

## THE PROTECTION OF HUMAN RIGHTS IN THE UK CONSTITUTION: FREEDOM OF EXPRESSION AND SOCIAL MEDIA

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*This paper examines the ways that freedom of expression – especially expression on social media – has constitutional and human rights protection in the UK, including under the European Convention on Human Rights and the Human Rights Act 1998. After sketching the context and legal background it explores issues including the enhanced functions of UK courts, especially with respect to interpretative duties and declarations of incompatibility. It looks at the overarching themes in Article 10 jurisprudence and the domestic regulation of speech on social media (with especial reference to the application of criminal law).*

This is an outline paper prepared for the purposes of a presentation. For a detailed consideration of these and related issues, with full references, see:

- IG Cram, "Dealing with the googling juror: a commentary on Part 3 of the Criminal Justice and Courts Bill" (2014) 19 (4) Communications Law 110-113.
- IG Cram, "Twitt(er)ing Open Justice" in J Townend (ed) Justice Wide Open: Working Papers, Centre for Law, Justice & Journalism and City University London (2012), pp 93-99.
- IG Cram, "Comparative Constitutional Bills of Rights" in Mapping the Path towards Codifying - or Not Codifying - the UK Constitution - Case studies on constitution building, Westminster: House of Commons Political and Constitutional Reform Committee, (2014), pp 146-155.

*The views expressed in this Conference Paper are those of the author(s) and do not necessarily represent those of the Bingham Centre for the Rule of Law or the British Institute for International and Comparative Law.*

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## A. INTRODUCTION: CONTEXT AND LEGAL FRAMEWORK

### Context

1.2 billion people regularly use Facebook; 255 million regularly use Twitter (15 million in the UK); 500 million tweets made per day.

Types of overlapping problematic expression (which have their non-digital equivalents and often already prohibited at criminal law) include cyber-bullying; trolling; revenge-porn; breaching anonymity of persons (e.g. witnesses/complainants in sexual offence cases); harassment.

Much of the law that is applied to instances of the above kinds of expression pre-dates the era of internet communications.

### Article 10

Article 10 of the European Convention on Human Rights 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 authority 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, 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.

### *Key features of Art 10 Convention jurisprudence*

Freedom of expression is valued for two broad reasons - one of which is the intrinsic value to the individual and the other refers to the benefits to wider society:

- One of the basic conditions for the progress of democratic societies and for the development of each individual. *Handyside v UK* (1979-80) 1 EHRR 737.
- '(F)reedom of expression constitutes one of the essential foundations of a democratic society.'  
- *Sunday Times v UK* (1979) 2 EHRR 245.

Protection for freedom of expression under Article 10 of the ECHR includes offensive expression. Without such protection, it would be relatively easy for the majority to suppress unpopular, dissenting opinion on the basis that the expression in question caused hurt to their feelings. Nonetheless, the Court has not always lived up to the commitment to protect offensive expression. In *Otto Preminger Institut v Austria* for example, a majority in the Court refused to interfere with the decision of Austrian

authorities to seize and confiscate a film which was to be shown to a private film club.<sup>2</sup> The film was said to deal with themes that were deeply offensive to Christians and was scheduled to be shown in an area of Austria where 87% of the population described themselves as Roman Catholics.

The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time.

It is difficult to see how decisions such as *Otto Preminger* allow breathing space for minority and controversial opinions from the censoring tendencies of majorities. In this regard, it is clear that protection against contents-based regulation of expression falls well short of the exacting oversight standards deployed under the First Amendment in the US Constitution. In the US it is virtually impossible for the state to regulate speech by reference to its content.<sup>3</sup> The ease with which governments might distort debate by favouring certain speakers and viewpoints and disfavouring others (including by subjecting speakers to criminal penalties) is considered to be sufficiently serious a threat to a self-governing people as to make contents-based regulation almost always unconstitutional.

The Strasbourg Court has nonetheless articulated a consistent position regarding the hierarchy of expression types with the consequence that restrictions on some speech types will be policed more closely than restrictions on other speech types. Generally speaking, expression that is said to be 'political' enjoys a preferred status under the European Convention on Human Rights. The ECtHR in *Lingens v Austria* (1986) 8 EHRR noted that:

Freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. .. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.

