

Third Study Commission Questionnaire 2002

Israel

Answers on behalf of England and Wales

1. **Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.**

1.1. Freedom of speech is protected both at Common Law and also by virtue of Article 10 of the European Convention of Human Rights as it is applied by the Human Rights Act 1998.

1.2. Common Law

1.2.1. Freedom of speech / expression was traditionally regarded as a residual right – namely one of the liberties of the civilian that remain after legal limits have been defined by the law.

1.2.2. The nature of this right has been expressed in a variety of different but essentially common ways, eg:-:

i. **Attorney-General v Guardian Newspapers (No.2) 1990 1 AC 109** – [The Spycatcher case] – Sir John Donaldson MR observed (p.178) that:-

“the starting point of our domestic law is that every citizen has a right to do what he likes unless restrained by the common law or by statute”;

ii. Dicey **An Introduction to the Study of the Law of the Constitution** (10th Edn, 1964) p 246 –

‘freedom of discussion is . . . in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written’;

iii. **R v Central Independent Television PLC 1994 Fam 192** Hoffman LJ (p.202-203) said that –

“... a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.”

iv. **Redmond-Bate v Director of Public Prosecutions (1999) 7 B.H.R.C. 375** at [pp 20]:

“Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative ... Freedom only to speak inoffensively is not worth having ...”

v. In **R v Shayler [2003] 1 A.C. 247** at [pp 21], Lord Bingham emphasised the connection between freedom of expression and democracy –

“the fundamental right of free expression has been recognised at common law for very many years” and explained: “The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated”

v. Even the words of George Orwell in his unpublished introduction to *Animal Farm* – “*If liberty means anything at all, it means the right to tell people what they do not want to hear.*” have received judicial approval — **R. (on the application of Miller) v College of Policing 2020 EWHC 225** – by Knowles J.

1.3. Human Rights Act 1998

1.3.1. The UK was one of the first signatories to the European Convention on Human Rights. It did not however incorporate the Treaty into its laws. The Convention bound the UK to amend its laws and procedures in so far they were found to have breached the Convention. As such the courts sought to apply the common law and interpret legislation in a way that was consistent with the Convention.

1.3.2. The Human Rights Act 1998 (HRA) came into force on 2nd October 2000. However the Act did not incorporate the Convention directly into UK Law.

1.3.3. By s.1 of the HRA Articles 2-12 and 14 of the ECHR are to be given effect in domestic law through – and for the purposes of - the HRA. The Act places a responsibility on each branch of government (legislature, executive and the judiciary) to give effect to Convention rights in exercising domestic public powers. The HRA creates rights by reference to the convention. Public authorities (including the courts) must not act incompatibly with Convention rights (s.6); the courts must – as far as is possible - interpret and give effect to legislation in a way which is compatible with Convention rights (s3) and where this is not possible then to make a declaration of incompatibility (a4).

1.3.4. In determining a question which arises in connection with a Convention right a court must take into account any judgment decision or opinion of the ECHR

1.3.5. By s.6 of the HRA it is unlawful for a public authority to act in a way that is incompatible with a Convention right and a victim of any such unlawful act may bring proceedings against that public authority. The courts may award damages by way of compensation or any other relief or remedy or make such order as is within its powers.

1.3.6. Accordingly since October 2000 Article 10 of the ECHR has had particular significance in securing a person’s right of free speech. The right itself is not absolute and may be restricted.

1.3.7. The terms of Article 10 are well known:-

Article 10 (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....

Article 10 (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”

1.3.8. Whereas the right to freedom of expression is broadly and constructively interpreted any interference with or restriction of the right to freedom of expression is to be narrowly interpreted. The jurisprudence can be summarised as follows

1.3.8.1. Interference must be prescribed by law or in accordance with law. The domestic law must itself be accessible and formulated with sufficient precision as to be foreseeable in its consequences

1.3.8.2. Interference must be necessary (in support of a pressing social need) in a democratic society in pursuit of one of the legitimate aims set out in Article 10 and there must be a reasonable relation of proportionality between the aim pursued and the restriction employed – so as to achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In assessing the question of proportionality the courts will ask 4 questions:-

1.3.8.2.1. Whether the objective pursued is sufficiently important to justify limitation of a fundamental right;

1.3.8.2.2. Whether the measure is rationally connected to the objective;

1.3.8.2.3. Whether a less intrusive measure could have been adopted ;

1.3.8.2.4. Whether a fair balance has been struck between the individuals rights and the interests of the community (as set out by Lord Sumption in **Bank Mellat v HM Treasury (No.2) 2014 AC 700 at p.771**

1.4. As far as the interaction between the common law and Art 10 is concerned – the courts have consistently held the two to be consistent one with the other:

- **Attorney General v Guardian Newspapers (No.2) 1990 1 AC 109 – p.283-284**
Lord Goff of Chievely

“I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising since freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech and turn to our law to discover the established exceptions to it ...”

