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Judicial discourses about journalism in journalism-related judgments in the United Kingdom (UK) since *Reynolds*

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ABSTRACT

In the 1999 case of *Reynolds v Times Newspapers*, a qualified privilege defence was developed to libel action. However, section 4 of the Defamation Act 2013 abolished the defence and replaced it with a new defence of 'publication on a matter of public interest'. This paper combines n-gram and qualitative approaches to analysing discourses about journalism in 228 journalism-related judgments since *Reynolds*. Findings suggest a fluctuating increase in cases, particularly in those involving defamation and libel, and a rise in non-news organisations as sole or primary defendants. The acknowledgement of journalism's right to freedom of expression in judicial discourses of journalism weakened over time, placing an increasing emphasis on journalism's responsibilities, ethics, and its watchdog role, particularly after 2013. These changes suggest courts' evolving interpretations of journalism and related issues, reflecting legal values that could significantly impact journalistic practices, with alarming implications for media freedom in the United Kingdom.

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KEYWORDS Judicial discourse; N-gram; The *Reynolds* defence; freedom of expression; privacy

Introduction

Judicial discourse intertwines law and language, representing judicial thinking through legal language, usually articulated by judges or legal professionals.[1] It typically occurs in judicial settings but can also arise in ongoing discussions and debates on legal issues within the legal community. It is evident in formal legal communication, such as court judgments, opinions, briefs and judicial interactions. Judicial discourse encompasses the interpretation and application of laws, reasoning, and legal decision-

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[1]Beverley Brown, 'Legal Discourse' in *Routledge Encyclopedia of Philosophys* (Routledge 1998).

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making, illustrating how specific subjects are understood within the realm of law. It also reflects and shapes broader social norms, values, and issues. Therefore, analysing judicial discourse reveals the legal conception of subjects and the influence of prevailing social norms.[2] Legal judgments are often analysed to understand judicial discourse on specific topics, judges' views on subjects, legal principles, judicial reasoning and decisions, and the application of law and legal principles to particular scenarios.[3]

Scholars[4] have examined judicial discourse from various angles.[5] Their studies highlight the central role played by power relations and authority in these legal texts and discourse. Linguistic methods, particularly corpus linguistic methods, have been widely used. A growing (corpus-linguistic) literature explores judicial discourse through examining phraseology in legal texts. Phraseology, an emerging and important concept in corpus linguistics, refers to the study of 'fixed phrases', or lexical co-occurrences, in language.[6] Among others, one approach involves studying n-grams. An n-gram refers to a contiguous sequence of *n* items (*n* means the number of the items; items are words in the present study) in a given text.[7] Studying n-grams can reveal patterns or trends in the use of language in legal texts.

In this study, we conducted an n-gram analysis, supplemented by a qualitative analysis, of judicial discourses about journalism in journalism-related judgments in the United Kingdom (UK) following the 1999 case of *Reynolds*

[2]Peta Broughton, 'Jurisprudence: Discourse Analysis of the Law' (1999) 3 *Southern Cross University Law Review* 136.

[3]See, for example, Stanislaw Goźdź-Roszkowski, 'Signalling Sites of Contention in Judicial Discourse. An Exploratory Corpus-Based Analysis of Selected Stance Nouns in US Supreme Court Opinions and Poland's Constitutional Tribunal Judgments' (2017) 32 *Comparative Legilinguistics* 91; Gianluca Pontrandolfo and Stanisla Goźdź-Roszkowski, 'Evaluative Patterns in Judicial Discourse: A Corpus-Based Phraseological Perspective on American and Italian Criminal Judgments' (2013) 3(2) *International Journal of Law, Language & Discourse* 9.

[4]Mitchel de S.-O.-l'E Lasser, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1994) 104 *Yale Law Journal* 1325; Upendra Baxi, 'Judicial Discourse: Dialectics of the Face and the Mask' (1993) 35(1/2) *Journal of the Indian Law Institute* 1; Terezie Smejkalová, 'Story-telling in Judicial Discourse' (2011) 5 *Comparative Linguistics* 95.

[5]Gaetano Pentassuglia, *Minority Groups and Judicial Discourse In International Law: A Comparative Perspective* (Martinus Nijhoff Publishers 2009); Petra Minnerop and Ida Røstgaard, 'In search of a Fair Share: Article 112 Norwegian Constitution, International Law, and an Emerging Inter-Jurisdictional Judicial Discourse in Climate Litigation' (2021) 44 *Fordham International Law Journal* 847; Vera Lazzaretti, 'Ayodhya 2.0 in Banaras? Judicial Discourses and Rituals of Place in the Making of Hindu majoritarianism' (2023) 32(1) *Contemporary South Asia* 66; Aleksander Peczenik, *On Law and Reason* (Springer 1989); Aleksander Trklja, 'A Corpus Investigation of Formulaicity and Hybridity in Legal Language' in Stanislaw Goźdź-Roszkowski and Gianluca Pontrandolfo (eds), *Phraseology in Legal and Institutional Settings* (Routledge 2017) 89–106; Magdalena Szczyrbak, 'Stancetaking Strategies in Judicial Discourse: Evidence from US Supreme Court opinions' (2014) 131(1) *Sutida Linguistica Universitatis Iagellonicae Cracoviensis* 91.

[6]John Sinclair, *Corpus Concordance Collocation* (Oxford University Press 1991); Stefan Th Gries, 'Phraseology and Linguistic Theory' in Sylviane Granger and Fanny Meunier (eds), *Phraseology. An Interdisciplinary Perspective* (John Benjamins Publishing Company 2008) 3–25; See the discussions in Stanislaw Goźdź-Roszkowski and Gianluca Pontrandolfo (eds), *Phraseology in Legal and Institutional Settings: A Corpus-based Interdisciplinary Perspective* (Routledge 2018).

[7]William B. Cavnar and John M. Trenkle, *N-gram-based text Categorization* (1994) *Proceedings of SDAIR-94, 3rd Annual Symposium on Document Analysis and Information Retrieval.*

v Times Newspapers Ltd[8] to 2024. With this analysis, we aimed to reveal how courts viewed and interpreted journalism and its rights during this period, which can reflect the changes in law and the wider social attitudes towards journalism and related issues such as how freedom of expression or speech (freedom of expression will be used throughout this paper) is balanced with other rights, such as privacy, and contribute to legal research and practices.

In the legal domain, the rights of journalism are often examined within the context of freedom of expression, as this fundamental right empowers journalism to support democracy and serve the public interest.[9] Freedom of expression is heralded as a basic human right that should be protected within the law.[10] There are numerous reasons why freedom of expression is considered of the utmost importance.[11] For example, freedom of expression can allow us to engage in discussion and debate with peers.[12] It also allows us to participate in a democratic society as we can hold public discussions of public issues[13] and therefore contribute towards an informed citizenry.[14] While freedom of expression is clearly of the utmost importance, this does not mean that it is an unlimited right. In some instances, it can be limited for the protection of others.[15] In a number of countries, for example, hate speech, defamation, privacy violations, and other speech-related offenses may limit freedom of speech.[16] Defamatory statements made by individuals may put them at risk of legal action.[17] In the UK, for example, freedom of expression and the limitations on it have been the subject of numerous debates in both academia and judicial discourse.[18]

In the UK, *Reynolds*, a landmark case in the House of Lords, spelled out the rights, responsibilities and roles for journalism.[19] The House of Lords emphasised that journalism that was found to be on matters of the public

[8]*Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609.
[9]Yolande Stolte and Rachael Craufurd Smith, 'Protecting the Public Interest in a Free Press: The Role of Regulators in the United Kingdom' in Evangelia Psychogiopoulou (ed), *Media Policies Revisited* (Palgrave Macmillan 2014); Jacob Rowbottom, 'Leveson, Press Freedom and the Watchdogs' (2013) 21(1) *Renewal* 57; Julian Petley, 'The Leveson Inquiry: Journalism Ethics and Press Freedom' (2012) 13(4) *Journalism* 529.
[10]Eyal Zamir and Barak Medina, *Law Economics, and Morality* (Oxford University Press 2010).
[11]Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005).
[12]ibid.
[13]Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *The Supreme Court Review* 245.
[14]Kevin W. Saunders, *Free Expression and Democracy: A Comparative Analysis* (Cambridge University Press 2017).
[15]Barendt (n 11); H.J. McCloskey, 'Liberty of Expression its Grounds and Limits (I)' (1970) 13(1) *Inquiry* 219.
[16]Barendt (n 11); Susan J. Brison, 'The Autonomy Defense of Free Speech' (1998) 108(2) *Ethics* 312.
[17]Defamation Act 2013.
[18]Such as Aharon Barak, 'Freedom of Expression and its Limitations' in Raphael Cohen-Almagor (ed), *Challenges to Democracy Essays in Honour and Memory of Isaiah Berlin* (Ashgate 1990); Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' (2009) 1 *Journal of Media Law* 49; Daniel Riffe and Kyla P. Garrett Wagner, 'Freedom of Expression: Another Look at How Much the Public Will Endorse' (2021) 26 *Communication Law and Policy* 161.
[19]Eric Barendt, 'Balancing Freedom of Expression and the Right to Reputation: Reflections on *Reynolds* and Reportage' (2012) 63(1) *Northern Ireland Legal Quarterly* 59.

interest and could also be considered 'responsible' should be protected from libel action even if the journalist/news organisation had published defamatory remarks.[20] In this case, journalism was seen to play a role in 'the expression and communication of information and comment on political matters'; by practising investigative journalism, the press was viewed as discharging 'vital functions as a bloodhound as well as a watchdog'.[21]

