward (n203).
[205] Temkin (n96) 31-32.

International found that 29% of the people asked said women who failed to say no, were at least partially responsible for being raped, whilst 8% considered the victim totally responsible, 28% believed that a woman who acted in a flirtatious manner was partly responsible for being raped and 6% totally responsible, 26% believed that a woman who was drunk was at least partly responsible for being raped and 4% considered her totally responsible.[206] The consequence of societal prejudice is that it discourages rape victims from reporting crime: it affects the victim's experience of and treatment throughout the judicial process and adversely affects the chances of a (guilty) defendant being successfully convicted in court.[207] It can also be linked to the disproportionately high attrition rates in rape cases, [208]the consequence of which is that only about 6% of reported rapes will secure a conviction in court.[209]

Rape myths are compounded by 'social scripts': mental representations that allow individuals to explain certain outcomes through logical sequences of events.[210] This includes the belief that if a woman dresses in a certain way, or exhibits certain forms of behaviour then she is likely to get raped, rather than accepting that a fellow human being is capable of such a crime. Kennedy reinforces this argument stating that [M]yths are not the same as lies, in that they do not involve deliberate falsification. They endure because they serve social needs'.[211]Ironically, by supporting rape myths, individuals are putting themselves at greater risk of becoming rape victims themselves, whilst some rapists remain at large. Worryingly individuals involved in all areas of the legal process, are no less susceptible to rape myths and social scripts.

2.2.3.1 The real rape scenario

The first rape myth concerns the scenario required for a rape to be considered 'real'. It involves an attack by a violent stranger, in a dark street, late at night, where a chaste lady struggles to defend herself. She receives bodily injury and reports the offence to

[206] Amnesty International UK, *Sexual Assault Research Summary Report* (prepared by ICM 12 October 2005) 5.
[207] Temkin (n96) 31-32.
[208] Attrition is any means by which cases drop out of the CJS.
[209] Rape Crisis UK, 'Myths and facts' <http://www.rapecrisis.org.uk/commonmyths2.php> accessed 10th August 2012.
[210] Ellison. L, Munro. Vanessa, 'Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' [2009] 18 *Social and Legal Studies* 291, 292-293.
[211] Kennedy (n97) 31.

the police immediately afterwards.[212] This is the typical scenario imagined when people think of rape attacks and any deviation acts against the victim. Research has suggested that the likelihood of a rape defendant being charged with the crime of rape increased with the extent to which a rape victim and attack conformed to this stereotypical ideal.[213] The individual components of this scenario all act adversely on the decision of a victim to report the crime, or for a reported crime to end in a conviction.

The situational context of this first rape myth is at odds with the more common setting for a rape: somewhere private such as the home. The defendant is likely to be someone known to the victim, a husband, boyfriend, work colleague or ex-partner. However it is estimated that in approximately 80% of rape cases the defendant is known to the complainant.[214] Unfortunately the closer the relationship between the defendant and victim, the less likely a conviction is to occur.[215] In court the familiarity of a relationship is considered to be a mitigating circumstance, making the offence less serious. The Court of Appeal was of this opinion in *R v Diggle (1995)* where Evans LJ referred to :

> 'The two extremes of violent rape or attempted rape between strangers, and intercourse without a girl's consent on a particular occasion after she had consented previously or indicated that she might consent'.[216]

The second component refers to the type of individual a real rape victim is. She should be a 'chaste, sensible, responsible, cautious (and) dependant' woman.[217] This notion reinforces the aforementioned construct of a woman as naturally vulnerable and physically weak compared her male counterpart. The real rape victim foresees any

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[212] Bourne (n100) 126-127.
[213] Spears. J, Spohn. C, 'The genuine victim and prosecutors' charging decisions in sexual assault cases' [1996] 20(2) *American Journal of Criminal Justice* 183, 184.
[214] Rape Crisis UK, 'Common myths about rape' <http://www.rapecrisis.org.uk/commonmyths2.php> accessed 10th August 2012.
[215] Bourne (n100) 129.
[216] *R v Diggle* [1995] 16 Cr App R (s) 163.
[217] Larcombe. W, 'The 'Ideal' Victim v Successful Rape Complainants: Not what You Might Expect' [2002] 10 *Feminist Legal Studies* 131, 133.

level of risk of sexual assault and takes all precautions to avoid an attack. She modifies her behaviour to avoid unwanted sexual encounters with men, fearing she may become 'out of control' whilst anticipating the male's natural 'sexual domination and prowess.[218]

When the woman does not conform to this ideal, whether that be dressing, or acting in a particular way, or having consumed alcohol or drugs prior to the reported event, she is seen as responsible for her own rape.[219] Whilst society has modernised in many ways, views of what is considered appropriate behaviour for females is still reminiscent of those held in previous centuries. Non-conformity instantly poses problems for a successful prosecution in court. Barristers representing both the defence and prosecution in rape trials often view rape complainants in a very negative light. Defence barristers in particular tended to be of the opinion that non-stereotypical rape complainants sabotaged their own efforts in court. They distinguished between women who were outwardly respectable and those who were not, at times using very uncomplimentary language to describe these individuals. When questioned, one barrister said 'It would be useful if they could sit down without showing their knickers'. Another commented that juries 'were not very good (at convicting) when somebody can be depicted as a slut'.[220]

A woman who is intoxicated through alcohol or drugs attracts particular stigma. According to Lee, drink and drugs are considered especially potent factors used to discredit the complainant, whilst in parallel demonstrating the double standards of the judicial system. She states:

> 'The use of alcohol and drugs carries different meanings for men and women. For men heavy drinking serves to enhance their male status, it signifies "real manhood". For women, on the other hand, alcohol carries the taint of immorality and promiscuity.' [221]

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[218] Larcombe (n217).
[219] Kennedy (n97) 32.
[220] Temkin. J 'Prosecuting and defending rape: Perspectives From the Bar' [2002] 27(2) *Journal of Law and Society* 219, 225.
[221] Lees (n99) 145-246.

A previously promiscuous victim is also likely to face difficulties when being cross-examined in court. Her previous sexual encounters will be used to suggest she consented to sexual intercourse at the time of the alleged offence. Jurors set a low threshold for what they consider promiscuous behaviour[222], as have senior members of the jury. In *R v Brown (1989)* the Court of Appeal found that on the facts of the case the complainant's behaviour was 'near the borderline' of promiscuous, since she had had sex with her boyfriend as well as having had a child with another man.[223] As discussed in the previous section, whilst legislation was implemented to restrict the use of cross-examination regarding sexual history evidence in sexual offence cases,[224] a subsequent House of Lords judgment has effectively rendered that legislative provision ineffective.[225] (See chapter 2.1.10 for further discussion).

The real rape scenario includes a requirement that the attack should have resulted in physical injury in order to amount to 'real rape', which is equally counter-intuitive. However victims of rape and sexual violence often don't respond in this manner. Many remain still and quiet because they are too shocked and fearful to cry out. Others remain unresponsive as a means of self-preservation, where resisting could result in greater physical harm being inflicted upon them.[226]

Any deviation from these requirements will be used to contend that the victim was actually consenting.[227] If in these circumstances a rape case does reach the circumstantial requirements, then the potential to argue that a complainant was not a 'real rape victim'[228] is facilitated through criminal burden of proof. The prosecution must persuade the jury that the defendant is guilty beyond all reasonable doubt, in

[222] Bourne (n100) 131-132.
[223] *R v Brown* (1989) 89 Cr App R 97.
[224] YJCEA 1999, S41.
[225] *R v A (no.2)* [2001] UKHL 25.
[226] The University of Sheffield, 'Coping with Rape and Sexual Assault', *American Academy of Experts in Traumatic Stress*, <http://www.aaets.org/article117.htm> accessed 12th August 2012: See also 'Myths-some myths and facts about rape', *Rape Crisis Network Europe,*<http://www.rcne.com/Myths.htm> accessed 12th August 2012.
[227] Bourne (n100) 131.
[228] Ellison. L, Munro. V, 'Jury deliberation and complainant credibility in rape trials' in Mcglynn. C, Munro. V, (eds), *Rethinking Rape Law: International and comparative perspectives* (Routledge, London, 2010) 281.

order to find him guilty.[229] Proof beyond all reasonable doubt is inherently difficult to demonstrate if there are no witnesses to the act. It makes it easier for defence counsel to plant doubt in the minds of the jury, as to the defendant's guilt, when conducting their examination in chief. Jurors are no less susceptible to rape myths than other member of the public. Ellison and Munro acknowledge that this is especially problematic:

> 'In rape trials in England and Wales, it is largely a matter for the jury- applying their combined good sense, experience and knowledge of human nature and modern behaviour to determine the absence of complainant defence and to assess the reasonableness of any belief in consent harboured by the defendant, which constitute the key grounds for criminal liability'.[230]

Finally a victim of the 'real rape' scenario will be hysterical and tearful in the aftermath of a rape and they will make a complaint to the police at the earliest possible opportunity. In fact, victims are often deeply affected by the rape and may suffer from what has been termed rape trauma syndrome. In contrast to the expected reaction a rape trauma syndrome sufferer may actually mask their feelings, appearing calm and even relatively composed. [231] Even when a rape victim does demonstrate an outwardly acute reaction to being raped it might be a period of time before they feel able to report the rape to the police, if at all. Furthermore, a rape victim may feel a range of emotions following an attack. These include feelings of fear of reprimand by the rapist, shame, guilt, self-blame, humiliation and degradation.[232] All of these can act to further forestall a victim's decision to report a rape to the police. Our judicial system is so concerned with the need to evidence a recent complaint that a special rule has been made. Usually evidence of a previous statement is not admissible in court since it serves no purpose. Yet the rules in rape cases are different, and if the victim tells someone at the earliest opportunity, then it is deemed admissible. The effect of the

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[229] Richardson. J, (ed*), Archbold: Criminal Pleading, Evidence and Practice* (Thomson Reuters Legal, London, 2010) 4.380.
[230] Ellison (n228).
[231] Temkin (n187) 2.
[232] Temkin(n187) 2.

special rule is to suggest that a woman who makes an early complaint is likely to be telling the truth, whereas a victim, who only complains later due to the trauma of the event, is more likely to be under suspicion of having made a false allegation.[233]

2.2.3.2 All women secretly want to be raped

A second prevalent rape myth focuses on the erroneous idea that all women secretly want to be raped and fanaticise about the situation:[234] that women have a secret desire to be ravished.[235] It is reinforced by male notions of power and superiority, and is in the male's interest to rape and therefore it is in the male psyche that it should naturally be in the name of femininity that women also want to be raped. This myth has its roots in the gender power imbalance and according to Brownmiller 'is more than arrogant insensitivity, it is the belief in the supreme rightness of male power'.[236]

As Meyer points out, there is a stark contrast between situations of fantasy and of reality. Whilst any individual, male or female may have sexual fantasies, they are in control of every aspect, ranging from the circumstances to the seducer's characteristics. By comparison in rape the victim has no control.[237] Rape is not an enjoyable situation but a terrifying and degrading experience.[238] By expounding the myth that all women want to be raped the blame is refocused from the defendant onto the victim, reinforcing societies' belief that a rape victim is somehow 'guilty' for being raped.

2.2.3.2 Women commonly make false allegations

The final myth is that rape complainants make numerous false allegations and can't be trusted to tell the truth. Common reasons given as to why complainants make false allegations include revenge, fearing parents, or having cheated on a husband or partner. [239] Bourne argues, there are a number of embarrassing and intrusive personal

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[233] Bourne (n100) 134-135.
[234] Meyer. J, 'Rape Myths and Facts', *Colorado Coalition Against Sexual Assault* (22nd November 2000) <www.ccasa.org/documents/Rape_Myths_&_Facts.pdf> accessed 13th August 2012, 2.
[235] Brownmiller (n193) 312-313.
[236] Brownmiller (n193) 312-313.
[237] Meyer (n234) 3.
[238] 'Myths about Rape and Sexual Violence', *Bristol Rape Crisis,* <http://www.bristolrapecrisis.org.uk/mythsaboutrape.php> accessed 13th August 2012.
[239] Lees (n99) 126-127.

reasons to deter a woman from making false allegations.[240] They include personal examination, questioning by the police, and subjection to potentially humiliating cross-examination in court. In 1982 a fly-on-the-wall series of documentaries was broadcast, following the work of the Thames Valley Police. In one episode 'a Complaint of Rape', viewers were shocked over the brutality of police officers being filmed interrogating rape victims. One woman who had suffered from psychiatric illness in the past alleged she had been raped by three men. The response of the three male offices present was to bully the woman before dismissing her story completely: one of the officers even telling her that 'This is the biggest bollocks I've ever heard'. [241] Another example, whilst coming from a 1982 case, aptly demonstrates some of the judicial attitudes towards rape. Judge Richards considered that a woman was contributory negligent for her own rape on the basis that she had been alone at night and a hitchhiker. In those circumstances the judge considered that a fine was a suitable punishment for the rapist.[242]

Actual figures showing the number of false reports in rape cases have varied considerably between research studies. This has been attributed to their being no 'official' definition of rape. Consequently police forces and prosecutors have employed different criteria to define what amounts to false allegations. [243] There was a tendency to equate complainant withdrawals and retractions with evidence of false allegations.[244] On this point Kelly *et al.* acknowledge that 'a culture of suspicion remains within the police' and consequently 'this reproduces an investigative culture in which elements that might permit a designation of a false complaint are emphasised'.[245] Using fluid definitions, false complaint rates are estimated to be around 12%. Evidence used of a false complaint for statistical purposes includes, the

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[240] Bourne (n100) 128.

[241] Sieder. J, 'Police 1982', (*BFI Screen Online: The definitive guide to Britain's film and TV history)*<http://www.screenonline.org.uk/tv/id/464502/index.html> assessed 13th August 2012.

[242] 'History of the Rape Crisis Centre' *Rape Crisis Glasgow*<http://www.rapecrisiscentre-glasgow.co.uk/index.php?id=134 accessed 13th August 2012.

[243] Burton. M and others, *'Understanding the progression of serious cases through the Criminal Justice System: Evidence drawn from a selection of casefiles,* Ministry of Justice Research Series 11/12 (July 2012) <http://www.justice.gov.uk/publications/research-and-analysis/moj/understanding-the-progression-of-serious-cases-through-the-criminal-justice-system> accessed 14th July 2012, 19.

[244] Kelly (n190) 51-52.

[245] Kelly (n190) 52.

absence of physical injury, forensic evidence, witnesses to corroborate with the complainant[246] and intoxication of the complainant. These definitions only reinforce and reflect the other rape myths, so damaging to rape victims and inhibit the process of rape cases through the CJS. There has been a misunderstanding that 'no criming' of an offence indicates that it is a false complaint.[247] By comparison, using a much narrower definition based only on malicious complaints, the estimated level is 3%[248]

Discrepancies between estimated figures for false allegations render it difficult to accurately compare false rape allegations to false allegation statistics for other types of crime. One comparison that can be made is with grievous bodily harm (GBH),where false allegations were estimated at 2%. Whilst this is lower than both estimates for rape (and considerably lower than the higher estimate of 12%) it has been pointed out the differences in crime type could account for these differences. GBH is a crime where physical injuries are usually present, in combination with other evidence and witnesses. The presence of varying forms of evidence forms the basis for prosecution in the majority of crimes. Rape is unusual since physical injury may be absent and there are often no witnesses to corroborate what the complainant is saying.[249]Seemingly since these elements are often seen as indicative of false allegations it should not be unexpected that false allegation levels in rape cases appear inflated. As with any crime, some level of false allegations in rape cases are inevitable. It should not be assumed that such allegations are necessarily made maliciously but rather, as some evidence has suggested, could be indicative of underlying problems meaning the individual actually requires additional support.[250]

It is through a combination of these factors that the need for rape complainant anonymity has arisen and has guided the development of related legislative provisions in recent decades. By comparison the granting of defendant anonymity has undoubtedly been the more openly contested element in the anonymity debate.

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[246] The compulsory corroboration warning was abolished by the POA 1994, s33 but the discretion to provide a corroboration warning remains as confirmed in *R v Makanjuola*[1995] 3 ALL ER 730.
[247] MoJ (n 20) 14: No criming an offence literally means that the incident is recorded as no offence having been committed.
[248] Burton (n243).
[249] Burton (n243) 21.
[250] MoJ (n20).

2.2.4 Defendant anonymity

Whilst arguments in favour of defendant anonymity are less numerous and rape defendants do not have anonymity at present, they do not have have less merit.

2.2.4.1 Rape is more severe than other crimes

The first argument in favour of rape defendant anonymity is that rape as a crime is more severe than other crimes. Consequently defending a rape allegation is more severe than defending allegations in other crimes.[251] If and to what extent this is so remains contested. On the one hand Dominic Grieve argued that 'precisely because the issues [of a rape allegation] may be so difficult to resolve it leaves a taint [against a defendant] that may be as damaging as it is undeserved'.[252] Support can be found through reference to the aforementioned instances where rape defendants have taken their own lives following the accusation. It is questioned to what extent the same is applicable to defendants in a number of other serious crimes such as murder or fraud. Caroline Flint MP said that she found no credibility in the argument that:

> 'Rape is uniquely devastating, [to defendants] in a way that being accused of domestic violence, murder, sexually abusing children, or even defrauding a popular charity are not'.[253]

Baroness Walmsley contended the very reason rape defendants were different was because of the media coverage involved. 'Murderers and shoplifters unless they are movie stars do not have the same amount of coverage from the press as possible rapists'.[254]The strength of Baroness Walmsley's reasoning appears weak, seemingly made on the basis of personal opinion and not evidentially substantiated.

An alternative approach which furthered the position for defendant anonymity was put forward by Michael Ellis MP, who advocated that providing defendants with

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[251] Baird. V, 'Anonymity for defendants in rape cases never made sense' *The Guardian* (29th July 2010) <http://www.guardian.co.uk/law/2010/jul/29/anonymity-defendants-rape-cases-coalition>accessed14th October 2011.

[252] Grieve. D, Baird. V,' A question of identity' *The Guardian* (29th September 2003)<http://www.guardian.co.uk/uk/2003/sep/06/ukcrime.prisonsandprobation?INTCMP=ILCNETTXT3487>accessed 11th October 2011.

[253] HL Deb 8th July 2010 vol. 513 cols 595.

[254] HL Deb (n147) col. 1085-1086.

anonymity would not mean they were treated differently in a number of respects. In the first instance he stated that defendant anonymity was withheld in numerous criminal cases involving minors on a daily basis. He accepted that the principle related to young people but that nevertheless it did exist.[255] The implication was that providing defendant anonymity *per se* would not mark a fundamental change in the law. Notwithstanding this point he also added that rape was different from other offences on the basis that the allegations revolved around a question of consent. In contrast to other offences there often lacked additional physical evidence to support an allegation.[256] Similar reasoning was given in a recent MoJ report which considered why false rape allegations appeared inflated. By analogy, the suggestion in relation to rape defendants is that lack of physical evidence makes rape allegations harder to disprove.

2.2.4.2 Equality with rape complainants

A second argument in favour of defendant anonymity in rape cases is one of equality before the law. The law should be 'tit for tat',[257] and rape complainants and defendants should receive equal treatment in the legal process. Anonymity provisions for one party should be matched by anonymity provisions for the other. This argument has been put forward on a number of occasions during parliamentary debates, including when Mr Burley said '[I]f we are singling out this particular area of the criminal justice system for special treatment, why should it not apply equally to both men and women?'[258]

Televised research involving mock jury deliberations has suggested that notwithstanding anonymity provisions, it is the rape defendant who is at a legal disadvantage compared with the rape complainant. The view of one juror was summed up by Rape Crisis Scotland who reflected that:

> '[A] wrong decision would be more serious if found against the defendant as it would destroy a young man's future, whereas if the

[255] HL Deb(n253) cols.612-613.
[256] HL Deb(n253) cols.613.
[257] Baird (n251).
[258] Baird (n251).

> decision was the wrong one and found him to be innocent, the wrong committed against the woman is already in her past and therefore somehow less of a consideration'.[259]

Assessing the merits of an argument on the basis of whether the harm is prospective of retrospective is erroneous. Doing so would fail to take into account factors including the interests of justice, public safety and public interest. Added to which, as long ago as the Helibron Report it was argued that the rape defendant's equality was with defendants in other crimes and not with the rape complainant.[260]

Even if the defendant's equality did lie with that of the complainant, women's legal inequality combined with the severe stigma faced by rape complainants means formal equality would not ensure justice was done. Baroness Kennedy reinforced the point stating:

> 'We have come to understand that formal equality does not do justice. To create formal equality and not take account of the inequalities in our society beyond the courtroom door creates greater injustice. To treat as equal those who are unequal only creates further injustice'.[261]

Effective equality requires equal treatment whilst taking into account differences.[262] In terms of sexual offence laws, that may require anonymity for rape complainants but not rape defendants.

2.2.4.3 Innocent Until Proven Guilty

The final argument in favour of rape defendant anonymity is based on the idea that all defendants have the right to be innocent until proven guilty: a fundamental principle of our domestic legal system. This was reinforced by Rehman Chrishti MP who stated:

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[259] 'The Case against anonymity for rape defendants', *Rape Crisis Scotland* (5th August 2010), <http://www.rapecrisisscotland.org.uk/blog/the-case-against-anonymity-for-rape-defendants>accessed 26th November 2011.
[260] Home Office (n50) para. 177.
[261] HL Deb (n147) col. 1086.
[262] Kennedy (n97) 4.

> 'the concept that "mud sticks" is alive and kicking [in relation to being accused of rape]….[defendants] deserve some measure of protection, as I believe we still have a system of justice in this country, of which we are justly proud, in which the accused is innocent until proven guilty'.

Indeed one would assume there are few individuals who would disagree with this statement. This right still has to be balanced against other competing arguments, both those in relation to rape complainant anonymity and those against rape defendant anonymity. *Prima facie* the aforementioned arguments suggest a need to limit this principle, whilst mitigating negative impact on an innocent rape defendant, through acquittal at trial. The positive outcome of withholding defendant anonymity is most notable in cases of serial rapists, such as John Worboys. It is sometimes following the arrest of a rape defendant that his name is publicised and other women come forward to make their own complainants against the same man, resulting in a conviction.[263] This is particularly beneficial where the original complainant lacks sufficient evidence to ensure a conviction in court.