This extended freedom of criticism extends beyond the realm of party politics to societal affairs more generally. For example in *Thorgeirson v Iceland*, the applicant had criticised police officers in newspaper articles calling them 'beasts in uniform' and described the police force as 'bullying'. Mr Thorgeirson was convicted under Icelandic law of having defamed the police officers. At Strasbourg, the Court asked whether his conviction was 'necessary in a democratic society' and concluded that it was not for the following, connected reasons: First there was a factual basis for Mr Thorgeirson's allegation of brutality - a police officer had been convicted of assaulting a civilian and this event had given rise to considerable public debate in Iceland. Second, other parts of his articles were based upon what other witnesses of police conduct had related to him about a comparatively few individual officers. Moreover, his purpose in writing the articles was to prompt an independent investigation into those allegations. Finally, his conviction and penalty (10,000 Icelandic crowns or

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<sup>2</sup> (1995) 19 EHRR 34.

<sup>3</sup> *Boos v Barry* 485 US 312 (1988) - restriction must be narrowly tailored and serve a compelling state interest.

8 days imprisonment) would discourage others from openly discussing matters of legitimate public concern.

It follows that other speech types (commercial, artistic) are entitled to less protection from national authorities' interference. This translates as a wider margin appreciation within which national authorities are permitted under the Convention to decide where the boundary falls between protected expression and a competing interest (such as preventing misleading advertising or protecting morals) Authorities supporting this proposition include *Casado Coca v Spain* (1994) 18 EHRR 1 and *Jacobowski v Germany* (1995) 19 EHRR 64. It may be said that the seized film in *Otto Preminger* concerned artistic expression and therefore on this basis the Austrian authorities were entitled to a wider margin of appreciation. At the same time, it is right to acknowledge that the boundaries between expression types may not always be clear cut (*VGT Verein GegenTierfabriken v Switzerland* (2002) 34 EHRR 159).

In the case of some extreme forms of political expression such as racist expression however, speakers have been denied Convention protection under one of two routes - viz treating the national authorities' restriction on expression as permitted under Art 10(2) or, more drastically, treating the expression as falling outside Art 10 altogether by virtue of Art 17.

An example of the first is evident in *Féret v. Belgium* where an elected politician who had been found guilty of inciting hatred against ethnic minorities was given a relatively lenient sentence of 250 hours community service by the Belgian court. Feret claimed this penalty amounted to a violation of his Art 10 rights however the Strasbourg Court refused to interfere with this penalty. Feret represented a danger to the social and political stability of Belgium and it could not be said that Belgium had exceeded the margin of appreciation it enjoyed under Article 10 to control such conduct.

#### *Relevance of Article 17 of the Convention to hateful expression*

'Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity aimed at the destruction of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

The framers sought to prevent the use of Convention rights by those dedicated to the overthrow of democratic values and institutions. Article 17 fits broadly within what may be called 'militant' or 'strong-arm' defences of the democratic state whereby those perceived to be the enemies of democracy are denied Convention protection (typically for expression and association activities). For example in *Glimmerveen and Hagenbeek v. the Netherlands*, the Commission refused to hear applications from two leaders of a proscribed party who were consequently prevented from standing for election. The leaders had produced a leaflet which had advocated the forcible expulsion of non-white people. The inadmissibility finding drew explicitly upon Article 17. Article 17 has also been used to deny Article 10 protection to statements praising national socialism or denying that the Holocaust took place - *H., W., P. and K. v. Austria* Appn. No. 12774/87, 62 DR (1989) 216, at pp. 220/1.

## B. THE CONVENTION IN DOMESTIC LAW

The Convention now enjoys status in domestic law by virtue of the Human Rights Act 1998 which allows citizens to invoke its provisions against public authorities in legal proceedings in England and Wales. So what are the key features of the 1998 Act?

### *Features of Human Rights Act 1998*

The 1998 Act represents a fundamental shift away from the piecemeal and residual approach to individual liberty that previously characterised the relationship between the citizen and the state. The 1998 Act gives judges a greater role in determining human rights questions than they had previously enjoyed but stops short of authorising the courts to strike down domestic laws that are inconsistent with the Convention. The *Preamble* to the Human Rights Act 1998 declares that the measure is intended to:

Give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.