Reynolds highlighted that those practising journalism had the right to freedom of expression if they used it responsibly and dutifully played its expected role. Acting 'responsibly' required journalists and publishers to properly inform the public of information in the public interest and take steps to 'verify the information'.[22] Being responsible thus involved both the content and the conduct of journalism. The *Reynolds* case created the defence of qualified privilege and defined the responsibilities and roles of journalism and news media in a democracy. While *Reynolds* was heralded as being a case to take 'greater account of freedom of expression than the common law had previously done',[23] it 'would be wrong to think that English libel had altogether ignored freedom of expression before the decision in *Reynolds*'[24] as it had been recognised in other areas of law.[25] Nonetheless, the defence shifted the dial in the direction to balance the right to freedom of expression with the right to reputation. Lord Hoffmann said in *Jameel* that English law had predominantly protected reputation rights over the right to freedom of expression.[26]

Since the conclusion of *Reynolds*, however, there have been a number of changes in English law. The introduction of the Defamation Act 2013 saw the *Reynolds* defence replaced.[27] In its place, Section 4 of the Act provides a defence for defamation if the defendant is able to show that the statement complained of is in the public interest and that the defendant reasonably believes the statement complained of is in the public interest.[28]

Freedom of expression in the UK is also protected under Article 10 of the European Convention on Human Rights (ECHR)[29] and the courts have had to incorporate this into judgments concerning freedom of expression. The Human Rights Act 1998 came into force in 2000, following *Reynolds*, and with its passing and incorporation into law, the courts must also take into consideration judgments handed down by the European Court of Human

[20]Barendt (n 11); *Reynolds* (n 8).
[21]*Reynolds* (n 8).
[22]Barendt (n 11).
[23]Barendt (n 11), 59–60.
[24]Barendt (n 11), 60.
[25]Barendt (n 11).
[26]*Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359 [38].
[27]s 4(6) Defamation Act 2013.
[28]s 4(1)(a)-(b) Defamation Act 2013.
[29]Article 10(1) European Convention on Human Rights.

Rights (ECtHR).[30] Aside from protecting freedom of expression, the ECHR and the ECtHR prescribe that journalism and news media should play a role of a 'public watchdog', constituting the concept of public interest.[31] However, while freedom of expression is protected by the ECHR, in certain situations, it can be limited as per Article 10(2), meaning that it is not an absolute right.[32] In recent years, the courts have been forced to grapple with the balancing of Article 10 against numerous other rights, including, perhaps most notably, the right to privacy which is protected within Article 8 of the ECHR.[33] There has been a long string of case law[34] involving these two rights and how they should be balanced with each other, making it clear that neither one takes precedence over the other.[35]

These developments surrounding how freedom of expression is protected and how journalism's responsibilities and roles are ascribed in law in the UK form the basis of questions that will be answered in this article. It will explore the types of legal cases involving journalism that have emerged since *Reynolds*, and how judges have interpreted the rights, responsibilities, and roles of journalism in journalism-related judgments in the UK since the turn of the twenty-first century when the judgment of *Reynolds* was passed, and the ECHR was incorporated into domestic law. Examining court judgments will allow this paper to examine the way in which judges apply laws and principles, alongside how they convey values that shape social practices.[36] This knowledge can reveal the discourses articulated by judges about journalism, indicating the legal landscape for journalism and its right to freedom of expression, which may shape journalistic practices and the level of freedom it enjoys, with implications for media freedom in the UK. It can also help lawyers and other legal professionals understand how the legal interpretations of and attitudes toward journalism and related issues such as freedom of expression and privacy changed over time, so that they can identify key precedents and plan appropriate arguments and approaches to cases related to journalism or freedom expression in actual legal practices.

[30]s 2 Human Rights Act 1998; While this is the case, it has not always happened. For example, while the ECtHR declared that prisoners should have a right to vote in free elections, as per Article 3 ECHR, the UK has refused to comply. See *Hirst v UK (No.2)* [2005] ECHR 681.
[31]Rebecca Moosavian, 'Deconstructing 'Public Interest'in the Article 8 vs Article 10 Balancing Exercise' (2014) 6 *Journal of Media Law* 234.
[32]Article 10(2) European Convention on Human Rights.
[33]Article 8(1) European Convention on Human Rights.
[34]See: *Campbell v MGN Ltd* [2004] 2 AC 457 (HL); *Douglas v Hello!* [2005] EWCA Civ 595; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *Goodwin v News Group Newspapers* [2011] EWHC 1437 (QB); *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); *PJS v News Group Newspapers Ltd* [2016] UKSC 26; Re S [2004] UKHL 47; *Richard v BBC* [2018] EWHC 1837 (Ch).
[35]Re S [2004] UKHL 47 (n 35) [17].
[36]Le Cheng and David Machin, 'The Law and Critical Discourse Studies' (2022) 20(3) *Critical Discourse Studies* 243.

This article will first discuss the rights, responsibilities, and roles of journalism within the context of freedom of expression, which provides a framework for the analysis of the judicial discourses about journalism in these judgments. It then introduces the data and methods used in this research. The discussion will then explore the main findings from the research, which reveal that, alongside a general increase in the number of judgments involving journalism, judicial discourses recognise journalists' right to freedom of expression. However, this recognition has weakened since 2013, when the introduction of the Defamation Act 2013 abolished the common law *Reynolds* defence. Meanwhile, there has been an obvious stress on the responsibilities, ethics, and watchdog role of journalism since 2013 following the conclusion of the Leveson Inquiry. The findings have concerning implications for UK democracy as a decline in court favourability towards freedom of expression has the potential to lead to a reduction in media freedom.

The rights, responsibilities, and roles of journalism

The concepts of the rights, responsibilities, and roles of journalism are crucial to analysing the language in judgments about journalism, which is the focus of this paper. This is because they can provide a valuable framework for understanding journalistic work in the legal context. As acknowledged in the introduction, the rights of journalism are often considered within the context of the right to freedom of expression. This fundamental right has been recognised in law through the incorporation of the ECHR. Additionally, it should be emphasised that the UK is the signatory of a number of other treaties that recognise the right to freedom of expression. For example, the Universal Declaration of Human Rights[37] and the International Covenant on Civil and Political Rights[38] both contain Articles focusing on the protection of freedom of expression. As has also been noted, the right to freedom of expression is not without potential limitations. Scholars have long contested the issue of whether or not media freedom is a separate right to freedom of expression.[39] As Tambini has noted:

> Freedom of expression is a human right and freedom of the media clearly not the right of a human. As such, whereas it is a commonplace to conflate media freedom with freedom of speech and freedom of expression and locate the fundamental arguments for freedom of expression in truth, democracy and human autonomy, it is necessary to set out more precisely the appropriate theory and normative basis … Media freedom is more tied up with the role

[37] Article 19 Universal Declaration of Human Rights.
[38] Article 19 International Covenant on Civil and Political Rights.
[39] András Koltay, 'The Concept of Media Freedom Today: New Media, New Editors and the Traditional Approach of the Law' (2015) 7(1) *Journal of Media Law* 36; Andrew T. Kenyon and Andrew Scott, *Positive Free Speech* (Hart 2020); Eric Barendt, *Freedom of Speech* (Oxford University Press 2005).

> of the media in democratic societies and the social value of truth. Media freedom is both institutional – it concerns the media as an institution rather than with humans, and instrumental – it is a means to other goods – such as democratic communication. The fact that it is a means to other ends is important especially if media fail to serve those ends.[40]

Leading on from this, there has been a debate concerning the definition of media and who should be granted media privileges, particularly so in the era of citizen journalists and the rise of bloggers and vloggers who use social media to disseminate news.[41] The passing of the Online Safety Act 2023 has emphasised this debate even further.[42]

While this debate of differentiating between media freedom and freedom of expression is outside the scope of this paper, it is important to note as it emphasises the potential challenges that the courts have to face in the UK, as there are no explicit media freedom rights. Instead, as has been acknowledged by Koltay, Article 10 ECHR, while it 'does not mention media freedom as a separate right, the recognition of this right is implied by the text when it makes specific reference to the imparting of ideas'.[43]

Indeed, while these legal protections have been in place, the UK government has emphasised the importance of protecting the press in numerous instances. For example, the UK is a member of the Media Freedom Coalition which was launched in 2019 with the aim of advocating for media freedom and the safety of journalists.[44] The UK also launched the National Action Plan for the Safety of Journalists in 2021.[45] Despite these initiatives, concerns have been raised that media freedom in the UK is under threat, with Index on Censorship noting that the UK's environment for media freedom is only 'partially open'.[46] Despite these concerns, the UK has risen in the ranks on Reporters' Without Borders' (RSF) Global Press Freedom Index from 2023 to 2024.[47] Nonetheless, RSF makes clear that there are a number of issues that the UK media landscape has to contend with that impacts their freedom, such as a lack of pluralism and a restrictive political climate.[48] Additionally, legislation such as the introduction of the National Security

[40]Damian Tambini, 'A Theory of Media Freedom' (2021) 13(2) *Journal of Media Law* 135, 148.
[41]Jan Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) *Journal of Media Law* 5(1) 57.
[42]Peter Coe, 'Tackline Online False Information in the United Kingdom: The Online Safety Act 2023 and its Disconnection from Free Speech Law and Theory' (2023) 15(2) *Journal of Media Law* 213; Ricki-Lee Gerbrandt, 'Media Freedom and Journalist Safety in the UK Online Safety Act' (2023) 15(2) *Journal of Media Law* 179.
[43]Koltay (n 39) 39.
[44]Mary Myers and others, 'Reset Required? Evaluating the Media Freedom Coalition after its First Two Years' (2022) Foreign Policy Centre.
[45]GOV.UK, 'National Action Plan for the Safety of Journalists' (2023) *GOV.UK*.
[46]Index on Censorship, 'Major new global free expression index sees UK ranking stumble across academic, digital and media freedom' (25 January 2023).
[47]Reporters without Borders, 'United Kingdom' (2024) <https://rsf.org/en/country/united-kingdom>.
[48]ibid.

