



Freedom of expression, a comparative-law perspective

The United Kingdom

STUDY

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Abstract

This study forms part of a wider-ranging project which seeks to lay the groundwork for comparisons between legal frameworks governing freedom of expression in different legal systems.

The following pages will analyse, with reference to the United Kingdom and the subject at hand, the legislation in force, the most relevant case law and the concept of freedom of expression with its current and prospective limits, ending with some conclusions and possible solutions for future challenges.

In the absence of formal constitutional protection for freedom of expression, the approach of the UK is residual in nature. That is to say, the extent of a person's freedom of expression is what is left after statutory and common law (judge-made) incursions into the freedom. Notwithstanding the passage of the Human Rights Act 1998, it remains the case that the UK Parliament is free to modify and restrict freedom of expression.

AUTOR

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List of abbreviations

AC	Appeal Cases
CLJ	Cambridge Law Journal
Cr App R	Criminal Appeal Reports
EMLR	Entertainment and Media Law Reports
ER	English Reports
EWCA (Crim)	England and Wales Court of Appeal Criminal Division
EWCA (Civ)	England and Wales Court of Appeal Civil Division
EWHC	England and Wales High Court
ICLQ	International and Comparative Law Quarterly
PL	Public Law
QB	Queens Bench
s.	Section (of an Act of Parliament)
TLR	Times Law Reports
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports

Executive summary

Freedom of expression is protected in the UK Constitution in statute and common law. It has enjoyed an enhanced status since the enactment of the Human Rights Act 1998 along with other human rights such as the rights to a fair trial and respect for private life. As in the European Convention on Human Rights, the right to freedom of expression is a qualified right meaning that it may be limited, modified or even lost altogether if a countervailing interest (eg. State security, the administration of justice or privacy interests) is considered more pressing and the actual curtailment of expressive freedom deemed to be appropriately and narrowly tailored to advance the countervailing interest.

An appreciation of the extent and limitations upon freedom of expression is best gained through an account both of leading criminal and civil law statutes that restrict the freedom in diverse circumstances and also those laws that expressly protect expression. The latter include freedom of information legislation. As a common law jurisdiction, a fuller understanding of the domestic position can only be attained after consideration of leading cases and the authoritative interpretations of domestic law offered by the higher courts. Given the constraints of space available in this report, attention is focused primarily upon the more significant tranches of legislation (and associated case law). Thus discussion of counter terrorism laws, public order, administration of justice and defamation laws are accorded more detailed treatment than other expression-related provisions.

Problematic forms of expression increasingly take digital forms. Some domestic statutes have been passed with the express intention of regulating online expression considered to be harmful (see in this regard the creation of a new offence of 'revenge porn' in section 33 of the Criminal Justice and Courts Act 2015 and the new defences available for website operators in s.5 of the Defamation Act 2013 in cases where an allegation of defamation is raised). In other instances, online is regulated via pre-digital era statutes and it has fallen to the courts to interpret and apply these laws to online content. Good examples include the Public Order Act 1986 and the Contempt of Court Act 1981. Judicial extensions of criminal liability in the category of pre-digital era statutes are obviously more contentious lacking as they do the democratic imprint of legislative authorisation and considered pre-legislative policy analysis.

The dominant rationale for freedom of expression in domestic law is the argument from democracy, namely that citizens need access to a range of view and information in order to form judgments about political matters at election time and to participate themselves in the political lives and institutions of their communities.

Looking to the future, it is clear that online expression is evolving and that legal regulation will need to keep pace. Various threats to democratic decision-making may be identified. Internet search engines ranking algorithms clearly have the potential to influence which news stories and information are communicated to citizens. Yet these algorithms are considered to be non-disclosable private commercial intellectual property. In the case of electoral law a number of concerns currently exist, including the ease with which deliberately false statements may be circulated online (such as false reports regarding the closure of polling stations on election day or the length of queues at these locations) that can adversely impact on the integrity of the electoral process. Some worry about the role of artificial intelligence (such as bots) in influencing voters' political affiliations and distorting their perceptions about the actual levels of support for particular causes. Moreover there are currently no laws in the UK to regulate online political advertising, unlike the blanket ban upon broadcast political advertising. The microtargetting of political advertisements is considered problematic because of the lack of transparency for the voter around the identity, funding and physical location of the advertiser. It is expected that new laws will soon be introduced to address these issues.

I. Introduction

I.1. Brief historical account

In the absence of a formal, written constitution, the regulation of freedom of expression in the United Kingdom occurs via statute, common law and codes of practice developed by statutory bodies. For much of its history, freedom of expression has existed as a residual freedom only. That is to say, it existed insofar as no other legal rule (statutory or judge-made) restricted expression. Needless to say, many provisions in statute and common law did limit freedom of expression across a range of different settings, sometimes in quite draconian ways that today appear to be out of all proportion to the nature of the dangers posed by the specific instance of expression in question. Under the Human Rights Act 1998, Article 10 of the European Convention is given status in domestic law with the effect that the qualified protection for freedom of expression can be invoked in proceedings before UK courts against public authorities

As every lawyer knows the phrases 'freedom of discussion' or 'liberty of the press' are rarely found in any part of the statute-book nor among the maxims of the common law... The true state of things ... (is that) (a)ny man may, therefore, say whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement ... which he is not legally entitled to make.

AV Dicey Introduction to the Study of the Law of the Constitution

For all the claims about 'liberty of the press' in England, this in truth amounted to nothing more than an application of the general principle of the rule of law, namely that no one is punishable except for a distinct breach of the law. A person's freedom of speech was what was left after statutory and common law incursions into the freedom had been allowed for. As occurred in cases of seditious and blasphemous libel at the time, ordinary jurors determined whether a particular act of expression was protected or not.¹ Subsequently, the UK's major role in the drafting of the 1950 European Convention on Human Rights² with the latter's positive statement of rights of the individual is not to be read as a sudden loss of confidence in the common law and the residual method of rights protection. Indeed, as far as the British were concerned, the Convention existed primarily to shield the citizens of *other* European countries from states' abuse of power. Domestically, the common law was thought to offer an effective mechanism for the protection of individual rights.³ This confidence in the common law explains the United Kingdom's initial refusal to allow a right of individual petition to the European Court of Human Rights.⁴

Nevertheless, the residual approach exposed unpopular expression to majoritarian forms of censorship whether expressed in parliamentary enactment or judicial pronouncements.⁵ In the

¹ AV Dicey, *Introduction to the Study of the Constitution* Ch.VI.

² G Marston 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights' (1993) 42 *ICLQ* 796.

³ A Lester, 'Fundamental Rights: The UK Isolated' [1984] *PL* 50.

⁴ *Ibid.*

⁵ G Robertson & A Nicol, *Media Law* (3rd edn.) (Penguin Books, London) ch.1.

latter sphere, even where recognized as an important public interest, freedom of expression claims in the 1970s and 1980s almost always ceded precedence to an assortment of apparently weightier claims derived from an assortment of putative administration of justice, confidentiality, and national security interests in the House of Lords. Thus in *AG v. Times Newspapers Ltd*⁶ an injunction was upheld preventing publication of an article that was critical of the US drug company Distillers in its handling of thalidomide claims from affected families. The article was thought to pose a 'real risk' to the fairness of proceedings before a professional judge hearing the thalidomide claims.⁷ The free speech interest that was deemed of lesser importance centered upon the public's interest in learning of Distillers' treatment of affected families. As such the injunction served to dampen pressures on members of the Executive and/or Legislature to intervene to secure a fairer funding settlement for affected persons now and in the future.

Further subordination of individual/societal interests in freedom of expression/information occurred in *BSC v Granada Television*⁸ where disclosure of a source's identity was ordered during a national strike of steel workers. The source had revealed confidential documents belonging to the state-owned *British Steel Corporation*, which revealed significant mismanagement. The House of Lords ruled that *Granada* had to disclose the identity of its source. The balance of competing interests lay 'strongly' with the steel corporation. It had suffered a grievous wrong in which the broadcaster had become involved. Disclosure of the source's identity would enable appropriate disciplinary action to be taken against the disloyal employee.⁹ The private law entitlements of the employer were not to be gainsaid by the public interest in uncovering mismanagement at the publicly owned corporation. That the accountability interests of taxpayers (electors) in not ordering disclosure were so lightly dismissed speaks to a poorly understood conception of the interests of the electorate as the owners and ultimate beneficiaries of a properly run national steel industry. A stronger commitment to the ideal informed level of participation by citizens and their political representatives in the oversight of governmental affairs would have led to the refusal of *Granada's* application for source disclosure.