- **Derbyshire County Council v Times Newspapers Ltd 1993 AC 534** – per Lord Keith of Kinkel (p.551)

My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109, 283-284, expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and P article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field.

- **McCartan Turkington Breen v Times Newspapers Ltd 2001 2 AC 277** – Per Lord Steyn: even before the coming into force of the HRA:

“the principle of freedom of expression had attained the status of a constitutional right with high attendant normative force ...”

2. **Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.**

2.1. Hate speech is criminalised.

2.2. There are certain broad categories of offence that criminalise words that are offensive, threatening or intended to cause distress and anxiety. In addition more particular categories of “hate speech” are criminalised – namely those certain groups having identified protected characteristics including religion, race, sexual orientation, disability or transgender identity. However the ways in which such behaviour is criminalised – both by the creation of offences and the imposition of criminal sanction is varied. The various different approaches are set out below – in the context of

2.2.1. Communications Offences;

2.2.2. Public Order Offences – (both generally and as aggravated offences)

2.2.3. Harassment Offences – (both generally and as aggravated offences)

2.2.4. Three specific means of criminalising hate speech against particular protected groupings;

2.2.5. Miscellaneous offending

2.3. The act of criminalising speech inevitably involves an interference with what is otherwise accepted to be a right to freedom of expression. Underlying such a restriction of this right is the notion that certain forms of speech create an unwarranted social harm that itself justifies the protection of the criminal law. The balance to be struck may be difficult – particularly

where any society is founded on a multitude of different opinions many of which may cause serious offence to others. There has been a general reluctance to criminalise opinions – even distasteful opinions – except in cases where such a restriction is required to prevent harm (physical or psychological), damage to property or public disorder.

Redmond-Bate v Director of Public Prosecutions (1999) 7 B.H.R.C. 375 at [pp 20]:

“Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative ... Freedom only to speak inoffensively is not worth having ...”

2.4. Communications Offences

2.4.1. The Malicious Communications Act 1988 and the Communications Act 2003 criminalise certain forms of communication.

2.4.2. *The Malicious Communications Act 1988* (MCA)

2.4.2.1. Makes it an offence for a person to send to another a message that is either indecent or grossly offensive, or which amounts to a threat, or which is false and is known or believed by the sender to be false, with the intent to cause the recipient distress or anxiety (section 1 of the MCA);

2.4.3. *The Communications Act 2003* (Section 127)

2.4.3.1. Makes it an offence for either

2.4.3.1.1. A person to send or cause to be sent over an electronic communications network a message that is grossly offensive, indecent, obscene, or menacing. There is here no requirement for such a message to be sent to any particular individual or for it to have been received;

2.4.3.1.2. A person to send or cause to be sent a message that he knows to be false or otherwise to persistently make use of a public electronic communications network where his purpose in either case is to cause annoyance, inconvenience or needless anxiety to another.

2.4.4. The compatibility of s.127 with Article 10 was considered by the House of Lords in **DPP v Collins 2006 1 WLR 2223** where it was held that s.127 of the Communications Act 2003 – although itself an interference with freedom of expression went no further than was necessary in a democratic society for achieving the legitimate objective of preventing the use of a public electronic communications network for attacking the reputations and rights of others [D telephoned MP and left messages on answer phone making generic racial references but not to any one person as the intended recipient of those messages – HL held he should have been convicted of sending messages that were “grossly offensive”]

2.5. Public Order Offences

2.5.1. A number of statutes have, at different times, restricted unfettered freedom of expression to safeguard public order – and also to safeguard persons being subjected to speech or behaviour that causes, or has the potential for causing, harm, alarm or distress.