Act 2023[49] and the Online Safety Act 2023[50] have also raised concerns for freedom of the press. Strategic Lawsuits against Public Participation (SLAPPs) have also continued to be an issue despite the introduction of anti-SLAPP legislation.[51]

Throughout the case law, the courts have had to grapple with balancing freedom of expression alongside other rights. As mentioned above, one such right they have to balance in many cases is the right to privacy. Research within this paper emphasises that these types of cases are prominent before the courts. Balancing these two rights is done through a two-prong test. Firstly, the courts consider if there was a reasonable expectation of privacy and, if so, the next part of the test is engaged where they ask if it is in the public interest to reveal the information. The two-stage test was established in the case of *Campbell v MGN Ltd.*[52] This case concerned information published by the *Mirror* regarding supermodel Naomi Campbell's substance abuse, alongside images of her outside her Narcotics Anonymous meeting. Additionally, cases concerning defamation, copyright, intellectual property disputes, and protection of sources have also seen the courts have to consider how these should be balanced with the right to freedom of expression.

It is also important to note that, while the press enjoy greater freedoms in the UK than in a number of other countries, there are still restrictions imposed on them, not only through laws, but through regulation. In the UK, there is both self-regulation and statutory regulation. Broadcasters are subject to statutory regulation which is overseen by Ofcom. The print industry, on the other hand, can opt to join a self-regulator. In some cases, some publications have their own in-house regulation, such as *The Guardian*. However, for those who choose to join a self-regulatory body, there are two main players within the industry. These two bodies were formed following the conclusion of the Leveson Inquiry. The Leveson Inquiry concluded in 2012 after it came to light that phone hacking practices had taken place at certain publications, including the now defunct *News of the World*.[53] It was revealed at the Inquiry that the self-regulator at the time, the Press Complaints Commission (PCC) had been considered ineffective and was disbanded following the conclusion of the Inquiry. Currently, there are two

[49]Campaign for Freedom of Information and ARTICLE 19, 'Briefing for Commons 2nd Reading of the National Security Bill' (6 June 2022) <https://www.article19.org/wp-content/uploads/2022/06/2R-Briefing-on-National-Security-Bill.pdf>

[50]Peter Coe, 'Tackling Online False Information in the United Kingdom: The Online Safety Act 2023 and its Disconnection from Free Speech Law and Theory' (2023) 15(2) *Journal of Media Law* 213.; Ricki-Lee Gerbrandt, 'Media Freedom and Journalist Safety in the UK Online Safety Act' (2024) 15(2) *Journal of Media Law* 179.

[51]Mark Hanna, 'SLAPPs: What are They? And How Should Defamation Law be Reformed to Address Them' (2024) 16(1) *Journal of Media Law* 118; Peter Coe, 'Strategic Lawsuits Against Public Participation (SLAPPs) and the Economic Crime and Corporate Transparency Act 2023' *Inforrm,* 23 November 2023.

[52]*Campbell* (n 34).

[53]Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (HC-780, 2012).

press self-regulators: Independent Press Standards Organisation (IPSO) and The Independent Monitor for the Press (Impress). The latter has been recognised as an official regulator by the Press Recognition Panel (PRP) for meeting the criteria laid out in the Royal Charter. IPSO has not achieved such recognition, nor is it seeking it.[54] Both regulators have editorial codes of conduct that journalists have to follow and, if they are believed to have breached these codes, members of the public can complain to the regulator who, if they agree there has been a breach, can either order apologies or issue fines. Clearly, alongside taking consideration of legal restrictions on freedom of expression, journalists must also consider regulatory restrictions too.

As acknowledged within this section, freedom of expression in the UK is offered protection under Article 10 ECHR, but this right is not absolute. As has been discussed, there are numerous instances where Article 10 ECHR can be limited and there is a long string of case law that has shown this to be the case. Nonetheless, the courts have acknowledged that freedom of expression is of the utmost importance in the UK.

When it comes to journalism, protecting freedom of expression is inseparable from its role to serve the public interest, which corresponds with or justifies the exercise and protection of such freedom. At the centre of journalistic responsibilities and roles is what constitutes the public interest. Scholarly discussions defining the public interest include those of Moreham citing the ECtHR decision of *von Hannover v. Germany,* in which it is defined as contributing to 'a debate in a democratic society relating to politicians in the exercise of their functions' and being differentiated from public curiosity.[55] However, defining the public interest is a hard task in the fields of 'ethics, political philosophy and social theory'.[56] Although being a topic that is beyond the scope of this research, it is important to note that what constitutes the public interest pertains contextually, defining the responsibility and roles of journalism. In a democratic context, the press is expected to inform the electorate effectively. For the United States (US) where objective journalism has a long tradition, journalism is expected to serve as a watchdog, monitoring the government and those in power.[57] In the UK, the partisan press serves multiple functions, with journalism expected to foster social debate, raise public awareness of diverse perspectives, and contribute to social change, among other roles.[58]

[54]IPSO, 'Response to Press Recognition Panel's annual report' (23 February 2021) <https://www.ipso.co.uk/news-analysis/response-to-press-recognition-panels-annual-report/>.
[55]Nicole A. Moreham, 'Privacy in Public Places' (2006) 65(3) *The Cambridge Law Journal* 606.
[56]Dale Jacquette, 'Journalism Ethics as Truth-Telling in the Public Interest' in Stuart Allan (ed), *The Routledge Companion to News and Journalism* (Routledge 2009).
[57]W. Lance Bennett and William Serrin, 'The Watchdog Role' in Geneva Overholser and Kathleen Hall Jamieson (eds) *The Press* (Oxford University Press 2005).
[58]Brian McNair, *News and Journalism in the UK* (Routledge 2009); Also see articles in the edition: Hugo de Burgh, *Making Journalists: Diverse Models, Global Issues* (Routledge 2005).

Additionally, case law has distinguished what interests the public and what is in the public interest.[59] This is not to say that information that is interesting to the public should not be published if there is no public interest value to it, celebrity news stories might fall into this category as they have 'no potential to make the reader better or worse off in any meaningful way'.[60] However, a distinction between a news story that 'serves the public interest' or is just 'interesting the public' typically arises in cases where Article 10 needs to be balanced with Article 8.[61]

These developments in UK law and society raise questions that are addressed in this article: What types of lawsuits were addressed in journalism-related judgments (RQ1)? When judges talked about journalism in judgments, how did they define journalists' rights, responsibilities and roles (RQ2)? Particularly, how did their views change over time, particularly since the *Reynolds* judgment and after 2013? Did any other developments, such as the Leveson Inquiry, play a role in this process (RQ3)? And how was the protection of freedom of expression balanced with other rights (RQ4)? These questions are important because changes in the law and society may have an impact on the boundaries of what news media can or cannot report, as perceived by those who initiate legal action. These changes may also affect the types of action taken against journalists and news media under the new legal framework, as well as how courts approach and interpret cases involving journalism. By answering these questions, we can gain a deeper understanding of the evolving legal landscape for journalism and news media, which can contribute to both legal research and practices.

Methodology

This study analysed 228 judgments related to journalism with an aim to answer the research questions outlined earlier. All judgments containing the keyword 'journalism' issued between 2000 and 2023 were collected from the National Archives and BAILII (British and Irish Legal Information Institute).[62] The National Archives did not include court judgments issued before 2002, and no judgments from BAILII were collected prior to that year. The data was subsequently cleaned by removing entries unrelated to journalism and eliminating duplicates. There were 228 judgments (between 2002 and 2023) in the final dataset for a detailed analysis.

[59]Moosavian (n 31).
[60]Brian Cathcart, 'Is There any Difference Between the Public Interest and the Interest of the Public' *Inforrm* 8 October 2021.
[61]Moosavian (n 31).
[62]All case law from all courts were collected from the National Archives. The cases from UK House of Lords, Supreme Court, and Privy Council were collected from BAILII.

Python scripts were written to collect, clean (pre-process and prepare), and analyse the data.

Corpus linguistic techniques, in particular, a combination of n-gram analysis and qualitative concordance analysis (i.e. a qualitative analysis of the content/context in which these *n*-grams appear) were used. As introduced earlier in this paper, an n-gram refers to a sequence of n consecutive words in a specific text. Here is an example to show how n-grams work: in this phrase 'freedom of information act', a bigram ($n = 2$) could be 'freedom of', 'of information', or 'information act'. A trigram ($n = 3$) could be 'freedom of information', or 'of information act'. An n-gram analysis is used because this linguistic technique involves dividing the legal text of judgments into short, contiguous sequences of words, providing valuable insights into patterns within the judgments. In particular, in this study, it can reveal changes in how certain terms or phrases (such as 'freedom of expression', 'defamation', 'public interest', or 'privacy') were used across different judgments over time, revealing how courts contextualised, interpreted, or highlighted these terms, and indicating shifts in legal approaches or attitudes toward journalism and related issues, such as freedom of expression, privacy and reputation. Alongside the corpus linguistic analysis, a qualitative analysis of selected cases was conducted to deepen the understanding of how these judgments discussed journalism. This understanding can provide insights into the legal landscape surrounding journalism and freedom of expression in the UK. It can also enhance lawyers' ability to tailor arguments to judicial trends, identify key rulings, and strategise effectively while handling complicated journalism-related cases.

The data analysis involved four stages. Before each n-gram analysis, the data was pre-processed and prepared for the analysis, involving tokenisation and the removal of stop words such as 'of', 'the', and 'to', punctuations, and words expected to be frequent but whose meanings were already implied by the context and did not add additional useful information – such as 'judgment'. The first stage contributed to exploring an overview of the data, including the temporal trend, the mentioning of key terms and who were involved as sole or primary defendants, which also involved manual coding.