Analysis of the arguments in favour of and against party anonymity in rape cases suggest that the balance falls in favour of maintaining complainant anonymity whilst withholding it from defendants. Nevertheless the arguments overlap significantly, consequently lacking in clarity, and ensuring that opinion on the anonymity debate remains divided. One important issue that does arise in any debate involving anonymity is why these provisions should be deemed necessary when they directly conflict with a fundamental principle of our legal system: the principle of open justice.[264]

2.3 The 'need' for anonymity: justifying a circumvention of the principle of open justice

The meaning of 'open justice' was recently given by Lord Neuberger when he said:

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[263] HL Deb (n147) col.1086.

[264] See for example *Scott v Scott* [1913] AC 417; *Williams v Williams* [1974] QB 759.

> '[W]e live in a country which is committed to the rule of law. Central to that commitment is that justice is done in public – that what goes on in court and what the court decides is open to scrutiny'.[265]

His Lordship added the importance of open justice was reflected in the role it plays in supporting the rule of law. By allowing public scrutiny of the judiciary it ensures that judges 'do justice according to the law,[266] and that public confidence in the domestic court system is preserved.[267] In turn this supports our liberal democracy.[268] Open justice is an equally important principle under the ECHR Article 6(1)[269] as incorporated into UK domestic law via the HRA 1998.[270]

How then could any discussion relating to anonymity in a rape case become anything more than a moot point? The answer is found in that despite the importance of open justice, it is not an absolute principle.[271] To make it so would potentially undermine effective administration of justice and the UK's legal system in certain cases. For example, in cases where state security is concerned or cases involving vulnerable witnesses.[272] Instead in given circumstances, the principle of open justice may be limited and public access to legal proceedings denied.[273] This principle was upheld in a recent case where the UK Supreme Court held that (in limiting open justice) 'it is for the legislature to consider and introduce, as it has done in certain specific classes of case, where it considers it appropriate to do so'.[274]

It should be noted that discussions relating to open justice refer specifically to the courtroom process. When there is a compelling need to limit the principle of open justice the limitation could extend outside the confines of the courtroom. In some instances not imposing limitations would prevent justice being administered effectively.

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[265] Lord Neuberger of Abbotsbury, Master of the Rolls, 'Open Justice Unbound' (Judicial Studies Board Annual Lecture 16th March 2011) 1.
[266] Lord Neuberger (n265) 2-3.
[267] Richardson (n229) 4.3.
[268] Lord Neuberger (n265) 23.
[269] Article 6(1) ECHR enshrines the right to a fair trial.
[270] Human Rights Act 1998, Schedule 1, Article 1.
[271] Judicial Studies Board, *Reporting Restrictions in the Crown Court* (May 2000) 2 <http://www.societyofeditors.co.uk> accessed 16th June 2012; Lord Neuberger (n251) 23.
[272] Lord Neuberger (n265) 23.
[273] Lord Neuberger (n265) 12.
[274] *Al Rawi and others v Security Service and others* [2010] EWCA Civ 482 [70].

It would include the pre-trial stages of the legal process and even extend after formal legal proceedings had finished. The latter instance refers more to the situation where media reporting on aspects of a specific case, could inhibit effective justice being done in future cases of a similar class. These considerations will become integral to later discussions relating to anonymity in rape cases.

Chapter 3 Article 3 Rights and anonymity

3.1 Introduction

Article 3 of the ECHR, as enshrined in domestic law by the HRA 1998[275] states that '[N]o one shall be subjected to torture or inhuman or degrading treatment or punishment'. Article 3 is one of the most succinct provisions contained within the convention, a fact detracting from its true complexity[276] and scope to apply in wide ranging situations.[277] It is also an absolute human right and places strict obligations upon the state to protect citizens from potential breaches. The state must ensure this by taking preventative measures and/or positive steps, such as implementing effective domestic legislation, as is necessary.[278] Article 3 cannot be derogated from under any circumstances, [279] as affirmed by the ECtHR in the *Chalal* case. It was held that:

> '[I]n cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of art 3 and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe'.[280]

The focus of this chapter is to analyse whether withholding anonymity from either party in a rape case could breach their human rights under Article 3. *Prima facie* it appears that the Article's wording excludes all but a rare class of heinous acts.[281] It has been argued that the threshold necessary, to amount to a breach of Article 3, should not be set at such a low level that it renders torture, inhuman or degrading treatment

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[275] HRH 1998, Schedule 1 Article 3.
[276] Addo. M, Grief. N, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights' [1998] 9 *EJIL* 510, 510.
[277] Merrills. J, Robertson. A, *Human Rights in Europe: A study of the European Convention on Human Rights* (4th edn, Manchester University Press, Manchester, 2001) 35.
[278] Duffy. P, 'Article 3 of the European Convention on Human Rights' [1983] 32 *International and Comparative Law Quarterly* 323.
[279] Battjes. H, 'In search of a fair balance: the absolute character of the prohibition of refoulement under Article 3 ECHR reassessed' [2009] *L JIL* 583, 583.
[280] *Chahal and others v United Kingdom* [1996] 1 BHRC 405, para. 428.
[281] McGlynn. C, 'Rape as 'Torture'? Catherine Mackinnon and Questions of Feminist Strategy' [2005] 16(1) *Feminist Legal Studies* 71, 82.

'commonplace'.[282] Therefore something as comparatively common as being subject to public scrutiny during legal proceedings for rape would be unlikely to amount to a breach of Article 3. In furtherance of this argument it is conceded that to date, there have been no specific ECtHR cases concerning a similar factual scenario.

Nevertheless the potential for an increase in the scope of Article 3's ambit is evident. It has been posited that Article 3 represents a 'pre-existing European legal tradition against torture' that is imbedded within national legal systems.[283] The ECtHR has stated that the convention should be interpreted in a vibrant, progressive manner, capable of reflecting changing social norms, such as fluctuating standards of acceptable behaviour.[284] Guidance of a corresponding nature, intended to assist the judiciary and prosecutors in the correct implementation of human rights, also establishes that Article 3 encompasses a wide range of assaults on human dignity and integrity[285] with emphasis being placed on the concept of dignity,[286] especially where institutional force is used.[287]

The requirement that the convention is interpreted in a vibrant, progressive manner has been reinforced specifically in relation to Article 3.[288] In *Pretty v UK* the court said that:

> 'in light of the fundamental importance of Article 3, the court has reserved itself sufficient flexibility to address the application of that article under other situations that might arise'.[289]

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[282] Cooper. J, *Cruelty-an analysis of Article 3* (Sweet and Maxwell, London, 2003) 3.
[283] Jenkins. D, 'The European legal tradition against torture and implementation of Article 3 of the European Convention on Human Rights' [2007] *Public Law* 15, 15.
[284] *Tyrer v United Kingdom* (1979-80) 2 EHRR 1.
[285] Reidy. A, *'The Prohibition of Torture: A guide to the implementation of Article 3 of the European Convention on Human* Rights' Human Rights handbooks No. 6 (Directorate General of Human Rights, Council of Europe, 2003) 9.
[286] Frowein. J, 'Human Dignity in International Law' in Kretzmer. D, Klein. E (eds)*, The Concept of Human Dignity in Human Rights Discours,* (Klewer Law International, London, 2002) 124.
[287] *Tyrer* (n284) para 33.
[288] See *Seloumi v France* [1999] 7 BHRC 1, para. 26 where it was held that Article 3 had the ability to expand, meet changing social norms and cover acts which may not have been included in the past; *Pretty v UK* [2002] 35 EHRR 1, paras. 32-33.
[289] *Pretty* (n288) para. 50, confirming the Court's earlier decision in *D v United Kingdom* (1997) 2 BHRC 273, para. 49.

One of the most prominent examples of Article 3's ability to adapt to changing social norms was when the ECtHR first found that rape could amount to torture.[290]

It is proven that Article 3 can adapt to address new circumstances. Thus it is suggested that if the requisite criteria were met, there is no reason preventing the ECtHR from finding that being the subject of public scrutiny during criminal legal proceedings for rape, breached an individual's Article 3 human rights. This chapter analyses the possibility of such a ruling by the ECtHR in relation to both rape complainants and defendants. The analysis draws upon earlier debates in chapter two, particularly those focused on the psychological effect that being a rape complainant or defendant could have on an individual.[291]

3.2 The distinct components of Article 3

Article 3 is composed of five distinct elements: torture, inhuman, degrading, treatment and punishment.[292] The former three are distinct but related components,[293] referring to the gravity of the Article 3 breach and representing a hierarchy of the harm suffered by an individual.[294] There is some difficulty in ascertaining where the 'entry' threshold for Article 3 is and where the distinguishing factors for each of the components sit. [295]

A finding of torture constitutes the greatest severity and inhuman or degrading relatively less so.[296] The latter two elements refer to the type of act/omission inflicted upon the individual. Notably most acts breaching Article 3 concern 'treatment' but there are some circumstances that would more correctly be termed as 'punishment'. An example is where an individual is repeatedly punished and prosecuted for the same offence[297] or punishment is arbitrary and disproportionate.[298] For ease of discussion,

[290] *Aydin v Turkey* (1998) 25 EHRR 251
[291] See in particular chapter 2.2.
[292] Reidy (n285) 12.
[293] *Greek Case,* Commission Report of 5th November 1969 Yearbook 12, 186; Merrills. (n277) 35.
[294] Aydin. Y, *The European Court of Human Rights approaches to the prohibition of Torture, inhuman and degrading treatment or punishments*www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf accessed 30th August 2012, 9.
[295] Evans. M, 'Getting to grips with torture' [2002] 51(2) *I.C.L.Q* 365, 371.
[296] Arai-Yokoi. Y, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' [2003]21 *Neth. Q. Hum. Rts*. 385, 386.
[297] See for example *Ülke v Turkey* [2009] 48 EHRR 48.
[298] *R v Lichniak* [2003] 1 AC 903 HL; *R v Bieber*[2009] 1 WLR 233 CA.

this thesis refers to 'treatment' as a generic term for both treatment and punishment throughout this chapter.

When any Article 3 breach is alleged, the first criterion to be met is that the treatment is of great enough severity to breach Article 3.[299] This is known as the *de minimis* rule[300] and will vary depending on whether it is torture, inhuman or degrading treatment that is being alleged. The criteria are actually less clear than one might at first assume since there is no clear threshold of severity that is universally applicable in all Article 3 cases. The European Commission emphasised this in the *Greek Case* when it held that each case had to be decided on its own facts since what would be considered cruel or excessive would vary between societies and even within different sections of them.[301]

The second point is that Article 3 consists of both objective and subjective components.[302] The potential utility of a subjective component, in the context of the current debate is important as it focuses attention on the victim's interpretation of the alleged breach. [303] *Prima facie* this allows greater scope for extending the circumstances where an Article 3 breach may arise.

The subjective element will be important in the context of a rape case, for both rape complainants and defendants. The suffering caused to the individual may not include physical damage but has the potential to cause severe psychological suffering throughout the course of legal proceedings. [304] However in parallel to the landmark decision of the ECtHR that first held that rape could amount to torture, [305] the Court has become been more explicit and restrictive in its criteria for what can constitute

[299] Aydin (n294) *7.*
[300] Duffy (n278) 320.
[301] *Greek Case* (n293) 501.
[302] Palmer. S, 'A wrong Turning: Article 3 ECHR and Proportionality' [2006] 65(2) *Cambridge Law Journal* 438.
[303] See for example the case of *Raninen v Finland* [1997] ECHR 209 para. 55, where the court held the test for whether treatment was inhuman or degrading included whether it adversely affected his/her personality in a way that was incompatible with Article 3.
[304] See in particular chapter 2.2.
[305] *Aydin* (n290).

torture.[306] To some extent this will have a limiting effect upon any extension of Article 3's ambit to include anonymity for either party in a rape case.

In ascertaining whether or not the requisite threshold has been met, the ECtHR in *Ireland v UK*, stated that:

> '[Any assessment on the level of severity] depends on all the circumstances of the case, such as nature and context of the treatment, its duration, its physical or mental effects and, in some circumstances, the sex, age, and state of health of the victim'.[307]

The authority of *Ireland* correlates with the subjective component of the Article 3 ambit and leaves further flexibility in the context of anonymity in rape cases for the purpose of individual differences.

One should not forget that an individual must also satisfy an objective component of Article 3 in order for a breach of that Article to be found. It is submitted that the 'objective' element is the act or omission, that, when considered together, any requisite subjective element, has the potential to amount to torture or inhuman or degrading treatment. Below the individual elements of Article 3 are analysed briefly in turn. The purpose of doing so is twofold. It enables the reader to understand the threshold's necessary to constitute a breach of Article 3 and will provide a point of reference, against which a rape complainant's and defendant's Article 3 rights, in relation to the anonymity debate, can be discussed.

3.2.1 Torture

The most severe form of an Article 3 breach is torture, as confirmed by Article 1 of the United Nations Convention on Torture and partly endorsed by the ECtHR in the case of *Akkoc v Turkey.*[308]

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[306] McGlynn. C 'Rape, Torture and the European Convention on Human Rights' [2009] 58 *International and Comparative Law Quarterly* 565, 569.
[307] *Ireland v UK* (1979-80) 2 EHRR 25, para. 162.
[308] *Akkoc v Turkey* (2002) 34 EHRR 51, para. 115.

There is no set definition of torture but rather an 'approach' which it has been argued is equally applicable to 'inhuman and degrading' treatment or punishment.[309] When considering what amounts to torture, the ECtHR has made reference to the definition contained within Article 1 of the United Nations Convention Against Torture[310]. This definition asserts that torture contains three essential components: 'severe [mental or physical] suffering', that the pain is 'intentionally inflicted' and that the act or omission is carried out for a specific purpose.[311]

In deciding whether a particular type of action amounts to torture, emphasis has been placed on both the intensity and purpose of the act/omission in question. The court in *Selmouni* furthered the principle stating that 'the convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'.[312] Whilst an assessment of the act/omission would always be dependent upon all the circumstances of the case, there are always some acts that would be shocking and degrading for anyone, irrespective of their condition.[313] The purposive nature of the act might include the intention to adduce information through confession, or the infliction of punishment.[314]

One may question how the excerpt from the ECtHR's judgment in *Seloumi* translates in practical terms to findings of torture. In the *Greek Case,* acts that included mock executions, threats to kill victims, heavy beatings, falanga beatings,[315] electric shock treatment and threats to kill victims amounted to torture.[316] In *Aksoy v Turkey* the victim had been subjected to a 'Palestinian hanging' (stripping the victim naked, tying arms behind their backs, and then hanging them by their arms),[317] whilst in *Aydin v*

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[309] Evans (n295) 365, 369.
[310] See for example *Selmouni v France* [1999] ECHR 25803/94 para. 97; *Akkoç* (n308); *Salman v Turkey* (2002) 34 EHRR 17, para. 114.
[311] United Nations convention on Torture, Article 1, which came into force on 26th June 1987.
[312] *Selmouni*(n310) para. 96: Notably this statement reflects the wording of Resolution 3452 *(xxx)* of the General Assembly of the United Nations which states that torture is 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted'.
[313] *Selmouni*(n310) para. 103.
[314] Reidy (n285) 14.
[315] An act involving beating the soles of a victim's feet repeatedly.
[316] *Greek Case* (n 93).
[317] *Aksoy v Turkey* (2000) 34 EHRR 1388.

Turkey[318] the victim was raped whilst in police custody. In both of these cases the ECtHR concluded that torture had occurred.

In order to avoid further unnecessary explanation, it is asserted that by analogy to the aforementioned cases, being a rape complainant or defendant in legal proceedings for rape would not amount to the finding of torture in breach of Article 3 of the ECHR.

It is accepted that an unfortunate consequence of our domestic legal process, is that both victims and defendants in any criminal case may suffer humiliation as a result. That humiliation may be exacerbated where there is publicity surrounding the case. Yet it cannot be said that it is the *purpose* of our domestic, judiciary, the executive, or the legislature to *inflict* such suffering. Rather it is the opposite, to ensure that legal proceedings are open, impartial, and that justice is done for the parties involved.[319] For these reasons, it is unnecessary to consider a possible finding of torture further in relation to the anonymity debate. That does not mean, that lack of anonymity for either party in a rape case, could not still be found to be inhuman or degrading treatment in breach of Article 3: this is due to the relatively less serious nature of those elements of Article 3.

3.2.2 Inhuman

Treatment or punishment may amount to a finding of 'inhuman' treatment where it causes 'intense physical or mental suffering'.[320] As was acknowledged earlier in this chapter, the overall threshold of severity is lower for inhuman treatment than torture.[321] Notwithstanding the relatively lower threshold, an extreme level of suffering is still required in order to meet the *de minimis* rule for a finding of inhuman treatment in breach of Article 3. Examples of cases where the threshold has been met include where a detained suspect has been subject to kicking, biting and slapping by police, [322] the individual has been caused severe psychiatric disturbances during

[318] *Aydin* (n290).
[319] See chapter 2.3 for a discussion on the principle of open justice.
[320] *Ireland* (n307) para. 167.
[321] Starmer. K*, 'European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights'* (LAG Education and Service Trust Ltd, London, 1999) 402 para. 14.48.
[322] *Tomasi v France* (1993) 15 EHRR 1.

interrogation, [323] or the individual has been subjected to intense and purposeful violence when arrested and in the period directly following arrest.[324]

3.2.3 Degrading treatment

Alternatively, treatment may breach Article 3 because it is degrading. It has been asserted that treatment is degrading if it:

> '[A]rouses in the victim a feeling of fear, anguish and inferiority, capable of humiliating and debasing the victim and possibly breaking his/her moral resistance [325]whether the object of the treatment was to debase, and whether it adversely affected his or her personality in a manner incompatible with Article 3'.[326]

In order for treatment to become degrading, the level of humiliation must go distinctly beyond the level inherent in any form of punishment,[327] although the ECtHR will consider all the circumstances of the case when formulating its judgment.[328] Examples of behaviour amounting to degrading treatment include racial harassment,[329] forcing a suspect to remain in clothing soiled by his own defecation,[330] and the forced administration of emetics to an individual suspected of having swallowed bagged drugs.[331]

In the context of the current debate it is interesting to note that the majority of cases that come before the ECtHR and concern inhuman and degrading treatment are decided on a fact specific basis. This is as opposed to the ECtHR basing its' decisions upon points of general applicability [332] and evidences the Courts own previous

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[323] *Ireland* (n307)para. 167.
[324] *Egmez v Cyprus***(**2002) 34 EHRR 29. Note paragraph 78 of the judgment where it was held that what distinguished this treatment from torture was in part because the violence inflicted upon the applicant was not done with for the purpose of extracting a confession.
[325] Starmer (n321) 403 para. 14.52.
[326] *V v United Kingdom* (2000) 30 E.H.R.R. 121 para. 87.
[327] *Tyrer*(n 84) para. 30.
[328] *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112 para. 30.
[329] *East African Asians v United Kingdom* (1981) 3 EHRR 76 paras. 207-209.
[330] *Hurtado v Switzerland* (1994) 1754/90 Judgment of 28 January (unreported).
[331] *Jalloh v Germany* (2007) 44 EHRR 32;[2007] Crim. LR 717.
[332] Starmer (n321) 403 para. 14.53.

assertion that it retains the flexibility to apply Article 3 to new situations.[333] It has also been demonstrated in practical terms by recent judgments such as *X v Turkey:*[334]a highly significant case as it was the first time in which the court found treatment that was based upon the applicant's sexual orientation to be inhuman and degrading, contrary to Article 3. It is suggested that there are practical implications for the proven flexibility of Article 3's application in relation to the anonymity debate. Namely that there is no bar *per se* to the ECtHR concluding that lack of anonymity for either rape complainants or defendants, throughout the legal process *could* amount to inhuman or degrading treatment contrary to Article 3. The likelihood of the ECtHR making such a finding is the focus of the remainder of this chapter.

3.3 The complainant's Article 3 human rights

The question to be considered now is whether, if anonymity were withheld from rape complainants, it would be likely to cause them inhuman or degrading treatment in breach of their Article 3 human rights. In light of previous discussions, it is not proposed to consider a possible finding of torture in relation to a rape complainant's (or defendant's) Article 3 human rights due to the purpose and exceptional intensity required.[335] That is not to detract from the suffering that being a rape complainant may cause but rather an acknowledgement that 'torture' is reserved for rare acts/ omissions of an exceptionally grave nature, rather than being 'commonplace'.[336] By comparison any stress and suffering caused through being a rape complainant in legal proceedings is a common event.

Precisely what the impact of being a rape complainant in legal proceedings, could have on an individual, was considered in chapter two.[337] It is suggested that the most important of those impacts, in relation to a rape complainant's Article 3 rights are rape myths. More specifically it is societies' perception of the majority of rape complainants who do not conform to the widely held rape myths and the psychological impact that this can have on rape complainants as a result. The problem is summarised by the

[333] *Pretty* (n288) para. 50.
[334] *X v Turkey* (24626/09) Unreported October 9, 2012 (ECHR).
[335] See *Ireland* (n307)*;Selmouni* (n310) para 96.
[336] Cooper. J, *Cruelty-an analysis of Article 3* (Sweet and Maxwell, London, 2003) 3.
[337] See chapter 2.2.1

statement of Temkin, who as previously noted states that 'there is probably no other criminal offence that is intrinsically related to broader social attitudes and evaluation of the victim's conduct as sexual assault'.[338]

The impact upon rape complainants has been shown to potentially affect that complainant from the time the complaint was made, during legal process and in its aftermath. Some victims have suffered from rape trauma syndrome as a result of the act against them.[339] A frequently cited result of having been subjected to rape, is that victims will experience a 'second assault'.[340] The second assault is the means through which rape complainants are 'embarrassed, doubted and abused by the institutions that process them'. It is argued that this can include all aspects of the legal process, ranging from how the complainant is treated by police officers investigating their complaint, through to their treatment during examination in the courtroom.[341] Complainants may also feel isolated from their wider communities, making psychological recovery difficult.[342]

It is argued firstly, that there are virtually no other crimes where the potential impact upon a complainant can be so severe. Secondly, that it is precisely this heightened treatment or degradation that a rape complainant may feel that sets them apart from complainants of other crimes. Partial support from this thesis submission is inferred from the fact that rape complainants have had anonymity for more than 30 years, whereas victims of other crimes have not.[343] It is however acknowledged that suffering of complainants is only part of the reason that anonymity was provided.[344]

To further compound the difficulties faced by rape complainants, the nature of a rape offence means that it usually occurs in private, where there are rarely witnesses to collaborate different versions of events. Therefore in a rape case, where the central

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[338] Temkin (n69) 33.