2.5.2. *The Public Order Act 1986*

2.5.2.1. makes it a criminal offence for a person to use towards another threatening, abusive or insulting words, or behaviour (and in the case of section 5 disorderly behaviour) where:-

2.5.2.1.1. with the intent, or awareness, that such words would be, or may be, threatening abusive or insulting he also intends by the use of such words to either cause that other person to believe that immediate unlawful violence will be used against him or another or to provoke the immediate use of unlawful violence (section 4)

2.5.2.1.2. he intends to cause the other person harassment, alarm or distress and such threatening abusive or insulting words in fact cause another person harassment alarm or distress (Section 4A)

2.5.2.2. It is also made a criminal offence for a person to use threatening or abusive (but not insulting) words within the hearing of a person who is likely to be caused harassment alarm or distress by such use (Section 5).

2.5.2.3. Whether a particular communication is “threatening, abusive or insulting” is a matter of fact in each case.

2.5.2.4. In the case of an offence under section 5 a defendant who was in the practice of walking around the UK naked was convicted of disorderly behaviour by walking through Halifax wearing only boots, socks, a hat, rucksack and a compass around his neck. Whilst his Art 10 rights to freedom of expression were engaged there was nevertheless a “pressing social need” for the restriction of his right to be naked in the context of this case where others may be alarmed and distressed at the sight of his naked body – *Gough v DPP 2014 ACD 49*. Mr Gough’s complaint to the ECHR that his repeated arrests for numerous offences including breach of the peace, public indecency and contempt of court constituted an unjustified interference with his freedom of expression was rejected *Gough v UK 2015 6 EHRR 8*

2.6. Harassment / Stalking Offences

2.6.1. *Protection from Harassment Act 1997* [PHA]

2.6.1.1. Makes it offences for a person to

- i. pursue a course of conduct (which could include unwanted e-messaging, tweets or tagging on line content) which he knows or ought to know amounts to harassment of another (Section 1 of the PHA);

- ii. pursue a course of conduct that causes another to fear that violence will be used against him when he knows or ought to know that his course of conduct will have such an effect (Section 4 of the PHA);
- 2.6.1.2. Harassment is not defined – but Section 7 (2) provides that harassing includes “alarming a person or causing a person distress”; otherwise it has been held to be a word that is “generally understood”¹. The conduct must cross “*the boundary between conduct which is unattractive, even unreasonable and conduct which is oppressive and unacceptable*”
- 2.6.1.3. Harassment offences may be committed by a group (Section 7 (3A) of the PHA or perpetrated against a group (Section 1 (1A) of the PHA).
- 2.6.1.4. Harassment that amounts to stalking is also a specific offence – (Section 2A (3) of the PHA) and is defined as including the publishing of any statement or material that relates to another person or which purports to emanate from such a person. This will cover the use of the internet, social media platforms to harass abuse others on line.

2.7. In England and Wales 3 distinct sets of provisions criminalise hate speech directed to those with protected characteristics:-

2.7.1. Aggravated Offences:-

- 2.7.1.1. Specific “hate speech” offences are created by making it a criminal offence to commit certain specified pre-existing offences when the offender is motivated by, or displays religious or racial hostility towards the victim of the offence.
- 2.7.1.2. By the terms of the Crime and Disorder Act 1998 the commission of 11 separate “base” offences are made distinct “aggravated offences” when at or immediately after their commission the offender is motivated by, or demonstrates hostility towards the victim based on the victim’s membership or presumed membership of a religious or racial group. These offences include assaults; public order offences (as set out above – ie – sections 4, 4A and 5 of the Public Order Act 1986) harassment/stalking (offences under the Protection from Harassment Act 1997 – as above), and criminal damage.
- 2.7.1.3. Such aggravated offences apply only where the hate or hostility is based on religion or race.

2.7.2. Enhanced sentencing:-

- 2.7.2.1. Where offences (which are not themselves aggravated offences) are motivated by or demonstrate hostility against a specific group that is based on

¹ *Thomas v News Group Newspapers Ltd 2001 EWCA Civ 1233*

race, religion, sexual orientation, disability or transgender identity then sentencing courts are required to treat such hostility as an aggravating factor when considering sentence and must set out the precise extent to which any sentence has been increased on account of such hostility [Section 66 Sentencing Act 2020];

2.7.3. Offences of “stirring up hatred against groups based on race, religion and sexual orientation

2.7.3.1. Parts III and IIIA of the Public Order Act 1986 make it criminal offences to stir up hatred against a group of persons defined by reference to race, religious belief (or lack of religious belief) or sexual orientation.