1.2. Freedom of expression as a legal principle

The fragile residual status of freedom of expression in domestic law documented above remained intact until the passing of the Human Rights Act 1998. The Act incorporated the European Convention on Human Rights into domestic law by imposing (i) duties on public authorities to act in accordance with incorporated Convention rights (including a qualified freedom of expression) unless the unequivocal terms of a domestic statute prevented compliance; and (ii) obliges domestic courts to give effect to the rights by giving a reading where possible of domestic law that conforms to the Convention.¹⁰ Relevant decisions, judgments and advisory opinions of the European Court of Human Rights 'must be taken into account' by domestic courts and tribunals when determining a question that has arisen in

⁶ [1974] AC 273.

⁷ *Ibid.*

⁸ [1981] AC 1096.

⁹ *Ibid.*, at 1202 (Lord Fraser of Tullybelton).

¹⁰ The European Convention Rights incorporated by s.1 of the Human Rights Act 1998 are Articles 2-12 and 14 of the Convention, Articles 1-3 of the First Protocol and Article 1 of the Thirteenth Protocol.

relation to the meaning of a Convention right.¹¹ In the case of new legislative measures introduced to Parliament since the coming into force of the 1998 Act, the Human Rights Act requires the sponsoring Minister to make a statement prior to the Second Reading of any proposed Bill regarding whether in the view of the Minister the Bill is or is not compatible with Convention rights.¹² No other statute in domestic law requires Ministers to make an equivalent compatibility statement in respect of earlier incorporated law. The higher status of Convention rights means that any ambiguities in domestic law must be resolved in favour of an interpretation of domestic law that is compliant with the Convention. For example in relation to freedom of expression, existing common law rules of confidentiality that limit freedom of expression must now be given an interpretation that is consistent with prevailing understanding of Article 10 of the Convention. Previously before the 1998 Act, a judge need not have given a Convention-complaint reading to confidentiality laws as he/she was not bound as a matter of law to have regard to the Convention.

¹¹ Human Rights Act 1998, s.2.

¹² S.19 Human Rights Act 1998.

II. British legislation concerning freedom of expression

II.1. Constitutional level provisions

In the absence of a written constitution, domestic law does not recognise formally entrenched fundamental law. Any account of the domestic constitution must include a range of non-fundamental (i.e. ordinary) statutes, common law and conventional rules that *are* constitutional in nature in as far as they regulate the institutions of government, courts and the legislature. The rights of the individual vis a vis the state are also treated as comprising an important element of the domestic constitution. A list of some of the more prominent statutes that regulate freedom of expression is provided below. In overarching terms, the Human Rights Act 1998 requires public authorities to act in accordance with Articles 2-12 & 14 of the European Convention on Human Rights unless a provision of an Act of Parliament unambiguously prevents them from doing so. In what follows below, I have divided the statutory section of materials into those statutes which (i) restrict expression via the criminal and civil law; and those which (ii) create rights to freedom of expression. The broad categories discussed below include criminal laws intended to safeguard personal security, public order (including preventing incitement to racial, religious hatred and hatred upon the grounds of sexual orientation), the administration of justice, public decency, state security, the integrity of the electoral process, the physical well-being of minors and adult privacy. Civil laws touched upon in the following section attempt to balance freedom of expression interests with the right to reputation and personal honour as well as intellectual property rights. Separate duties attach to broadcast media (unlike print and online media) to provide balanced and accurate coverage of news and current affairs topics.

II.2. Statutes restricting expression

II.2.1. Criminal statutes

II.2.1.1 Expression and the causing of distress, offence, alarm, harassment to others

II.2.1.1.a) *Malicious Communications Act 1988, s.1*

The original purpose was to curb 'poison pen' letters but this statute can be applied to online expression.

S.1 '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.'

II.2.1.1.b) *Communications Act 2003, s.127*

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'.

II.2.1.1.c) *Public Order Act 1986*

This statute creates offences in respect of public speech and written displays that cause harassment alarm or distress and in sections 18-23 contains offences concerning incitement of racial hatred and possession of racially inflammatory material. A further set of sections prohibit hatred of persons on the basis of (i) religion and (ii) sexual orientation.

S.4 Fear or provocation of violence

- (1) A person is guilty of an offence if he—
- (a) uses towards another person threatening, abusive or insulting words or behaviour, or
 - (b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,
- with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

S.4A Intentional harassment, alarm or distress

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.

- (3) It is a defence for the accused to prove—
- (a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
 - (b) that his conduct was reasonable

S.5 Harassment, alarm or distress

- (1) A person is guilty of an offence if he—
- (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or
 - (b) displays any writing, sign or other visible representation which is threatening or abusive
- within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

...

- (3) It is a defence for the accused to prove—
- (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
 - (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
 - (c) that his conduct was reasonable.

S.6 Mental element: miscellaneous

...

- (3) A person is guilty of an offence under section 4 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting.
- (4) A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening or abusive, or is aware that it may be threatening or abusive or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly.

II.2.1.2 Expression and the incitement of hatred

II.2.1.2.a) Public Order Act 1986

S.17 Meaning of "racial hatred"

In this Part "racial hatred" means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

S.18 Use of words or behaviour or display of written material

- (1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—
 - (a) he intends thereby to stir up racial hatred, or
 - (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
- (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

S.23 Possession of racially inflammatory material

- (1) A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to—
 - (a) in the case of written material, its being displayed, published, distributed, or included in a cable programme service, whether by himself or another, or
 - (b) in the case of a recording, its being distributed, shown, played, or included in a cable programme service], whether by himself or another,is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.
- (2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may reasonably be inferred that he has, in view.
- (3) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

S.29A Meaning of “religious hatred”

In this Part “religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

S.29AB Meaning of “hatred on the grounds of sexual orientation”

In this Part “hatred on the grounds of sexual orientation” means hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both).

S.29B Use of words or behaviour or display of written material

- (1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.
- (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.
- (4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.
- (5) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

S.29C Publishing or distributing written material

- (1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.
- (2) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

S.29G Possession of inflammatory material

- (1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to—
 - (a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or
 - (b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another,is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

S.29J Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

S.29JA Protection of freedom of expression (sexual orientation)

- (1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred
- (2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

II.2.1.2.b) Protection from Harassment Act 1997

A criminal offence is committed

Ss.1, 2 Offence of harassment

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

S.4 Putting people in fear of violence

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).

II.2.1.3 Expression and the administration of justice

II.2.1.3.a) Contempt of Court Act 1981

The strict liability rule (S.1.)

'In this Act, 'the strict liability rule' means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.'

The test for contempt

A contempt is committed if a publication under s.2(2) 'creates a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced.'

The strict liability rule applies whilst proceedings are active – that is in respect of criminal proceedings typically from the moment of arrest, issuing a warrant for the arrest of a wanted person. Proceedings cease to be active upon the acquittal or sentencing of the accused person or any other verdict, finding, order or decision that puts an end to proceedings.

Defences:

- S.3(1) 'A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.
- (2) A person is not guilty of contempt of court under the strict liability rule as the distributor of a publication containing such matter if at the time of publication

(having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.

- (3) The burden of proof of any fact tending to establish a defence afforded by this section to any person lies upon that person.'

S.5 A publication made as or part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice is merely incidental to the discussion.

S.4(2) Postponement Orders

'the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for the purpose.'

S.11 Prohibition Orders

'In any case where a court (having the power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to be necessary for the purpose for which it was withheld.

Section 11 of the 1981 Act does not create new powers to restrict media reports but merely affirms the existing panoply of miscellaneous statutory and common law (judge developed) restrictions.

11.2.1.3.b) Rape and other sexual offence complainants - Sexual Offences (Amendment) Acts 1976 (as amended) & 1992 - Criminal Justice Act 1988, s.158.

Lifelong complainant anonymity in rape cases was established by the 1976 Act and was extended to other sexual offences such as incest, intercourse with a girl under 16 and indecent assault was provided by the Sexual Offences (Amendment) Act 1992 and by the Youth Justice and Criminal Evidence Act 1999 to include abduction of a woman by force. The anonymity can be waived by the complainant.