In the second stage, the first 200 words of each judgment were extracted for a bigram analysis to understand the first research question about the types of lawsuits (RQ1). This analysis was important because the beginning of a judgment usually outlines the backgrounds and key legal issues in the case. Analysing bigrams in the first 200 words of these judgments can provide insights into the types of case and even key legal principles, and for this reason, this analysis cannot be replaced by examining the full text of the judgments. This analysis was complemented by a comprehensive examination of bigrams across the entire content and an assessment of

how many judgments mentioned key phrases indicating types of legal action, such as 'libel', 'defamation', 'copyright', and terms such as 'privacy', as they usually are the legal cases or issues surrounding journalism and news media, as suggested by the literature.[63] After a careful observation of the results, the choice to focus on bigrams was made because bigrams, the smallest pairs of words, could capture contextual information and were more interpretable, meaningful and simpler to process than unigrams or trigrams. As two words appearing together in close succession provide contextual information for each other, which unigrams do not, bigrams represent pairs of words with their relationship, making them easier to interpret than trigrams. Unigrams were more frequent but could miss contextual information as they are individual words in isolation, taking no considertaion of the surrounding words that can provide meanings in a context, and they cannot reveal relationships between words.[64] Trigrams could have been included, but this study did not include them as their low frequencies would not provide significant information, making it unlikely that they would effectively reveal meaningful patterns in the texts.

In the third stage, a bigram frequency analysis including mutual information (MI) analysis – analysing the occurrence and associations of bigrams[65] – of judgment content and of the words frequently co-occurring and correlated with the keyword 'journalism' in the content of judgments was conducted to answer the other research questions (RQs 2-4). Mutual information is a statistical measure that was calculated in Python through comparing the joint probability of observing the two variables/points together with the probabilities of observing each variable/point independently.[66,67] This important statistical measure was used to calculate the associations between two words in bigrams. Both frequency and MI scores were considered in determining the top 10 bigrams, with an MI score threshold of 5. Based on a careful observation of the MI scores and their distribution, an MI score of 5 or above was deemed to indicate a strong association. For example, the bigrams associated with 'journalism' until the end of 2013 (before 2013 will be used in the remainder of the article) (Table 1) had a

[63]Lili Levi, 'The Weaponized Lawsuit against the Media: Litigation Funding as a New Threat to Journalism' (2017) 66 *American University Law Review* 761; Jonathan Peters, 'Staying Abreast of the Law: Legal Issues Affecting Journalism Practice' in Patrick Ferruci and Scott Eldridge II (eds), *The Institutions Changing Journalism: Barbarians Inside The Gate* (Routledge 2022).

[64]Quintino R. Mano and Heidi Kloos, 'Sensitivity to the Regularity of Letter Patterns Within Print Among Preschoolers: Implications for Emerging Literacy' (2018) 32 *Journal of Research in Childhood Education* 379.

[65]In this study, the two consecutive words are actually words next to one another after the stopwords have been removed.

[66]Kenneth Ward Church and Partrick Hanks, 'Word Association Norms, Mutual Information and Lexicography' (1990) 16(1) *Computational Linguistics* 22.

[67]Marcelo Tisoc and Jhosep Victorino Beltrán, 'Mutual Information: A Way to Quantify Correlations' (2022) 44 *Revista Brasileira de Ensino de Física* 1.

Table 1. Top 10 bigrams associated with 'journalism' with MI scores > 5 before and after 2013.

Before 2013				After 2013			
Bigram	Freq[68]	MI Score	Freq/ mil[69]	Bigram	Freq	MI Score	Freq/ mil
purpose[70], journalism	321	6.7	218.6	purpose, journalism	149	6.7	68.9
responsible, journalism	248	8.0	168.9	responsible, journalism	82	7.9	38.0
journalism, art	138	7.5	94.0	investigative, journalism	31	9.2	14.3
journalism, board	46	6.6	31.3	journalism, art	26	8.7	12.0
investigative, journalism	37	8.5	25.2	rogue, journalism	15	9.4	6.9
functional, journalism	21	9.3	14.3	ethics, journalism	14	9.5	6.5
activity, journalism	15	6.0	10.2	piece, journalism	9	6.4	4.2
quality, journalism	12	5.1	8.2	irresponsible, journalism	8	8.7	3.7
definition, journalism	10	5.4	6.8	fashioned, journalism	7	9.5	3.2
elevated, journalism	7	8.4	4.8	lazy, journalism	6	9.8	2.8

mean MI score of 2.9, with the 75 percentile at 4.1 and a maximum score of 9.3. Bigrams with MI scores above 5 represented less than 25% of the total, highlighting their relative strength in association (see the MI distribution in Figure 1).

Finally, six cases (three before and three after 2013): *Campbell v MGN Ltd*,[71] *Jameel v Wall Street*,[72] *Flood v Times Newspapers*,[73] *Serafin v Malkiewicz & Ors*,[74] *Bloomberg LP v ZXC*,[75] and *Banks v Cadwalladr*[76] were selected for a qualitative analysis based on their importance to help answer the research questions about journalism's rights and roles in these judicial discourses (RQs 2-4). These cases are all landmark judgments in media law in the UK with significant implications for journalism. They address key issues surrounding freedom of expression and how it is balanced with other rights, such as privacy, alongside the protections it is offered in defamation cases. There is also a focus on the changing nature of the public interest.

In all these stages, after computational bigram analysis, a qualitative concordance analysis was conducted to gain a deeper understanding of the meaning of these bigrams within the context. One-word and two-word windows around these bigrams, as well as bigrams in the 200-word window surrounding key phrases such as "freedom of expression" were also analysed to gain more understanding.

[68]Freq is short for frequency
[69]freq/mil is short for frequency/million words.
[70]'Purpose' includes both 'purposes' and 'purpose'.
[71]*Campbell* (n 34).
[72]*Jameel and others v Wall Street Journal* [2006] UKHL 44.
[73]*Flood v Times Newspapers* [2012] UKSC 11.
[74]*Serafin v Malkiewicz & Ors* [2020] UKSC 23.
[75]*Bloomberg LP v ZXC* [2022] UKSC 5.
[76]*Arron Banks v Carole Cadwalladr* [2023] EWCA Civ 219.

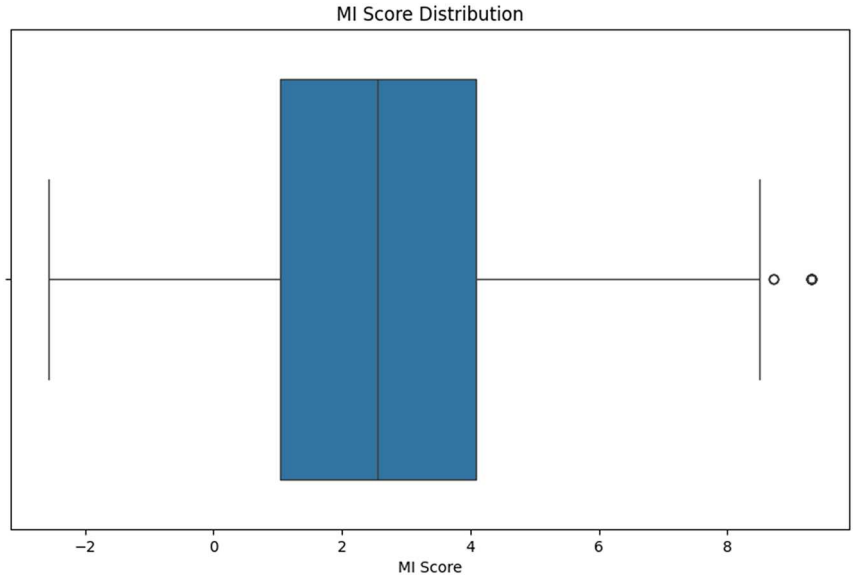

Figure 1. MI score distribution for bigrams associated with 'journalism'.

At the end of the analysis, all of the findings were consolidated to form a comprehensive understanding of the judicial discourses of journalism constructed in these judgments.

An overview of the data

Altogether, 228 judgments were included in the final dataset for analysis, comprising 3,629,004 words in the corpus between 2002 and 2023 (the data before 2002 was absent in the dataset). Overall, there were fluctuations during the period, with the numbers starting to climb from 2002, reaching a peak in 2012 (one year following the conclusion of the Leveson Inquiry), and then declining in 2013. Subsequently, there were ups and downs until it reached a new peak in 2023.

The Leveson Inquiry was mentioned minimally, with a slight increase over time across these judgments (Figure 2). The mentions of the *Reynolds* privilege in judgments remained consistent, indicating a moderate positive correlation with the year ($r = 0.48$), whereas the mentions of 'responsible journalism' did not have meaningful correlation with the year ($r = -0.03$) but decreased notably after 2020. However, despite being replaced by the Defamation Act 2013, the phrase 'responsible journalism' was still used in court cases such as *Times Newspapers Ltd v Flood*[77] and *Sooben v Badal*[78]

[77] *Times Newspapers Ltd v Flood* [2014] EWCA Civ 1574.
[78] *Sooben v Badal* [2017] EWHC 2638 (QB).