2.7.3.2. In the case of offences of stirring up racial hatred:-

2.7.3.2.1. A person is guilty of such an offence if he uses threatening, abusive or insulting words or behaviour or displays any written material which is threatening abusive or insulting and when either (a) he intends to stir up racial hatred or (b) where racial hatred is likely to be stirred by the use of such words or behaviour.

2.7.3.2.2. It is made an offence for a person to publish or distribute written material that is threatening, abusive or insulting, or to present or direct a play that involves the use or threatening abusive or insulting behaviour or to distribute, show or play a recording of images or sounds that are threatening, abusive or insulting, or to provide a “programme service” or to produce or direct a “programme” that involves threatening, abusive or insulting images or sounds if either (a) he also intends thereby to stir up racial hatred or (b) racial hatred is likely to be stirred up thereby;

2.7.3.2.3. A person in possession of written material, or a recording, which is threatening, abusive, or insulting with a view to them being displayed, published, distributed, played, or shown is guilty of an offence if he intends for racial hatred to be stirred up or if racial hatred is likely to be stirred up

2.7.3.3. In the cases of offences of stirring up religious hatred or hatred on the grounds of sexual orientation –

2.7.3.3.1. the offences are drawn more narrowly:

2.7.3.3.1.1. The words or conduct must be threatening and not merely abusive or insulting;

2.7.3.3.1.2. There must have been an intention to stir up hatred and not simply a likelihood that such hatred would be stirred up

2.7.3.3.1.3. There are express provisions protecting freedom of speech – covering, for example, criticism of a religious belief or sexual conduct (Section 29J and 29JA);

2.7.3.3.2. There are similar offences of possession of inflammatory material or recordings for display, publication etc where the offender intends to stir up religious hatred or hatred on the grounds of sexual orientation

2.7.4. The fact that such offences have as their core the notion that public harm could result from the wider dissemination of hatred against particular protected groups is also demonstrated in the exemption given to words or behaviour used in a private dwelling in circumstances where they could not be seen or heard outside that dwelling.

2.8. Miscellaneous offences:

2.8.1. Section 3 of the Football (Offences) Act 1991 makes it an offence of a person to engage or take part in chanting of an indecent or racist nature at a designated football match.

2.8.1.1. Racist nature is defined as “ consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality or ethnic or national origins”

3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like? Including

Restrictions of the freedom of speech:

3.1. There is something of an overlap between this question and that above which sets out the manner in which hate speech is criminalised.

3.2. The public interest in free speech is (in reflecting the common law) subservient to what are deemed to be competing public interests – including eg the prevention of crime, national security, administration of justice, the restriction of publication of obscene or corrupting or offensive material, the protection of religious beliefs, maintenance of public order, protection of vulnerable groups.

3.3. This is equally reflected in the exceptions/justifications within Article 10(2) see above.

3.4. The following areas are given as examples of cases where the criminal law places restrictions on freedom of expression:

3.4.1. Where the restriction is aimed at the prevention of substantive criminal offences;

3.4.2. To protect the integrity of the court/judicial process;

3.4.3. To protect national security – treason and sedition

3.4.4. To combat terrorism

3.4.5. To protect public morals

3.4.6. To protect public order

3.5. General restrictions on freedom of expression which involves the commission of a substantive crime

3.5.1. Such restrictions may be found in eg – Statutory and common law offences of conspiracy; making threats to kill (Section 16 of the Offences Against the Person Act 1861); and blackmail (s.21 Theft Act 1968 – unwarranted demand for menaces with a view to gain)

3.6. Protection of the integrity of the courts/judicial process

3.6.1. *Contempt of Court Act 1981*

3.6.2. Publications may amount to criminal contempts of court where, in relation to “active proceedings” they, for example:-

- i. create a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced regardless of any intent to do so – by eg impairing the impartiality of the court which is to try proceedings or which deter or influence the evidence to be given by witnesses;
- ii. are intended to interfere with or impede the administration of justice;
- iii. breach reporting restrictions on proceedings in court (such as those requiring postponement of reporting of a trial to avoid the risk of injustice in other proceedings that have not been completed – imposed under s.4 of the Contempt of Court Act 1981

There are a number of defences to any such allegation including innocent publication. A publisher is protected from revealing his sources of information unless such disclosure is necessary in the interests of justice or national security (s.10 of the Contempt of Court Act 1981)

3.6.3. *Protection of witnesses and young defendants*

3.6.3.1. Victims of or witnesses to crime may be protected by the prohibition of any publication that might reveal their identity. A person publishing such information commits an offence.