[339] See for example Martin. P, Powell. R, 'Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims' [1994] 19(4) *Law and Social Enquiry* 853; Iles. C, 'Rape Trauma Syndrome'; [1985] 50 *Mo. L. Rev* 947.

[340] 'Rape and the Law: Court Procedures', *Rape Crisis: England and Wales*, <http:// www.rapecrisis.org.uk/Courtprocedures2.php> accessed 14th October 2011.

[341] See for example Lees (n99) 117-118.

[342] Aswad. E, 'Torture by Means of Rape' [1995-1996] 84 *Georgetown Law Journal* 1913, 1941.

[343] Since section s4(2) of the SOAA 1976 came into force.

[344] See chapter 2.1.2 'The Helibron Report'.

issue is one of consent to sexual intercourse, that consent must be one person's word against another's. Despite the POA 1994 s33 having removed the requirement for judges to give a corroboration warning against the complainant,[345] it is inevitable that lack of corroboration causes evidential and burden of proof issues. In a criminal case the prosecution have to prove the defendant guilty beyond all reasonable doubt to secure a conviction. As a consequence the jury acquits many defendants due to lack of evidence, even when they may well be guilty. Regardless of the reasons for acquittal, all too often it makes the complainant feel like she is being called a liar and this only seeks to enhance her sense of humiliation and distress.[346]

It is conceded that anonymity alone cannot prevent in absolute terms the humiliation and degradation that a rape complainant might feel. However it can reduce those feelings to a degree by protecting them from the public element of any scrutiny they would otherwise be subjected to. With this in mind it is argued that the heightened humiliation or degradation a rape victim could feel is considerably beyond the usual level of humiliation or degradation encountered by other victims of criminal offences. It therefore satisfies, at least, the threshold level of humiliation necessary to amount to degrading treatment in breach of Article 3.[347]

Having ascertained that without anonymity the treatment a rape complainant *could* be subjected to, may amount to inhuman and degrading treatment, weight should also be given to the firmly established principle that both the ECHR and Article 3 are dynamic in nature.[348] Article 3 therefore has the potential to adapt and expand to meet changing norms and encompass new sets of facts[349] such as lack of anonymity in rape trials. Additionally the principle established in *UK v Ireland* should be taken into account. That principle states that in order to ascertain whether any Article 3 threshold

[345] See chapter 2.1.7 'Criminal Justice and Public Order Act'. Note that the judge retains a discretion to given a warning in cases where they consider it to be appropriate as confirmed in *R v Makanjoula*[1995] 3 ALL ER 730.
[346] Lees (n99) 115-116.
[347] *Tyrer* (n284*)* para. 30.
[348] See for example *Tyrer v the United Kingdom*(n284) ; Seloumi [n288) 26; *Pretty* (n 288).
[349] The decision of *X* (n334) is but one example.

has been met, all the circumstance of the individual cases should be taken into account.[350] This includes the victim's (or complainant's) own vulnerability.[351]

Therefore if a rape complainant in legal proceedings were withheld anonymity it is possible that the psychological effect on them, when considered in light of all the circumstances of the case, could be so severe as to amount to either inhuman or degrading behaviour contrary to Article 3 ECHR. Whether the breach of Article 3 amounted to inhuman or degrading treatment would be dependent upon the relative seriousness of the treatment.

However there is a potential problem with the likelihood of the ECtHR making such a finding. For a finding of 'torture' there must be a clear intention or purpose behind the treatment.[352] By comparison the level of intention required, amounting to a finding of inhuman and degrading treatments is less clear. It has been held that the absence of a specific intent will not be *decisive* in ruling out a finding of inhuman and degrading treatment.[353] What it does suggest is that lack of intent is a factor that will be taken into account when assessing whether or not there has been a breach of Article 3.

Intention in relation to rape complainants as a factor is highly relevant. This is because it cannot be said that if the UK Government chose to withhold anonymity from rape complainants that their intention in doing so would be to debase or humiliate those individuals. Rather, the reason for doing so would arguably be the opposite. It would be to uphold the principle of open and fair justice, as a cornerstone of our legal system.[354] The implications for rape complainants are that this lack of intention would be likely to act as a partial bar to a finding by the ECtHR, that their Article 3 rights had been breached.

Due to individual differences, not all rape complainants will suffer the same level of humiliation and debasement if they lacked anonymity during the legal process. Indeed a significant proportion would be unlikely to meet the required threshold to amount to

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[350] *Ireland (n307)* para.162.
[351] *Ribitsch v Austria* (1996) 21 EHRR 573.
[352] *Ireland* (n307) para. 167.
[353] *V* (n326).
[354] See chapter 2.3 for a discussion of the open justice principle.

a breach of Article 3. As a result blanket anonymity to rape complainants, on the basis that it is required to prevent breaches of Article 3 is unnecessary. Anonymity could adequately be provided to rape complainants under current legislation where protecting the impact upon the victim, and the interests of justice so required.[355]

Notably Article 8, right to a private life, also provides a viable, alternative human rights avenue where the suffering encountered by an individual does not meet the severity threshold to amount to a breach of Article 3. It is suggested that a consideration of a rape complainant's Article 8 human rights may yield a more forceful human rights argument in favour of complaint anonymity. It is this Article that will be the focus of Chapter 4.

3.4 The rape defendant's Article 3 human rights

As with rape complainants, it is not disputed that rape defendants face a level of humiliation and debasement by virtue of their being subjected to open and public legal proceedings. In contrast to rape complainants, defendants currently receive no anonymity, despite a significant body of support in favour of them doing so.[356] What this means in practical terms is that the actual effect of being a rape defendant in publicised legal proceedings is evident. By comparison one can only hypothesise about the effect on rape complainants who did not benefit from anonymity.

Those in favour of defendant anonymity have sought to distinguish defendants of rape from those of other crimes. In doing so they have attempted to demonstrate a level of debasement and suffering which is distinct from that experienced by defendants of other crimes. If this is demonstrated to be the correct assertion then, as with rape complainants, the superior level of humiliation or degradation a rape defendant experiences, could *prima facie* satisfy the threshold level of humiliation necessary to amount to degrading treatment in breach of Article 3.[357]

A couple of examples of the severe suffering that rape defendants could experience were highlighted during the course of public debate. The first concerned a 21 year old

[355] s46 Youth Justice and Criminal Evidence Act 1999.
[356] See chapter 2.2.4 for a detailed discussion of the arguments in favour of defendant anonymity.
[357] *Tyrer* (n287) para. 30.

man named Mark Jackson who hanged himself following an accusation of rape by his former girlfriend. He had been acquitted of the offence at the Crown Court in Exeter. Nevertheless a newspaper headline in his home town of Wigan, more than 250 miles away read 'jilted man, 21, raped ex-girlfriend'. A second man Dennis Proudfoot committed suicide by inhaling exhaust fumes in his car shortly before Christmas 1996, following a charge of rape. A few days later the man's parents received correspondence from the complainant admitting she had not been raped.[358]

In situations, such as the first of those highlighted above, the defendant's suffering may be exacerbated by a feeling that he is assumed to be guilty even though he has not been proven to be. Public debate has highlighted this concern. Dominic Grieve stated that 'precisely because the issues [of a rape allegation] may be so difficult to resolve it leaves a taint [against a defendant] that may be as damaging as it is undeserved'.[359] In a similar manner Rehman Chishti MP contended that:

> '[T]he concept that "mud sticks" is alive and kicking' [in relation to being accused of rape]… '[defendants] deserve some measure of protection, as I believe we still have a system of justice in this country, of which we are justly proud, in which the accused is innocent until proved guilty on conviction by his peers'.[360]

The question posed is whether there is substantive evidence to demonstrate that the humiliation and debasement suffered by rape defendants is distinct from that of defendants of other crimes. It is argued that there is not the evidence to provide a positive answer to that question. It was submitted above, that specific aspects of being a rape complainant, including rape myths and social stigma, set those complainants apart from complainants of other crimes. By comparison no evidence has been adduced to show that there are any distinct and specific aspects of being a rape defendant, such as 'rape defendant trauma syndrome' or 'rape defendant myths', that set rape defendants apart from defendants of other crimes.

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[358] HC Deb 8th July 2010 col. 1259.
[359] Grieve (n252).
[360] HC Deb(n358) col. 573.

It is actually suggested that jurors in criminal trials view rape defendants in a comparatively sympathetic light. This is due to the serious implications that being convicted of rape could have upon an individual.[361] It is furthered that the prevalence of rape myths and the societal perception that women commonly lie about rape[362]also act in the rape defendant's favour. This is because through casting doubt on the truth of a rape complainant or suggesting that an alleged rape was not a real rape, it attracts a level of public sympathy for the defendant. Whilst either of these factors would undoubtedly not prevent the defendant feeling humiliated during public proceedings it should mitigate the level of suffering to some degree.

There remains a lack of evidence demonstrating that rape defendants suffer a level of humiliation and debasement distinct from the normal level of humiliation and suffering. There also lacks evidence to suggest that the defendants in rape cases suffer adversely in comparison to defendants of other serious crimes. For these reasons it is submitted that a rape defendant, who was withheld anonymity during legal proceedings, would be very unlikely to satisfy the threshold level of humiliation necessary to amount to degrading treatment in breach of Article 3.[363] It is posited that blanket anonymity for defendants in rape trial is unnecessary to protect their Article 3 human rights.

It is important to note that this position may alter in the future, particularly in light of recent high profile historic sexual offence cases, involving public figures such as Jimmy Savile,[364] Rolf Harris[365] and Max Clifford[366]. It may be that in light of the highly publicised nature of such cases public opinion changes significantly, thereby having an adverse effect on defendants in rape cases. Specifically it may significantly enhance the

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[361] See chapter 2.2.4.2

[362] See Chapter 2.2.3.3 'Women commonly make false allegations'.

[363] *Tyrer*(n284)para. 30.

[364] Hough. A, 'Jimmy Savile Helped police crime campaigners despite sex offence warnings' *The Telegraph,* 10th May 2012 <http://www.telegraph.co.uk/news/uknews/crime/jimmy-savile/10048173/Jimmy-Savile-helped-police-crime-campaigns-despite-sex-offence-warnings.html> accessed 26th May 2013.

[365] Martin. A, Shears.R ,'Rolf Harris abused me in my teens, says woman in Australia', *Mail Online*, 12 May 2013 <http://www.dailymail.co.uk/news/article-2323285/Rolf-Harris-abused-teens-says-woman-Australia.html> accessed 26th May 2013.

[366] Max Clifford pleads not guilty to 11 indecent assault charges, 28thMay2013 ,*The Guardian* < http://www.guardian.co.uk/uk/2013/may/28/max-clifford-pleads-not-guilty > accessed 2nd June 2013.

humiliation and debasement that rape defendants experience during the legal process. If that did occur then it would be prudent to re-evaluate a rape defendant's article 3 human rights.

In relation to a rape defendant's Article 3 human rights, as the arguments currently stand there is one final point to consider. It is a question of whether a lack of anonymity in legal proceedings is actually *necessary* despite the potential humiliation and debasement suffered by defendants. To further this point reference is made to the controversial question of whether torture could ever be justified in exceptional circumstances.

The question has been raised both by academics[367] and by the case of *Gäfgen v Germany.*[368]The submission made is that whilst the routine use of torture, in breach of Article 3, is never justifiable a state may be justified in employing a limited amount of torture in exceptional circumstances.[369] Circumstances might include where there was an impending risk of a terrorist attack [370] and where the torture could yield information capable of saving lives.[371]

Indeed these are the terms by which arguments in the UK have been conceptualised. Domestic courts have noted the need, when balancing competing human rights, to find in favour of the least detrimental alternative.[372]

The most prevalent objections to this train of legal thought is that if a limited amount of torture were allowed then the difficulties would arise in knowing where to draw the line, in terms of acts that were or were not permissible.[373] Some torture would be the

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[367] Miller. S, 'Is Torture Ever Morally Justifiable?' [2005] 19(2) *International Journal of Applied Psychology* 179.

[368] *Gäfgen v Germany* (2011) 52 EHRR 1. This case considered the 'ticking time bomb' scenario in which the question of whether torture should ever be allowed was considered. Whilst the ECtHR reiterated the absolute nature of Article 3 ECHR its decision on the fact of the case seemed to suggest otherwise.

[369] Miller (n367) 179, 182.

[370] Chowdury. Z, *'Article 3 of the Human Rights Convention: protection against torture, inhuman and degrading treatment or punishment'* [2005] 11(3)I.L.D. 21, 21.

[371] Bagric. M, Clarke. J, *Torture: When the Unthinkable is morally permissible* (State University of New York Press, Albany, 2007) 64.

[372] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 CA. This case concerned the separation of two conjoined twins. The separation was necessary in order to save the life of one twin, but in doing so the other would be killed. Alternatively, if the twins remained conjoined both would die.

[373] Beattie, A. 'Risking Torture' [2005] *E.H.L.R* 6, 565

beginning of a 'slippery slope' therefore requiring a total ban on torture to be maintained.[374]

A detailed discussion of correctness of these Article 3 arguments is outside the scope of this thesis. However it is submitted that to a much lesser extent the arguments are analogous with the suffering and humiliation that a rape defendant might experience during the legal process. This is despite the fact that the humiliation a rape defendant experiences is highly unlikely to meet the threshold level and amount to a breach of Article 3. It is also accepted that being a rape defendant is comparatively common compared to any exceptional circumstances when torture might be permitted. Nonetheless the basic principles of the aforementioned argument are still applicable.

The suggestion is that, as with arguments in favour of torture, the humiliation rape defendants experience is a necessary 'by-product' of something which is required for the greater good: namely open justice. The harm suffered becomes justifiable to a degree because open justice is necessary for the greater good. Open justice both helps to further the principle of a democracy and ensures that rape defendants receive a fair trial. Both of these aims are achieved through a public and transparent legal process.

3.5 Conclusion

Evidentially anonymity in rape cases is not a factual scenario that has been deliberated upon by the ECtHR. Any arguments suggesting that lack of anonymity would amount to a breach of Article 3 are reliant on established principles and the dynamic nature of Article 3. Of particular importance is the potential for Article 3 to adapt and encompass new factual scenarios.

A careful assessment of the composite elements of Article 3 establishes that lack of anonymity for either party in a rape case could not amount to a finding of torture due to the purpose, intensity and exceptionally heinous quality required. It is possible that the humiliation and suffering caused to a rape complainant who lacked anonymity, would amount to inhuman or degrading treatment contrary to Article 3. This was due to the level of humiliation and debasement they experienced which was far higher

[374] Terrorism and civil liberty:Is torture ever justified?' *The Economist* September 20th (2007) <http://www.economist.com/node/9832909> accessed 2nd August 2012.

than that experienced by complainants of other offences. Whether or not the suffering experienced reached the threshold level to breach Article 3 would depend on all the circumstances of the case. It was suggested that in many cases the threshold level would not be breached. For these reasons it was furthered that blanket anonymity provisions in order to protect a rape complainant's Article 3 human rights was not necessary. Rather anonymity could more appropriately be invoked, under existing statutory provisions, on a case by case basis, where it was deemed absolutely necessary to do so.

By comparison it is asserted that withholding anonymity from a rape defendant would be unlikely to breach his Article 3 human rights. This is because there lacks the evidence to suggest that the humiliation or debasement experienced by a rape is superior to that faced by defendants of other crimes. The recent, highly publicized, historic sexual offence cases could alter that in the future. If public opinion of rape defendants is negatively influenced by these cases then the level of suffering experienced by rape defendants could increase, thereby necessitating a review of the rape defendant's Article 3 rights.

Finally it is suggested that Article 8, right to a private life might offer both rape complainants and defendants a more substantive human rights argument in relation to their needing anonymity. Article 8 could be particularly influential where the suffering an applicant experienced did not reach the threshold level required to amount to a breach of Article 3.

Chapter 4 The right to a private and a family life: questioning anonymity provisions and Article 8

4.1 Introduction

Article 8 ECHR [375] governs an individual's right to a private and family life and to their home and their correspondence.[376] Unlike the Article 3 human rights, discussed in chapter 3, Article 8 is qualified.[377] It is not a human right that is guaranteed in all circumstances but one that must be balanced against other competing human rights: most frequently the media's Article 10 human right to freedom of expression.[378] The qualified nature of Article 8, differing European standards as to what constitutes a breach of an Article 8 human right[379] and individual differences in how members of the ECtHR judiciary apply the balancing exercise to individual cases,[380] has led to significant disparities in the Article 8 jurisprudence.[381]These inconsistencies were noted by legal scholars more than two decades ago and evidenced by the Court needing to proceed on a 'case-by-case' basis.[382]

It is submitted that the forthcoming discussion of relevant case law in this chapter will demonstrate that these inconsistencies still remain today. This fact may entail some difficulties when considering the anonymity debate in relation to a rape complainant's and rape defendant's Article 8 human rights. It has been suggested that since people

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[375] Incorporated into domestic law by the HRA 1998, Schedule 1, Article 8.
[376] HRA 1998, Schedule 1 Article 8(1).
[377] See chapter 1.2 for a discussion of the distinction between a qualified and an absolute human right. See also chapter 3.1 for a dissuasion of the absolute nature of Article 3. However note the arguments made in chapter 3.4 concerning whether torture, in breach of Article 3 should be permissible in exceptional circumstances.
[378] Reid. E 'Rebalancing Privacy and Freedom of Expression' [2012] 16(2), *Edin.L.R.* 253, 253.
[379] Warbrick. C, 'The structure of Article 8' [1998] *E.H.R.L.R* 32, 34.
[380] See: Pinto. T, 'Tiptoeing along the catwalk between Articles 8 and 10: Naomi Campbell v Mirror Group Newspapers Limited', Case Comment, *Ent. L. R*. 199, 200. It has been suggested that the ability to 'balance' competing human rights under Articles 8 and 10 depended, in part on the extent to which individual judges were able to put themselves in the shoes of the applicant claiming the Article 8 breach.
[381] Warbrick (n379) 33.
[382] Connelly. A. 'Problems of interpretation of Article 8 of the European Convention on Human Rights', [1986[35 *I.C.L.Q*. 567, 577.

disagree as to the precise ambit of the protection awarded by Article 8, it provides scope for 'creative advocacy' to bring interests not previously found to fall within those protected by Article 8, within its auspice.[383] This factor should be considered together with the established principle that the ECHR's dynamic, flexible nature, enables its interpretation and the scope of substantive rights it covers, to develop over time. In doing so the convention is able to adapt to the views and needs of a changing society.[384]

For these reasons it is suggested that *prima facie,* there would be no bar *per se,* to a future finding by the ECtHR, that the UK, by withholding anonymity from either rape complaint or defendant during the legal process, was not in breach of that individual's Article 8 human rights. Without prior consideration of relevant jurisprudence and scholarly debate, one might think that a right to a private and family life would automatically extend to the right not to have personal and highly intimate details regarding a sexual act disseminated in the public domain. The issue of suspect anonymity and competing Article 8 and 10 human rights has recently been debated before the English courts in relation to terrorist suspects, who had been the subject of freezing orders.[385] However it has not yet, been specifically addressed in relation to anonymity provisions for parties in a rape case.

This chapter considers whether withholding anonymity provisions from rape complainants and/or defendants during legal proceedings could amount to a breach of their Article 8 human rights, in a way not permitted by the qualified component of Article 8.[386] The chapter begins by defining the right to a private and family life as set out in Article 8 ECHR, followed by some exemplary instances where the ECtHR has found that an individual's Article 8 human rights have been interfered with. Consideration is then given to the obligations that are placed on the member state in relation to ensuring an individual's Article 8 human rights are upheld. In doing so reference is made to the requirement to balance an individual's Article 8 human rights

[383] Fieldman.D, 'The developing scope of Article 8 of the European Convention on Human rights [1997] *E.H.R.L.R.* 265, 265.
[384] Gómez-Arostegui. H, 'Defending Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations' [2005] 35(2) *Cal.W'Intl L.J*. 153, 154.
[385] *Guardian News and Media Ltd, Re* [2010] UKSC 1.
[386] HRA 1998, Schedule 1 Article 8(2).

with the media's Article 10 human right to freedom of expression. However, Article 10 human rights, in relation to the anonymity debate will form the focus of chapter 5 and therefore discussion of Article 10 in the present chapter is limited to where it is necessary for clarity. Finally, due to the qualified nature of Article 8, discussions relating to the Article's applicability to the anonymity debate overlap to a greater degree than they did in chapter 3. Therefore, rather than being self- contained within separate subsections, discussions of how Article 8 could apply to parties in a rape case, who lacked anonymity, are integrated throughout the chapter.

4.2 Defining the right to a private and family life

As a qualified right, Article 8 is defined in two parts. The 'right protected'[387] is set out in Article 8(1) whilst the exceptions when a state may justify restricting an individual's Article 8 rights is set out in Article 8(2).[388] The Article reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Evidentially Article 8(1) defines the substantive rights to which respect must be given, namely private and family life and home and correspondence. Cases proceeding under the 'private and family life' heading generally relate to highly personal matters[389] such as divorce proceedings,[390] family relationships,[391] or the right of public figures to

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[387] Although Warbrick acknowledges that what is actually protected under Article 8 is *respect for* particular interests as opposed to the right itself: see Warbrick (n379).

[388] Forder. C, 'Legal Protection under Article 8 ECHR: *Marckx* and Beyond'[1990] 37 *NILR* 162, 170.

[389] Kravchenko. S, Bonine. J, 'Interpretation of Human Rights such for the Protection of the Environment in the European Court of Human Rights' [2012] 25*Global Business & Development Law Journal* 250.

[390] See for example *Charalambous v Cyprus* [2008] 1 F.L.R. 473.