11.2.1.3.c) Jury Deliberations – Juries Act 1974 (as amended by the Criminal Justice and Courts Act 2015), s.20D(1)

'... it is an offence for a person intentionally—

- (a) to disclose any information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court; or
- (b) to solicit or obtain such information

SUBJECT to the exceptions in s. 20E to 20G.

S.20E allows jurors to discuss the case among themselves in the jury room as part of their deliberations;

S.20F – after jury deliberations – allows disclosure to police, trial/appeal judge or courtroom staff if the person making the disclosure reasonably believes that a juror has/may have committed a contempt or that a juror's conduct may provide grounds for an appeal against conviction/sentence

S.20G not an offence to solicit disclosures/obtain information in connection with s. 20F.

II.2.1.3.d) Juries Act 1974 (as amended by the Criminal Justice and Courts Act 2015) – s.20

A new offence of private research by jurors during the trial – intentionally seeking information that they know or ought reasonably to know is or may be relevant to the case (including asking questions/ searching electronic databases, visiting or inspecting a place/object/ asking another person to seek the information.) Information relevant to the case includes information about persons involved in the case, the law relating to the case, court procedure. It is not an offence to seek the above information (i) outside the trial period; (ii) for a reason not connected to the case.

II.2.1.3.e) 1925 Criminal Justice Act s.41(1)

it is an offence to take any photograph in court or to make a sketch in court of any juror, witness, party, judge with a view to publication. It is also an offence to publish such a sketch/photograph.

II.2.1.4 Children and Young Persons

In the Crown Court and Magistrates Court the Youth Justice and Criminal Evidence Act 1999 imposes automatic restrictions on the identification of alleged offenders/victims/witnesses who are under the age of 18 years once a criminal investigation has begun (s.44)

In the case of *Youth court proceedings* s.49(1) of the Children and Young Persons Act 1933 states:

- '(a) no report shall be published which reveals the name, address or school of any child or young person concerned in the proceedings or includes any particulars likely to lead to the identification of any child or young person concerned in the proceedings: and (b) no picture shall be published or included in a programme service as being or including a picture of any child or young person concerned in the proceedings.'

This prohibition may be lifted by the court in three sets of circumstances. First, for the purpose of avoiding injustice to a child or young person. Second, where a child/young person having been charged with or convicted of either a violent offence or a sexual offence; or an offence punishable in the case of a person over the age of 21 with fourteen years or more, that child/young person is unlawfully at large and publicity is needed for the purpose of apprehending him/her; and finally where, after conviction of a young offender, it is in the public interest to do so.

II.2.1.5 Expression and the conduct of elections

II.2.1.5.a) The Electoral Administration Act 2006

Section 15 EAA inserts section 13D to the Representation of the People Act 1983 ("RPA") and creates an offence of supplying false information to the Electoral Registration Officer, in connection with the registration of electors. The elements of the offence are the provision of any false information to an Electoral Registration Officer for any purpose in connection with the registration of electors.

11.2.1.5.b) Representation of the People Act 1983

65A False statements in nomination papers etc.

- (1) A person is guilty of a corrupt practice if, in the case of any relevant election, he causes or permits to be included in a document delivered or otherwise furnished to a returning officer for use in connection with the election—
 - (a) a statement of the name or home address of a candidate at the election which he knows to be false in any particular; or
 - (aa) (where the election is a parliamentary election) a statement under rule 6(5)(b) of Schedule 1 to this Act which he knows to be false in any particular; or
 - (b) anything which purports to be the signature of an elector who proposes, seconds or assents to, the nomination of such a candidate but which he knows—
 - (i) was not written by the elector by whom it purports to have been written, or
 - (ii) if written by that elector, was not written by him for the purpose of signifying that he was proposing, seconding, or (as the case may be) assenting to, that candidate's nomination

S.66A Prohibition on publication of exit polls

- (1) No person shall, in the case of an election to which this section applies, publish before the poll is closed—
 - (a) any statement relating to the way in which voters have voted at the election where that statement is (or might reasonably be taken to be) based on information given by voters after they have voted, or
 - (b) any forecast as to the result of the election which is (or might reasonably be taken to be) based on information so given.
- (2) This section applies to—
 - (a) any parliamentary election; and
 - (b) any local government election in England or Wales.
- (3) If a person acts in contravention of subsection (1) above, he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding six months.
- (4) In this section—

“forecast” includes estimate;

“publish” means make available to the public at large, or any section of the public, in whatever form and by whatever means;

and any reference to the result of an election is a reference to the result of the election either as a whole or so far as any particular candidate or candidates at the election is or are concerned.

S.106 False statements as to candidates

- (1) A person who, or any director of any body or association corporate which—

- (a) before or during an election,
- (b) for the purpose of affecting the return of any candidate at the election, makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.

II.2.1.5.c) Political Parties, Elections and Referendums Act 2000

S.143 Details to appear on election material

- (1) No election material shall be published unless—
 - (a) in the case of material which is, or is contained in, such a printed document as is mentioned in subsection (3), (4) or (5), the requirements of that subsection are complied with; or
 - (b) in the case of any other material, any requirements falling to be complied with in relation to the material by virtue of regulations under subsection (6) are complied with.
- (2) For the purposes of subsections (3) to (5) the following details are “the relevant details” in the case of any material falling within subsection (1)(a), namely—
 - (a) the name and address of the printer of the document;
 - (b) the name and address of the promoter of the material; and
 - (c) the name and address of any person on behalf of whom the material is being published (and who is not the promoter).

II.2.1.6 Expression and state security/public safety

II.2.1.6.a) Official Secrets Act 1989

S.1 Security and intelligence

- (1) A person who is or has been—
 - (a) a member of the security and intelligence services; or
 - (b) a person notified that he is subject to the provisions of this subsection,is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.

S.2 Defence

- (1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to defence which is or has been in his possession by virtue of his position as such.
- (2) For the purposes of subsection (1) above a disclosure is damaging if—
 - (a) it damages the capability of, or of any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those

forces or serious damage to the equipment or installations of those forces;
or

- (b) otherwise than as mentioned in paragraph (a) above, it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad; or
 - (c) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects.
- (3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to defence or that its disclosure would be damaging within the meaning of subsection (1) above.

5.3 International relations

- (1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of—
- (a) any information, document or other article relating to international relations; or
 - (b) any confidential information, document or other article which was obtained from a State other than the United Kingdom or an international organisation,
- being information or a document or article which is or has been in his possession by virtue of his position as a Crown servant or government contractor.
- (2) For the purposes of subsection (1) above a disclosure is damaging if—
- (a) it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad; or
 - (b) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects.
- (3) In the case of information or a document or article within subsection (1)(b) above—
- (a) the fact that it is confidential, or
 - (b) its nature or contents,
- may be sufficient to establish for the purposes of subsection (2)(b) above that the information, document or article is such that its unauthorised disclosure would be likely to have any of the effects there mentioned.
- (4) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question was such as is mentioned in subsection (1) above or that its disclosure would be damaging within the meaning of that subsection.

S.4 Crime and special investigation powers

- (1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he discloses any information, document or other article to which this section applies and which is or has been in his possession by virtue of his position as such.
- (2) This section applies to any information, document or other article—
 - (a) the disclosure of which—
 - (i) results in the commission of an offence; or
 - (ii) facilitates an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or
 - (iii) impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or
 - (b) which is such that its unauthorised disclosure would be likely to have any of those effects.
- (4) It is a defence for a person charged with an offence under this section in respect of a disclosure falling within subsection (2)(a) above to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the disclosure would have any of the effects there mentioned.
- (5) It is a defence for a person charged with an offence under this section in respect of any other disclosure to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question was information or a document or article to which this section applies.

S.5 Information resulting from unauthorised disclosures or entrusted in confidence

- (1) Subsection (2) below applies where—
 - (a) any information, document or other article protected against disclosure by the foregoing provisions of this Act has come into a person's possession as a result of having been—
 - (i) disclosed (whether to him or another) by a Crown servant or government contractor without lawful authority; or
 - (ii) entrusted to him by a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which the Crown servant or government contractor could reasonably expect that it would be so held; or
 - (iii) disclosed (whether to him or another) without lawful authority by a person to whom it was entrusted as mentioned in sub-paragraph (ii) above; and
 - (b) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not an offence under any of those provisions.
- (2) Subject to subsections (3) and (4) below, the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is

protected against disclosure by the foregoing provisions of this Act and that it has come into his possession as mentioned in subsection (1) above.