3.6.3.1.1. This applies principally to young witness (Section 45 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) – prohibition lasts until 18) and victims of sexual offences (Sexual Offences (Amendment) Act 1992 – lifetime prohibition) . Where the quality of a witnesses evidence may be impeded by reason of fear or distress without a lifetime prohibition on their identification an order may be made to that effect. (Section 45A (youths) Section 46 (adults)YJCEA)

3.6.3.1.2. In the case of young defendants (under 18) similar provisions prevent the publication of their identity until they reach the age of 18 – (Automatic and mandatory restriction where the youth appears in the Youth Court - section 49 of the Children and Young Persons Act 1933 – and discretionary under

Section 45 of the Youth Justice and Criminal Evidence Act 1999 where D is in the Crown Court);

3.6.4. *Jury Integrity*

3.6.4.1. To protect the integrity of a jury's deliberation in reaching its verdict it is (subject to certain exceptions) an offence for a person intentionally to disclose any information about statements made or opinions expressed arguments advanced or votes cast within those deliberations – section 20D of the Juries Act 1974

3.7. **Protecting National Security Treason and Sediton**

3.7.1. *Official Secrets Act 1989 (OSA)*

3.7.1.1. It is an offence for a member of the security or intelligence services, or any person who has been notified that he is subject to the provisions of the OSA, to disclose, without lawful authority, any information document or article relating to security or intelligence that is or has been in his possession. (section 1(1)(a) of the OSA)

3.7.1.2. **R v Shayler 2003 1 AC 247** the House of Lords confirmed that although this prohibition on disclosure amounted to an interference with freedom of expression it was nevertheless justified and so no public interest defence could be raised by a person disclosing an official secret in breach of the Act

3.7.2. *Atomic Energy Act 1946*

3.7.2.1. By Section 11 it is a criminal offence to communicate to an unauthorised person sensitive information about nuclear power plants – including drawings photographs plans or models of, or information relating to existing proposed power plants or any processes or operations within such plants.

3.7.3. *Treason / incitement to disaffection in the police and armed forces*

3.7.3.1. *Treason* – it remains a criminal offence to “imagine the Death of our Lord the King or of our Lady his Queen or of their eldest son and heir” – Treason Act 1351;

3.7.3.2. *Incitement to disaffection*

3.7.3.2.1. It is an offence for a person to cause or attempt to cause or do any act calculated to cause “disaffection” amongst members of the police force or to induce a member of the police force to withhold his services (*Police Act 1996 s.91*)

3.7.3.2.2. It is an offence for an “alien” to attempt or do any act calculated or likely to cause sedition or disaffection amongst the armed forces of the UK or its allies or amongst the civilian population (*Aliens Restriction (Amendment) Act 1919 (s.3)*)

3.7.3.2.3. It is an offence for a person to endeavour to seduce any member of the Armed Forces from their duty or allegiance to the Crown (*Incitement to Disaffection Act 1934 (s.1)* **Arrowsmith v The UK 1981 3 EHRR 218** the ECHR found that the resulting restriction on a campaigning pacifist, Pat Arrowsmith's freedom of expression (to distribute leaflets encouraging soldiers not to participate in service in Northern Ireland) was justified.