[391] See for example *Berrehab v Netherlands* (1986) 8 EHRR CD 280. In this case the state was required to allow the non-native applicant to remain in the Netherlands following divorce from his Dutch wife.

protection from media publications regarding their personal lives.[392] By comparison Article 8 claims proceedings under the home and correspondence heading usually relate to issues such as seizure.[393] It is submitted that both the protected interests falling within the ambit of Article 8, when taken together with the wide range of circumstances in which a breach of Article 8 has been found,[394] demonstrates that the article offers wide-reaching protection.

Article 8 has been held to encompass the physical and psychological integrity of an individual,[395] the right to personal development[396] and the right to develop external relationships with other people.[397] It incorporates personal features including gender identification, sexuality, sexual life[398] and person's name.[399] The protection of Article 8 can extend to business related activities[400] and activities which are in the public domain.[401] Equally wide ranging are the factual scenarios where a breach of Article 8 has been found. These vary from retention by state authorities of the DNA or fingerprint samples of non-convicted people without their consent,[402]to a local authority's disclosure of photographs and closed circuit television footage, showing a mans attempted suicide on national television, without putting in place adequate safeguards to protect his identity.[403] In light of the extensive reach of Article 8 it is again suggested that there would be no bar *per se* to a future finding by the ECtHR that

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Doing so ensured that both parents could maintain a relationship with their child thereby ensuing their Article 8 rights to a private and family life were protected.

[392] See for example *Rio Ferdinand v MGN Limited* [2011] EWHC 2454 (QB); *Douglas v Hello! Ltd* (No.1)[2001] Q.B. 967.

[393] See *Sallinen v Finland* (2007) 44 EHRR 18; Lindberg. P, 'Defend my Castle: Is the UK in violation of Article 8 of the European Convention of Human Rights' [2010] 22 *The Denning Law Journal* 1.

[394] Warbrick (n379) 33.

[395] *X v Netherlands* (1986) 8 EHRR 235 para.22; *Pretty v UK* (2002) 12 BHRC 149, para. 61.

[396] *Pretty* (n395); *Goodwin v United Kingdom* (2002) 35 EHRR 843, para.65; *Peck v UK* (2003) 13 BHRC 669. para. 57.

[397] *Peck* {n396); See also *Rotaru v Romania* (2000) 8 BHRC 449, para. 43.

[398] *Dudgeon v UK* (1982) 4 EHRR 149; *SL v Austria* (2003) 37 EHRR.

[399] *G v UK***(**2011) 53 EHRR SE25; *Peck* (n396); See also *PG v UK* [2001] ECHR 44787/98, para. 57.

[400] *Peck* (n396); *Von Hannover v Germany* [2004] ECHR 59320/00, para. 50.

[401] *Niemietz v Germany* [1992] ECHR 13710/88, para.29; *Rotaru v Romania* (2000) 8 BHRC 449, para.43;*Amannv Switzerland* (2000) 30 EHRR 843, para. 65.

[402] *S v United Kingdom* (30562/04) (2009) 48 EHRR 50.

[403] *Peck v United Kingdom* (44647/98) [2003] EMLR 15.

the UK, if it withheld anonymity from either rape complainants or defendants, were violating their Article 8 human right.[404]

Analysis of the full range of interests protected by Article 8 is outside the scope of this thesis. It is the 'private and family life' (hereafter 'privacy') elements of Article 8(1) that will be focused on in this chapter and for the purposes of the anonymity debate. This is because a rape complainant or defendant becomes party to those legal proceedings due to their involvement in an act of a highly personal, intimate and private nature. *Prima facie* sexual intimacy is a 'highly personal matter' which falls under the auspice of the privacy heading.

In order to assess the merits of an Article 8 complaint, the ECtHR employs a three-stage test.[405] Whilst many of the cases discussed in this chapter are actually domestic cases decided before English courts, the same general principles apply.[406]

4.3 Stage one: Is the information private?

The first stage of the test is for the court to ask whether an individual's Article 8 right to privacy is engaged.[407] The court has held that the information must be private in that it is in principle protected by Article 8.[408]

In assessing what information is *prima facie* private, UK courts have focused on whether an individual has a 'reasonable expectation to privacy'.[409] In turn this reasonable expectation to privacy is derived from the judgment of Glesson CJ in an Australian case.[410] The respondent in that case sought an interlocutory injunction

[404] Notably the question of whether lack of anonymity for a defendant in a criminal case has recently been considered in relation to individuals suspected of terrorism in *Guardian News and Media Ltd, Re* [2010] UKSC 1(SC).
[405] Gómez-Arostegui (n384} 156.
[406] Whilst judgments of the ECtHR are not literally binding upon UK courts, they are highly persuasive. See Macdonald. I, 'ECHR article 8: bringing the UK courts back in step with Strasbourg [2008]*J.I.A.N.L. 293, 293.* In accordance with s2 HRA 1998 UK courts must consider any relevant ECtHR jurisprudence. Furthermore in the case of *Huang (FC) v Secretary of State for the Home Department* UKHL 11, para. 18 the court held that'While the case law of the Strasbourg court is not strictly binding, it has been held that domestic courts and tribunals should, in the absence of special circumstances, follow the clear and constant jurisprudence of that court'.
[407] Macmillan. K, 'Baby steps', *Comms.L.* 72.
[408] *McKennit v Ash* [2008] Q.B. 73, para. 11.
[409] *Associated Newspapers Limited v His Royal Highness the Prince of Wales* [2006] EWCA Civ 1776 para. 34; *Lord Browne of Madingley v Associated Newspapers Limited* [2007] Q.B. 103, para. 20.
[410] *Australian Broadcasting Corpn.v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

preventing the broadcasting of a documentary showing his procedures at a possum processing factory: in particular filming the stunning and killing of possums. Glesson CJ was firmly of the opinion that information relating to the respondent's slaughtering methods, whilst being filmed on private property, was not shown to be private for any other purpose.[411] In turning to when information may be considered private, Chief Justice Glesson stated that:

> 'An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private: as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private'.

There are two principles that have been taken from this judgment and applied in cases before the UK courts. Firstly that there are some forms of information that are easily defined as private: health, personal relationships, or finances[412] being given as examples. Secondly, in cases where it is not obvious whether the information is private or not, a good gauge of whether information is private is whether a person of 'reasonable sensibilities' would find it offensive. Domestic courts in subsequent cases have applied these two principles.[413]

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[411] *Australian Broadcasting Corpn.* (n410) paras. 34-35.
[412] *Australian Broadcasting Corpn*. (n410) para. 42.
[413] See for example *Naomi Campbell v MGN Limited* [2002] EWCA Civ 1373, para. 20; *A v B & C* [2002] EWCA Civ 337, para.11(v).

The question to be posed in relation to the anonymity debate is whether the information, on which a rape case is based, and relates to the individual rape complainant and or defendant in an individual case, is private for the purpose of Article 8(1). To answer the question posed, emphasis is placed on the type of information upon which legal proceedings in a rape case are based: namely information of an intimate, sexual nature. One of the forms of information that has been held to be 'easily identified as private' was personal relationships.[414] Information relating to sexual activity goes directly to the heart of what today's society regards a personal relationship. Furthermore it is an established principle that sexual life falls within the ambit of privacy for the purposes of Article 8.[415] These principles are directly applicable to defendants and complainants in a rape case. Namely, that where either a rape complainant or defendant lacked anonymity during legal proceedings, it would, due to the sexual nature of the information involved, engage their Article 8 right to privacy.

4.3.1 The obligations upon a state in relation to the Article 8 human rights of its citizens

In upholding an individual's Article 8 human right, specific obligations are placed upon states. The first is a negative obligation not to cause arbitrary interference into an individual's private life. [416] The second is a positive obligation upon the state to protect the individual from any arbitrary interference into the private sphere. By doing so, the state allows the individual to enjoy their Article 8 human rights.[417]The European Court has acknowledged that the boundaries between positive and negative obligations may

[414] *Australian Broadcasting Corpn* (n410) para. 42.

[415] *G* (n 399) There remains exceptions when sexual activity would fall outside the ambit of private life for the purposes of Article 8(1), for which see *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, para. 38.

[416] Connelly (n 382) 570. For an example of the negative obligation being placed upon a state see *Prokopovich v Russia (2006)* 43 EHRR 10. In that case the state had unlawfully evicted the applicant from a property, in such a way as to render it incompatible with her Article 8 human rights.

[417] Starmer. K, Byrne. I, 'A Fair Trial in Criminal Proceedings' in Klug (ed) *Blackstone's Human Rights Digest* (Blackstone Press Ltd, Oxford, 2001) 234. For an example of the positive obligation being placed upon a state see *Gaskin v UK*(1989) 11 EHRR CD402. In this case it was found that the state had a positive obligation to allow the individual access to records of his foster care.

be difficult to define, but in any event the principles applied remain similar in both instances.[418]

It has been ascertained that Article 8 human rights of both rape complainants and defendants who lacked anonymity during the legal process would be engaged. *Prima facie* the UK would be under a positive and negative obligation to ensure those Article 8 human rights were protected by ensuring that information relating to the sexual act and the rape charge, remained private. The negative obligation would be to prevent the media from reporting on the rape case and from imparting information to the general public. The positive obligation would be to provide both parties in a rape case with anonymity in order to ensure they remained unidentifiable during the legal process and in any later published case reports.

The assertions made in the previous paragraph would be most likely to form the conclusion to this chapter if Article 8 was an absolute right and if Article 8(1) constituted the wording of the complete Article. However the ECtHR has also found that when considering obligations placed upon a state by Article 8 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole'.[419] It is at this juncture that Article 8(2) comes into play.

4.4 Stage two: Limiting Article 8 human rights under Article 8(2)

As was considered previously in this chapter, Article 8(2) prescribes circumstances when Article 8 human rights may be limited. This is the second stage of the test for assessing the merits of Article 8 human rights. The limitations are that the interference must be in accordance with the law, must be necessary in a democratic society, and must be necessary to protect the rights and freedoms of others.[420] These limitations may have direct applicability to complainants and defendants in rape cases. This proposition will be analysed further in subsequent sections of this chapter.

[418] *Stjerna v Finland* (1997) 24 EHRR 195, para.38.
[419] *Stjerna* (n418).
[420] HRA 1998, Schedule 1 Article 8(2).

4.4.1 Interference must be in accordance with the law and necessary in a democratic society

The ECtHR held that when considering whether limiting an individual's Article 8 human rights are justified, a court must first consider whether the interference with the applicant's right to respect for his private life is in accordance with the law. Firstly this requires that the measures concerned must be in conformity with domestic law and secondly that the law itself does not fail to show respect for the individual's private life.[421] The legislation, or equally the common law principle, must be both precise and non-arbitrary in nature.[422] The legislation in question must be sufficiently precise so that an ordinary person can understand in what circumstances their right to privacy under Article 8(2) would occur.[423] A state will have difficulty arguing that a given measure has a legal basis where there is no clear legislation to confirm that is so.[424] Reformulating this question to address the anonymity debate, one would ask whether withholding anonymity from either party in a rape case is in accordance with UK domestic law.

In answering the aforementioned question it is posited that the relevant law is the principle of open justice.[425] This common law principle underpins our legal system and our system of justice.[426] It is a principle with an 'extensive pedigree'[427] holding that proceedings should generally be conducted in public with the media being fully and freely able to report on those proceedings: the importance of this principle having been reiterated by senior courts on many occasions.[428] Advancing the acute importance of open justice, it has been argued that public confidence flows from the

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[421] *Gaskin* (n417) para. 92.

[422] Kilkelly. U, *The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights',* Human Rights handbooks, No. 1, (2nd edn, Directorate General of Human Rights, Council of Europe, 2003) 22.

[423] *Andersson v Sweden* (1992) 14 EHRR 615para.75;*Kruslin v France*[1990] ECHR 11801/85 paras. 27,29, 30.

[424] See for example *Malone v United Kingdom* (Application 8691/79) (1984) 7 EHRR 14; *Khan v UK*, 12th May 2000.

[425] See chapter 2.3 for further discussion of the open justice principle.

[426] A l-Rawi v Security Service [2011] UK SC 34 (SC), paras. 10-11.

[427] McGlynn. C, 'Rape, defendant anonymity and human rights: adopting a "wider perspective" [2011] *Crim. L.R* 199, 203.

[428] See for example *R v Sussex, Ex p McCarthy* [1924] 1 KB 256, 259; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218, para. 38-39; *Al-Rawi v Security Service* [2011] UK SC 34 (SC), para. 10.

knowledge that courts of law proceed openly, thereby reducing the likelihood of individuals taking law into their own hands.[429]

The principle of open justice is not an arbitrary legal principle, failing to take into account the private lives of individuals and lacking in precision, but one with which society generally is familiar. Citizen's living in the UK are used to seeing court cases and legal proceedings reported in the media and comprehend that this is a normal part of the UK's justice system. A citizen would also be likely to appreciate that in a legal system where justice is open, the privacy of an individual who is a party in legal proceedings, may be limited in order to uphold the principle of open justice. On this basis it is suggested that a restriction by the UK government, of the privacy rights of either party in a rape case, on the basis of ensuring open justice would be 'in accordance with the law' for the purposes of Article 8(1).

Whilst this is true, it does not necessarily mean that either party in a rape case would automatically be refused the protection of anonymity provisions in order to protect their Article 8 right to privacy. Notwithstanding its fundamental importance, open justice in itself is not an absolute principle. The fact was emphasised by Lord Haldane LC in the case of *Scott v Scott.*[430] He stated that when confronted with the need to depart from the principle, the question had to be treated 'as one of principle, and as turning, not on convenience, but on necessity'.[431]

The view that derogations from the principle of open justice should be based on necessity overlaps with the second limiting factor set out in Article 8(2): namely that any restrictions on Article 8 human rights must be necessary in a democratic society. One should appreciate that 'necessity' does not imply an absolute need[432] but rather that it 'implies a pressing social need and, in particular that it is proportionate to the legitimate aims pursued'.[433] If open justice is a fundamental principle of our legal

[429] McGlynn (n427) 204.
[430] *Scott v Scott [1913] AC 417*.
[431] *Scott v Scott [1913] AC 417*, 438.
[432] *Handyside v United Kingdom* (1979-80) 1 EHRR 737 para. 48.
[433] *Olsson v Sweden* [1988] ECHR 10465/83, para. 67. The ECtHR in *Dudgeon* (n398) para. 53 has also held that necessity extends to 'tolerance and broadmindedness'.

system, and thus necessary in a democratic society can it ever be limited to provide anonymity to parties in a rape case?

Firstly, as discussions in chapter 2 illustrated, witness anonymity in legal proceedings is not a new concept *per se.*[434] It has been contended that anonymity during legal proceedings is one of three areas that is placing pressure on open justice.[435] Whether anonymity itself become necessary during the legal process will depend on whether the human right it is protecting, which in relation to the anonymity debate is the right to privacy, overrides the need for open justice and other competing human rights. Competing human rights are considered in chapter 4.4.2. In this section, the relative strength of a rape complainant's and defendant's right to privacy can be addressed in relation to the corresponding need for open justice being necessary in a democratic society.

4.4.1.1 Open justice and the rape defendant's right to privacy

Recent academic comment has raised the valid question of whether withholding any defendant's right to privacy, in favour of open justice really is necessary.[436] These concerns have arisen in light of particularly invasive media reporting in today's modern society. In principle the media play an important role in upholding the principle of open justice through their ability to report on all the majority of legal proceedings and impart that information to the public.[437] However there is an apprehension that the media are becoming more focused with furthering their commercial interests rather than upholding the principle of open justice.[438]Albeit in a non-legal context, a recent example highlighting this problem was the topless pictures of the Duchess of Cambridge taken while sunbathing with her husband in a private villa in France in

[434] See chapter 2.1.3 and also s46 Youth Justice and Criminal Evidence Act 1999.
[435] Zuckerman. A, 'Common law repelling super injunctions, limiting anonymity and banning trial by stealth' [2011] *C.J.Q, 223, 223.* Zuckerman contends that the other two pressurising factors are increased requests for super injunctions by parties to a case, and requests for increased use of closed material procedure and use of special advocates in cases by the government.
[436] Bohlander (n133) 321.
[437] Agate. J, Case comment: "Vital Role of the "Public watchdog" confirmed by European Court of Human Rights: *Yordanova and Toshev v Bulgaria* [2013] 24(1) *Ent.L.R* 27-29, 28; White, R. Ovey, C. 'Jacobs, *White, Ovey: The European Convention on Human Rights' (5th edn, Oxford University Press, Oxford 2010)* 426.
[438] Bohlander (n133) 323.

September 2012.[439] One can ask what the specific intention of revealing these pictures to the public was other than enhancing sales. A full enquiry into the malpractice of some sectors of the media became necessary in the UK in 2011. This followed the 'phone hacking' scandal which affected the privacy of both private individuals and individuals in the public eye.[440]

In relation to defendants of criminal cases it has been stated that:

> [F]rom breakfast to bedtime there is an unrelenting barrage of institutionalised public gossip on the radio, TV, in tabloids etc. about the evil deeds and character of fellow citizens'.[441]

In some cases, identity, place of residence and other personal details of defendants are published in the media shortly after they have been charged. This is notwithstanding the fact that their lives may be adversely affected as a result, regardless of whether they are later acquitted or not.[442] To give a specific example of the effect that media reporting may have had on one rape defendant, the reader may recall the aforementioned newspaper article entitled 'Jilted man, 21, raped ex-girlfriend'. The article regarded the acquittal of a 21 year old man of his ex-girlfriend at Exeter Crown Court but was published in the man's home town of Wigan more than 250 miles away. This young man subsequently hanged himself.[443]

One may therefore question whether any media reporting of defendants in any criminal case should be allowed, especially where the article produced provides an excessively embellished view of events to make it more appealing to read and thus commercially profitable.[444] Bohlander argued that the problems lie not in the legal principle itself but rather in the misunderstanding by the media of their correct role in society. He draws comparison to the German media where names of victims or

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[439] Cockerton. P, 'Kate Middleton topless pictures: Two charged after pictures of sunbathing Duchess published' *Mirror News,* 25th April 2013 <http://www.mirror.co.uk/news/world-news/kate-middleton-topless-pictures-two-1851681> accessed 18th May 2013.
[440] See The Leveson Inquiry <http://www.levesoninquiry.org.uk> accessed 12th May 2013.
[441] Bohlander (n133) 321.
[442] Bohlander (n133) 322.
[443] HC Deb8th July 2010 col. 1259.
[444] Further discussion of the 'artistic license' given to the media in the course of their reporting duties is addressed in chapter 5.

offenders are not generally disclosed in newspapers.[445] Non-disclosure of names in the German media is representative of the German media's attitude to reporting, as evidenced in the Press Code of Conduct.[446] Bohlander suggests that whilst the German public love to hear gossip as much as the English public, newspapers do not fail to sell through not having disclosed names.[447] It is asserted, on account of Bohlander's arguments that a more effective and ethical self-regulation of the press, rather than blanket anonymity provisions for all defendants would be the most effective means of balancing a defendant's right to privacy with(in) the principle of open justice.

The final question to pose is whether rape defendants should be equated with defendants of other crimes, or whether as a group they should amount to an exception who require anonymity during legal proceedings. The court in *Guardian News and Media Ltd, Re [2010]* held that whilst an anonymity order cannot be made for the benefit of the comfort or feelings of defendants', publishing of material that could lead to a defendant suffering substantial harm can be restricted'.[448] When considered together with the principle that anonymity is an exception to open justice, the term 'substantial harm' suggests the need for harm which is more severe than that experienced by defendants of other offences. In the previous chapter the proposition was made that rape defendants do not experience a level of harm that is distinct from that experienced by defendants of other crimes.[449] It is posited that blanket anonymity provisions for rape defendants would not be considered necessary in order to protect their Article 8 right to privacy, thereby overriding the principle of open justice.

It is accepted that a specific rape defendant, or any other defendant, in a given case may experience a greater level of harm than is normally experienced. In such circumstances the UK High Court retains the jurisdiction to make any orders it deems necessary in order to carry out the balancing exercise between competing human rights.[450]

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[445] Bohlander (n133) 323.
[446] Bohlander (n133) 333-335.
[447] Bohlander (n133) 323.
[448] *Guardian News and Media Ltd, Re [2010]* 2 A.C. 697, 705.
[449] See chapter 3.4.
[450] The jurisdiction arises from reading s6 of the HRA (right to a fair trial) together with s37 Senior Courts Act 1981 (power to grant injunctions) as confirmed in *re British Broadcasting Corporation* [2010] 1 AC

4.4.1.2 Open justice and the rape complainant's right to privacy

Seemingly the position regarding a rape complainant's Article 8 right to privacy, when balanced against open justice and corresponding need for open justice to be necessary in a democratic society, is comparatively straight forward. There is no dispute that open justice is an important part of an effective and fair criminal justice system. Ensuring that complainants of criminal offences come forward and report the crimes against them is equally important. Indeed chapter 2 detailed the severe consequences that being a rape victim could have upon an individual.[451]

In chapter 3 analysis focused upon whether being a rape complainant could amount to inhuman or degrading treatment in breach of Article 3 human rights. Emphasis was placed upon the social stigma associated with being a rape victim by virtue of rape myths. In particular some rape victims experienced the legal process as a 'second assault' upon them or suffered rape trauma syndrome as a consequence of their experiences. Other practical factors also act to enhance the trauma experienced by rape victims during the legal process. These include the difficulties of proving consent, or lack thereof, to participate in what is usually a private sexual act, and the residual jurisdiction of a judge to provide a corroboration warning to juries, against the complainant. When taken together, these distinct difficulties render the experience of being a rape complainant more severe than being a complainant of other crimes. [452]

Notwithstanding this conclusion, difficulties arose in terms of rape complainants meeting the threshold level of humiliation or degradation required to amount to a breach of Article 3 human rights. Whilst it was conceded that individuals in specific cases may reach that threshold it was argued that the majority of rape complainants probably would not do so due to the exceptional level of suffering required.[453] Herein lies the potential utility of Article 8.

145, para. 13.

[451] See chapter 2.1

[452] See chapter 3.3 for a further consideration of these factors in relation to a rape complainant's Article 3 human rights.

[453] *Ireland* (n307) para. 167.