- (3) In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless—
- (a) the disclosure by him is damaging; and
 - (b) he makes it knowing, or having reasonable cause to believe, that it would be damaging; and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or 3(1) above.

II.2.1.6.b) Terrorism Act 2000

S1. Terrorism: interpretation

- (1) In this Act “terrorism” means the use or threat of action where—
- (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
- (2) Action falls within this subsection if it—
- (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person’s life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section—
- (a) “action” includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

S.12 Support

- (1) A person commits an offence if
- (a) he invites support for a proscribed organisation,
- and
- (b) the support is not, or is not restricted to, the provision of money or other property.
- (2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is
- (a) to support a proscribed organisation,
 - (b) to further the activities of a proscribed organisation, or
 - (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.
- (3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities. (4) Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities

S.19 Disclosure of information: duty

- (1) This section applies where a person—
- (a) believes or suspects that another person has committed an offence under any of sections 15 to 18, and
 - (b) bases his belief or suspicion on information which comes to his attention—
 - (i) in the course of a trade, profession or business, or
 - (ii) in the course of his employment (whether or not in the course of a trade, profession or business).]
- (1A) But this section does not apply if the information came to the person in the course of a business in the regulated sector.]
- (2) The person commits an offence if he does not disclose to a constable as soon as is reasonably practicable—
- (a) his belief or suspicion, and
 - (b) the information on which it is based.
- (3) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure.

S.382(B) Information about acts of terrorism

- (1) This section applies where a person has information which he knows or believes might be of material assistance—

- (a) in preventing the commission by another person of an act of terrorism, or
 - (b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.
- (2) The person commits an offence if he does not disclose the information as soon as reasonably practicable in accordance with subsection (3).
- (3) Disclosure is in accordance with this subsection if it is made—
- (a) in England and Wales, to a constable,
 - (b) in Scotland, to a constable, or
 - (c) in Northern Ireland, to a constable or a member of Her Majesty's forces.
- (4) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure

S.57 Possession for terrorist purposes

- (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.
- (2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.
- (3) In proceedings for an offence under this section, if it is proved that an article—
- (a) was on any premises at the same time as the accused, or
 - (b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public,
- the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it.

S.58 Collection of information

- (1) A person commits an offence if—
- (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism,
 - (b) he possesses a document or record containing information of that kind or
 - (c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.]
- (1A) The cases in which a person collects or makes a record for the purposes of subsection (1)(a) include (but are not limited to) those in which the person does so by means of the internet (whether by downloading the record or otherwise).]
- (2) In this section “record” includes a photographic or electronic record.
- (3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.
- (3A) The cases in which a person has a reasonable excuse for the purposes of subsection (3) include (but are not limited to) those in which—

- (a) at the time of the person's action or possession the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
- (b) the person's action or possession was for the purposes of—
 - (i) carrying out work as a journalist, or
 - (ii) academic research.

S.58A Eliciting, publishing or communicating information about members of armed forces etc.

- (1) A person commits an offence who—
 - (a) elicits or attempts to elicit information about an individual who is or has been—
 - (i) a member of Her Majesty's forces,
 - (ii) a member of any of the intelligence services, or
 - (iii) a constable, which is of a kind likely to be useful to a person committing or preparing an act of terrorism, or
 - (b) publishes or communicates any such information.
- (2) It is a defence for a person charged with an offence under this section to prove that they had a reasonable excuse for their action.

II.2.1.6.c) Terrorism Act 2006

S.1 Encouragement of terrorism

- (1) This section applies to a statement that is likely to be understood by a reasonable person] as a direct or indirect encouragement or other inducement to some or all of the members of the public to whom it is published,] to the commission, preparation or instigation of acts of terrorism or Convention offences.
- (2) A person commits an offence if—
 - (a) he publishes a statement to which this section applies or causes another to publish such a statement; and
 - (b) at the time he publishes it or causes it to be published, he—
 - (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or
 - (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.
- (3) For the purposes of this section, the statements that are likely to be understood by a reasonable person as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—
 - (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

- (b) is a statement from which ... members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.
- (4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—
 - (a) to the contents of the statement as a whole; and
 - (b) to the circumstances and manner of its publication.
- (5) It is irrelevant for the purposes of subsections (1) to (3)—
 - (a) whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and,
 - (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.

5.2 Dissemination of terrorist publications

- (1) A person commits an offence if he engages in conduct falling within subsection (2) and, at the time he does so—
 - (a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;
 - (b) he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or
 - (c) he is reckless as to whether his conduct has an effect mentioned in paragraph (a) or (b).
- (2) For the purposes of this section a person engages in conduct falling within this subsection if he—
 - (a) distributes or circulates a terrorist publication;
 - (b) gives, sells or lends such a publication;
 - (c) offers such a publication for sale or loan;
 - (d) provides a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan;
 - (e) transmits the contents of such a publication electronically; or
 - (f) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e).

II.2.1.7 Expression and public morality

II.2.1.7.a) Obscene Publications Act 1959

S.1 Test of obscenity

- (1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
- (2) Any person who, whether for gain or not, publishes an obscene article [or who has an obscene article for publication for gain (whether gain to himself or gain to another)] shall be liable
 - (a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months;
 - (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding five years or both...

S4 Defence of public good.

- (1) ...a person shall not be convicted of an offence against section two of this Act ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

II.2.1.7.b) Indecent Displays (Control) Act 1981.

S.1 Indecent displays

- (1) If any indecent matter is publicly displayed the person making the display and any person causing or permitting the display to be made shall be guilty of an offence.
- (2) Any matter which is displayed in or so as to be visible from any public place shall, for the purposes of this section, be deemed to be publicly displayed.
- (3) In subsection (2) above, "public place", in relation to the display of any matter, means any place to which the public have or are permitted to have access (whether on payment or otherwise) while that matter is displayed except—
 - (a) a place to which the public are permitted to have access only on payment which is or includes payment for that display; or
 - (b) a shop or any part of a shop to which the public can only gain access by passing beyond an adequate warning notice;

II.2.1.7.c) Protection of Children Act 1978

S.1 Indecent photographs of children.

- (1) Subject to sections 1A and 1B,] it is an offence for a person—
 - (a) to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph] of a child; or
 - (b) to distribute or show such indecent photographs or pseudo-photographs; or

- (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
 - (d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so.
- (2) For purposes of this Act, a person is to be regarded as distributing an indecent photograph or pseudo-photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person.
 - (3) Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions.
 - (4) Where a person is charged with an offence under subsection (1)(b) or (c), it shall be a defence for him to prove—
 - (a) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession; or
 - (b) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect, them to be indecent.

11.2.1.7.d) Theatres Act 1968

S.2 Prohibition of presentation of obscene performances of plays

- (1) For the purposes of this section a performance of a play shall be deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to attend it.

S.3 Defence of public good

- (1) A person shall not be convicted of an offence under section 2 of this Act if it is proved that the giving of the performance in question was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning.
- (2) It is hereby declared that the opinion of experts as to the artistic, literary or other merits of a performance of a play may be admitted in any proceedings for an offence under section 2 of this Act either to establish or negative the said ground.

S.6 Provocation of breach of peace by means of public performance of a play

- (1) Subject to section 7 of this Act, if there is given a public performance of a play involving the use of threatening, abusive or insulting words or behaviour, any person who (whether for gain or not) presented or directed that performance shall be guilty of an offence under this section if—
 - (a) he did so with intent to provoke a breach of the peace; or
 - (b) the performance, taken as a whole, was likely to occasion a breach of the peace.

S.8 Restriction on institution of proceedings

Proceedings for an offence under section 2, 5 or 6 of this Act ... shall not be instituted in England and Wales except by or with the consent of the Attorney-General.