3.8. Combatting terrorism

3.8.1. *Terrorism Act 2000*

- 3.8.1.1. Makes it a criminal offence to –
 - 3.8.1.1.1. invite support for a proscribed terrorist organisation; (Section 12 (1);
 - 3.8.1.1.2. express an opinion or belief that is supportive of a proscribed organisation – being reckless as to whether the person to whom the expression is directed will be encouraged to support a proscribed organisation (Section 12 (1A));
 - 3.8.1.1.3. Arrange, manage, or assist in arranging, or managing, a meeting which he knows is either to support or further the activities of a proscribed organisation, or which will be addressed by a person who belongs to such an organisation (Section 12 (2);
 - 3.8.1.1.4. Address any such meeting with the purpose of encouraging support for a proscribed organisation;
- 3.8.1.2. **R v Choudhary 2018 1 WLR 695** the Court of Appeal held that support did not have to be tangible or practical but could include encouragement emotional help, mental comfort, or the act of writing or speaking in favour of something. Such an offence limited a person's freedom of expression but such interference was necessary in a democratic society for achieving the legitimate aims of preserving national security and public safety, preventing disorder and crime and protecting the rights and freedoms of others, and was proportionate to those aims;

3.8.2. *Terrorism Act 2006*

- 3.8.2.1. Section 1 TA 2006 makes it an offence to make or publish a statement that encourages, or induces, others to commit, prepare for, or instigate acts of terrorism;
- 3.8.2.2. Section 2 makes it an offence to disseminate terrorist publications i.e. publications that contain material which is either likely to be understood as encouragement or inducement to others to the commission preparation or instigation of acts of terrorism or likely to be useful in the commission or preparation of acts of terrorism.
- 3.8.2.3. In so far as freedom of expression is concerned in this context

R v Ali Humza 2018 1 WLR 6105 Treacy LJ stated that

“The article 10 right guaranteeing freedom of expression is not an absolute right, but is qualified by article 10.2 which provides that “The exercise of [the right] may be subject to such . . . restrictions . . . 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”. It is in our view clearly a legitimate objective to criminalise conduct which intentionally or recklessly encourages others to commit acts of terrorism, including acts of violence on behalf of proscribed organisations. The terms of section 2 do not prevent a person such as the defendant from holding offensive views or personally supporting a terrorist cause or communicating the fact that he supports such a cause. What section 2 prohibits is the intentional or reckless dissemination of a terrorist publication where the effect of an offender’s conduct is a direct or indirect encouragement to the commission, preparation or instigation of acts of terrorism. The aim of section 2 is clearly lawful, proportionate and necessary”,

3.9. Protecting Public Morals

3.9.1. Common law offences :-

3.9.1.1. It is an offence for a person to outrage public decency - requiring an act that takes place in the presence of 2 or more people in a public place, or within view of the public, which is of a lewd, obscene or disgusting character that outrages minimum standards of public decency

3.9.1.2. It is an offence to conspire to corrupt public morals – *Shaw v DPP 1962 AC 220* and also to conspire to outrage public decency – *Kneller (Publishing and Promotions) Ltd v DPP 1973 AC 435*

3.9.2. Obscene Publications Acts 1959 and 1964

3.9.2.1. Section 2 of the 1959 Act makes it an offence to publish an obscene article – where an article is defined to be obscene if it *has a tendency to deprave and corrupt those who are likely to read see or hear the relevant material*

3.9.2.2. *Handyside v The UK 1979-1980 1 EHRR 737*

Concerned the prosecution of a publication “The Little Red Schoolbook” – which was said to be a reference book for children and included a chapter covering various sexual topics including masturbation, intercourse and orgasm. The book was available in other parts of Europe.

ECHR confirmed:-

i. Freedom of expression constitutes one of the essential foundations of ... society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2). it is applicable not only to ' information' or ' ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism. tolerance and broadmindedness without which there is no

'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.

ii. the Obscene Publications Acts had a legitimate aim under Article 10(2) – namely protection of morals and the prohibitions amounted to a proportionate response to a pressing social need within the margin or appreciation open to the UK

3.9.3. *Indecent Displays (Control) Act 1981* – makes it an offence to display or cause to be displayed in public any indecent matter excluding any such places to which the public must pay to gain access

3.10. **Public Order**

3.10.1. By the terms of the *Public Order Act 1986* (as amended by the *Police, Crime, Sentencing and Courts Act 2022*) a senior officer of police may if he reasonably believes that (a) an intended public procession may result in “serious public disorder, serious damage to property or serious disruption to the life of the community” or (b) the noise generated may result in serious disruption to the activities of an organisation carried on in the vicinity of such a procession or (c) that the purpose of those organising any procession is to intimidate others to act or not act in particular ways he may either (1) impose conditions on such a procession the breach of which amounts to an offence or (2) if he considers that such conditions will be insufficient to prevent serious public disorder apply to the local council (outside London) or (in London) seek permission of the Secretary of State for an order to be made prohibiting such processions for a period of 3 months and any person taking part in such a procession commits an offence.