Prima facie information of a sexual nature engages an individual's Article 8 human rights. [454] When those Article 8 human rights relate to criminal proceedings they will be balanced against the principle of open justice as well as any other competing human rights. Both derogations from Article 8 human rights and derogations from the principle of open justice must be necessary in a democratic society. [455] The aforementioned discussions demonstrate the level of suffering that rape complainants, face during the legal process, which is distinct from the suffering experienced from complainants of other crimes.

Upholding their Article 8 privacy rights by providing rape complainants with anonymity would have a number of benefits. Firstly it would encourage rape complainants to report their crime in the knowledge that they would not be publicly exposed to the stigma of being a rape complainant. Secondly, in preventing rape complainants from public identification, it ensures that the humiliation experienced by complainants during the legal process is mitigated to a degree and more rape complainants are able to endure the legal process. This in turn would assist in lowering rape.[456] Thirdly, through a combination of factors one and two it is hoped that the number of successful convictions will rise and more guilty defendants will be brought to justice for their actions.

It is asserted that ensuring a rape complainant's Article 8 rights are upheld *is* necessary in a democratic society. In these circumstances a rape complainant's Article 8 human rights would be likely to supersede the principle of open justice. This conclusion corresponds with the assertion made by Baroness Kennedy during the course of public debate, as was acknowledged in chapter 2. She was of the opinion that anonymity provisions needed to be reserved for exceptional circumstances: a category that rape complainants fell into, due to the crime's stigma and the difficulty of getting woman to come forward and report rape.

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[454] *G* (n399). There remains exceptions when sexual activity would fall outside the ambit of private life for the purposes of Article 8(1), for which see *Laskey* (n415).
[455] *Scott v Scott [1913] AC 417*, 438.
[456] Attrition is any means by which cases drop out of the CJS.

Taken alone, this finding appears to demonstrate that rape complainants should have anonymity in order to protect their Article 8 human rights. However due to the qualified nature of Article 8 there remains an additional balancing exercise that must be undertaken to ensure that any limitation of Article 8 human rights is necessary to protect the rights and freedoms of others. As mentioned at the outset of this chapter the predominant competing human right to be balanced against an individual's right to privacy is the media's Article 10 right to freedom of expression. This balance will now be addressed. It has already been accepted that the principle of open justice would be likely to outweigh a rape defendant's Article 8 human rights in the legal process, thereby legitimising their lack of anonymity. The current balancing exercise of Article 8 and 10 human rights will nevertheless be considered in relation to both parties in a rape case for the purposes of completeness.

4.4.2 The Article 8 limitation must be necessary to protect the rights and freedoms of others

Article 10 has a similar structure to Article 8 in that it is a qualified human right.[457] When a case arises where these two human rights directly conflict with one another, a fair balance must be struck between the interests of the public in receiving information and the requirements of an individual's right to privacy.[458] Ascertaining whether one of these two human rights should generally take precedence over the other has been difficult, particularly when both Article 8 and Article 10 are fundamentally important in a democratic society.[459]

Attention has been drawn to the fact that the media are in a prime position to cause damage to an individual's right of privacy, the state's interests of administering an effective justice system and the public generally, through dissemination of socially damaging information. The media can do this by virtue of its wide-ranging powers of investigation and its ability to deliver information to a wide audience.[460] Nonetheless

[457] Mowbray.A, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human rights [2010] 10(2) *Human Rights Law Review* 289, 306.
[458] Mowbray (n457) 289.
[459] Rogers. H, Tomlinson. H, 'Privacy and expression: Convention rights and interim injunctions' [2003] *EHRLR* 37, 38.
[460] Tierney. S, 'Press freedom and public interest: the developing jurisprudence of the European Court of Human Rights [1998] *EHRLR* 419, 420.

the Court have frequently reaffirmed the importance of the press to political process.[461] The ECtHR in *Castells v Spain* (1992) commented that freedom of press 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress'.[462] More recently the Court in *Yordanova v Bulgaria*[463] restated the media's role as public watchdog in a democratic society.[464]

It is submitted that jurisprudence considering how Article 8 and 10 human rights should be balanced has been inconsistent: as will become apparent from the forthcoming analysis. There has been some jurisprudence suggesting that Article 10 rights to freedom of expression prevail over the right to privacy. The suggestion has been mooted that when competing privacy and freedom of expression claims arise, freedom of expression should prevail. For example in *Reynolds v Times Newspapers Ltd and Others* the court stated:

> 'The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression much be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification'.[465]

Legal scholars have also debated whether the meaning of s.12[466] of the HRA 1998 is to place freedom of expression as a right of greater importance than other competing human rights.[467]

At the same time, domestic courts have been keen to uphold an individual's right to privacy. In recent years the Court of Appeal has held that the law now recognises and

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[461] Tierney (n460).
[462] *Castells v Spain* (1992) 14 E.H.R.R. 445 at 476.
[463] *Yordanova v Bulgaria* (25446/06) 2012 (ECHR)
[464] Cited in Agate (n437) 27.
[465] *Reynolds v Times Newspapers Ltd and Others* [2001] 2 A.C. 127, 208.
[466] S.12 HRA entitled 'Freedom of expression' applies whenever a court is considering whether to grant relief (such as an anonymity provision or an injunction), which might interfere with the right to freedom of expression. In these circumstances the court must have particular regard to the importance of the ECHR right to freedom of expression.
[467] See for example Rogers (n459).

will protect as necessary, an individual's right to privacy.[468] Specifically domestic courts appear to have developed a common law remedy for invasion of an individual's privacy in the form of a tortuous 'breach of confidence'.[469] In *Campbell v MGN Ltd [2004]* the court stated that:

> 'The law of confidence should protect from disclosure private information where its publication has a real potential to adversely affect a person's health or mental well-being'.[470]

Until very recently, judgments of the European Court have inadvertently tended to favour the right to privacy, notwithstanding a lack of intention to favour Article 8 rights.[471]Justification for decisions, have been based primarily upon the margin of appreciation awarded to states when deciding whether there is justification for restricting either of the two human rights.[472]

Some examples can be provided to contextualise how the courts have placed the balance. In *Peck v UK* the court held that disclosure of closed circuit television footage and images, on national television, showing events surrounding an attempted suicide by the applicant, violated the applicants Article 8 privacy rights. They failed to place adequate safeguards in place to protect his identity.[473] Notably, the applicant's right to privacy was violated even though the images and footage were recorded in a public street because he was a private individual and was not there for any specific purpose such as a publicised event. [474]

In *Von Hannover v Germany* (2005) Princess Caroline of Monaco, who undertook no official functions, had unsuccessfully applied to the German courts to obtain an injunction. This was to prevent the German media from publishing various pictures of

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[468] *Douglas* (n392).
[469] The common law 'breach of confidence' lies outside the scope of this thesis, but for discussions of the principles see Phillipson. G, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' [2003] 66 *The Modern Law Review* 726.
[470] *Campbell v MGN Ltd* [2004] A.C. 457, 460.
[471] Murphy. D, Delany. H, 'Towards common principles relating to the protection of privacy rights?An analysis of recent developments in England and France and before the European Court of Human Rights' [2007] *EHRLR* 568, 570.
[472] Murphy (n471).
[473] *Peck* (n 403).
[474] Murphy (n471) 571.

her and her children. On application to the ECtHR the Court acknowledged that whilst it should not overstep a specific remit, especially in relation to the rights of other people, the media did have a duty to impart 'information and ideas on all matters of public interest'.[475] The Court drew a distinction between circumstances where public figures were participating in official functions and facts relating to the private lives of individuals such as the Princess, who undertook no official duties. In the former case the press would be acting in its role as '"watchdog" in a democracy' while in the latter case it would not.[476]The Court held 'that the decisive factor in balancing the protection of private life against freedom of expression is the contribution of the photos and articles to a debate of general interest'.[477] The Court drew a distinction, holding that images of the Princess undertaking activities such as horseback riding or playing tennis, where she could expect her privacy to be respected could be contrasted with those where she was undertaking activities in a public place such as grocery shopping. [478] The former group of images violated her Article 8 right to privacy.

However a couple of very recent judgments by the ECtHR have suggested a definite shift towards favouring of Article 10 human rights. Whilst the Court has not altered the factors employed when undertaking the Article 8 and 10 balancing exercise, the judgments seemed to have used a wide-ranging interpretation of what amounts to debates in the public interest and individuals who are considered to be public figures.[479]

In *Von Hannover v Germany* (No2) (2012),[480] the case involved further pictures of Princess Caroline. This time the Princess was photographed with her husband Prince Ernst August and the pictures were taken while the couple were on holiday together. The case involved three pictures, two of which showed the couple walking together whilst one pictured them both travelling on a chair lift. The German courts had prevented publication of the walking pictures. The third picture had been used as a background image for an article reporting on the ill health of the Princess' father and

[475] *Von Hannover v Germany*(2005) 40 EHRR 1, 2.
[476] *Von Hannover* (n475).
[477] *Von Hannover* (n475) 3.
[478] *Von Hannover* (n475) 31-32.
[479] Reid (n 378) 256.
[480] *Von Hannover v Germany* (No.2) (40660/08) Unreported February 7, 2012.

publication had been permitted. Upon application to the ECtHR the decision of the domestic court was upheld. While the walking photos concerned the intimacies of the couple's private holiday the third picture, which accompanied the article related to an event of 'contemporary society' on which it was in the public interest for the press to report. The ECtHR therefore held that the media's right to freedom of information prevailed.[481] It is submitted that by comparison to the 2005 *Von Hannover* decision this more recent judgment has taken too lenient a view of information that is said to be in the public interest. The third photograph, publication of which was allowed, was the same type of picture as the walking images. All three photographs showed the couple on a private holiday undertaking private activities. The 'public interest' element that arose in relation to the third photograph was tenuous at best: by linking a 'holiday snap' to an entirely separate holiday step of another member of the Von Hannover family.

In *Axel Springer AG v Germany* (2012) the case concerned an actor, known in Germany for his role in a detective series. [482] The application before the ECtHR related to an article that was published by the German media. The article referred to the applicant's confession to the German court that he had smoked cannabis on occasion, as well has having taken cocaine. It also reported the fact that the applicant was fined and showed a picture of the applicant.[483] In giving its' reasoning as to the correct balance between Articles 8 and 10, the court held that there was an element of public interest in being informed about criminal proceedings. This principle was increased in relation to the applicant, due to his character on the detective series being a police superintendent, 'whose mission was law enforcement and crime prevention'.[484] Furthermore the applicant had previously sought media attention on other occasions and as such he could not expect the same level of privacy as someone who had avoided the limelight.[485] Ultimately the court held that the media's right to freedom of expression should be favoured over the applicant's right to privacy.[486]Again it is suggested that

[481] Discussed in Reid (n278) 255-257.
[482] *Axel Springer AG v Germany* (2012) 55 EHRR 6, para. H4.
[483] *Axel Springer* (n482).
[484] *Axel Springer* (n482).
[485] *Axel Springer* (n482) para. H18.
[486] *Axel Springer* (n482) para. 119.

the court's finding that the nature of the applicant's role in the detective series increased the public interest element involved, was a tenuous link. The court may have been inferring that the public would consider that the applicant's drug use affected his suitability to undertake a *fictional* role as a police superintendent. Otherwise it seems that this factor would only seek to be of interest to the public rather than in the public interest *per se.*

Whilst these cases do suggest that the ECtHR is moving towards favouring Article 10 rights, it is submitted that the domestic courts in the UK may be less willing to follow this trend. This assertion is made due to the current political climate in the UK and the negative attention the press has received following the phone hacking scandal of recent years and the consequential Leveson inquiry.[487]

It is important to understand, these are but examples of many cases where the exercise of balancing Articles 8 and 10 has been undertaken by the courts.[488] Regardless how these two rights are balanced in a given case neither right should automatically be favoured. The court in *Campbell v MGN* [2004] acknowledged that:

> 'Since neither article 8 nor article 10 has pre-eminence over the other the court has to consider the proportionality of the proposed interference with each right in turn, weighing those features which enhance the importance of each right in the particular case.[489]

The courts have tended to employ a common set of principles when undertaking the balancing exercise, regardless of the facts of a specific case.[490] These principles were helpfully reaffirmed by the ECtHR in the recent decision of *Axel Springer AG v Germany* (2012).[491]

The court initially outlined some ancillary matters relevant to the balancing exercise, reaffirming that both Articles 8 and 10 are of equal importance and that the margin of

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[487] 'Press 'need to act' after Leveson', *BBC News UK,* 30th November 2012 <http://www.bbc.co.uk/news/uk-20551634> accessed 2nd January 2013.
[488] See for example *A v B & C* [2003] Q.B. 195;*Campbell (n 470)*;*McKennit (n 408)*; *Guardian News and Media Ltd. Re* [2010] UKSC 1 (SC);*Mosley v United Kingdom* (2011) 53 EHRR 30.
[489] *Campbell* (n 470).
[490] *A v B & C* (n488).
[491] *Axel Springer* (n482).

appreciation, that is the element of latitude given to states in their implementation of these rights, should be equal for both Articles.[492] It also noted that freedom of information allows for a degree of embellishment by the media when imparting information. It is not for the Court to ascertain what particular style of reporting is appropriate in a given case.[493]

In relation to the substantive balancing exercise the court stated that the ability of any photographs or articles published by the media in contributing to a debate of general interest, was an essential criterion.[494] Indeed the court has actually gone further on a number of occasions in stating that public interest is the decisive factor in the balancing exercise.[495] Furthermore, a factor of particular relevance in relation to the anonymity debate interest is that the court has considered there to be a public interest in the full reporting of criminal proceedings.[496]

Emphasis must also be placed on the role of the person concerned and which activities they were undertaking when their right to privacy was violated. In furtherance of this principle a distinction will be made between private and public individuals, such as politicians, celebrities, or royalty. An individual unknown to the general public may have their right to privacy upheld in the same circumstances where a public individual may not.[497] It is submitted that this factor would fall in favour of rape defendants and rape complainants who are generally individual's unknown to the general public.

Consideration should be given to how the individual claiming privacy acted prior to the publication of the information or whether the picture or information had already appeared in earlier publications,[498] whether the information was obtained honestly by the media and 'in accordance with the ethics of journalism'.[499] The court should also focus on what lead to the information being published and whether the information was disseminated to a wide or a limited audience. The Court in *Springer* then asserted

[492] *Axel Springer* (n482) para. H16.
[493] *Axel Springer* (n482) para. 81.
[494] *Axel Springer* (n482) para. 90.
[495] *Guardian News and Media Ltd. Re* [2010] UKSC 1 (SC), para. 49.
[496] *White v Sweden*(2008) 46 EHRR 3, para. 29.
[497] *Axel Springer* (n482) para.91.
[498] *Axel Springer* (n482) para. 92.
[499] *Axel Springer* (n482) para. 93.

that attention should be given to the sanctions imposed by virtue of the right that was interfered with.[500]

One final factor which it is submitted should be taken into account when undertaking the balancing exercise, is whether the dissemination of information included photographs. This is because the photographs can be particularly intrusive to an individual's privacy. The Court in *Theakston v MGN Limited* [2002] acknowledged that:

> 'Courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed'.[501]

The recent shift of the Court's jurisprudence, suggesting a tendency to favour freedom of expression, brings an element of uncertainty when assessing how the Article 8 and 10 balance would be likely to fall in relation to rape complainants and defendants. However *prima facie* neither right should automatically be favoured: cases turning instead on how their specific facts relate to the factors set out in *Springer.* For these reasons, a relatively accurate assessment can still be made for the purposes of the current debate.

4.4.2.1. Rape complainants, rape defendants and the balance of Articles 8 and 10

The anonymity debate is undoubtedly an issue of public interest, as evidence by the ongoing debate, resulting in the questions posed in this current thesis.[502]Additionally the information imparted, upon which a rape complainant or defendant's claim to privacy is based is criminal proceedings in a rape case. The Court has clarified that there is a public interest in the full reporting of criminal proceedings[503] and that this factor should be decisive in the Article 8 and 10 balancing exercise. Both of these factors are therefore favourable to the media's Article 10 human rights, as opposed to the privacy rights of either party in a rape case.

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[500] *Axel Springer* (n482) para. 96.
[501] *Theakston v MGN Limited* [2002] EWHC 137, para. 78.
[502] See chapter 2.1 for further discussions of the popular arguments relating to the anonymity debate.
[503] *White* (n496).

In all but exceptional circumstances rape complainants and defendants are both private individuals and thus could expect a higher degree of privacy than public figures could in the same situation. Nonetheless, the situation surrounding which, any media publications derive, is the public legal process. It is posited that it is the public legal process element that corresponds to the aforementioned principle of open justice: a principle which earlier analysis demonstrated, carries substantial weighting against providing either party in a rape case with anonymity.

The factor concerning how the individual claiming a breach of privacy acted before the relevant information was published, raises an interesting issue in relation to the current debate. It is suggested that how a rape complainant and defendant acted before the information was published relates to the act of rape. The ECtHR have held that an individual cannot complain about an impugnation to their reputation, which is a foreseeable consequence of their own actions, such as embarking upon criminal activity.[504] The Court may take the view that both complainant and defendant have done nothing wrong until the defendant is proven to be either innocent or guilty. If that is the view taken, it is likely that the innocent prior conduct of both parties would be likely to increase the weight given to their right to privacy.

However in *Guardian News and Media Ltd Re* [2010] the applicant, upon being suspected of involvement in, or facilitating, terrorism was the subject of an asset freezing order. The applicant wished to remain anonymous during proceedings. In support of an anonymity order in his favour the applicant argued that if his name were publicly disclosed for being suspected of terrorism, some members of the public would treat him as if he was guilty of the offence, as opposed a mere suspect. Yet the Court were unsupportive of this particular line of argument, maintaining that the public were able to distinguish between suspects and conviction criminals.[505] This train of thought could be applied to a case involving a rape defendant who argued that lack of anonymity during legal proceedings would cause some members of the public to treat him as a convicted rapist rather than a rape defendant. Considering the strength of the Court's assertion, reference is once again made to the example of Mark Jackson. This

[504] *Axel Springer* (n 482) para. 49.
[505] *Guardian News and Media Ltd, Re* [2010] UKSC 1, paras. 59-60.

man was acquitted of rape at Exeter Crown Court. Even so one newspaper headline 250 miles away in his hometown read 'Jilted man, 21, raped ex-girlfriend.[506] This headline may imply that in actual fact some members of the public would be likely to assume a defendant's guilt in some circumstances, even without a conviction. However it is submitted that it is equally likely to simply be the product of newspapers writing headlines for commercial gain. If the latter assertion is true then it is submitted that the appropriate remedy would be more ethical self-regulation by the press, rather than anonymity provisions. Both of these assertions are of course speculative to a degree, but it is suggested that by virtue of his at the very least being a suspect, a rape defendant will have a slightly lowered expectation of privacy.

In relation to the circumstances under which the information was obtain by the media, the court would probably accept that in the majority of rape cases much of the information would be obtained from legal proceedings themselves. This factor relates directly to the principle of open justice and the media's role as public watchdog in a democratic society.[507]As such the court would be hesitant to unnecessarily restrict the media's freedom of expression in pursuance its vital role in society. This factor may however be afforded less weight when publications relate to highly embellished or distorted articles such as the above Mark Jackson article,[508] with additional pictures and imparted to a wide audience, hundreds of miles from where the proceedings took place.

Finally the court would take into account the impact that the media's reporting on the legal proceedings would have on both rape complainants and rape defendants who lacked anonymity. It is unnecessary to discuss the potential impact that lack of anonymity could have on both rape complainants and defendants once again, the issues already having been having been addressed in a number of other places in this

[506] See chapter 2.1.9: Youth Justice and Criminal Evidence Bill 1999.

[507] Cited in Agate (n437) 27.

[508] The circumstances when images would accompany media publications relating to parties in a rape case would be limited to a degree. This is because s.41 of the CJA 1925 prohibits the taking of photographs in the courtroom itself or the court's precincts. Thus any pictures taken would have to be taken away the court building and the substantive legal proceedings.

thesis[509] However whilst undoubtedly there is potential for both parties to suffer psychological harm through being either rape complainants or defendants, the distinguishing factor is that rape complainants usually suffer disproportionately to complainants of other crimes. By comparison, no such statement can be made about rape defendants. For these reasons it is submitted that more weight would be attributed to the impact that upholding the media's Article 10 rights would have on a rape complainant, rather than a rape defendant.

When all of these factors are taken together it is suggested that, in relation to the Article 8 and 10 balancing exercise alone, the media's right to freedom of expression would be favoured over the rape defendant's right to privacy. Whether freedom of expression would be favoured over the rape complainant's Article 8 human rights is debatable, due to the significant harm that rape complainants as a group tend to suffer. For this reason it is suggested that it would be more appropriate to consider whether a specific rape complainant's Article 8 rights should be upheld in a given case, rather than providing blanket anonymity to all rape complainants.

4.5 Stage 3 - The margin of appreciation

When deciding whether or not to uphold an individual's Article 8 right to privacy, and when the required balancing acts have been undertaken, there is third element that the ECtHR will consider. This is the margin of appreciation afforded to states when assessing whether limiting an individual's Article 8 human rights is necessary in a democratic society.[510] The margin of appreciation refers specifically to the discretion that the ECtHR affords to national authorities in their exercising of certain actions such as balancing competing human rights.[511] It is unnecessary to conduct a detailed analysis of this principle for the purposes of the anonymity debate. However it is important to briefly consider how wide a margin of appreciation would likely be afforded to the UK with regards to any limitations imposed on a rape complainant or defendant's Article 8 human rights.

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[509] See chapter 2.2, 3.3, 3.4, 4.4.1.1, 4.4.1.2 for a further discussion of the potential impact that lack of anonymity could have on both rape complainants and rape defendants.

[510] Arai. Y 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights'[1998] 16 *Neth. Q. Hum. Rights* 41, 42.

[511] Greer. S '*Margin of appreciation: Interpretation and discretion under the European Convention on Human Rights'*, Human Rights Files No.17, Council of Europe Publishing, Strasbourg, 2000, 32.