II.2.1.7.e) Postal Services Act 2000

S.85 Prohibition on sending certain articles by post

- (3) A person commits an offence if he sends by post a postal packet which encloses—
 - (a) any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film or other record of a picture or pictures, book, card or written communication, or
 - (b) any other indecent or obscene article (whether or not of a similar kind to those mentioned in paragraph (a)).
- (4) A person commits an offence if he sends by post a postal packet which has on the packet, or on the cover of the packet, any words, marks or designs which are of an indecent or obscene character.

II.2.1.7.f) Criminal Justice and Immigration Act 2008

S.63 Possession of extreme pornographic images criminalizes the possession 'extreme' pornography where an image produced solely or principally for the purpose of sexual arousal and is 'grossly offensive, disgusting or (is) otherwise of an obscene character' and portrays 'in an explicit and realistic way' an act which 'threatens a person's life'; 'results, or is likely to result in serious injury to a person's anus, breasts or genitals'; 'involves sexual intercourse with a human corpse'; 'a person performs an act of intercourse or oral sex with an animal (whether dead or alive)'.

II.2.1.7.g) Serious Crime Act 2015

S.69 makes it an offence to be in possession of 'any item that contains advice or guidance about abusing children sexually.'

II.2.1.8 Expression and privacy

Parliament has created a specific offence of 'revenge porn' in Criminal Justice and Courts Act 2015.

S. 33 Disclosing private sexual photographs and films with intent to cause distress

- (1) It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—
 - (a) without the consent of an individual who appears in the photograph or film, and
 - (b) with the intention of causing that individual distress.

S.34(4) defines 'photograph or film' to consist in 'a still or moving image in any form that

- (a) appears to consist of or include one or more photographed or filmed images, and
- (b) in fact consists of or includes one or more photographed or filmed images.'

S.35 A photograph or film is "private" if it shows something that is not of a kind ordinarily seen in public.

- (3) A photograph or film is "sexual" if—
 - (a) it shows all or part of an individual's exposed genitals or pubic area,
 - (b) it shows something that a reasonable person would consider to be sexual because of its nature, or

- (c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

S.33 Defences

- (2) But it is not an offence under this section for the person to disclose the photograph or film to the individual mentioned in subsection (1)(a) and (b).
- (3) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.
- (4) It is a defence for a person charged with an offence under this section to show that—
 - (a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and
 - (b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

II.2.2. Civil law

II.2.2.1 Expression and defamation law

II.2.2.1.a) Defamation Act 1996

S.1 Responsibility for publication

- (1) In defamation proceedings a person has a defence if he shows that—
 - (a) he was not the author, editor or publisher of the statement complained of,
 - (b) he took reasonable care in relation to its publication, and
 - (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.
- (2) For this purpose “author”, “editor” and “publisher” have the following meanings, which are further explained in subsection (3)—
 - “author” means the originator of the statement, but does not include a person who did not intend that his statement be published at all;
 - “editor” means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and
 - “publisher” means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.
- (3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—
 - (a) in printing, producing, distributing or selling printed material containing the statement;
 - (b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

- (c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
- (d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;
- (e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

- (4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.
- (5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to—
 - (a) the extent of his responsibility for the content of the statement or the decision to publish it,
 - (b) the nature or circumstances of the publication, and
 - (c) the previous conduct or character of the author, editor or publisher.

11.2.2.1.b) Defamation Act 2013

S.1 The requirement of serious harm

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant
- (2) ... serious harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss"

S.2 Defences: Truth

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

S.3 Defences: Honest opinion

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—

- (a) any fact which existed at the time the statement complained of was published;
 - (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion

5.4 Defences: Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that—
- (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

5.5 Defences: Operators of websites

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
- (a) it was not possible for the claimant to identify the person who posted the statement,
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.

II.2.2.2 Expression and broadcasting – Communications Act 2003

This statute imposes duties of impartiality and accuracy on news services that are broadcast in the UK via detailed provisions in the regulator's (Ofcom) Code of Practice.

S.319 Ofcom's standards code

- (1) It shall be the duty of Ofcom to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.
- (2) The standards objectives are—
 - (a) that persons under the age of eighteen are protected;
 - (b) that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;
 - (c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with;
 - (d) that news included in television and radio services is reported with due accuracy;
 - (e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
 - (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material
...
 - (g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;

S.321 Objectives for advertisements, sponsorship and product placement

- (2) For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is—
 - (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
 - (b) an advertisement which is directed towards a political end; or
 - (c) an advertisement which has a connection with an industrial dispute

II.2.2.3 Expression and copyright law – Copyright, Design and Patents Act 1988

This Act gives a measure of legal protection from unauthorised reproduction to the creators of original works of literature, typography, film, music, sound recording, drama, performance where a degree of skill, labour and/or judgment is used. For works of literature, film, dramatic and music the protection from unauthorised use extends to 70 years from the year of death of the copyright holder. (ss.12-15 CDPA 1988).

Permitted uses of another's copyrighted work include where copying occurs for personal use exclusively. (s.28). A separate fair dealing defence is available where the use is for non-

commercial research and a sufficient acknowledgement of the copyrighted work is made. (s.29, CDPA 1988).

Use of another's copyrighted work will be treated as fair dealing and not actionable in cases where the copyrighted work (i) has been made available to the public if for the purpose of reporting current events; and (ii) the amount of copyrighted work that is used is not excessive; and (iii) where the use competes commercially with that of the copyright holder. (s.30 CDPA 1988). In each case a sufficient acknowledgement of the copyrighted work is required unless it is not practicable to do so.

II.2.3. Statutes expressly authorising/protecting expression

II.2.3.1 Freedom of Information Act 2000

This Act imposes disclosure duties of varying kinds on public authorities listed in the Act when requested to disclose by a member of the public. It has been used by journalists to provide background factual material in circumstances where previously the information might not have been obtainable. The Act's provisions are complex however and the various sets of exemptions mean that some categories of information have remained secret. Public bodies must publish a *Publication Scheme* in which they set out which classes of information they intend to publish and any payment they intend to seek from persons making disclosure requests. Various exemptions for material on the basis of its content (defence, security, policing etc.) are set out in Part II 'Exempt Information'. Critics point in particular to the width of the exemptions in s.36 'Prejudice to effective conduct of public affairs' as denying public access to a range of democracy-enhancing information. The main enforcement mechanism against a recalcitrant public authority lies with the Information Commissioner. A further appeal lies to an Appeal Tribunal. Controversially, s.53 of the 2000 Act gives the Minister a power to veto a decision of the Tribunal. The chief provisions are listed immediately below.

S.1 General right of access to information held by public authorities.

- (1) Any person making a request for information to a public authority is entitled—
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

S.12 Exemption where cost of compliance exceeds appropriate limit

- (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

S.19 Publication schemes

- (1) It shall be the duty of every public authority—
 - (a) to adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a "publication scheme"),
 - (b) to publish information in accordance with its publication scheme, and
 - (c) from time to time to review its publication scheme.
- (2) A publication scheme must—

- (a) specify classes of information which the public authority publishes or intends to publish,
- (b) specify the manner in which information of each class is, or is intended to be, published, and
- (c) specify whether the material is, or is intended to be, available to the public free of charge or on payment

S.35 Formulation of government policy, etc.

- (1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
 - (a) the formulation or development of government policy,
 - (b) Ministerial communications,
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
 - (d) the operation of any Ministerial private office.

S.36 Prejudice to effective conduct of public affairs

- (1) This section applies to—
 - (a) information which is held by a government department or by the Welsh Assembly Government] and is not exempt information by virtue of section 35, and
 - (b) information which is held by any other public authority.
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 - (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
 - (b) would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

S.53 Exception from duty to comply with decision notice or enforcement notice

- (1) This section applies to a decision notice or enforcement notice which—
 - (a) is served on—
 - (i) a government department,

- (ii) the Welsh Assembly Government, or
 - (iii) any public authority designated for the purposes of this section by an order made by the Minister for the Cabinet Office, and
- (b) relates to a failure, in respect of one or more requests for information—
- (i) to comply with section 1(1)(a) in respect of information which falls within any provision of Part II stating that the duty to confirm or deny does not arise, or
 - (ii) to comply with section 1(1)(b) in respect of exempt information.
- (2) A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b).