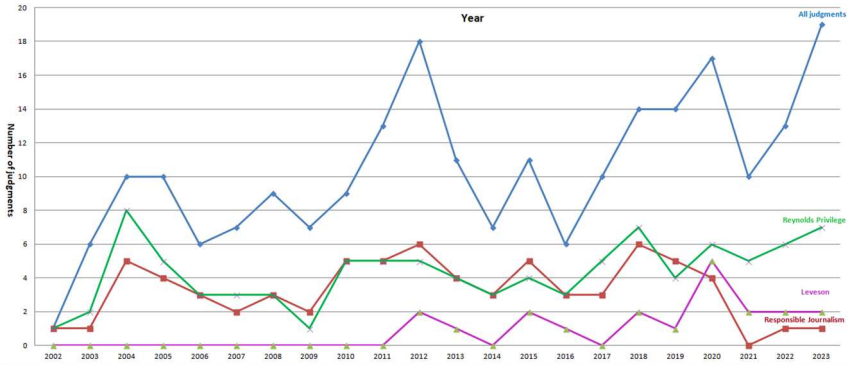

Figure 2. Temporal distributions of all judgments and judgments mentioning the *Reynolds* privilege, the Leveson Inquiry, and responsible journalism.

because the cases involved happened before commencement of the Defamation Act 2013.[79] Interestingly, after 2020, while the mentions of 'responsible journalism' decreased in the judgments, references to the *Reynolds* privilege increased, suggesting its continued influence despite the Act replacing the *Reynolds* defence. Additionally, these changes also showed the influence of *Serafin* that suggested avoiding the reference to act 'responsibly' to implement the legal principles outlined in the ACT in 2020.[80]

A closer look into the data reveals that there were more judgments with news organisations as sole (89) or primary (42) defendants than those with non-news organisations as sole or primary defendants (97) in the dataset. However, in 2007, 2017 and from 2021, non-news organisations overtook news organisations as sole or primary defendants (see Figure 3).

As a group, news organisations were the major group of defendants in the legal judgments related to journalism. The number of judgments with news organisations as sole or primary defendants fluctuated between 2002 (0) and 2023 (7) and reached a peak in 2011 and 2020 (11 respectively).

However, for judgments involving non-news organisations as sole or primary defendants, the number increased greatly after 2019. In contrast, the number of judgments involving news organisations as defendants dropped sharply in 2021 before rising moderately again in 2022 and 2023. Among non-news media organisation defendants (as sole or primary defendant), individual journalists including those both employed by news organisations and freelancers were the biggest group (23 judgments), followed by other individuals (such as news sources) (12), information commissioner (10) and editor (8).

[79] ibid [22].
[80] *Serafin* (n 74) [75].

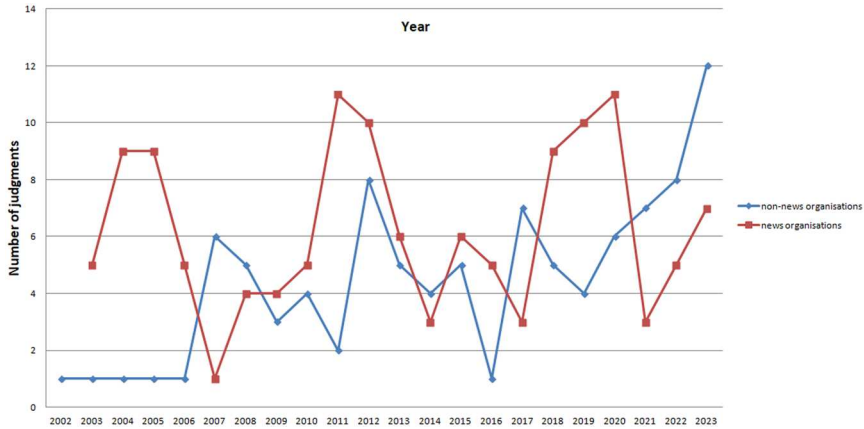

Figure 3. Temporal distributions of judgments with news organisations and non-news organisations as sole or primary defendants.

From 2007, individual journalists started being sued as the sole defendants (or primary defendant). In that year, there were five judgments involving journalists sued as primary (3) or sole (2) defendants. Altogether, thirteen judgments involved journalists who were sued as sole defendants including the infamous *Banks v Cadwalladr* case in which Carole Cadwalladr, a journalist, was sued for defamation by Arron Banks following a TED talk she delivered in Canada and a tweet she sent where she made statements that he claimed were false. The court found that her remarks were protected at the time she made them as they were in the public interest, but the public interest defence ceased in April 2020 when the Electoral Commission stated that there had been no evidence Banks had broken the law.[81] A journalist in exile from Iran, a Russian journalist, a Korean journalist and a freelance journalist were also among journalists taken to court. This echoes recent concerns over individual journalists being sued and the rise of transnational repression targeting exiled journalists. [82]

Except in one case, editors were not sued as sole defendants. This was the 2017 libel case, *Sooben,* where the defendant Eshan Badal was the editor of *Mauritius Now*.[83] An article was published containing allegations of perjury and incitement to commit perjury against the plaintiff. The plaintiff was a solicitor and the court held that the statement had been

[81] *Banks* (n 76).
[82] Jessica Ní Mhainín, 'A Review of How Laws are Being Used in Europe to Bring Actions Against Journalists' *Index on Censorship,* 2020 ; Fiona O'Brien, 'Transnational Repression in a Digital Age: The use of social media to silence exiled journalists' (Threats to Media Freedom: An Online Symposium); Jessica White, Grady Vaughan and Yana Gorokhovskaia, 'A Light That Cannot Be Extinguished' Freedom House, 2023.
[83] *Sooben* (n 78).

libelous. Furthermore, *Reynolds* privilege was used in the case as the Defamation Act 2013 did not come into force until 1 January 2014 and, as consequence of this, the 'defendant's defence in this case falls to be assessed under the old common law'.[84] This case serves as an example of a libel case with an individual editor being sued rather than a news media organisation.

There were two defamation and libel cases in which a blogger or entrepreneurial journalist was sued, showing the evolving media landscape witnessing the rise of entrepreneurial journalism with the interpretation of journalism's responsibilities and rights extended to this domain. Entrepreneurial journalism means a new way of practising journalism by individual journalists who create their own, usually Internet-based, news outlets by embracing the opportunities provided by digital technologies to raise funds and to disseminate news content. Practising entrepreneurial journalism deinstitutionalises journalism, as individual journalists create jobs for themselves rather than being employed by news organisations and they also play multiple roles ranging from producing news content to raising funds to audience engagement.[85] Both cases were *Riley v Sivier*,[86] in which Michael Sivier was sued over his article published on his own website. The dispute concerning anti-Semitism and the Labour Party in the cases not only involved Sivier's article but also the tweets of presenter Rachel Riley and a 16-year-old as well as online interactions. These cases reflect the changes in the journalism-related legal landscape as a result of the wide application of digital technologies and social platforms, as well as the application of legal principles in the online world involving Twitter (now X) and entrepreneurial journalism.

The overall increase in the number of judgments involving journalism, along with the increase in the number of non-news organisations as sole or primary defendants, particularly individual journalists, is worrying. This concern arises against a backdrop of the UK's decline in the press freedom index[87] and growing concerns over the weaponisation of the law, such as through the use of SLAPPs.[88] Interestingly, however, the case of *Banks* was not considered to be a SLAPP by the judge with the High Court stating that:

> At [9] the judge addressed the fact that the defendant had "repeatedly labelled this claim a SLAPP suit, that is a strategic lawsuit against public participation, designed to silence and intimidate her." The judge said that label was "neither

[84] *Sooben* (n 78) [22].
[85] Jingrong Tong, *Journalism in the Data Age* (SAGE 2022).
[86] *Riley v Sivier* [2021] EWHC 79 (QB); *Riley v Sivier* [2022] EWHC 2891 (KB).
[87] Brohn Maher, 'RSF Press Freedom Index 2024: UK and US scores hit by widespread job cuts' *Press Gazette* 3 May 2024.
[88] Foreign Policy Centre and ARTICLE 19, ''London Calling': The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom' (Foreign Policy Centre 25 April 2022).

Table 2. Top 10 bigrams with MI scores >5 in the first 200 words of the judgments before and after 2013.

Year	Top 10 bigrams in first 200 words
2002–2013	(libel, action), (qualified, privilege), (information, act), (sunday, times), (freedom, information), (preliminary, issue), (times, newspapers), (newspapers, limited), (information, held), (action, brought)
2014–2023	(public, interest), (misuse, private), (private, information), (application, made), (defamation, act), (libel, action), (local, authority), (preliminary, issue), (factual, background), (phone, hacking)

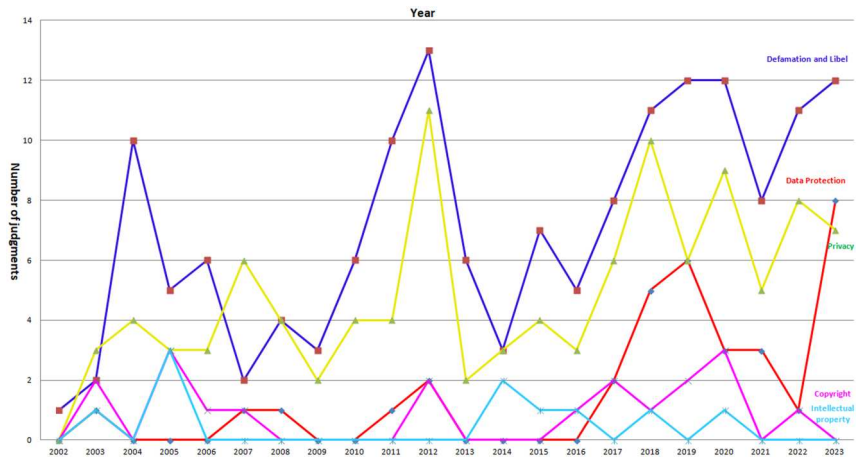

Figure 4. Temporal distributions of judgments mentioning types of lawsuits.

fair not apt" as the claimant's "attempt to seek vindication through these proceedings was … legitimate."[89]

Types of lawsuits

Journalism and news media may become involved in various types of legal actions, including those related to copyright and intellectual property disputes. However, the analysis in this study suggests that defamation, including libel, constitutes the primary type of legal action involved in these judgments either before or after 2013 (Table 2). Defamation and libel were mentioned in more judgments than copyright and intellectual property (Figure 4). The mentioning of defamation and libel has a relatively strong positive correlation with the year ($r = 0.66$), while that of copyright and intellectual property does not have correlation ($r = 0.06$ and $r = -0.09$ respectively) with the year. This indicates that over time, defamation and libel appeared more

[89] *Banks* (n 76) [21].

frequently in the judgments. However, the changes in the mentions of copyright and intellectual property were likely random, with no significant linear trend.