Ultimately the ECtHR will look to see whether a state, when interpreting and balancing competing human rights has struck a proportionate balance between any limitation of those rights and the end goal pursued.[512] Furthermore the margin of appreciation afforded to states when interpreting rights that relate to a highly personal area of an individual's life, is significantly reduced.[513] It was earlier posited, that rape and sexual intimacy, which lie at the heart of the anonymity debate, amount to such highly personal areas of an individual's life. The court in *Dudgeon v UK* (1982) reinforced this principle stating that when rights involve a highly personal area of a person's life 'there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8 (2)'.[514] Notably this case also related to an individual's sexual life, although in the context of criminalisation of homosexual activities. On this basis it is suggested that the UK would only be afforded a narrow margin of appreciation in relation to its interpretation of a rape complainant or defendant's Article 8 human rights. This would also be true when the UK undertakes a balancing exercise of Article 8 and 10 human rights.

4.6 Conclusion

This chapter has demonstrated that the balancing act between Articles 8 and 10 is by no means simple. *Prima facie* legal proceedings in a rape case relates to a highly personal and intimate matter, namely sexual intimacy. The fact entails that both rape complainant and rape defendant's Article 8 human rights are engaged. However there are two specific means by which the UK could possibly impose restrictions on these Article 8 human rights. The first is the fundamental principle of open justice and the second is the need to balance the media's Article 10 rights to freedom of expression. In light of the need for open justice and the public interest element involved, the media's right to freedom of expression would carry a heavy weighting in the balancing exercise of the media's Article 10 rights against the Article 8 rights of both parties in a rape case. This is despite the narrow margin of appreciation that would be awarded to the UK in relation to the area of sexual activity.

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[512] Arai (n 510) 44.
[513] Marshall. J, 'Women's right to autonomy and identity in European human rights law: manifesting one's religion' [2008] *Res Publica* 177, 185.
[514] *Dudgeon* (n398) para. 52.

Whilst it is not disputed that a rape defendant may experience a level of distress or harm during their legal process, there is nothing to distinguish rape defendants as a group from defendants of other crimes. Furthermore whilst a defendant is a private individual, and as such, can expect a greater level of privacy than a public figure generally would, he has at least been suspected of some unlawful activity. This acts to limit his legitimate expectation to privacy to a degree and further pushes the Article 8 and 10 balancing exercise unfavourably against his right to privacy. Furthermore it has been held that there is a legitimate public interest in reporting on legal proceedings. For all of these reasons it is submitted that blanket anonymity in order to protect a rape defendant's Article 8 right to privacy is unnecessary.

By comparison, the balance of Article 8 and 10 rights may lie more favourably towards rape complainants due to the specific stigma of being a rape complainant, which is distinct from complainants of other offences. Nonetheless it is furthered that when balanced solely against freedom of expression, a rape complainant's right to privacy would not have sufficient weight in most cases to prevail: therefore not warranting blanket anonymity for all rape complainants. However when the inherent difficulties of being a rape complainant are also balanced against the principle of open justice it is suggested that their right to privacy would necessitate a derogation from open justice. On this basis it is suggested that anonymity provisions for rape complainants are necessary in order to uphold their Article 8 right to privacy.

Chapter 5 The right to freedom of expression: questioning anonymity provisions and Article 10

5.1 Introduction

Article 10[515] ECHR governs the right to freedom of expression.[516] Whilst Article 10 is important in its own right, it is also closely associated with other substantive rights.[517] Examples include the right to freedom of assembly[518] under Article 11 ECHR[519] and freedom of thought, conscience and religion[520] under Article 9 ECHR[521]. The importance of Article 10 has been reinforced through both European and domestic jurisprudence[522] and academic discussion by reference to its integrity to social progress, democracy and even to the personality of state citizens.[523] It is argued that '[W]ithout a broad guarantee of the right to freedom of expression protected by impartial and independent courts, there is no free country, there is no democracy'.[524]

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[515] Incorporated into UK domestic law by the HRA 1998, Sch1, Art 10.

[516] See Flaus. J. F, 'The European Court of Human Rights and the Freedom of Expression' [2009] *Indiana Law Journal* 809, 809: where 'freedom of expression' is summarised as including expression of an opinion, imparting information and receiving information.

[517] Macovei. M, *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights',* Human Rights handbooks, No. 2 (2nd edn, Directorate General of Human Rights, Council of Europe, Strasbourg, 2004) 6.

[518] See for example *R (on the application of Gallastegui) v Westminster City council* [2012] 4 ALL ER 401; *City ofLondon Corporation v Samede and others* [2012] 2 ALL ER 1039.

[519] Incorporated into UK domestic law by Sch 1, Art 11 HRA 1998.

[520] See for example *RT (Zimbabwe) and others v Secretary of state for the Home Department; KM (Zimbabwe)(FC) v Secretary of State for the Home department* [2012] UKSC 38.

[521] Enshrined into domestic law by HRA 1998, Schedule 1, Art 9.

[522] *R v Legal Aid Board, ex p KaimTodner* (a firm) [1998] 3 ALL ER 541; *Reynolds v Times Newspaper Ltd (1999)* 7 BHRC 289, para.301, per Lords Nichols of Birkenhead.

[523] See for example Robertson, G. Nicol, A, *'Media Law'* (5th edn, Penguin Books, London, 2007) 44; *Handyside v UK* (1979-80) 1 EHRR 737; *Lingens v Austria* [1986] ECHR 9815/82; *Sener v Turkey* (2003) 37 EHRR 34.; *Maronek v Slovakia* [2001] ECHR 32686/96;*Financial Times Ltd and others v United Kingdom* (2010) 50 EHRR 46.

[524] Frowein, J. 'Freedom of expression under the European Convention on Human Rights', *Monitor/Inf* (97) 3, 1997, Council of Europe,<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=321883&SecMode=1&DocId=584134&Usage=2> accessed 12th May 2012.

Equally, it is indisputable that freedom of expression underpins a cornerstone of our legal system, the principle of open justice.[525] One of the most efficient means of achieving open justice is by ensuring that the popular media can freely report on all nature of legal proceedings and that the information can be imparted to the public. For these reasons the media are considered to play a fundamental role in furthering the realisation of Article 10 rights and there is a positive obligation imposed upon the state to ensure that the right to freedom of expression is upheld in all but the most limited circumstances.[526] When the ECHR was enshrined into domestic law by the HRA 1998 there was a general understanding that domestic courts would find in favour of freedom of speech.[527] Termed the 'free speech principle', it was based on the premise that liberty was best ensured through unrestricted speech, regardless of content, because 'in a free market of ideas and opinions the good will triumph over the bad'.[528]

With this in mind, the question to be answered in the immediate chapter is how Article 10 affects the anonymity debate. The question has already been addressed to some degree in the preceding chapter when considering how a rape defendant and complainant's Article 8 right to privacy should be balanced against the media's Article 10 right to freedom of expression. This feature of Article 10 human rights will not be repeated in this chapter, apart from where necessary for the purposes of clarity. Instead there will be a great focus placed upon Article 10 as a substantive right, the circumstances in which the state can justify limiting this right and how freedom of expression may impact upon the anonymity debate. When addressing potential limitations, consideration will be given to any rights against which freedom of expression must be balanced. In the context of this chapter it will be the rape defendant's Article 6 human right to a fair trial.

An appropriate starting point is to acknowledge that for the purposes of the anonymity debate, in addition to rape complainants and defendants, Article 10 necessarily requires the rights of two additional parties to be taken into account: the popular

[525] For additional discussion on the principle of open justice see chapter 2.3.
[526] Agate (n437) 28; White (n437).
[527] Unless the limitations set out in Art 10(2) ECHR apply.
[528] Robertson (n523) ix.

media and the general public.[529] As will duly become apparent, the media, as 'speakers of information' *prima facie* have a right to collect and impart information, and the general public as 'hearers of information', a corresponding right to receive that information.[530] For ease of discussion the 'media' will be referred to generically when discussing Article 10 human rights throughout this chapter. Naturally that right would extend to the reporting of legal proceedings and the legal process in rape trials. In addition the right to impart and gain knowledge of the legal proceedings falls directly under the auspice of the open justice principle, the fundamental importance of which has been emphasised by Zuckerman.[531]

Nevertheless Article 10 is a qualified right, subject to limitations[532] and as such may be balanced against other competing human rights where necessary.[533] For the purposes of the anonymity debate it is asserted that potential conflicts arise in relation to the rape complainant and defendant's right to a private and family life[534], the rape complainant's right not to be subject to inhuman and or degrading treatment[535], the rape defendant's right to a fair trial[536], and more generally the right of both parties in a criminal rape case not to be subjected to discrimination.[537] Thus when freedom of expression conflicts with any of the aforementioned rights, the court must balance the competing rights against one another to assess which right should prevail in a given circumstance.

The remainder of this chapter is split into two distinct parts. The first considers the definition and scope of Article 10 human rights, including practical examples of how both the ECtHR and domestic courts have interpreted freedom of expression. The

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[529] Leach. P *'Blackstone's Human Rights Series: Taking a case to the European Court of Human Rights'* (2nd edn 2005, Oxford University Press, Oxford 2005) 321.

[530] Ramsay. M 'The status of hearers' rights in freedom of expression' [2012] 18(1) L.T, 31, 31.

[531] Zuckerman (n 435) Zuckerman contends that the importance of open justice was highlighted by Lord Neuberger M.R, who gave the 2011 Judicial Studies board Annual Lecture on the topic. Further reference to lord Neuberger's lecture can be found in chapter 2.3.

[532] Bonner. D, Fenwick. H, Harris-Short, 'Judicial approaches to the Human Rights Act' [3003] *ICLQ,* 549, 566.

[533] Macovei (n517): chapter 1.2 contains further discussion of the distinction between qualified and unqualified human rights.

[534] Article 8 ECHR, incorporated into UK domestic law by HRA 1998, sch1. Article 8.

[535] Article 3 ECHR, incorporated into UK domestic law by HRA 1998, sch1. Article 3.

[536] Article 6 ECHR, incorporated into UK domestic law by HRA 1998, sch1. Article 6.

[537] Article 14 ECHR, incorporated into UK domestic law by HRA 1998, sch1. Article 14.

second focuses on the specific way in which the right to freedom of expression may conflict with the competing human rights of either party in a rape case.

5.2 Defining freedom of expression

Article 10 ECHR provides:

> 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 authorities 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 or 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.

Article 10(1) defines the substantive human right to be protected whilst 10(2) details the limitations that may be imposed upon freedom of expression and the circumstances in which a state may legitimately interfere with the exercise of an individual's Article 10 rights. Notably Article 10(1) places specific duties and responsibilities upon an individual in exercising their freedom of expression.[538] This positive duty is absent from the wording of all other ECHR human rights.[539] It is argued that the specific reasoning behind this requirement is to acknowledge the 'distinctive identity' of freedom of speech and to 'prevent the irresponsible uses of democracy.'

[538] Merris. A, 'Can we speak freely now? Freedom of expression under the Human Rights Act' [2002] *EHRLR* 750, 750-751.
[539] Flaus (n516) 810.

Indeed this later need is, in part, protected by the role of the media as 'public watchdog' in a democratic society.[540]

5.2.1 Explaining the ambit of Article 10 (1)

When considering whether the right to freedom of expression will prevail over other rights in a given circumstance, the necessary starting point is to assess whether the substantive human right contained within Article 10(1) is engaged. This asks the question whether the form of expression and the person either imparting, or receiving freedom of expression falls under the auspice of Article 10(1). It is asserted that the current bank of jurisprudence demonstrates that Article 10(1) is engaged with relative ease.[541]

Notably Article 10(1) provides that *everyone* is entitled to freedom of expression. This wording suggests Article 10 is fully comprehensive and intended to uphold the rights of all citizens. It is a suggestion substantiated through the jurisprudence of the ECtHR and has been found to extend both to legal[542] and natural persons.[543] Examples of persons who have fallen within its scope, have included legal personalities,[544] lawyers,[545] members of the civil service,[546] people partaking in military covert operations[547] and the media.[548] However, a state may restrict an individual's freedom of expression when it relates to the political activity of aliens.[549]

The forms of expression covered by Article 10(1) have been construed in an equally generous manner. This is assisted by the fact that the convention provides for three forms of free speech as opposed to one:[550] the freedom to hold opinions, to impart

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[540] *ThorgeirThorgeirson v Iceland* (1992) 14 EHRR 843, para.63; *Goodwin v UK* (1996) 22 EHRR 123, para 3(a); *Stoll v Switzerland* (2008) 47 EHRR 59, para. 5.
[541] Merris (n538) 751.
[542] An example of a legal person would be a limited company whilst a natural person would be an individual person.
[543] Nicol, A. Millar, G. Sharland, A. *'Blackstones's Human Rights Series: Media Law & Human Rights'* (Blackstone's Press Limited, London, 2001) 13.
[544] *Autronic AG v Switzerland* (1990) 12 EHRR 485.
[545] *Schopfer v Switzerland* (2000) 33 EHRR 845, para. 33, 47.
[546] *Vogt v Germany* (1996) 21 EHRR 205, paras.41-44; *Ahmed v UK* (1998) 29 EHRR 1, para.70(d).
[547] *Hadjianastassiou v Greece* (1993) 16 EHRR 219.
[548] Mosley (n488) para. 114.
[549] See the ECHR s.16 which states that 'Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens'.
[550] Flaus (n516) 810.

information and ideas and a corresponding right to receive information and ideas. Whilst the ECtHR has failed to define an exhaustive list of activities that would fall within Article 10(1) previous arguments on behalf of the contracting state arguing that a specific form of expression doesn't fall within 10(1) are usually met with failure.[551]

The reach of Article 10(1) has extended to forms of expression as diverse as sending pornographic images, [552] partaking in political protest, [553] holding political opinions, [554] internet 'blogging', blasphemous films, [555] posting leaflets [556] and newspaper articles.[557] Notably there is no specific test that a specific form of expression must satisfy in order to be afforded the protected of Article 10(1).[558]

One should also appreciate that freedom of expression covers both imparting and receiving information and has potential implications for the anonymity debate. If rape complainants and or rape defendants received blanket anonymity it would severely restrict or prevent in their entirety the media's publication of information surrounding the legal process in rape cases. *Prima facie* this would engage both the media's Article 10(1) right to disseminate the information and also the general public's right to receive that information. The two-pronged reach of Article 10(1) was confirmed in *Open Door Counselling and Dublin Well Woman Centre v Ireland* (1992). This case involved the implementation of an injunction that prevented a counselling centre publishing leaflets about abortion. The Court allowed two women of childbearing age to become party to the proceedings. Whilst neither of the women were pregnant, as hearers of the information, they could both be affected by implementation of an injunction preventing publication of the leaflets. Their Article 10(1) right to freedom of expression was therefore engaged.[559]

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[551] Nicol (n543).
[552] *Miss C Henderson v The London Borough of Hackney, The Governing Body of Haggerston School, The Learning Trust* (2009) WL 5386942.
[553] *R (on the application of Gallastegui) v Westminster City Council* [2013] EWCA Civ 28, para. 3.
[554] *Lopes Gomes Da Silva v Portugal* (2002) 34 EHRR 56, para. 1.
[555] *Wingrove v United Kingdom* (1997) 24 EHRR 1, para. 1.
[556] *Arrowsmith v United Kingdom* (1981) 3 EHRR 218, para. 78.
[557] See for example *BladetTromsø and Stensaas v Norway* (2000) 29 EHRR 125.
[558] Merris (n538) 751.
[559] *Open Door Counselling and Dublin Well Woman Centre v Ireland* (1992) 18 BMLR 1.

That said, the right to receive information under the ECHR does not currently impose a positive obligation upon the state to release particular government information to the public,[560] although this situation is on the cusp of changing.[561] Rather it covers the situation where a willing information giver such as the media, is prevented from imparting that information to a receiver such as the general public.[562] This may, subject to the limitations set out in Article 10(2), be a violation of the receiver's right to receive information. By application of these principles to the anonymity debate it can be said that both the media and the general public in a rape case could claim that by allowing parties in a rape case to have anonymity, the UK *may* be violating their Article 10 right to freedom of expression. At the very least it is submitted that the media and general public's rights to freedom of expression would be engaged, thus satisfying Article 10(1).

5.2.2 The special position of the media in relation to article 10 and the margin of appreciation

Before addressing the factors set out under 10(2), when a state may legitimately curtail freedom of expression, it is important to briefly consider why the media's freedom of expression is of particular importance. This is because of the significant weight that the media's freedom of expression may have in the context of the anonymity debate, when balanced against any competing rights of either rape complainants or defendants. Because the margin of appreciation awarded to states when balancing Article 10 against other competing rights is influenced by the importance of the media, this point is addressed here for ease of understanding.

Freedom of expression is one of the fundamental principles of a democratic society.[563] The media therefore plays an important role as 'public watchdog'[564] through its utilisation of freedom of expression to impart information to the general public. Additionally a significant proportion of the information received by society from the

[560] *Leander v Sweden* (1987) 9 EHRR 433, para.74; Gaskin v UK (1990) 12 EHRR 36, para.52; *Guerra and Others v Italy* (1998) 26 EHRR 357, para. 53.
[561] See generally Hins. W, Voorhoof. D, 'Access to state-held information as a fundamental right under the European Convention on Human Rights' [2007] *ECL Review* 114.
[562] Fenwick, H. Phillipson, G, 'Media Freedom under the Human Rights Act' (Oxford University Press, Oxford, 2006) 44. See also *Autronic AG v Switzerland* (1990) 12 EHRR 485.
[563] *ThorgeirThorgeirson* (n540).
[564] *Axel Springer* (n482) para. H15(2).

media, is of political value, thereby assisting in an individual citizen's relationship with the state.[565]

The media also plays an important role in furthering the principle of open justice.[566] This role was considered in the previous chapter.[567] The necessity of open justice was confirmed by the court in *Donald v Ntuli* [2010], acknowledging that open justice should not be circumvented in circumstances, other than those strictly necessary in ensure the correct administration of justice.[568] Furthermore, a key attribute of open justice is that courts administer justice publicly, ensuring that the process is transparent and visible to all.[569] As such, the right to a public and fair hearing, is at least in theory, ensured through the media's role in reporting on the legal process.[570] This factor it is submitted, will be a key point of discussion when addressing the balancing exercise of the rape defendant's Article 6 human right to an open and fair trial, against the media's Article 10 rights to freedom of expression.

It is perhaps for all of the aforementioned reasons that ECtHR has held that the duty to impart information extends 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'.[571] Information regarding legal proceedings in a rape case may fall under the latter category of offensive, shocking or disturbing information due to the intimate and unpleasant nature of the offence. Subject to the limitations set out in Article 10(2) the media's ability to report on such proceedings may engage competing human rights of rape complainants and or rape defendants who lacked anonymity during the legal process.

Journalistic freedom of expression also takes into account the possibility that 'a degree of exaggeration or even provocation' may be involved in the publication produced,[572]

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[565] Chrisite. G, 'Freedom of expression and its competitors' [2012] C.J.Q 466, 472.
[566] Zuckerman (n435).
[567] See chapter 4.4.1.2.
[568] *Donald v Ntuli* (Guardian News & Media Ltd intervening) [2010] EWCA Civ 1276, para. 52.
[569] Zuckerman (n435) 225.
[570] Davis. H, 'The rights approach to the right to a public hearing' [2010] *PL* 11, 16.
[571] *ThorgeirThorgeirson v Iceland* [1992] ECHR 13778/88, para. 63. See also *Filipović v Serbia* (2009) 49 EHRR, para. 53.
[572] *White v Sweden* [2007] EMLR 1, para. H12(4)

although acceptable limits must still be maintained.[573] This fact when taken together with the qualified nature of Article 10 naturally requires a margin of appreciation to be applied when states balance Article 10 with other competing human rights.[574] When considering the margin of appreciation in relation to Article 10[575] specific focus has been placed upon the subject matter of the information.[576] Additionally the court in *Handyside v UK* (1979-80) offered some valuable guidance. The Court opined that state authorities were generally in a better position than European judges to make the appropriate balance of Article 10 with other competing rights.[577] Whilst this did not provide national authorities with an unfettered discretion:

> '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…. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.[578]

The paragraph suggests that due to the importance of the media's freedom of expression, states should only be prepared to limit those rights when it is justifiable, being proportionate to the aims pursued.[579] This interpretation has subsequently been confirmed in more recent judgments.[580] Undoubtedly the margin of appreciation is one element favourable to the media in considering whether to uphold their freedom

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[573] *Prager and Oberschlick v Austria* (1996) 21 EHRR 1, para.34 and 38.

[574] Spielmann. D, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', *Centre for European Legal Studies, Working Paper Series*, University of Cambridge Faculty of Law, February 2012, 6.

[575] The margin of appreciation refers to the leeway afforded to states by the ECtHR, when they are carrying out the obligations placed upon them by the ECHR. See Benvenisti 'Margin of Appreciation, Consensus, and Universal Standards' [2009] 31 *International law and Politics* 843-854, 843. The margin of appreciation doctrine is essentially a degree of discretion given to states by the ECtHR, in the states resolution of conflicting individual and national interests.

[576] Filipova.V, 'standards of protection of freedom of expression and the margin of appreciation in the jurisprudence of the European Court of Human Rigths' [2012] *Cov.LJ* 2012, 64, 67.

[577] *Handyside* (n523) para. 49.

[578] *Handyside* (n523) para. 49.

[579] Spielmann (n574).

[580] See for example *Goodwin* (n540) para. 60(4); *Nilsen and Johnsen v Norway* (2000) 30 EHRR 878, para.1(b); *Sánchez v Spain* (2012) 54 EHRR 24, para. 34.

of expression. However the current focus is freedom of expression in relation to the anonymity debate. The reader may recall from the previous chapter, where the balance of the media's freedom of expression against the rape complainant and defendant's right to privacy was considered. In assessing the margin of appreciation awarded to a state when balancing the rape complainant and defendant's Article 8 human rights, it was argued that the margin of appreciation would be a narrow one. This was due to the narrow margin awarded to states when interpreting rights linked to a highly personal area of someone's life.[581] Sexual activity and sexual offences were asserted to be one such area.[582] As with freedom of expression, the privacy of the parties in rape cases is also a circumstance when states should only limit rights when is truly necessary and proportionate. If a case arose where privacy rights for parties in a rape case conflicted directly with the media's freedom of expression to report on those legal proceedings, it is submitted that the states would have similar margin of appreciation in each case, due to the importance of both rights. Ultimately in assessing which right prevailed, a delicate balancing exercise would be conducted.[583]

Notwithstanding the evidential importance of upholding the media's right to freedom of expression in all but the most necessary of circumstances, the list of 'restrictions' whereby a state may legitimately derogate from or withhold Article 10 rights is actually longer than it is for any other Article within the ECHR.[584] These represent the 'qualified' aspect of Article 10 set out in Article 10(2).