II.2.3.2 Representation of the People Act 1983

S.91 Candidate's right to send election address post free

- (1) A candidate at a parliamentary election is, subject to [such reasonable terms and conditions as the universal service provider concerned may specify], entitled to send free of charge for postage either—
- (a) one unaddressed postal communication, containing matter relating to the election only and not exceeding 60 grammes in weight, to each place in the constituency which, in accordance with those terms and conditions, constitutes a delivery point for the purposes of this subsection; or
 - (b) one such postal communication addressed to each elector.
- (2) He is also, subject as mentioned above, entitled to send free of any such charge for postage as mentioned above to each person entered in the list of proxies for the election one such communication as mentioned above for each appointment in respect of which that person is so entered.

II.2.3.3 Contempt of Court 1981

S.10 Sources of information

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

III. The most relevant case-law

In what follows below, a selection of the most important case law is provided. Constraints of space have entailed the unavoidable exclusion of some case law (especially in the areas of copyright law and some aspects of obscenity law). It is noteworthy that in respect of certain criminal investigations (such as those into alleged terrorist offences), the criminal law compels persons to disclose material information about planned/executed terrorist attacks to investigators.

Materials on the protection of personal privacy and their relationship with freedom of expression have been referred to extensively in a previous report entitled 'The right to respect for private life: digital challenges, a comparative-law perspective – The United Kingdom' at [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/628249/EPRS_STU\(2018\)628249_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/628249/EPRS_STU(2018)628249_EN.pdf).

III.1. Malicious Communications Act 1988, s.1

The meaning of 'indecent or grossly offensive' was discussed in *Connolly v DPP* where the defendant sent pictures of aborted 21 week-old fetuses to pharmacists who stocked the 'morning-after' pill.¹³ The photographs were considered 'grossly offensive' in their ordinary meaning as determined by a jury even after reading down s.1 of the 1988 Act via Article 10 to give a Convention-compliant reading of the statute. The defendant was unable to claim Article 10 protection since the photographs were sent to employees of store rather than those who had the power to decide what medicines to stock. The employees were not in a position to influence public debate. Other convictions under s.1 of the 1988 Act include *R v Byrne*.¹⁴ Texts sent by defendant to the mobile phone of the son of a woman who had ended a relationship with the defendant included the following "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."

III.2. Communications Act 2003, s.127

In *Chambers v DPP* the need for the prosecution to show the menacing nature of the defendant's communication was emphasised. On the facts in *Chambers* the defendant had posted the following tweet on his public time line - "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!!"¹⁵ After conviction in the lower courts, the High Court ruled that the message could not be considered to be 'menacing' as it would not have been understood by his Twitter followers as conveying a serious threat.

The test for liability was stated by the House of Lords in *DPP v Collins* to be whether a communication is expressed in terms liable to cause gross offence to those to whom it relates.¹⁶ Lord Bingham said there that in assessing this matter, the courts 'must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of

¹³ *Connolly v DPP* [2007] EWHC 237.

¹⁴ [2011] EWCA 3230.

¹⁵ [2012] EWHC 2157.

¹⁶ [2006] UKHL 40.

their context and all relevant circumstances.¹⁷ The defendant had made calls to his MP and his staff referring to 'wogs', 'Pakis' in a conversation about immigration policy. Crucially, the House of Lords held that whether gross offence was caused to the recipients was not relevant.

Examples of successful convictions include the case of *Nunn*. The defendant was 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."¹⁸

Even where a defendant is posting a comment on a matter of public interest, if he/she expresses himself in language considered 'grossly offensive' under s.127, this will be sufficient to create liability. If the post is removed quickly and an apology issued then a less severe penalty may be imposed by the court.¹⁹

III.3. Public Order Act 1986

S.4A

In March 2012, a 21 year old man was convicted and imprisoned for 56 days under s.4A for sending racially abusive messages via Twitter when black footballer Fabrice Muamba collapsed during a televised game.²⁰

In March 2011 a football supporter was convicted under s.4A when he was identified on a video posted on *Youtube* for making mocking gestures relating to the Munich airplane tragedy in 1958 in which Manchester United footballers and others were killed.²¹

S.5

The words of s.5 are to be given their natural, ordinary meaning.²² It is clear that the terms 'harassment, alarm or distress' carry different levels of emotional disturbance. Distress is said to entail real emotional disturbance or upset that is not necessarily present in respect of harassment. Neither is it sufficient for the prosecution to show that only trivial harassment has been caused.²³

Previously a defendant would commit a criminal offence if the harassment, alarm or distress was caused/likely to be caused by 'insulting' words. Thus in *Hammond v DPP*²⁴ an evangelical preacher carried a placard with the words 'Stop Immorality, Stop Lesbianism'. About 30-40 people had gathered around him. Some threw soil at him. Someone tried to pull his placard

¹⁷ *Ibid.* at para.9.

¹⁸ <https://www.theguardian.com/uk-news/2014/sep/29/peter-nunn-jailed-abusive-tweets-mp-stella-creasy>.

¹⁹ <https://www.theguardian.com/commentisfree/libertycentral/2012/mar/15/azhar-ahmed-treason-army-facebook-comments>.

²⁰ <https://www.theguardian.com/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets>.

²¹ <https://www.bbc.co.uk/news/uk-england-12634907>.

²² *Brutus v Cozens* [1973] AC 854.

²³ *Southard v DPP* [2006] EWHC 3499.

²⁴ [2004] EWHC 69.

away from him, whilst another person poured water over him. A police officer asked him to stop preaching and move on. When he refused, he was arrested and charged with s.5 offence. He was convicted in the Magistrates' Court. On appeal to the Divisional Court, the conviction was upheld on the basis that the Magistrates had been entitled to find that his words were insulting even though he had not used abusive language. In *R v Choudhury* muslim protestors who chanted 'British Soldiers burn in hell' and burned poppies during a Remembrance Day event were convicted of a s.5 Public Order Act 'insulting' conduct offence.²⁵ Since *Hammond and Choudhury*, s.5 has been amended to remove the word 'insulting' with the result that defendant has to use 'threatening or abusive' words before liability can be established.²⁶ In assessing whether expressive conduct entails a breach of s.5, the court must give appropriate weight to the freedom of expression interests of defendant.²⁷

An instance of abusive language was found in *R v Munim Abdul and ors* when several Muslim protestors shouted 'baby killers', 'rapists' and 'burn in hell' at a parade of UK soldiers.²⁸ The words were found to be inflammatory and 'personally abusive' of the marching soldiers.

Where the words or conduct is directed at police officers, the remarks of Glidewell LJ in *Orum v DPP* must be recalled when determining if harassment, alarm or distress were in all the circumstances likely to result from the defendant's words:

*Very frequently words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom. It may well be that, in appropriate circumstances, justices will decide (indeed they might decide in the present case) as a question of fact that the words and behaviour were not likely in all the circumstances to cause harassment, alarm or distress to either of the police officers. That is a question of fact for the justices to be decided in all the circumstances, the time, the place, the nature of the words used, who the police officers are, and so on.*²⁹

Merely using offensive words towards officers will not suffice to meet the threshold of liability under s.5. In *Harvey v DPP* the defendant swore at two officers whilst being arrested. Neither officer mentioned being caused alarm or distress as a consequence.³⁰ There was no evidence of anyone else having been within earshot other than the associates of the defendant. Accordingly the defendant's conviction in the lower court was quashed.

There are limits though even to what police officers might be expected to hear without being caused harassment, alarm or distress. In *Taylor v DPP* the words "fucking nigger" and "fucking coon bitch" were used in the presence of two police officers, an ambulance crew and neighbours. The words were found to be capable of causing distress to a police officer.³¹

On the question of what counts as 'reasonable conduct' for the purposes of the s.5(3) (c) defence guidance is to be found in *Norwood v DPP*.³² The defendant had placed a poster on the window of his flat which stated 'Islam out of Britain' 'Protect the British People'. The poster also

²⁵ <https://www.bbc.co.uk/news/uk-england-london-12664346>.

²⁶ Crime and Courts Act 2013, s.54.

²⁷ *Percy v DPP* [2001] EWHC 1125.

²⁸ [2011] EWHC 247.

²⁹ (1989) 88 Cr.App. R. 261.

³⁰ [2011] EWHC 3992.

³¹ [2006] EWHC 1202.

³² [2003] EWHC 1564.

displayed a photograph of the Twin Towers in flames after the suicide attacks on September 11, 2001. The Divisional Court held that that the defendant's conduct was not reasonable. The restriction on his expression was proportionate and needed to safeguard the protect rights of others and/or prevent crime. It was irrelevant that no one person has actually suffered harassment alarm or distress. The prosecution need only show that it is *likely* that a person be caused harassment, alarm or distress.