3.10.2. Similar provisions apply to impose conditions on public assemblies or prohibit assemblies where it is believed that they are to be held on land to which there is no public right of access. Breaching such conditions and/or prohibitions is again a criminal offence;

3.10.3. A senior officer of police may also impose conditions on an individual where that person is engaging or intends to engage in a “one-person” protest where it is reasonably believed that the noise generated by such a person may result in “serious disruption” to the activities of an organisation carried on in the vicinity of that protest or otherwise result in intimidation of others or cause alarm or distress which has a significant impact. A person who organises or carries on a one-person protest in breach of such conditions commits an offence.

Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion

3.11. Apart from the protection afforded by Article 9 of the ECHR there is no special protection given to particular groups of persons. Rather those having certain protected characteristics are given protection from unrestricted and harmful actions / expression by others – see the section on hate speech above.

3.12. Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics?

3.13. *Politics*

3.13.1. Speeches made in Parliament cannot be the subject of criminal proceedings. Any conduct which might in this context otherwise be a criminal offence – if stated outside Parliament is subject to internal controls and conventions of Parliament.

3.13.2. *Bill of Rights Act 1688* – Article 9 - provides:-

That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.

3.13.3. This privilege does not extend to “ordinary crimes” – such as theft, assault, rape or procedures – such as schemes for payment of fees and expenses – which were not connected to parliamentary activities of the house or proceedings in Parliament.

3.13.3.1. In **R v Chaytor 2011 1 AC** The Supreme confirmed that the protection of Article 9 extended to actions that were incidental to the exercise of freedom of speech and so part of the proceedings of Parliament and not to the submission of fraudulent claims that were an incident of the administration of Parliament.

Similarly there would be no privilege in relation to “ordinary” criminal conduct such as assaults or theft of another MP’s property

i. Lord Phillips said at p.711 pp.61 -

*There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted - freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown’s judges. The protection of article 9 is **absolute**. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of members for conduct which is criminal. As to the latter,*

Parliament has no criminal jurisdiction. It has limited penal powers to treat criminal conduct as contempt.

ii. Lord Rogers – at p.725

“In this context the expression “ordinary crime” occurs in the judgment of Stephen J in Bradlaugh v Gossett (1884) 12 QBD 271, 283, where he said: “I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice.” Although his use of the expression has been criticised, Stephen J was clearly drawing a distinction between an “ordinary crime” (such as theft) and a crime (such as sedition) which a Member of Parliament committed by saying something in the exercise of his freedom of speech in the House. What the member said in the House would fall within the exclusive cognisance of the House and would be protected by article 9 of the Bill of Rights. The House of Commons alone could consider the matter and decide what sanction, if any, should be applied to the MP. So he could not be prosecuted for the crime in the ordinary courts and, if any attempt were made to prosecute him, the House would intervene to stop the prosecution in order to protect the privilege of freedom of speech and debate of the House itself and, simultaneously, the particular member’s exercise of that privilege.

3.13.3.2. **Pepper v Hart 1993 AC 593** – per Lord Browne-Wilkinson

In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed.

3.14. **Education:-**

3.14.1. Every individual and body of persons concerned in the government of certain further and higher education establishments must take all reasonably practicable steps to ensure that freedom of speech within the law is secured for members, students and employees of that establishment and for visiting speakers – Education (No.2) Act 1986 (Section 43).

3.14.2. To further the duty imposed on such establishments the relevant governing body is obliged to keep and maintain up to date a code of practice designed to ensure freedom of speech.

3.15. **Religion**

3.15.1. Freedom of religion is protected under Article 9 – however this is not an absolute right and is accordingly subject to restrictions which would make criminal any statements made contrary to many of the provisions set out above.

4. **If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?**

4.1. In both the Common law and ECHR in general terms it is the right to freedom of expression comes first – it is the interference with that right that requires justification.