5.2.3 The limits set by Article 10(2)

The number of factors set out in Article 10(2) is substantial and a detailed analysis of each one is outside the ambit of the current debate. Rather it is proposed to address the potential limitation contained within Article 10(2) by using the same approach as taken by the ECtHR.[585] This requires a state to pass a three-fold test when assessing whether limitations imposed by Article 10(2) are permissible.[586] Firstly, the

[581] Marshall (n513).
[582] See chapter 4.5.
[583] See chapter 4.4.2.1 for a discussion of how Articles 8 and 10 should be balanced for the purposes of the anonymity debate.
[584] White (n 437) 433.
[585] See also *Da Haes and Gijsels v Belgium* (1998) 25 EHRR 1.
[586] Tierney (n 460) 422.

interference must be prescribed by law, secondly the interference must have been implemented to uphold one of the aims contained within Article 10(2) and thirdly the interference was necessary in a democratic society.[587] Due to the focus of the current debate, the second criterion of the test will be whether the restriction is necessary to protect the rights of others: namely the rape defendant's right to a fair trial.

5.2.3.1 'Prescribed by law',

The requirement that any limitation to freedom of expression under Article 10(2) must be prescribed by law means that any proposed restriction on Article 10 rights must have a clear basis in domestic law. Often this requires a statutory law enacted through Parliament,[588] but regardless the law in question must have enough precision to allow the general public to know how to regulate their actions.[589] Furthermore, as was previously acknowledged in the context of Article 8 human rights, a state will have difficulty reasoning that a particular derogation of rights under Article 10(2) had a legal basis where there is no clear legislation to demonstrate that is so.[590]

Even so, as long as an applicant's Article 10(1) right to freedom of expression is engaged it is rare for the ECtHR to find that the Article 10(2) limitation is not prescribed by law. [591] What is 'prescribed by law' has even extended to Article 10(2) limitations on grounds such as offensiveness, public sensitivity and decency. In upholding this principle the court in *R (Prolife Alliance) v British Broadcasting Corpn*[2002] stated:

> '[T]he Strasbourg court accepts that laws whose subject matter touches areas of subjective judgment where public opinion may shift, cannot be expected to be rigid or over-precise'.[592]

Notably the form of expression involved in this case was the television screening of aborted fetuses during a party political broadcast.

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[587] Tierney (n460) 422.
[588] Macovei (n 517) 30.
[589] Ovey. C 'Human rights- freedom of expression-interference "prescribed by law"' Crim L.R. 185, 185; *Sunday Times v UK*(1979-80) 2 EHRR 245, para. 49.
[590] See for example *Malone* (n 424).
[591] Merris (n538) 753.
[592] *R (Prolife Alliance) v British Broadcasting Corpn*[2002] EWCA Civ 297, para. 24.

Rare examples of where Article 10(2) restrictions have been found to not be prescribed by law do exist. In *Hasham v UK* (2000) the applicants had disrupted a foxhunt by shouting at the dogs and blowing a horn. A hearing at the magistrates court found that whilst the applicants were not guilty of breach of the peace, due to fact that they had not acted violently or threatened violence, they had acted *contra bono mores* or 'against good morals'. The applicants were duly bound over to behave well for the next year.[593] However, when the case came before the ECtHR the Court considered that there had been a breach of the applicant's Article 10 human rights. This was because the term 'to be of good behaviour' (defined in domestic law as 'behaviour which was wrong rather than right in the judgment of the majority of contemporary fellow citizens) was not sufficiently clear to ensure the applicants knew how they should behave in the future, and therefore could not be prescribed by law.[594]

It is submitted that the requirement for a case to be prescribed by law can be applied to the anonymity debate with relative ease. Currently rape complainants have anonymity during the legal process and for the remainder of their lives. The legal provisions both providing anonymity[595] and detailing the limits upon the media's freedom of expression[596] is clearly set out in the SOAA 1979. If journalists remain unclear on the restrictions imposed upon them then, further clarity can be gained from the Editors Code of Conduct (ECC)[597] s11 'Victims of sexual assault', which essentially paraphrases the wording of the SOAA 1979. Thus unlike the exception contained within *Hasham,* it is submitted that limits on freedom of expression, required to provide rape complainants anonymity *does* have a basis in domestic law that is clear enough for individuals' working in the media to understand, particularly when reinforced through the EEC. It would therefore meet the 'prescribed by law' criteria. Evidentially, it is not possible to speculate on the wording of future legislation.

[593] *Hashman and Harrup v UK* (2000) 30 EHRR 241, paras. 4-7.
[594] *Hashman* (n593)paras. 55-57; See also *Herczegfalvy v Austria* (1993) 15 EHRR 437, para. 94. In this case, staff having an unfettered discretion to open the mail of patients in a psychiatric unit was considered insufficient to be prescribed by law.
[595] SOAA 1976, s1 and s2.
[596] SOAA 1976, s4.
[597] *Press Complaints Commission*, 'Editors' Code of Practice'<http://www.pcc.org.uk/cop/practice.html> accessed 10th August 2012. This is a code of acceptable conduct which all members of the press are expected to comply with in the course of their profession.

However it is suggested that, were it deemed necessary at a future point in time to provide rape defendants with anonymity, a provision similar in nature to that providing anonymity to rape complainants would also meet the 'prescribed by law threshold'.

5.2.3.2 The restriction is 'necessary in a democratic society'

The second criterion that must be considered when assessing whether a state can limit the media's freedom of expression under Article 10(2) is that the restriction is necessary in a democratic society. This encompasses three interlinked components, as Lord Hope in *R v Shayler* [2002] inferred. Firstly under Article 10(2), 'necessary' had to be read in light of Article 18 HRA 1998. Article 18[598] only permits restrictions for the limitations specifically listed within qualified Articles. Secondly, to be necessary a limitation had to be proportionate to the ends to be achieved. Thirdly the limitation had to be 'necessary' a *per se*.[599] Each of these elements is briefly addressed in turn.

The first requirement is that the restriction imposed on freedom of expression is for one of the specific reasons listed within Article 10(2). In the context of the anonymity debate the proposed limitation is the rape defendant's Article 6 human right to a fair trial. It is submitted that this right is non-contentious and would fall squarely within the Article 10(2) limitation 'for the protection of the reputation or rights of others'. In support of this assertion some examples can be provided. In *Otto-Preminger Institute v Austria* (1994) the Court held that the protection of an individual's Article 9 ECHR right to peaceful enjoyment of their religion pursued a legitimate aim under Article 10(2) for the protection and rights of others'.[600] In the case of *Lehideux v France* (2000)[601] criminal proceedings were taken against the applicants, for a publication that, contrary to French legislation, was deemed to defend crimes of collaboration with the enemy during World War II. The applicants claimed that their criminal conviction was contrary to their Article 10 right to freedom of expression. The ECtHR found that the aim of the French legislation, was to 'protect the rights and reputation of others', namely 'the

[598] Schedule 1, Article 18 HRA 1 'Limitation on use of restrictions on rights' states that 'the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'.
[599] *Regina v Shayler* [2002] UKHL 11, para. 57.
[600] *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34.
[601] *Lehideux and Isorni v France* (2000) 30 EHRR 665.

direct or indirect victims of policy collaboration'.[602]

The second element that should briefly be considered is the notion of proportionality. It is a generally accepted proposition that the phrase, ''necessary'' in a democratic society' introduces an additional requirement of proportionality into a court's assessment of whether a given Article 10(2) interference is proportionate.[603] The court in the *Elloy de Freitas* case held that proportionality in itself involved a three stage test asking whether:

> '(i) the legislative objective is sufficiently important to justify limiting a fundamental right (ii) the measures designed to meet the legislative objective are rationally connected to it and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'.[604]

Furthermore the interference is unlikely to be held proportionate 'unless it "fulfils a pressing social need."'[605] Whilst the principle of proportionality may appear somewhat complex, Leigh asserted that one means of addressing proportionality is to focus on the 'merits and effects of the decision rather than the process by which it was reached'.[606] It is conceded that this approach seems to simplify the application of the proportionality somewhat. Further clarity can be gained via the use of the principle in the *Spycatcher case*: a leading example of where an Article 10 limitation was found not to be proportionate. The UK government applied for an injunction to prevent publication of the book Spycatcher, which contained confidential information, disclosed by a former Crown servant. However due to the book's already widespread publication outside of the UK, the measure designed to protect public security, would have little effect. It was therefore not a proportionate limitation.[607]

The third criterion is that the interference is 'necessary'. The ECtHR stated:

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[602] *Lehideux (n601)* para. 48.
[603] *R (prolife Alliance)* (n592) para. 29.
[604] *Elloy de Freitas Appellant v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others Respondents* [1998] 3 WLR 675, para. 80.
[605] *R (prolife Alliance)* (n592).
[606] Leigh. I, 'Taking rights proportionately: judicial review, the Human Rights Act and Strasbourg' [2002] *PL* 265.
[607] *Attorney General v Guardian Newspapers Ltd (No.1)* [1987] 1 WLR 1248.

> '[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" and that it implies the existence of a "pressing social need"'.[608]

Additionally, it has been posited that social need will indicate a highly compelling or urgent cause such as protecting the public from prejudice, defeating terrorists or ensuing the right to a fair trial.[609] The latter of these potentially 'necessary' limitations is of particular relevance to the right to a fair trial for a rape defendant.

Case examples can be given to assist the reader of what 'necessary' means in practical terms. In *Wingorve v UK,* the ECtHR considered that preventing the publication of a blasphemous film was necessary in a democratic society. This was because the domestic blasphemy laws were designed to protect arbitrary interference with individual rights, of which freedom of religion was one.[610] In *R (prolife Alliance) v British Broadcasting Corporation [2002]* the ECtHR held that restrictions on the publication of a televised party political broadcast, showing images of aborted foetuses was necessary in a democratic society on the grounds that it would offend public feeling.[611]

When assessing the necessity of restricting the limit to freedom of expression, the ECtHR has tended to group types of expression into three broad categories: political, artistic and commercial. It is asserted that these categories represent a hierarchy of importance, with political speech being most highly valued and commercial speech being the least.[612] Furthermore, the ECtHR has defined political speech widely so as to

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[608] *Sunday Times v UK* (n589) para.59; *Handyside*(n 432) para. 48.
[609] Robertson (n523) 46-47.
[610] *Wingrove* (n555).
[611] *R (prolife Alliance)* (n592).
[612] Leigh. I, 'Damned if they do, damned if they don't; the European Court of Human Rights and the protection of religion from attack' [2011] *Res publica* 55, 57. Notably 'expression may fall into more than one category see *Hertel v Switzerland* (1998) 5 BHRC 260.

encompass a variety of circumstances. [613] Of particular importance for the anonymity debate is that political speech has specifically been held to encompass legal proceedings. [614] Thus *prima facie* political speech would extend to cover legal proceedings in a rape case.

A final point to acknowledge in relation to the criterion of necessity is the margin of appreciation awarded to states when deliberating this component. The margin of appreciation in relation to freedom of expression was addressed more fully, earlier in this chapter.[615] However there is one further comment that should be made, namely that the margin of appreciation awarded to states interpreting Article 10 human rights is at its most narrow when interpreting political speech.[616] It is suggested that the reporting of proceedings in a rape case would be one such example of where the margin of appreciation would be employed narrowly.

A number of conclusions can be drawn from the preceding analysis. The first is that theoretically, if limitations upon the media's freedom of expression, by way of legislative provisions providing rape defendants with anonymity, this would meet the requirement of being 'prescribed by law' under Article 10(2). Secondly the criterion of 'necessity' under Article 10(2) may potentially be met by the need to ensure rape defendants receive a fair trial. Thirdly that reporting on legal proceedings in a rape case amounts to 'political speech' for which the narrowest margin of appreciation is awarded to the state when considering whether to limit Article 10 rights. Therefore the final question to pose is whether a rape defendant's Article 6 right to a fair trial would be outweighed by the media's right to freedom of expression.

5.2.3.3 The right to freedom of information and the right to a fair trial, a balancing act

Constrains as to the ambit of this thesis have meant that a full analysis of the Article 6 human right to a fair trial is outside the current range of discussion. However specific

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[613] This has included alleged cruelty to seals (*BladetTromso and Stensaas v Norway* (1999) 29 EHRR 125; litigation; police malpractice (*ThorgeirThorgeirson*(n540); comments regarding lack of emergency veterinary services (*Barthold v Germany* (1986) 13 EHRR 431).
[614] *Sunday Times v UK* (n294).
[615] See chapter 5.2.2
[616] Leigh (n612).

components of the Article are introduced with some brevity at this juncture. This is for the purposes of assessing whether a defendant's right to a fair trial may necessitate limiting the media's freedom of expression to report on the legal proceedings of a rape trial.

There are three aspects of the right to a fair trial, which are of importance in relation to the anonymity debate. These are that all defendants are entitled to a 'fair and public hearing', [617] to be considered innocent until proven guilty[618] and that the press and public may be excluded from all of the trial 'in special circumstances where publicity would prejudice the interests of justice.[619]

Perhaps the most striking element of Article 6 is that a public hearing is actually considered to be an aspect of a fair trial, ensuring that justice is administered publicly and correctly. Doing so ensures that the legal process is transparent and visible.[620] By reporting on proceedings that a defendant in a rape case is involved in, the media performs its duty as public watchdog,[621] checking that the rape defendant is not being subjected to an arbitrary or biased administration of justice. This is one example where lack of anonymity actually upholds the defendant's right to a fair trial, rather than hinders it. As Zuckerman posits, an individual can't accept the principle of open justice to aid their assurance of a fair trial whilst at the same time assisting that the trial takes place 'behind closed doors' or with anonymity.[622] In this instance there is clearly no 'pressing social need' to restrict the media's freedom of expression under Article 10(2).

A second key element of Article 6(2) is that a rape defendant has the right to a presumption of innocence until he is proven guilty. This is a guarantee to the defendant that the trial in court will not commence on the basis that the defendant has already committed the Act.[623] The rape defendant may pose the question of how he can be assumed innocent until proven guilty, if publications regarding the charges,

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[617] Schedule 1, s6(1) HRA 1998.
[618] Schedule 1, s6(2) HRA 1998.
[619] Schedule 1, s6(1) HRA 1998.
[620] *Axel Springer* (n482) para. H15(2);
[621] Zuckerman (n435) 225; See also *Donald* (n 568).
[622] Zuckerman (n435) 225.
[623] Mahoney. P, 'Right to a Fair Trial in Criminal Matters under Article 6 ECHR' [2004] 4(2) *Judicial Studies Institute Journal* 107, 120.

or the preliminary legal proceedings of the rape case, are publicly disclosed by the media prior to trial.

It is asserted that there are substantial merits to this question, particularly when taking into account the degree of provocation or exaggeration that is conceded when media publications are produced.[624] The defendant may therefore argue that the general public and potential jurors in his forthcoming trial may form opinions regarding his guilt before it has been proven. Consequently the general public may assume he was guilty or rape as opposed to being a rape defendant, thus necessitating a pressing social need for his anonymity, and form limitations on the media's freedom of expression. Indeed this argument was considered in the context of the defendant's right to privacy in chapter 4. Reference was made to the case of *Guardian News and Media Ltd, Re* [2010] where, in response to a similar assertion by the application the Court held that the court were able to distinguish between suspects and convicted criminals.[625]

The reader may recall the televised research involving mock jury deliberations in rape cases, discussed in chapter two.[626] One juror noted that:

> '[A] wrong decision would be more serious if found against the defendant as it would destroy a young man's future, whereas if the decision was the wrong one and found him to be innocent, the wrong committed against the woman is already in her past and therefore somehow less of a consideration'.[627]

Whilst this research only represents one individual view it confers a level of sympathy towards rape defendants, as opposed to an automatic assumption of guilt. This factor should be appreciated in tandem with the generally negative perception of rape victims, which is compounded by rape myths.[628] Attention should also be given to the

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[624] *White* (n572)para.H12(4).
[625] *Guardian News and Media Ltd, Re* [2010] UKSC 1, paras. 59-60.
[626] See chapter 2.2.4.2
[627] 'The Case against anonymity for rape defendants' (n259).
[628] See chapter 2.2.3.

desperately low current conviction rates in rape cases.[629] It is not suggested that any of these factors taken alone proves that every rape defendant receives a fair trial. They do however suggest that the defendant, at the very least is not treated unfairly in the trial process. Therefore there lacks any firm evidence that a rape defendant's current lack of anonymity during legal proceedings prejudice's justice in a manner that would be incompatible with his Article 6 right to a fair trial. This also confirms that there is no pressing social need requiring a restriction of the media's Article 10 right to freedom of expression. As a consequence blanket anonymity for rape defendants is not necessary in order to uphold their Article 6 human rights.

5.3 Conclusion

The media's Article 10 human rights to freedom of expression are of fundamental importance in a democratic society. This is particularly so in light of their roles as a public watchdog and in furthering the principle of open justice. *Prima facie* if rape defendants were in receipt of anonymity during the legal process, the legislation enabling that anonymity would meet the criteria to be 'prescribed by law' for the purposes of an Article 10(2) limitation to freedom of expression. However, for the purposes of the current debate the freedom of information that the media would be imparting, is a form of political information, namely proceedings in a rape case. This is the form of expression that is most valued and limitations to such speech must meet a compelling pressing social need. It was questioned whether a rape defendant's Article 6 right to a fair trial would amount to such a pressing social need. However analysis has demonstrated that the media's freedom of expression to report on legal proceedings in rape cases, actually supports a rape defendant's trial to be both public and transparent. Finally the question of whether public identification by the media, prior to a rape trial could violate the rape defendant's right to be deemed innocent until proven guilty. In answering this question it was noted that the court considers members of the public to be able to distinguish between a defendant and a convicted criminal and it was asserted that that was no evidence *per se* that a rape defendant's right to a fair trial was being breached by virtue of his lack of anonymity. The final conclusions drawn were that a restriction of the media's Article 10 human rights is

[629] See Chapter 2.2.1.

unnecessary in order to uphold the rape defendant's Article 6 right to a fair trial, nor is it necessary to impose blanket anonymity to rape defendants in order to uphold those Article 6 human rights.

Chapter 6 Article 14

6.1 Introduction

Article 14 ECHR (Article 14), as enshrined into domestic law by the HRA 1998 states:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.[630]

Initial reading of Article 14 may confuse the reader somewhat as to its correct interpretation and application. on one hand, Article 14 establishes a specific prohibition of discrimination, whilst on the other hand, jurisprudence of the ECtHR has concluded that Article 14 is not a stand-alone right, it is a right that can only be invoked under the auspice of one of the other substantive convention rights.

Article 14 is in fact both of these, as will be explained. However the 'complementary' function of Article 14 means that it is only necessary to introduce it with relative brevity. The intention of chapter 6, is to briefly consider how Article 14, in the context of the anonymity debate, would most likely be implemented in relation to other human rights. It is asserted that the increasing importance of Article 14, as reinforced by jurisprudence of the ECtHR and a limited degree of scholarly debate, has potential implications upon weight given to the competing arguments in the anonymity debate.

6.2 The scope of Article 14 and its interaction with other rights

Article 14 prohibits discrimination of individuals in relation to the effective application of the substantive rights under the ECHR.[631] When assessing whether discrimination may have occurred the ECtHR will follow a two-stage analysis.[632] It firstly considers whether there has been any difference or similarity in the treatment of individuals when placed in an analogous situation to others. If the first question is answered in the

[630] HRA 1998, Schedule 1, Article 14; see also *Wills v UK* [2002] ECHR 36042/97, para. 48.
[631] Richardson (n229) paras. 16-139 – 16-140.
[632] European Commission, *Justice, The Prohibition of Discrimination Under European Human Rights Law*, (European Communities, Luxembourg, 2011) 15.

affirmative then the court will move on to examine whether the state has an objective and reasonable justification for the similarity or difference in treatment employed[633] or of proportionality between the means employed and the ends sought.[634]

To assist an understanding of how Article 14 is applied, an example can be given in relation to the anonymity debate. It is possible that a rape defendant could bring a case before the ECtHR on the basis that his Article 6 right to a fair trial was being breached by virtue of his lack of anonymity during criminal legal proceedings. In association with the alleged breach of an Article 6 right it may also be claimed that the defendant's Article 14 right, not to be subject to discrimination has also been breached. It is submitted that the alleged breach of the Article 14 right would be brought on the basis that rape defendants, as a group, were being treated differently to an analogous group, namely rape complainants, and were therefore facing discrimination.[635] *Prima facie* this approach is supported by the authority of *Hugh Jordan v UK* [2001][636] where it was held that a measure could be discriminatory even when that measure was not specifically aimed at that group, but amounted to indirect discrimination. Discussions in earlier chapters have demonstrated that the purpose of withholding rape defendant anonymity is closely linked with the principle of open and fair justice,[637] as opposed to being *aimed* at discriminating against rape defendants. Thus it would be open for the ECtHR to conclude that rape defendants were being discriminated against, by virtue of their lack of anonymity, even if it were shown that the discrimination was not made on the basis that the group were rape defendants.[638]

Equally, it would be possible for a rape complainant to argue that they were discriminated against contrary to Article 14. Earlier discussions have demonstrated

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[633] Ivana. R, 'Gender Equality Jurisprudence of the European Court of Human Rights' [2008] 19(4) *The European Journal of International law,* 841, 843.

[634] European Commission, Justice, *The Prohibition of Discrimination Under European Human Rights Law* (European Communities, Luxembourg, 2011) 15; Arnardóttir. O, 'Non-discrimination Under Article 14 ECHR: the Burden of Proof' *Scandinavian Studies in Law* (2009-2012) 2; see also *Marckx v Belgium* [1979] ECHR 6833/74.

[635] See chapter 2.2.4.2 where for the purposes of the anonymity debate, the arguments purporting that rape defendants and rape complainants are directly comparable groups, were examined.

[636] *Hugh Jordan v UK* [2001] unpublished, para. 154, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450, (accessed 10th October 2012).