Section 2(1) of the Act requires that courts and tribunals ‘must take account’ of relevant judgments, decisions, declarations or advisory opinions of the European Court of Human Rights. It should be noted however that this provision stops short of requiring a court to *follow* Convention jurisprudence, a feature of incorporation that is significant in circumstances:

- (i) Where Strasbourg rulings are considered to set a minimum threshold of rights protection - allowing domestic legislatures (but not courts) to set a higher level of protection (Lord Bingham in *Ullah*<sup>4</sup> but see for a different view Baroness Hale<sup>5</sup>) or
- (ii) Where as in *Horncastle*<sup>6</sup> the domestic court may now depart from a ruling of the Strasbourg Court where that ruling insufficiently appreciated or accommodated particular aspects of the domestic process.

An amendment to make Strasbourg rulings binding on domestic courts was rejected during the Act’s passage in the House of Lords on the basis that this would unduly hamper UK courts’ flexibility to adapt European jurisprudence to domestic circumstances.

Section 6 of the 1998 Act offers protection against decisions/acts of ‘public authorities’ in the United Kingdom that violate core civil and political freedoms, albeit via mechanisms which do not ostensibly challenge the notion of parliamentary sovereignty. The preferred mechanism for achieving this protection is the interpretative duty on the courts by section 3(1) of the 1998 Act to read and give effect to primary and subordinate legislation (whether enacted before or after the commencement of the Human Rights Act) in a way which is consistent with the Convention in ‘so far as it is possible to do so’. The significance of this formulation is that the courts will be required to prefer a possible, though strained interpretation of legislation which is consistent with Convention rights to any

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<sup>4</sup> [2004] UKHL 26.

<sup>5</sup> *Argentoratium Locutum*: Is Strasbourg or the Supreme Court Supreme? (2012) 12 HRLR 65 arguing that “There is nothing in the Act, or in its purposes, to say that we should deliberately go no further than Strasbourg has gone, or that we should refrain from devising what we think is the right result in a case where Strasbourg has not yet spoken.”

<sup>6</sup> [2010] 2 AC 373.

alternative, inconsistent interpretation. In ascertaining the purpose of new legislation, judges look to the statement of compatibility made to Parliament under s.19 of the 1998 Act which requires Ministers prior to the Second Reading stage of a Bill to state whether, in the view of the Minister, the Bill's provisions are compatible with Convention rights.

In those cases where a conflict between Convention rights and a statutory provision has been identified - AND a strained, Convention-compliant interpretation of the provision cannot be given by the court without departing substantially from a fundamental feature of the Act<sup>7</sup> - a declaration of incompatibility may be granted by the higher courts using the power in s.4(2) of the Human Rights Act. Consistently with the notion of parliamentary sovereignty, a declaration does not affect the continuing validity of an incompatible statutory provision although a Minister may fast-track a remedial order to remove this incompatibility.<sup>8</sup> Professor Bradley has commented that although a s.4(2) declaration constitutes a wound to Parliament's handiwork that will often prove mortal, it is for the Government or Parliament to turn off the life support for the impugned legislation, not the courts.<sup>9</sup>

### C. DOMESTIC LAWS AFFECTING ONLINE EXPRESSION – with especial reference to criminal laws

Online expression has thrown up a variety of problematic forms of expression that for ease of classification may be subdivided roughly into the following, overlapping categories. From the earlier analysis of ECtHR jurisprudence, it would be expected that expression with a political content would receive from the domestic courts a greater degree of protection (either by a narrowed reading of the scope of offence or by a more expansive reading of the defences available to an accused person). 'Political' expression may include where someone is campaigning for a cause (such as amending abortion laws) or expresses hostility towards a politician on account of the latter's views.

- i) Credible threats of violence against a person/damage to property.
- ii) Communications that are grossly offensive/indecent/obscene/false.
- iii) 'Revenge porn' - where sexually explicit or intimate images of a person are sent/published to others without the consent of person with the purpose of humiliating/distressing the victim.
- iv) Incitement to hatred on the basis of race/religion/gender/sexual orientation.
- v) Communications that constitute harassment of an individual.
- vi) Breaching anonymity order/statutory ban on identification (eg in rape/serious sexual assault cases).

In what follows, the focus upon criminal liability ignores civil law issues to arise from electronic communications that include infringement of copyrighted interests and associated IP issues, defamation of individuals and companies, breach of confidence.

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<sup>7</sup> Where the court does this, it ceases its proper role of 'interpreter' of legislation and becomes instead (and impermissibly) a 'legislator', see *Re S Re W* [2002] 2 WLR 720 at 731 per Lord Nicholls of Birkenhead.