In addition, there were cases concerning journalistic protection of sources. A typical example of this is *Mersey Care NHS Trust v Ackroyd* in 2007.[90] In this case, Robin Ackroyd, a freelance investigative journalist, obtained clinical notes related to Ian Brady, one of the 'Moors Murderers' convicted in 1966. The hospital sought an order for disclosure of the source of the clinical notes. The Court of Appeal held that the source did not have a public interest defence and ordered Ackroyd to disclose the identity of the source.

Discourses on the rights, responsibilities, and roles of journalism

While acknowledging journalism's rights to freedom of expression, judicial discourses in these judgments emphasised journalism's responsibilities, ethics, and its role as a watchdog, particularly after 2013 and the conclusion of the Leveson Inquiry. In addition, differences in judicial discourses before and after 2013 can be identified. Before 2013, the discourses primarily focused on freedom of expression, responsible journalism, and qualified privilege, emphasising journalism's roles as a public watchdog and informing the public. After 2013, however, freedom of expression became less prominent compared to before 2013, with a shift in focus towards the ethics of journalism, journalism being rogue and irresponsible, and increased attention to the serious harm caused by journalism (Tables 1–3). These changes could be the influence of *Reynolds* on the discourse about journalism's rights, responsibilities, and roles. They might also result from the Leveson Inquiry emphasising the ethics of journalism and its role in society.

The rights of journalism

The main right of journalism, as identified in these judgments, was the right to freedom of expression, as suggested by the prominence of the bigram 'freedom, expression' in all content of the judgments (Table 3). Apart from *Banks*, the remaining five judgments selected for a detailed qualitative analysis frequently refer to the press' right to freedom of expression. This suggests and echoes other scholars' views[91] that the right to freedom of expression is recognised as a fundamental principle related to journalism and underscores its importance in judicial discourse about journalism.

However, there is a temporal change in the appearance of this right in the judgments. Despite a greater number of judgments being issued after 2013,

[90] *Mersey Care NHS Trust v Ackroyd (No. 2)* [2007] EWCA Civ 101.

[91] For example, Gill Moore, 'The English Legal Framework for Investigative Journalism', in Hugo de Burgh (ed), *Investigative Journalism* (Routledge 2013).

Table 3. Top 10 bigrams with MI scores >5 in all content before and after 2013.

	Before 2013				After 2013		
Bigram	Freq	MI Score	Freq/mil	Bigram	Freq	MI Score	Freq/mil
public, interest	1242	6.9	845.7	public, interest	2114	7.3	978.5
freedom, expression	449	9.4	305.7	private, information	837	5.9	387.4
words, complained	385	7.7	262.1	serious, harm	670	8.3	310.1
qualified, privilege	383	9.4	260.8	phone, hacking	627	8.8	290.2
public, authority	329	6.2	224.0	words, complained	501	7.4	231.9
information, held	323	5.3	219.9	common, law	410	7.7	189.8
reasonable, grounds	282	8.1	192.0	freedom, expression	384	10.0	177.7
lord, nicholls	261	8.4	177.7	expectation, privacy	380	9.2	175.9
human, rights	241	9.0	164.1	personal, data	380	7.9	175.9
south, east	232	10.5	158.0	reasonable, expectation	370	8.6	171.3

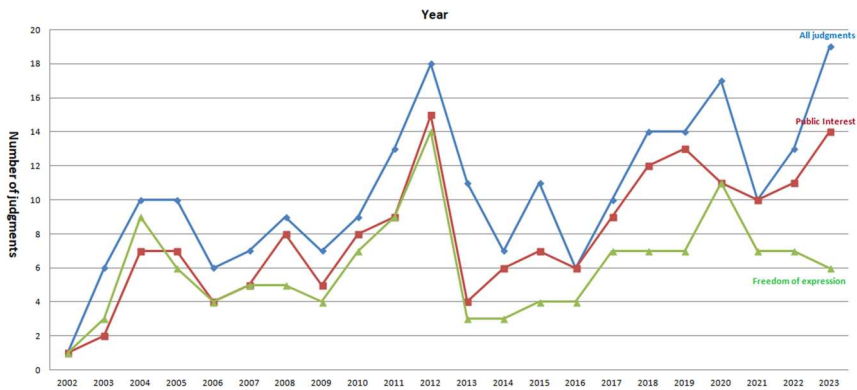

Figure 5. Temporal distributions of judgments mentioning "public interest" and "freedom of expression" (including "freedom of speech").

fewer of them mentioned the right to freedom of expression when compared to the period prior to 2013 (Figure 5). This suggests a potential change in judicial emphasis regarding the right to freedom of expression. Additionally, a significant reduction in the frequency of the bigram 'freedom, expression' is observed after 2013, with its occurrence dropping from 305.7 to 177.7 per million words (freq/mil). This decline indicates that this bigram was mentioned less frequently in the corpus (Table 3), suggesting a shift in emphasis and legal priorities, or a change in how the right to freedom of expression is viewed and balanced against other rights within the legal landscape. This shift may also reflect changes in social or legal attitudes towards journalism and the right to freedom of expression since the Leveson Inquiry. These changes indicate a decline in trust in journalism and the press, coupled with a greater emphasis on journalistic ethics and the role the press should play in society.

Top 10 bigrams in the 200-word window surrounding 'freedom of expression' or 'freedom of speech' (Table 4) show freedom of expression is

Table 4. Top 10 bigrams with MI scores > 5 in the 200-word window surrounding 'Freedom of Expression' or 'Freedom of Speech'.

Before 2013				After 2013			
Bigram	Freq	MI Score	Freq/Mil	Bigram	Freq	MI Score	Freq/Mil
freedom, expression	118	6.3	80.3	freedom, expression	89	6.6	41.2
public, interest	62	6.2	42.2	public, interest	60	6.0	27.8
right, freedom	52	5.1	35.4	right, freedom	42	5.4	19.4
human, rights	42	6.9	28.6	human, rights	30	6.5	13.9
freedom, speech	41	6.1	27.9	freedom, speech	26	6.1	12.0
common, law	31	6.6	21.1	common, law	25	6.3	11.6
lord, nicholls	25	7.5	17.0	private, information	24	5.6	11.1
qualified, privilege	23	8.0	15.7	misuse, private	21	7.6	9.7
european, convention	22	7.6	15.0	lord, nicholls	20	7.7	9.3
responsible, journalism	22	7.8	15.0	european, convention	19	7.5	8.8

a principle recognised by law (common law, ECHR) and a human right. But comparing before and after 2013, we can observe a shift in focus from 'qualified, privilege' and 'responsible, journalism' to 'private, information' and 'misuse, private'. In all content (Table 3), the bigram 'qualified, privilege' (freq/mil: 260.8), a key indicator of the *Reynolds* case, was prominent before 2013. It, however, disappeared from the list of top 10 bigrams appearing in the judgments after 2013, which instead suggests a focus on the public interest and privacy and ethics of journalism.

Figure 5 shows that the numbers of judgments mentioning 'public interest' and 'freedom of expression' (including "freedom of speech") were aligned before 2013. After 2013, except for 2020, however, fewer judgments mentioned 'freedom of expression' than 'public interest'. Especially after 2021, the number of judgments mentioning 'freedom of expression' declined, while those mentioning 'public interest' increased, correlating with the overall rise in the number of judgments. Both 'public, interest' and 'private, information' became more prominent after 2013 (Tables 2 and 3). Additionally, 'phone, hacking', an indicator for the phone hacking scandal and the Leveson Inquiry in 2011, gained prominence after 2013 (Table 3). Other bigrams also indicate a heightened focus on private information, journalistic ethics, and the impact of irresponsible journalism: 'private, information', 'serious, harm', 'expectation, privacy', 'personal, data', 'reasonable, expectation', 'misuse, private', 'defamation, act' (Tables 2 and 3), 'rogue, journalism', 'ethics, journalism', 'irresponsible, journalism' (Table 1).

However, the top 10 bigrams in the 200-word window surrounding 'freedom of expression' or 'freedom of speech' (Table 4) suggest that freedom of expression was often discussed together with privacy particularly after 2013, as indicated by 'private, information' or 'misuse, private'. This is also emphasised by the number of cases focusing on this balancing act between freedom of expression and the right to privacy.

These patterns from the bigram analysis aligned with and were supported by the qualitative analysis of the selected cases, which provided a more detailed picture of the arguments in the judgments. The importance of freedom of expression was well recognised across the five selected judgments, except *Banks*. However, in these judgments, the judges agreed that a balance needed to be struck between the right to freedom of expression and other rights, such as the right to protection of reputation or the right to privacy. *Reynolds* was frequently cited as a principle for balancing conflicting rights in these cases. The judges ruled that resolving the tension between these rights and determining which prevails depends on the specific case, with editorial judgment given weight. The following quote from Lord Hoffmann in *Jameel* exemplifies this point:

> But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting.[92]

The responsibilities and roles of journalism

In these judgments, however, the responsibilities of journalism were emphasised more than its rights. This had implications for understanding how legal principles were applied to balance journalists' rights to freedom of expression with individuals' rights to privacy and reputation, and how these concepts were interpreted by the courts. These responsibilities were primarily related to the public interest, the key focus identified by the top bigram across all judgments (Table 3). Journalists' responsibility to publish information either in the public interest or on a matter or matters of public interest was found to recur regularly. Journalism's responsibilities also lay in the editorial procedure of journalistic practice: whether 'the publisher has acted responsibly in publishing the information, a test usually referred to as 'responsible journalism"[93] – i.e. journalists take proper steps to verify information, make 'reasonable and responsible investigations', and write and say words with a 'responsible and measured tone'.[94] Through clarifying the responsibilities of journalism, the judgments also defined what best

[92] *Jameel* (n 72) [51].
[93] *Reynolds* (n 8) cited in *Flood* (n 73) [2].
[94] *Economou v de Freitas* [2018] EWCA Civ 2591.

served 'the public interest': publishing verified, truthful information, covering investigations, and presenting 'political expression' calmly, with awareness of the impact of words and ethical information gathering.