[637] See for example chapter 5.2.3.3

[638] Arnardóttir (n634) 1.

that rape complainants may still suffer severely throughout the legal process, despite their having been given anonymity. Alternatively, consider the scenario where the UK Parliament revoked complainant anonymity in rape cases on the basis that it was no longer deemed necessary. In either instance an individual might take a case to the ECtHR, on the basis that the trauma, stigma and humiliation that they had to endure throughout the legal process, by virtue of being a rape complainant, amounted to inhuman and degrading behaviour, in breach of their Article 3 rights. It is submitted that the likelihood of an individual taking a case to the ECtHR would be far greater where a rape complainant was not protected by anonymity. This is because the likelihood of that individual experiencing extreme suffering would be greatly increased where they were publicly identified as being party to an alleged sexual offence.

In the later example, in association with the substantive right, it may also be claimed that the complainant had suffered discrimination, contrary to Article 14 ECtHR, by virtue of their not being provided with anonymity. However, in this instance it would be on the basis that rape complainants were *not* being treated substantially differently from the analogous group, complainants in other crimes, where justice required it. The need for different treatment arising by virtue of the level of humiliation and trauma that is unique to complainants in rape cases. [639]

6.3 The limits of Article 14

6.3.1 A provision without 'bite'

As the aforementioned examples elicit, Article 14 is designed to complement other substantive rights.[640] It is unsurprising that the provision has been criticised for being merely an accessory right[641] that lacks 'bite',[642] or is even 'parasitic'.[643] It is conceded

[639] See 2.2.4.1 where the arguments that being a rape complainant is humiliating and unique in a way distinct from other crimes, was examined. See also *Thlimmenos v Greece* (2001) 31 EHRR 15 where the ECtHR confirmed that discrimination contrary to Article 14 could arise where justice required that a group received distinct treatment from an analogous group, but where identical treatment was employed.
[640] Richardson (n229) paras. 16-139 - 16-140.
[641] Arnardóttir (n634) 1.
[642] O'Connell. R, 'Cinderella comes to the Ball: Article 14 and the Right to non-discrimination in the ECHR' [2009] 29(2) *The Journal of the Society of Legal Scholars* 211, 211-212.
[643] Whitty. N, Murphy. T, Livingstone. S, *Civil Liberties Law: The Human Rights Act Era* (Butterworths, London, 2001) 404.

that the narrow scope of this Article, only enjoyable in the spheres in which the substantive rights are enjoyed, does severely restrict its scope. [644] Some scholars have therefore been highly critical of Article 14's application. One such proponent is McColgan, whose argument has a direct impact on the anonymity debate whilst also raising questions as to the utility of the ECHR and HRA more generally.[645] McColgan contends that the limiting application of Article 14 has been 'less than satisfactory' having had a particularly negative impact upon women.[646] This is because the narrow ambit of the provision means that too often women are being discriminated against in a manner that would not fall within the ambit of Article 14, albeit in association with another substantive right.

This line of argument raises three specific points in relation to the anonymity debate. Firstly it is possible to posit that if the scope of Article 14 was wider, or if it was transformed into a free standing right, then the state would be forced to put in place more effective measures to protect rape complainants throughout the legal process. In doing so it would theoretically mitigate the need for anonymity provisions to some degree. Secondly it remains possible that the need for anonymity would nevertheless remain because it would be arguable that rape complainants, as a group, face discrimination that is *prima facie* in breach of Article 14 and therefore require anonymity provisions to readdress that inequality. Thirdly it is plausible that a wider application of Article 14 could also require that rape defendant's be provided with anonymity if it were held that they were being treated differently from an analogous group, where that analogous group was rape complainant's. It is submitted however, following the consideration of the potential comparator groups in chapter 2, that the correct comparator group for rape defendants is actually defendants in other criminal cases rather than rape complainants.[647] There is a practical reason behind this assertion, in that defendants and complainants (as witnesses) have very different roles in criminal legal proceedings and it is therefore not possible to directly compare one to

[644] O'Connell (n642) 212.
[645] See chapter 1.2.
[646] McColgan.A 'Women and the Human Rights Act [2000] 51(3) *NILQ* 417, 433; See also Ivana (n633) 842. Ivana, like McColgan maintains the view that ECtHR jurisprudence has largely been impotent in challenging gender discrimination and achieving gender equality.
[647] See chapter 2.2.4.2.

the other. Instead they should be compared to other individuals who are directly comparable, namely complainants or defendants in other criminal cases.

6.3.2 The margin of appreciation

A further means by which the potential scope of Article 14 has been constrained is through the margin of appreciation doctrine.[648] The margin of appreciation doctrine has enabled the European Court to allow a greater degree of discretion to the state in circumstances where the court feels unable to second guess the national judgment.[649] The lack of common approach among member states has been the most prominent factor in influencing the level of scrutiny.[650] In recent years the ECtHR has been less willing to construe the margin of appreciation widely.[651] The margin of appreciation will vary depending on the scope, background and subject matter involved.[652] Hypothetically this could be applied to the margin of appreciation that the ECtHR would afford to the UK if it decided to withhold anonymity from rape complaints and or rape defendants.

It was noted in chapter 2 that the UK's rape conviction rates were found to be the lowest in Europe.[653] Thus if the UK were withholding complainant anonymity, taking into account the scope, subject-matter and background it is likely that it would construe the margin of appreciation narrowly in relation to Article 14 : because the ECtHR should conclude that rape convictions in the UK are lower than in other Member States. Thus, if lack of anonymity was being considered as a potential breach of another substantive right, thereby engaging Article 14, and it was considered that anonymity would help increase conviction rates then the margin would be construed narrowly.

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[648] O'Connell (n642) 212.

[649] These include national security, public morality, planning decisions and where there is no common standard. Notably a lack of common approach between states has been an important factor in determining the ambit of the margin of appreciation given to states.

[650] Ivana (n633) 843-844; See also *Frette v France* [2002] ECHR 36515/97(paras 32-3, 41)[650]where the margin of appreciation doctrine was invoked to prevent a single homosexual man from adopting a child.

[651] See for example *EB v France* [2008] ECHR 43546/02 where it was held that 'only particularly and weighty reasons could justify a distinction on the grounds of sexual orientation'.

[652] *Rasmussen v Austria* [1984] ECHR para.40 and *Inze v Austria* (1988) 10 EHRR 394 para. 45.

[653] See chapter 2.2.1.

By comparison it is suggested that there would be a wider margin of appreciation awarded to the UK in relation to a rape defendant's Article 14 rights. Again this is because emphasis would be placed upon the background and subject matter of the supposed breach. Factors the ECtHR would take into consideration would likely include the principle of open justice and fulfilling the rape defendant's need for a fair and open trial. Most importantly emphasis would be placed on the fact that to date, there lacks the evidence to demonstrate rape defendants suffer disproportionally during the legal process compared to defendants of other serious crimes:[654] their comparator group.

6.3.3 A provision of limited utility?

Despite Article 14 having received substantial criticism, its potential utility for the purposes of the anonymity debate should not be underestimated. Firstly, despite the fact that Article 14 can only be engaged in association with another substantive Article, a breach of that Article does not need to found on the facts of the case for there to be a finding of an Article 14 breach.[655] In these circumstances Article 14 may be engaged where a personal right close to the core of another substantive right has been breached. This ability could be of benefit for either rape complainants or defendants.[656]

Furthermore, although the wording of Article 14 provides a list as to what grounds amount to discrimination, those grounds are not exclusive, but have a degree of flexibility.[657] Finally it should be noted that potentially any instance of discrimination could be addressed under Article 14 regardless of whether it has previously been considered under international human rights law. Findings to date include sexual

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[654] See chapter 2.2.

[655] *Belgian Linguistics Case* [1967] (Applications 1474/62, 1691/62, 1769/63, 1994/63, 2126/64 and 1677/62) 1 EHRR 241para. 283.

[656] See for example *R (On the application of Clift) (FC) v Sec. of State for the Home Department* [2006] UKHL 54.

[657] Wintemute, R. '"Within the Ambit": How Big Is the "Gap" in Article 14 European Convention on Human Rights' [2004] 4 *EHRLR* 366, 371. Wintemute makes reference to the 'ambit' requirement of Article 14, in relation to convention Article's 8-11. He considers that Article 14 could be engaged in association with these Articles on any treatment relating to political or sexual orientation, religion or gender identification. Another example can be found in relation to the ambit of 'property' listened in Article 14. Article 1 of Protocol 12 ECHR, actually refers to the peaceful enjoyment of possession.The Court in *GasusDosier-und Fordertechnik GmbH V TheNetherlands* (1995) 20 EHRR 403 held that possessions were not limited to physical goods, but to qualify under the Article the right or interest had to have an economic value or be of pecuniary nature.

orientation,[658] distinction based on rank,[659] birth out of wedlock [660] and difference in child benefits between aliens with residence permits and those without.[661]

6.4 Substantive equality, Article 14 and its impact upon the anonymity debate

Historically Article 14 has been limited in its ambit, to a formalistic interpretation[662] and as such, has only been effective in dealing with instances of direct discrimination.[663] 'Formal equality' models look for a rationale or justification for any differences. By comparison, during the last decade, the ECtHR has begun to develop a substantive model of 'equality' that focuses on how 'victims' experience the reality of the discrimination, rather than whether the law makes a specific distinction or whether a specific wrongdoer can be identified.[664] In particular, a substantive model provides the opportunity to address systematic oppression and disadvantage by taking as its starting point the understanding that some people, by virtue of their membership of a particular group are subject to discrimination, oppression, or exclusion.[665] In the context of the anonymity debate this reference could be made to the aforementioned argument that women as a group are systematically disadvantaged.[666] Therefore a substantive model of equality under Article 14 would most likely require that rape complainants received anonymity.[667] In light of earlier discussions, the position in relation to rape defendants is somewhat different. At present there remains no substantial evidence to show that rape defendants as a

[658] *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47, para. 28.
[659] *Engel and others v Netherlands* (1979-80) 1 EHRR 647, para. 28.
[660] *Marckx v Belgium* [1979] ECHR 6833/74; *Mazurek v France* [2000] ECHR 34406/97.
[661] *Niedwiecki v Germany* [2005] ECHR 58453/00.
[662] O'Connell. R, 'Substantive Equality in the European Court of Human Rights?' [2009] *Michigan Law Review* 107, 129.
[663] O'Connell (n662)
[664] O'Connell (n622). Notably, some of the most important indirect discrimination cases have involved states providing special education schools for students with language or learning difficulties, where students have been disproportionality from Romani Origin: See *DH v Czech Republic* (2007) 23 BHRC 526; *Orsus v Croatia (2011) 52 EHRR 7* and *Sampanis v Greece* (32526/05) 5 June 2008.The Grand Chamber held that it was not necessary to prove any intention to discriminate in indirect discrimination cases.
[665] O'Connell (n642) 212-213.
[666] Kennedy (n147).
[667] For a comparison of where the court failed to employ substantive equality see: *Anguelova v Bulgaria* (2000) 30 EHRR CD319. But note the partially dissenting opinion of Judge Bonello at paragraph 13 where he stated 'The Court has often risen to the challenge in spectacularly visionary manners, and ought, in matters of ethnic discrimination, to succumb with pride to its own tradition of trail blazing'.

group,[668] or indeed men as a group, are systematically disadvantaged. For this reason the development of substantive equality in relation to Article 14 is unlikely to benefit rape defendants at present.

6.5 Conclusion

Unlike the other Articles discussed in this thesis, this chapter has demonstrated that Article 14's application is dependent upon it being considered in association with another substantive human right. This feature, in combination with the margin of appreciation doctrine, limits its scope. Nevertheless a breach of the substantive human right is not necessary in order for the ECtHR to find discrimination in breach of Article 14. Therefore theoretically Article 14 has the potential to apply to applications brought by rape complainants and/or defendants, in relation to one of the substantive human rights discussed in chapters three to five. By reference to the popular arguments surrounding the anonymity debate it was suggested that rape complainants as a group, would face discrimination contrary to Article 14, if they lacked anonymity. This was especially so when considering their disadvantaged status as a group and in light of more recent ECtHR judgments relating to substantive equality. By comparison, it was also suggested that at present rape defendants who are withheld anonymity would not face discrimination contrary to Article 14, nor are they systematically disadvantaged as a group. However in light of recent high profile sexual offence cases there is the possibility that this position may alter in the future.

[668] It is possible that this will change in the future, particularly in light of the recent high profile historic-sexual offences cases. See chapter 3.4.

Chapter 7 Final conclusions

In 2010 the Conservative-Liberal Democrat coalition proposed to extend anonymity in rape cases to rape defendants. These proposals reignited a long running, highly contentious debate over whether rape complainants and/or rape defendants should receive anonymity during the legal process. Currently only rape complainants receive anonymity. Anonymity provisions necessitate a circumvention of open justice, a cornerstone of the UK's legal system. Any limitations to this principle must be imposed only in the most restricted circumstances.

Arguments in favour of maintaining rape complainant anonymity fall broadly into two groups. Firstly, 'historical arguments' are premised on the idea that male power and dominance has resulted in a patriarchal legal system, made by men, in the interests of men. This reinforces gender inequality within the legal system and society. Kennedy contends that society assumes equality before the law requires a neutral set of rules. In truth, substantive equality entails treating people equally, whilst taking into account differences. The second group, 'rape myths', are widely held societal preconceptions which lay down unspoken criteria to be satisfied in order for a rape to be considered as 'real':

1. The 'real rape scenario' encompassing the necessary circumstances and type of rape required before a rape is considered to be legitimate.
2. 'Preconceptions' that woman commonly lie about being raped.
3. Women actually *want* to be raped.

Deviation from these myths places doubt on the rape complainant's credibility. Cumulatively these myths have led the legal process to be particularly distressing for rape victims, some viewing the legal process as a 'second assault' or experiencing rape trauma syndrome. Resultantly, rape complainants are reluctant to report offences or to endure the legal process, and so attrition during the legal process increases. Such

factors support the position of anonymity for rape complainants during the legal process.

Arguments in favour of rape defendant anonymity are three-fold.

1. Being accused of rape is more serious than being accused of other serious crimes such as murder. Difficulties in proving rape as a crime, leaves a blemish that is impossible to resolve, notwithstanding a subsequent acquittal. Furthermore defendants of other serious crimes receive less media coverage than rape defendants.

2. Rape defendants deserve equality with rape complainants, which would be realised through both parties receiving anonymity. If both parties did have such equality however, women's inequality generally, combined with the severe stigma that rape complainants face, means that formal equality, by anonymity for both parties would not suffice.

3. Defendants should be presumed innocent until proven guilty. Given the stigma attached to being a rape defendant, the public would assume the rape defendant was guilty by his simply being a defendant in legal proceedings. The only means of remedying this would be to provide rape defendants with anonymity.

Give the complexity of the rape anonymity debate this thesis suggested that a human rights perspective may address where the correct anonymity balance should lie. Whilst the same arguments would still be drawn, rephrasing in different terminology could allow a better understanding of competing arguments.

Lack of anonymity in a rape case as a potential violation of either a rape complainant or rape defendant's absolute Article 3 human right, not to be subjected to torture, inhuman or degrading treatment was considered. Anonymity was not a factual scenario that had previously been deliberated before the ECtHR and as such

arguments made would be reliant upon established principles. Nonetheless Article 3 ECHR can adapt to encompass new factual scenarios.

Through analysis of the individual elements of Article 3 it is concluded that lack of anonymity in a rape case would not amount to torture due to the specific purpose and intensity required. The level of humiliation and debasement a rape complaint faces during the legal process however, is distinct from that experienced by complainants of other crimes. Were rape complainants to be withheld anonymity, it may amount to inhuman or degrading treatment in breach of Article 3. Even so, due to differences in how individual rape complainants react to legal proceedings, the necessary threshold to amount to a breach of Article 3 would not be met in many cases. Subsequently blanket anonymity for rape complainants would not be necessary in order to uphold their Article 3 human rights. However anonymity could still be adequately provided in individual circumstances, where the interests of justice required it under existing legislative provisions.

Lack of anonymity for rape defendants would not be likely to violate their Article 3 human rights. There lacks substantive evidence to demonstrate that, unlike rape complainants, rape defendants suffer a level of humiliation or debasement, distinct from that suffered by defendants of other crimes. However following a number of recent, highly publicised, historic sexual offence cases, public attitudes towards rape defendants could alter in the future. If this occurred further research could reassess whether the suffering experienced by rape defendants had altered and whether the lack of anonymity now violated their Article 3 human rights.

Consideration has been given to whether lack of anonymity would be likely to breach a rape complainant and/or defendant's Article 8 right to privacy. Initial analysis concluded that since legal proceedings in a rape case amounted to the highly personal topic of sexual intimacy, the Article 8 human rights of both parties in a rape case would be engaged. Notwithstanding this finding the qualified nature of Article 8 meant that the UK could potentially impose limitations on the right to privacy. Two such limitations of relevance for the anonymity debate were the principle of open justice

and the need to balance the right to privacy against the media's right to freedom of expression.

Blanket anonymity to prevent violations of a rape defendant's right to privacy is considered unnecessary because:

1. On the basis of 'public interest' and the need to uphold open justice in all but the most limited of circumstances, the media's right to freedom of expression would carry significant weighting when balanced against the privacy rights of parties in a rape case.

2. Whilst rape defendants undoubtedly experience distress by virtue of their being a defendant, there is nothing *per se* to distinguish rape defendants from defendants of other serious crimes.

3. Rape defendants are at least *suspected* of having committed a criminal offence, thus pushing the Article 8 and 10 balance further against their right to privacy.

4. There is legitimate public interest in reporting on legal proceedings, and through doing so furthering the principle of open justice.

Assessment of the balance of Article 8 and 10 human rights in regard to rape complainants lies more favorably towards rape complainants. Principally, complainants of other offences do not experience the same level of humiliation suffered by rape complainants. However, when considered solely in terms of the Article 8 and 10 balancing exercise the media's Article 10 right to freedom of expression would nevertheless prevail in most cases. However the specific difficulties of being a rape complainant, when balanced against the principle of open justice, necessitate derogation from that principle. It is concluded that a circumvention of the principle of open justice, through provision of blanket anonymity to rape complainants during legal proceedings, is necessary in order to uphold the rape complainant's Article 8 right to privacy.

Consideration has been given to a rape defendant's Article 6 human right to a fair trial when balanced against the media's Article 10 human rights. The media undertake a

vital role as public watchdog in a democratic society and in furthering the fundamental principle of open justice. Upholding the media's right to freedom of expression is therefore of the upmost importance. Even so, Article 10 is a qualified right and it was argued that if rape defendants were in receipt of anonymity the enabling legal provisions would meet the criteria necessary to be 'prescribed by law', the first criteria to be met for the purposes of limiting freedom of expression under Article 10(2).

However for the purposes of the anonymity debate, the media's freedom of expression relates to reporting on legal proceedings during a rape trial. This form of expression amounts to the imparting of political information: the most valued form of speech that must be curtailed only when there is a pressing social need. It was considered whether the rape defendant's Article 6 human rights to a fair trial represented a pressing social need. Overall conclusions were that rather than impeding the right to a fair a trial, the media's ability to report on legal proceedings actually upholds an important aspect of a fair trial through legal proceedings being both public and transparent.

Public identification by the media, prior to a rape trial was considered as a potential breach of a rape defendant's right to be innocent until proven guilty. The court in *Guardian News and Media Ltd, Re* [2010] was of the opinion that the general public could distinguish between a defendant and a convicted criminal. Additionally, there is no evidence specifically proving that the lack of anonymity is causing a violation of a rape defendant's Article 6 right to a fair trial. Restricting the media's right to freedom of expression should not be mandated in order to preserve the rape defendant's right to a fair trial. Neither is blanket anonymity necessary to protect the Article 6 rights of rape defendants.

In addition to discussion of the substantive Articles, attention was focused on the Article 14 human right to be free from discrimination, which can only be invoked alongside another substantive human rights. This factor, when taken together with the margin of appreciation awarded to states in the interpretation of Article 14, does limit its potential reach. That said, a finding that a substantive Article has been breached is not necessary before there can be a finding that Article 14 has been violated. Article 14

could in theory apply to applications brought by rape complainants or defendants, that their Article 3 and 8, or the defendant's Article 6 human rights had been breached.

When considered in the context of the popular arguments surrounding the anonymity debate, rape complainants as a group would face discrimination in breach of their Article 14 human rights if they lacked anonymity. This is particularly so when taking into account ECtHR judgments focused on the need to implement substantive equality.

Conversely the same considerations, when applied to rape defendants would not entail defendants facing discrimination contrary to Article 14, because as a group rape defendants are not systematically disadvantaged. It is conceded however that the recent rise of highly publicised historical sexual offence cases may see this position change in the future. If this occurs a reassessment of the status of a rape defendant's Article 14 human rights should be undertaken.

The ultimate conclusions drawn from this thesis are that human rights do assist in a clearer understanding of how the competing arguments should be balanced with regards to party anonymity in rape cases. It is furthered that the current position, whereby rape complainants have anonymity during the legal process and rape defendants do not, is the correct position. This is on the basis that the specific humiliation and suffering that rape complainants face during the legal process engages their Article 8 human right to privacy. When balanced against the principle of open justice it is the rape complainant's right to privacy that prevails. Furthermore, when taken in association with Article 8, a rape complainant's Article 14 right to be free from discrimination is also engaged, because rape complainants as a group are systemically disadvantaged in the legal process and a lack of anonymity could breach their Article 14 human rights. Rape complainants require the continuation of statutory anonymity provisions in order to prevent breaches of their Article 8 and 14 human rights. One limit of the current research is a failure to ascertain whether a rape complainant's anonymity needed to be lifelong in order to uphold the aforementioned human rights. This aspect of her anonymity would benefit from some further research in order to clarify the matter.

By comparison there was no evidence produced by this research to support a finding that any of the human rights discussed would be violated if a rape defendant lacked anonymity. There is the possibility that this position may alter in the future following recent highly publicised historical sexual offence cases. If this occurs, further research should be undertaken to reassess the rape defendant's experience of the legal process compared to defendants of other crimes. Also to reassess whether the balancing exercise, undertaken in relation to the rights considered in this research would still be balanced unfavorably against rape defendants.

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