<sup>8</sup> S.10 Human Rights Act 1998 sets out two routes - the *non-urgent*, (Govt Minister proposes an order, a period of consultation follows and then a draft order is laid before Parliament which, in order to take effect must be approved by the affirmative resolution procedure) and the *urgent* procedure where an order is laid before both Houses of Parliament and comes into effect if approved by both Houses within a set period of days). Remedial orders may also be proposed after a ruling of the European Court of Human Rights appears to Govt ministers that a provision of domestic law is incompatible with the UK's Convention obligations.

<sup>9</sup> A Bradley, 'The Sovereignty of Parliament - Form or Substance?' in J Jowell & D Oliver (eds), *The Changing Constitution* (7th ed) (2011, OUP, Oxford).

**For conduct falling under i), ii) & iii) above**

### **1. Malicious Communications Act 1988, s.1**

The original purpose of the Act was to curb 'poison pen' letters. Section 1 provides:

It is an offence to send 'a (communication) which is indecent or grossly offensive; a threat; or information which is false and known or believed to be false by the sender (if his purpose is that) it should cause distress or anxiety to the recipient or any other person to whom he intends that it or its contents or nature should be communicated.

On meaning of 'indecent or grossly offensive' see *Connolly v DPP*. Here the defendant sent pictures of aborted 21 week-old fetuses to pharmacists who stocked the 'morning-after' pill. The photographs were deemed by a jury to be 'grossly offensive' in their ordinary meaning. The defendant's communication undoubtedly fell into the category of political speech. She was hoping to change views about the morality of abortion. However, even after reading down s.1 of the 1988 Act so as to give an Article 10 ECHR-compliant reading of the statute, the defendant was found guilty of the s.1 offence. The critical fact here was that the photographs had been sent to employees of the store – not those who had power to decide what medicines to stock, Had the photographs been sent to a body in a position to influence public debate – such as a newspaper or its /website – the Article 10 claim would have been stronger.

**Convictions under 1988 Act** include

(i) February 2012 - 29yr old man for posting comments about Newcastle United football club on Twitter in which he referred to them as 'Coon Army'.

(ii) *R v Byrne* [2011] EWCA 3230 texts sent by defendant to the mobile phone of son of a woman who had ended a relationship with the defendant rambled thus - "Tell your mother been passed enough times today big wood in garden blue 306 time for revenge mate, sorry." AND "Wait for the bang sweet dreams." (threatening to kill someone is also an offence under Offences Against the Person Act 1861, s.16).

This section could also be used against 'revenge pornography' – it depends in part on whether the images depicting consensual sexual conduct are 'indecent' (images of consensual sex are not considered obscene) No specific offence of publishing disseminating 'revenge porn' exists as yet although, at the time of writing (October 2014) the Coalition Government is looking to introduce a late amendment into the Criminal Justice and Courts Bill to make this a specific offence.

### **2. Communications Act 2003, s.127**

This is one of the first statutes that sets out to regulate online speech. It is an offence to send 'by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character'.

*Chambers v DPP* [2012] EWHC 2157

"Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!"

- Posted on defendant's public time line Twitter account. He was convicted in the Crown Court and appealed to the High Court.
- Held message was not 'menacing' – defendant's message would not have been understood by his Twitter followers as conveying a serious threat, rather they would have seen it as a joke or empty banter. Chambers initial conviction quashed by the High Court.

### **Convictions under 2003 Act**

June 2011 – NI man convicted for posting messages on Facebook that said an MP (Gregory Campbell) was a 'scumbag' and should 'get a bullet in the head.' Defendant argued unsuccessfully that this was a throwaway remark not intended to cause harm. Court heard evidence that the MP was genuinely distressed at the comment.

December 2010 – 21 yr old Huddersfield man set up Facebook group entitled 'Pakis die' and posted a message saying 'Help me shoot all the Pakis' – convicted (could also have been liable under incitement to racial hatred laws – see below at 3(ii)).

September 2014 – Peter Nunn convicted for sending menacing messages to a female Labour MP who was campaigning for the new £10 to carry the image of Jane Austen. He retweeted another person's threatening message which had been sent to the MP: "You better watch your back, I'm going to rape your arse at 8pm and put the video all over." The following day he sent more tweets all of which he believed wrongly under the cover of anonymity. These included "Best way to rape a witch, try and drown her first then just when she's gagging for air that's when you enter." Nunn was jailed for 18 weeks.