Ss.18-23 & 29

R v Sheppard [2010] EWCA 65 posting material on a website hosted in the US but sent from England and available to persons here. Material made derogatory remarks about black and Jewish persons as well as 'Tales of the Holofoax' which stated that the Holocaust was 'one of many Jewish lies'. The defendants were convicted of publishing racially inflammatory material and imprisoned for 3 years and 10 months.

For an instance of incitement to hatred on grounds of sexual orientation, see *R v Ali, Ahmed, Javed* where the defendants published leaflets that quoted Islamic texts urging capital punishment for gay people. The leaflets included an image of a mannequin being hanged.³³The defendants were sentenced to two years and 15 months imprisonment respectively.

III.4. Communications that constitute harassment of an individual: Protection from Harassment Act 1997 (originally aimed at stalkers)

- a criminal offence is committed

Ss.1, 2 Offence of harassment

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, see *Lau v DPP*.³⁴ It follows that this offence may not catch the situation where 100 persons each tweet once something that causes harassment to the target. The conduct may include a combination of social media communications with the target and other forms of contact (eg phone calls, unwanted visits etc.). It is also worth noting that 'harassment' is not defined in the Act. It is left to juries to decide.

III.5. Expression and the administration of justice

III.5.1. Contempt of Court Act 1981

Criminal liability arises when a publication creates a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced. This standard is set out in s.2(2) of the 1981 Act and is usually paraphrased as test is requiring there to be a 'substantial risk of serious prejudice' to particular proceedings. In *AG v English* the House of Lords stated that a 'substantial risk' was said to include all those publications where the risk of prejudice was simply 'more than remote'.³⁵

³³ <https://www.theguardian.com/uk/2012/feb/10/three-jailed-gay-hate-leaflet>.

³⁴ [2000] 1 FLR 799.

³⁵ [1983] 1 AC 116.

Publications that have been found to create a s.2(2) risk include those that reveal a defendant's previous convictions³⁶; express a view regarding the guilt of defendant or implies guilt/innocence³⁷; deter witnesses from coming forward³⁸; reveal a defendant's intended plea prior to trial³⁹; affect or may affect witness recollection especially where identity of defendant is an issue⁴⁰; put pressure on litigant to abandon action.⁴¹

According to *AG v MGN Ltd*⁴² the crucial questions in a s.2(2) case relate to the residual prejudicial impact of a publication. Specifically, these emphasise (a) the length of time between publication and likely trial date; (b) the likely focusing effect of listening over a prolonged period to evidence in the case; and (c) the likely effect of listening to judge's directions. In respect of (a) above, the courts will consider the so called 'fade factor'. Even though proceedings are active and the words create serious prejudice, the lapse of time between publication and the likely start of any criminal trial may well prevent there being a substantial risk to the fairness of proceedings. In *AG v ITN* the time gap was estimated at nine months and it was held that the prejudicial effect of the publication would not be so severe as to amount to a substantial risk of serious prejudice by the time the trial's scheduled start.⁴³ Conversely in *Birmingham Post & Mail* an article was published entitled 'When guns took over the streets' three days after a jury had been empanelled in a trial involving 8 defendants at Birmingham Crown Court on charges of murder and attempted murder.⁴⁴ The newspaper article was inaccurate in several key respects. Specifically, it had described the murder and attempted murder of the victims concerned in the trial and suggested that the offences were part of a drugs war between gangs known as 'the home boys' and the 'Yardies' This was not part of the prosecution's evidence. Although none of the defendants was identified, the trial judge decided that the jury would have to be discharged and the proceedings stayed. The newspaper owners were subsequently successfully prosecuted for breaching s.2(2).

Under the 1981 Act it is not sufficient for the prosecution to show that a publication has breached s.2(2), it must also be established the publication is not protected by virtue of s.5 of the 1981 Act. Thus, not all speech which causes a substantial risk of serious prejudice to active proceedings results in criminal liability. Discussion of matters with some connection to legal proceedings is lawful provided that discussion does touches in an incidental way upon those legal proceedings. The leading authority on the scope of s.5 is *AG v English*.⁴⁵ The Daily Mail published an article by Malcolm Muggeridge in which the author had written in support of an independent pro-life candidate (a woman handicapped at birth) at a parliamentary by-election. Muggeridge's article was critical of the policy of allowing newly-born hopelessly handicapped babies to die. The problem with the article was that it was published during a highly publicized trial at Leicester Crown Court of a paediatrician, Dr Arthur, for the attempted

³⁶ *AG v Morgan* [1998] EMLR 294.

³⁷ *AG v ITN* [1995] 1 Cr App R 204; *AG v BBC ex parte Hat-Trick Productions Ltd* [1997] EMLR 76.

³⁸ *AG v MGN Ltd* [2011] EWHC 2074.

³⁹ *AG v Unger* [1998] 1 Cr App R 308.

⁴⁰ *AG v Express Newspapers* [2005] EMLR 13.

⁴¹ *AG v Hislop* [1991] 1 QB 514.

⁴² [1997] 1 All ER 456.

⁴³ [1995] 1 Cr App R 204.

⁴⁴ *AG v Birmingham Post & Mail* [1998] 4 All ER 49.

⁴⁵ [1983] 1 AC 116.

murder of a Down's Syndrome child. It was held that the article was in breach of s2(2) and so it only remained to ask whether the publication was protected under s.5. The HL ruled that the publication created a risk which arose incidentally as a result of expounding the main theme of the article - the main theme being the moral justification for mercy killings. This controversial matter was clearly of general public interest and would not be stopped merely because there are in existence on-going legal proceedings centred upon some specific issue within the broader topic of mercy killings.

Subsequently in *AG v Times Newspapers and others* this section was seen to confer a wide latitude on the media to report the details and background of an intrusion into Buckingham Palace.⁴⁶ A description of the accused Michael Fagan in *The Mail on Sunday* as a 'rootless neurotic with no visible means of support' which went on to suggest a homosexual relationship between the accused and the royal bodyguard was held to be protected by s.5 because the publication concerned the Queen's safety, a matter of clear public interest. On the other hand, the publication in *The Sunday Times* of a statement that the accused had assaulted his stepson did not raise any issue of public concern and could not come within the protective ambit of the section. Similarly, the suggestion in *The Daily Star* that Fagan had admitted stealing a bottle of wine from Buckingham Palace was held not to be protected by s.5 and highly prejudicial to the burglary charge which he was facing. Mention should also be made of *AG v TVS & Southey*⁴⁷ where the trial of a Reading landlord for conspiracy to defraud the Department of Health and Social Security was halted after a regional broadcaster in the south of England TVS broadcast a programme called the *The New Rachmans*. The programme centred upon the fraudulent conduct of landlords in Reading and the south east of England and showed a still photograph of the defendant who was said to be still recognisable even with his face blanked out. Deciding that the broadcast constituted a s.2(2) contempt, the court held that the risk of prejudice could not be said to have arisen in an incidental way. It followed that s.5 was not available to the broadcaster.

It is tempting after *English* and *Southey* to conclude that the media should avoid referring to persons involved in, or events at issue in, legal proceedings. This is an overly restrictive reading of the case law as *AG v Times Newspapers* shows. Giving 'incidental' its proper meaning of 'secondary' or 'subsidiary' permits such references provided these do not become the central focus of a programme/publication. In *Southey*, the contempt conviction might have been avoided had the reference to on-going proceedings formed an illustrative part only of a broader discussion about the misappropriation of public funds by private landlords in the south of England.

Reporting restrictions can be issued under section 4(2) of the 1981 Act ('postponement orders) and section 11 of the same Act (prohibition orders). Consider first s.4(2) postponement orders which can be issued where matters are revealed in court in the absence of the jury, such as guilty pleas to some counts on the indictment or where a 'trial within a trial' occurs to determine the admissibility of evidence or to hear other legal submissions. They can also be issued where related trials are scheduled to take place after the conclusion of the present proceedings. Postponement orders represent a form of prior restraint that seeks to prevent media from causing prejudice to current or pending proceedings. They can apply to a part or the whole of proceedings. In *MGN Pension Trustees v Bank of America National Trust Savings Association and another*⁴⁸ the court stated that s.4(2) orders should only be made when (i) there

⁴⁶ (1983) *The Times* 12 February.