4.2. Any restriction must be read alongside the right to freedom of expression to determine whether that restriction is a proportionate and justified restriction on the right to freedom of expression

- 4.3. However in practice it is the legislative term/restriction that is given primary effect – with consideration then given as to whether such restriction is a justified restriction on freedom of speech. In this regard the approach is consistent with the interpretation of Article 10 (2) as noted above.
- 4.4. There is no distinction between persons groups or categories.
- 4.5. The guidelines are found within the jurisprudence of both the ECHR and in case law interpreting such jurisprudence. These are set out above.
- 4.6. The balancing of the restriction – its scope and extent against the freedom of speech being restricted is very much a case by case exercise – and the outcome largely dependent on the legislative aim and intent behind the particular restriction.
- 4.7. In theory there is no discretion in relation to the balancing exercise to be undertaken – there is however room for different judgments being made in relation to how the particular balancing exercise should be undertaken in any individual case.

5. **Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?**

- 5.1. It is assumed that the “legislation” referred to is legislation providing for freedom of expression.
- 5.2. If so then in relation to England and Wales – the effective legislation is Article 10 of the ECHR. This is clear in its terms and the jurisprudence developed and comprehensible.
- 5.3. However its application to particular statutory restrictions may give rise to uncertainty.
- 5.4. In relation to particular restrictions in England and Wales:-
 - 5.4.1. There is some confusion in a number of cases as to the extent to which a right to protest / freedom of expression gives rise to a justifiable reason excusing what would otherwise be unlawful conduct. This has most recently arisen in relation to the acquittal of Defendants charged with the criminal damage of a statue of a Bristol merchant and slave trader who not only argued that they had a lawful excuse to topple the statue into the harbour in order to prevent a crime (the public display of indecent matter) but also that any conviction would be a disproportionate interference in their right to free speech. The case is subject to an appeal.
 - 5.4.2. The Law Commission has recently undertaken a review of communication offences and hate crime. In the course of its review the offences created under the Malicious Communications Act and the Communications Act were subject to some considerable criticism as giving rise to too uncertainty given the use of terms such as “grossly offensive” and “indecent”. In the consultation document it was said that

“These terms are vague and ambiguous. Their use in these offences may be in tension with Article 10 of the European Convention on Human Rights (“ECHR”), which requires that all interferences with freedom of expression are clearly prescribed by law; “clearly” being the operative word.

In the case of section 1 MCA 1988, the problem is compounded because the grossly offensive or indecent nature of the communication is relevant not only to the conduct element of the offence (the sending of a grossly offensive communication to a victim), but also to the mental element (the intention to cause a victim distress or anxiety). The nature of the communication may constitute evidence that one of the defendant’s purposes was to cause the victim distress or anxiety. In other words, the prosecution would suggest to the jury that the communication is so grossly offensive that the defendant’s purpose must have been to cause its recipient distress. Hence, the problem of vagueness and uncertainty arises in relation to both the conduct and the mental elements of the offence.”

5.4.3. In the summary report (Reference <https://s3-eu-west-2.amazonaws.com/lawcom-production-11jxou24uy7q/uploads/2021/07/Summary-of-Modernising-Communications-Offences-2021.pdf>) it was said that

5.4.3.1.1. *“the breadth and vagueness of the existing communications offences give rise to concerns about the extent of the law’s interference in freedom of expression” [p.3]*

5.4.3.1.2. *“the threshold of criminality, especially when applied to the online space is often set too low. The offences do not target the harms arising from online abuse. The result is that they over-criminalise in some situations and under-criminalise in others”. [p.3]*

5.4.3.1.3. *“the existing patchwork of criminal law is unclear and has an unduly broad scope. This presents a real risk to freedom of expression which has long been protected under English common law, as well as under the ECHR ... we are concerned that the current offences are sufficiently broad that they could in certain circumstances constitute a disproportionate interference with the right to freedom of expression protected under Article 10 of the ECHR [p.3]*

- 6. Do you find in your work as a judge that the relevant legislation in your country as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases**

- 6.1. From a purely personal perspective issues of freedom of speech in the context of those offences that operate as a restriction to any such freedom rarely if ever arise. I have not had to deal with any such case.
- 6.2. From consideration of the jurisprudence in this area the principles to be applied are relatively clear – however their application will inevitably give rise to some apparent uncertainty given the wide range of factual circumstances in which the clash between the need for restriction of the freedom and the upholding of that freedom may arise.

His Honour Judge Timothy Smith

Circuit Judge

Crown Square, Manchester

Chairman of the Criminal Sub-Committee of Her Majesty's Council of Circuit Judges

19th July 2022