It is possible that this section could also be used against revenge pornography.

### **Actual Prosecution Practice – DPP Guidelines issued (2013)**

Following the Chambers case and others, concerns were expressed that prosecutors in regional offices across England and Wales were reacting inconsistently (and sometimes excessively) when deciding whether to prosecute under the 1988 and 2003 Acts for online expression. Subsequently the Director of Public Prosecutions issued guidance to prosecutors to ensure greater consistency. The Guidelines state that prosecutions will be brought when prosecutors are satisfied that the communication in question:

More than shocking, disturbing, satirical, iconoclastic or rude or the expression of unpopular opinion or unfashionable opinion or banter/humour even if distasteful/painful to some.

If a tweet/post is grossly offensive, the suspect may avoid prosecution if he/she has expressed genuine remorse; swift and effective action has been taken to remove the grossly offensive material; the communication was not intended for a wide audience or did not include the target/victim of the communication.

However where there is a credible threat of violence to persons/property or the communication targets an individual and may constitute harassment – then the Crown Prosecution Service will prosecute these robustly.

### **3. Public Order Act 1986**

#### **(i) s.4A**

It is an offence for a person to use “threatening, abusive or insulting words or behaviour” or display “any writing, sign or other visible representation which is threatening, abusive or insulting” which causes “that or another person harassment, alarm or distress” and which the speaker intends to have that effect.

March 2012 – 21yr old man convicted and imprisoned for 56 days under s.4A for sending abusive messages via Twitter when black footballer Fabrice Muamba collapsed during a televised game – the tweet was racially derogatory.

March 2011 - Crawley Town supporter convicted under s.127 (8 week suspended sentence) when he was identified on a video posted on *Youtube* for making mocking gestures relating to the Munich airplane tragedy in which Manchester United footballers and others were killed.

#### **(ii) ss.18-23 & 29**

Part 3 of the Public Order Act 1986 (as amended) prohibits expression likely to stir up racial, religious hatred or hatred on the basis of sexual orientation. It has also been used against online speech. In *R v Sheppard* [2010] EWCA 65 material was posted on a website making derogatory remarks about black and Jewish persons. Another section of materials entitled ‘Tales of the Holofoax’ stated that the Holocaust was ‘one of many Jewish lies’ The website was hosted in the US but sent from England and available to persons here. The defendants convicted of publishing racially inflammatory material and imprisoned 3 yrs 10 mths.

### **Communications that constitute harassment of an individual**

#### **Protection from Harassment Act 1997** (originally aimed at stalkers)

- A criminal offence is committed:

#### **(i) Offence of harassment ss.1, 2**

Where a person engages in a course of conduct that amounts to harassment of another and which he knows or ought to know amounts to harassment (S1(3) defences: where harassment occurs for the purpose of preventing/detecting crime; or where in all the circumstances the conduct was reasonable);

AND

#### **(ii) Putting people in fear of violence s.4**

A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions. (Defences similar to ss1,2 above.)

The element of 'course of conduct' requires there to be more than one instance of the conduct (and not simply two distant pieces of behaviour by the same person - there must be a sufficiently proximate connection in time between the separate pieces of conduct for these to amount to a 'course of conduct' - *Lau v DPP* [2000] 1 FLR 799). Moreover, this offence will not apply to the situation where 100 persons each tweet once something that causes harassment to the target since none of the tweeters do this more than once. Where there two or more communications, these need not take the same medium each time but may include a combination of social media communications (Twitter posts, Facebook posts with the target and other forms of contact (eg phone calls, unwanted visits etc.) The term 'harassment' is not defined in the Act. It is left to juries to decide using their own understanding of the term.

#### **D. CONCLUSION**

The sorts of abusive comment and unpleasant invective that is found in online communications is often said to constitute low level speech. This is to differentiate such expression from the more sophisticated and considered commentary associated with professional broadcasters and journalists. In the era of electronic communications, we are all potential speakers and the ease (and haste) with which we may post online our instant reactions to events may have much wider repercussions than originally intended. The task of a liberal legal system is to draw appropriate boundary lines that facilitate vigorous and sometimes ill-tempered or poorly- humoured debate on matters of societal importance on the one hand, whilst discouraging personal and vindictive attacks on persons on the other. As the *Chambers* case shows, the courts do not always get things right at the first time of asking.