Overall, the discourses surrounding 'journalism' were constructed around the responsibilities of journalism and its role as a watchdog, as suggested by the prominent bigrams associated with 'journalism' in Table 1, in particular, 'purpose, journalism', 'responsible, journalism', 'investigative, journalism', and 'quality, journalism'. This discourse was weaker after 2013 as suggested by the bigram frequencies per million words (freq/mil). The discourse about 'responsible journalism' was clear both before and after 2013 (Table 1), though its frequency reduced after 2013. The bigram 'responsible, journalism' was the second most common word pair associated with 'journalism' with a freq/mil of 168.9, which fell to only 38.0 after 2013. This change suggests the shift in the discourse about journalism after 2013 and shows the influence of the Defamation Act 2013, abolishing the *Reynolds* defence and requiring avoiding the use of 'responsible journalism', as well as potential changes in societal perceptions of journalism and attitudes towards the responsibilities of journalism following the Leveson Inquiry. The top 10 bigrams in content associated with 'journalism', particularly 'rogue, journalism', 'ethics, journalism', 'irresponsible, journalism' and 'lazy, journalism' (Table 1), highlight a focus on journalistic ethics post-2013, aligning with trends in the top 10 bigrams after 2013 across all content, especially suggested by 'serious, harm' and 'phone, hacking'.

The top three most frequently occurring words before 'journalism' in all content were '*purpose/s*' (freq: 470, MI: 6.9, freq/mil: 129.5), '*responsible*' (freq: 330, MI: 8.2, freq/mil: 90.3) and '*investigative*' (freq: 68, MI: 8.8, freq/mil: 18.7). These words revealed that in the judicial discourses about journalism, journalism was associated with its responsibility and investigative nature. Take 'purposes, journalism'. This phrase appeared in the context where the legitimacy of accessing, using, or publishing information for journalism was assessed in relation to the public interest. It appeared in Schedule 1, Part 2, Paragraph 13 of the Data Protection Act 2018, as shown in the following example:

> 48. Schedule 1, Part 2, Paragraph 13 DPA provides: (1) This condition is met if … 4) In this paragraph – "the special purposes" means – (a) *the purposes of journalism*; 49. Section 40 (2) is an absolute exemption and therefore the separate public interest balancing test under FOIA does not apply.[95]

This was a case in which a senior investigative reporter, Noel Titheradge, appealed against the Commissioner's decision to permit The Chief Constable for British Transport Police to rely on section 40(2) of the Freedom of

[95] *Noel Titheradge v The Information Commissioner* [2023] UKFTT 446 (GRC).

Information Act to hold back the required Body Worn Video footage in a case concerning misconduct. In this context, it was assessed whether disclosing information involving criminal offence data was justified for the purposes of journalism.

Likewise, in the following example, 'purposes, journalism' was used in the context of the Data Protection Act 2018 in a case where the legitimacy of using private information was assessed:

> Its progress has been slowed down considerably whilst the parties litigated a point of law, namely whether the court was obliged to stay the data protection claim because it is brought in respect of data processing undertaken only for *the purposes of journalism*, with a view to the publication of information about the claimant which the defendant has not previously published. That was the contention of the defendant, relying on s 32 (4) of the DPA.[96]

The most frequently co-occurring words before '*responsible journalism*' were '*test*' (freq: 29; freq/mil: 17.8; MI: 15.0), '*standard*' (freq: 29; freq/mil, 17.8; MI: 16.6), '*defence*' (freq: 12; freq/mil: 7.4, MI: 12.3), '*requirements*' (freq: 12; fre/mil: 7.4; MI: 15.6) and '*standards*' (freq: 11; freq/mil: 6.8; MI: 15.4). These words suggested that the discourse about 'responsible journalism' focused on whether journalism was responsible and how it could be perceived as such, rather than simply accepting it as definitely responsible. As shown in the following example, the phrase '*test of responsible journalism*' was used in the context of assessing qualified privilege in a case of defamation:

> Lord Nicholls (at p 205) listed certain matters which might be taken into account in deciding whether *the test of responsible journalism* was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege.[97]

The detailed analysis of the selected cases matched the findings of the bigram analysis and further revealed what constituted the responsibilities and roles of journalism, as well as the public interest. Among these six selected cases, *Jameel* and *Flood*, both, were more sympathetic toward journalism and the news media than the other three cases. *Campbell and Bloomberg* were cases of breach of confidence and misuse of private information, while *Serafin* and *Banks* were libel cases. These cases set precedents for balancing the public interest and the rights to freedom of expression with the protection of privacy and reputation protection.

The *Reynolds* privilege was applied in *Jameel* and *Flood*. In *Jameel*, when interpreting the *Reynolds* privilege, the judges stressed the importance of publishing a matter of public interest and that of the publisher taking

[96] *Stunt v Associated Newspapers Limited* [2019] EWHC 511 (QB).
[97] *Jameel* (n 72) [33].

steps to verify the information, with Lord Bingham citing Lord Hobhouse and stating that 'No public interest is served by publishing or communicating misinformation'.[98] Lord Bingham continued: 'Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner'.[99] And Lord Hoffmann stated that it was necessary to 'restate the principles' of *Reynolds* and considered the context of the news article, the reputation of *Wall Street Journal*, as well as the type of journalism it practised.[100] Lord Hoffmann expressed opinion about the related issues in favour of journalism and 'allowance must be made for editorial judgment'.[101] He held that 'the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by the newspapers and ratified by the Press Complaints Commission'.[102] Since then, the PCC has ceased to exist and IPSO and Impress as two new self-regulatory bodies have been created.

Flood emphasised the importance of freedom of expression and the press, while recognising the need to balance it with protecting reputation. The judges defined journalism's role as informing the public, protecting the right to know, and acting as a watchdog. For example, Lord Dyson decided 'naming the officer was responsible journalism'[103] and stated that 'the court should be slow to interfere with an exercise of editorial judgment'[104] and it 'was in the public interest for the allegations against DS Flood to be investigated promptly, and that was relevant to whether it was in the public interest to publish a story about the investigation'.[105]

Over time, privacy increasingly gained weight across these cases, echoing the changes in the UK legal framework such as the incorporation of ECHR into UK law by the HRA in 2000, which means UK courts must consider ECHR rights when interpreting laws where possible and the enactment and implementation of new laws such as the General Data Protection Regulation (GDPR). For example, in *Campbell*, Lord Nicholls commented: 'The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual'.[106] Lord Hope of Craighead explained how the changes in laws led to more consideration given to privacy:

[98]ibid [32].
[99]ibid [33].
[100]ibid [38].
[101]ibid [51].
[102]ibid [55].
[103]*Flood* (n 73) [199].
[104]ibid.
[105]ibid [202].
[106]*Campbell* (n 34) [12].

> The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. … new breadth and strength is given to the action for breach of confidence by these articles.[107]

The debates in these judgments portrayed what was 'in the public interest' or constituted 'matters of public interest', as well as what journalists should legitimately do in practising journalism. In these cases, journalism was tested on conduct (verification steps, information gathering), content focus and tone, news sources, the right to name, the public's right to know, and how ordinary readers would understand the meaning of words and articles. These debates defined the responsibilities and roles of journalism.

Campbell showed how the judges' views diverged about what constituted the public interest and what journalists should legitimately do. In this case, Lord Nicholls and Lord Hoffmann, with dissenting opinions, applied the *Reynolds* defence and determined the publication was in the public interest. They stated, 'The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure'.[108] But the other Law Lords: Lord Hope, Baroness Hale of Richmond and Lord Carswell, who allowed the appeal, did not apply the privilege, but drew attention to the privacy of Campbell, the details of *the Mirror* coverage, and the harm caused to Campbell's physical and mental health. Lord Hope pointed out the editor should not have included so much detail about her treatment, which 'was not the subject of any falsehood that was in need of correction'[109] and 'was information which any reasonable person who came into possession of it would realise was obtained in confidence'.[110] Such information 'had also been received from an insider in breach of confidence'[111] and 'the right of the public to receive information about the details of her treatment was of a much lower order than the undoubted right to know that she was misleading the public when she said that she did not take drugs'.[112] Their discussions clearly outlined what *the Mirror*'s editor should and should not have done, as expected by law. They also clarified the distinction between what constitutes the public interest and what merely interests the public.[113]

In *Bloomberg*,[114] the case concerned two reports about a US-based executive who was subject to a criminal investigation in the UK. One of the reports

[107]ibid [86].
[108]ibid [62].
[109]ibid [83].
[110]ibid.
[111]ibid [147].
[112]ibid [117].
[113]Ibid [57]–[59]
[114]*Bloomberg* (n 75).

discussed a confidential letter sent by a UK law enforcement body (UKLEB) seeking assistance in a criminal investigation. The Supreme Court unanimously agreed that *Bloomberg* should have looked into UKLEB's investigation itself, as it was a matter of public interest, which was the media's responsibility.[115] However, *Bloomberg* failed to do so. *Bloomberg's* right to freedom of expression under Article 10 of the ECHR was recognised together with the claimant's right to privacy under Article 8 of the ECHR. Along with examining other cases, including judgments passed down by the ECtHR such as *Axel Springer AG v Germany*,[116] the *Reynolds* case was cited to support the importance of the right to freedom of expression.[117] However, the overall focus of the judgment was very much on privacy and on how *Bloomberg* obtained the information rather than its right to freedom of expression. This is exemplified in the following quotes:

> In Murray, the nature of the activity plainly affected the question as to whether there was a reasonable expectation of privacy in the relevant information. However, this case does not turn on identifying the nature of the claimant's activity, but on the private nature of the information about the UKLEB's criminal investigation into his activities. The private nature of that information is not affected by the specifics of the activities being investigated. [118]
>
> …
>
> The judge was entitled to identify the most significant Murray factor as being "[t]he circumstances in which and the purposes for which the information came into the hands of the publisher" and to place less emphasis on the status of the claimant. We reject Bloomberg's argument that the courts below failed to give adequate consideration to the Murray factor of "the attributes of the claimant"[119]

While naming was justified in *Jameel* and *Flood*, it was judged to be illegitimate in this case. The Murray factors and the two-stage test established in *Murray v Express Newspapers*[120] were introduced to determine whether private information was misused and whether a person under criminal investigation has a reasonable expectation of privacy. These factors include '(1) attributes of the claimant; (2) nature of the activity; (3) place; (4) nature and purpose of intrusion; (5) absence of consent; (6) effect on claimant; (7) circumstances leading to the information finding publisher'.[121] This infamous case discussed Lord Nicholls' views particularly from *Campbell* in relation to

[115] ibid [112] and [130].
[116] *Axel Springer v Germany* 39954/08 [2012] ECHR 227.
[117] *Bloomberg* (n 75) [59].
[118] ibid [133].
[119] ibid [141].
[120] *Murray v Express Newspapers plc & Another* [2007] EWHC 1908 (Ch).
[121] *Murray v. Express Newspapers plc*, [2008] EWCA (Civ) 446 [36], cited in Kaylee Hartman, 'A Legal Battle Royale: The Conflict of Privacy and Press in HRH The Duchess of Sussex v. Associated Newspapers Ltd' (2023) 56 (2) *UIC L. Rev.* 343.

the reasonable expectation of privacy and how it relates to Article 8 of the ECHR. The Leveson Inquiry, cases including *Attorney General v MGN Ltd*[122], as well as the policies and guidance by other government bodies such as the College of Policing were referred to justify that the name or identifying details of a person under investigation should not be released. In addition, the role of journalism was clearly defined as a 'watchdog' and what the media should and should not be doing, as shown in the following quote:

> The judge also found that the UKLEB's investigation into X Ltd was itself a matter of public interest, and that there was a clear public interest in the media following and reporting on "developments" in the investigation. He noted, however, that the Article had not made any "criticism" of the investigation (such as "inadequacies in the investigation, undue delay or concern over the direction the investigation was taking" or if "investigators had been subjected to improper political pressure not to pursue certain people or lines of inquiry") which the media could legitimately be expected to highlight in its role as a "watchdog".[123]

> The Judge gave an instance of what the media might legitimately be expected to highlight: 'for example, any perceived inadequacies in the investigation'. This was plainly not intended to be exhaustive of legitimate media concerns.[124]

Therefore, *Bloomberg's* publication of the article was deemed not something that the media was legitimately expected to do and thus not on a matter of public interest.

In *Serafin*,[125] Lord Wilson reviewed the legal history surrounding and since *Reynolds*, discussed the *Reynolds* defence, cited landmark cases such as *Jameel* and *Flood*, as well as laws, such as the Defamation Act 2013. He deemed the previous trial 'unfair' and argued being 'responsible' involved the subjective judgment of the defendants. He distinguished 'in the public interest' from 'matter of public interest'[126] and stated that the ten factors of the *Reynolds* defence should not be used as 'a checklist'.[127] He proposed that the defendant should have 'reasonably believed' the publication was in the public interest but emphasised that the issue is not whether the article is 'in the public interest', but whether it concerns 'a matter of public interest'.[128] He also suggested best avoiding reference to acting 'responsibly'.[129] The argument not only stressed the new principles under the Defamation Act 2013 section 4 but also redefined the responsibilities of journalism.[130]

[122] *Attorney-General v MGN Ltd* [2002] EWHC 907.
[123] *Bloomberg* (n 72) [30]
[124] ibid [39].
[125] *Serafin* (n 74).
[126] ibid [74]
[127] ibid [57]
[128] ibid [75]
[129] ibid [75]
[130] ibid [52]–[54], [62] and [74].

When it came to *Banks,* the right to freedom of expression was not mentioned at all. There were three judgments involving this case in 2019, 2022 and 2023 respectively. Only the 2022 judgment discussed the legal principles and importance of freedom of expression and journalistic freedom as well as making the 'allowance for editorial judgment'[131] and concluded 'Ms *Cadwalladr* has succeeded in establishing a public interest defence in respect of the TED Talk from the original date of publication, 15 April 2019, until 29 April 2020' and 'no question of awarding damages arises'.[132] However, the judge ruled that Banks' attempt 'to seek vindication through these proceedings was, in my judgment, legitimate', countering Cadwalladr's repeated characterisation of the claim as a SLAPP suit – a strategic lawsuit against public participation aimed at silencing and intimidating her. The 2019 case relied on the truth defence, while the 2022 and 2023 cases shifted focus to rely on 'the statutory defence of publication on matters of public interest'. Meaning of language remained the key issue across the three judgments. In this 2023 judgment, examined in detail in this study, Lord Justice Warby, like Justice Steyn in the 2022 judgment, argued that a belief in the public interest of publishing was central to establishing the public interest defence – that is, demonstrating the publication addressed a matter of public interest.[133] But it was the responsibility of the defendant to have taken steps to 'stop publication of the TED Talk or the Tweet or to attach any qualifying statement to either of them' after the publication of the joint statement by the Electoral Commission and Mr Banks (and others) on 29 April 2020. This statement publicly confirmed no evidence for 'any criminal offences under the Political Parties, Elections and Referendums Act 2000 or company law had been committed by (among others) the claimant', suggesting 'that the claimant and his companies "received funding from any third party … or that he acted as an agent on behalf of a third party"'. Both judges, after examining how Twitter functioned, acknowledged that journalists' publications on Twitter were subject to scrutiny under defamation law, specifically regarding the public interest defence. Again, by doing so, the judges defined what journalists should do, i.e. journalists should be responsible for their publications on social platforms and must have a reasonable belief that these publications are in the public interest.[134] The judgment in this case suggests that the judges interpreted legal principles in a way that is adapted to the fast-changing digital world, where spaces for expression are no longer limited to traditional news coverage. Individuals should also be liable for their expressions in these spaces, and the legal

[131] *Banks* (n 76) [100], [112] and [378]
[132] *Banks v Cadwalladr* [2022] EWHC 1417 (QB) [414]-[415]
[133] *Banks* (n 73) [47].
[134] ibid [47], [68] and [70].

principles related to journalism's rights and responsibilities should apply to them as well. This knowledge can serve as a reference point for future legal cases.

Conclusion

The discussion above highlights a trend of increasing legal actions involving journalism since the turn of the twenty-first century. Despite some fluctuations, there has been a notable rise in defamation and libel cases over time. The discussion also details three key areas of focus in the judicial discourses: (1) the necessity for journalism to serve the public interest or report on matters of public concern; (2) the need to balance freedom of expression with the rights to privacy, reputation, and data protection; and (3) the ethics and responsibilities of journalism, rather than its right to freedom of expression, particularly after 2013. The judges delivered their arguments about what journalism should do in a democracy from a judicial perspective, defining the role of journalism as a watchdog.

The *Reynolds* privilege was constantly cited in cases throughout these years, though not in all of them. Lord Nicholls' ten-point test successfully highlighted the importance of the qualified privilege tradition, emphasising the need to balance the public interest with the rights of individuals to uphold their privacy, reputation, and data protection. This principle became the tenet in many judgments, regardless of whether judges ruled in favour of journalism, or whether the cases occurred before or after 2013.

In these judicial discourses, although interpreted within the realm of freedom of expression, journalism's freedom was deeply intertwined with its ethics and responsibilities. Echoing Article 10(2), freedom of expression was definitely not an absolute right that journalism could enjoy. It came with a condition closely connected with journalism's ethical practices, responsibilities, and respect for individuals' private lives and reputation. With the obvious rise in concerns over individuals' privacy, reputation, and data protection, as well as the ethics of journalism, the conditions under which journalism could exercise its right to freedom of expression had been increasingly emphasised. The role of journalism was defined as a watchdog rather than merely providing information, echoing the definition given by the ECHR. This also entailed what constituted the public interest or a matter of the public interest.

These features of the discourses show not only the influence of *Reynolds* but also that of the developments since *Reynolds* such as the Defamation Act 2013, the phone hacking scandal, and the Leveson inquiry. They also reflect the contours of legal debates surrounding freedom of expression and journalism and the evolution of the legal landscape in this century. The shift in legal discourse from prioritising journalists' right to media freedom

towards emphasising the ethics of journalism may have concerning implications for journalism and press freedom in the UK. This change can influence what journalists are able to cover and shape the perception of those who may pursue legal action against journalists and news media.

The present study contributes to our understanding of judicial discourses of journalism since *Reynolds*. It also provides valuable insights into how legal frameworks surrounding freedom of expression and journalism have evolved. With this knowledge, we can evaluate how journalistic practices may be changed in this legal environment. Lawyers can better understand the impact of *Reynolds* and other key cases on legal practices as well as courts' attitudes to and interpretations of key concepts such as 'freedom of expression' and 'privacy'. This knowledge can also help them evaluate how courts may approach journalism-related cases, and therefore plan legal arguments more effectively when preparing cases involving journalism and freedom of expression. This study also shows the usefulness of the n-gram-driven approach in combination with qualitative analysis for analysing judicial discourses. It, however, is limited by the choice of samples and the design of the research. For future research, it would be helpful to examine whether the journalism-related judicial discourses can be found in other types of legal cases that are related to freedom of expression but do not directly involve journalism.

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