⁴⁷ (1989) *The Independent* 7 July.

⁴⁸ [1995] 2 All ER 355.

is a substantial risk of prejudice to the administration of justice in the current or a pending trial; and (ii) it appears to be necessary for avoiding that risk that there should be made some order postponing publication of report of the current proceedings; and (iii) balancing the public interest in learning of the present proceedings and the countervailing arguments in favour of a postponement order, the latter outweigh the former.

Section 11 prohibition orders can be broader than s4(2) orders in that some orders under s.11 restricting publication will be expressed to endure permanently. They may also be seen as less extensive than s.4(2) orders in respect of the fact what may be restricted is confined to a 'name or other matter'. Section 4(2) orders can potentially prevent coverage of all aspects of a court proceeding. The power to issue a s.11 prohibition order at common law exists where departure from the principle of open justice is considered to be 'reasonably believed necessary to serve the ends of justice.'⁴⁹ In *Reg v Evesham Justices ex parte McDonagh*, Lord Justice Watkins stated that, whilst there were cases in which the identity of witnesses or even defendants ought not to be disclosed, they were 'rare'.⁵⁰ *Stone's Justices' Manual* confirms this point stating that departure should occur in 'exceptional and compelling' circumstances only.⁵¹ The law reports contain few instances where the use of s.11 orders have been approved by the higher courts. In one of these, *R v Reigate Justices ex parte Argus Newspapers and another*, the Divisional Court accepted obiter the use of s.11 to protect the identity of a police informer who had previously been given a new identity by the state and now appeared before the court as a defendant.⁵²

III.5.2. Juries Act 1974

In January 2012, juror and university lecturer Theodora Dallas was jailed for breaching the trial judge's direction not to search internet for trial related materials.⁵³ She had told fellow jurors what she had found about defendant (including a previous rape allegation). Her actions caused the trial to be halted.⁵⁴ Seven months previously in separate proceedings, another juror Joanne Fraill discussed the progress of jury deliberations on *Facebook* with a defendant who had been earlier been acquitted in the same proceedings and whose co-defendant (and boyfriend) was awaiting to learn his fate.⁵⁵ Fraill admitted revealing details of jury deliberations and also doing a Google search on the co-defendant. She was jailed in June 2011 for 8 months.⁵⁶

III.6. Official Secrets Act 1989

S.1 Disclosure of security or intelligence information

Persons who are subject to s.1 (Disclosure of security or intelligence information) include employees of the security and intelligence services as well as contractors working on defence and security contracts. The latter must be notified in writing that they are subject to s.1 of the

⁴⁹ *AG v Leveller* [1979] A.C. 440 at 450.

⁵⁰ [1988] 2 W.L.R. 227, 233.

⁵¹ (1998), 130th edn., Butterworths, London) para.1-37.

⁵² [1983] Crim.L.R. 564.

⁵³ [2012] EWHC 156.

⁵⁴ O Bowcott, 'Juror jailed over online research' *The Guardian* (2012) January 23.

⁵⁵ *AG v Fraill* [2011] EWHC 1629.

⁵⁶ J Deans, 'Facebook juror jailed for eight months' *The Guardian* (2011) June 16.

1989 Act. In *R v Shayler* a challenge was taken concerning the ECHR compatibility of s.1.⁵⁷ Specifically, it was argued that the absence of a public interest defence rendered the s.1 offence incompatible with Article 10 of the Convention. The argument was rejected. There were sufficient other safeguards in the Act that allowed for allegedly unlawful or improper conduct by the security/intelligence agencies to be reviewed. These included the possibility of disclosure to an Independent Commissioner or a Minister of the Crown as well as judicial review of a superior's refusal to authorise disclosure.⁵⁸

III.7. Terrorism Acts

III.7.1.1 Terrorism Act 2000

S.12 Inviting support for a proscribed organisation

In 2016 the Court of Appeal ruled in *Choudary* that the offence was made out when a speaker intentionally encouraged practical or moral support for an organization that had been proscribed.⁵⁹ It was not necessary for the prosecution to establish that the defendant speaker knew that the organization had been proscribed. Nonetheless, the Court of Appeal did add a rider that "the (mere) expression of personal beliefs, or an invitation to someone else to share an opinion or belief" did not fall within the s.12 offence.⁶⁰ Thus no offence may be committed under s.12 if all that a speaker does is express moral/intellectual agreement with a list of ideological objectives that corresponds closely (or even possibly exactly) with those of the proscribed organization or invites others to share those ideological positions. The degree of protection for freedom of political speech indicated by the Court of Appeal in *Choudary* clearly troubled the Government and Parliament. A new criminal offence was created in s.1 of the Counter-Terrorism and Border Security Act 2019. It is now an offence to 'express an opinion or belief that is supportive of a proscribed organisation'. The *mens rea* requirement has been lowered from an intentional invitation to support a proscribed organization in s.12 of the Terrorism Act of 2000 to mere recklessness as to whether the listener will be encouraged to support a proscribed organization.

S.38B(2) Information about acts of terrorism

This is a controversial offence because it attaches criminal sanctions including custodial sentences to the failure to inform the state about suspected/known activities of family or friends. There is a 'reasonable excuse' defence in s.38B(4) for failure to disclose. An example of the circumstances in which the offence is committed is *Sherif*. Here the defendants failed to disclose information of material assistance both before and after the failed attempted bombings of the London underground network on July 21 2007. Maximum sentences of five years imprisonment were imposed on a number of those convicted of the s.38B(2) offence.⁶¹ *Sherif* also permits the court to impose a lesser sentence when a vulnerable defendant (on grounds of age or a particular relationship with an offender) shows loyalty to the offender instead of informing the police about what he/she knows.

⁵⁷ [2002] UKHL 11.

⁵⁸ *Ibid* at paras. 28-32.

⁵⁹ [2016] EWCA Crim 61.

⁶⁰ *Ibid.*, at para.49.

⁶¹ [2009] 2 Cr App R (S) 33.

S.57 Possession for terrorist purposes

Liability can arise in respect of the possession of lawful articles such as wires, batteries, electronic timers and agricultural fertilizer, especially if a number of these are possessed by a person at the same time. The critical component is that the surrounding circumstances of possession give rise to a reasonable suspicion that the article(s) is (are) being possessed for purposes connected with the commission, preparation or instigation of an act of terrorism. A document (such as a map or building floor plan) is capable of being an 'article' under s.57 as well as more obviously 'information' under s.58, see *R v G; R v J*.⁶²

S.58 Collection of information

The radical Islamic preacher Abu Hamza who was convicted in 2006 on several charges of incitement to murder and incitement to racial hatred was at the same time convicted of an offence under s.58 in respect of his possession of the ten volume *Encyclopedia of Afghani Jihad*. The prosecution had claimed that the *Encyclopedia* was a 'terrorism manual' dedicated to Osama bin Laden and containing suggested targets that included Big Ben and the Eiffel Tower.⁶³ In *R v G; R v J* the House of Lords stated that for liability to arise under s.59, the information 'must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism.'⁶⁴ The defence of 'reasonable excuse' in s.58(3) puts the onus upon the collector to explain why he/she possesses the information.⁶⁵ Somewhat controversially, the House of Lords held that a person who possessed information say about a bank could not plead a 'reasonable excuse' on the basis that the planned criminal activity was robbery not terrorism. As far as the defence of 'reasonable excuse' is concerned, the purpose of the possessor is neutral. The matter of 'reasonable excuse' will always be highly fact and context dependant and is left to juries unless the trial judge is satisfied that no reasonable jury could find the defendant's excuse to be reasonable.⁶⁶ It is not a reasonable excuse to claim that the documents were collected with a view to help bring about the end of an undemocratic or unlawful regime.⁶⁷

III.7.1.2 Terrorism Act 2006

S.2 Dissemination of terrorist publications

In *R v Gul* the defendant uploaded a number of videos on *Youtube* that showed (i) UK/US Coalition forces being attacked in Afghanistan and Iraq, (ii) how to make and detonate Improvised Explosive Devices (IEDs), (iii) terrorist training camps and footage of the 9/11 attacks in New York, (iv) martyrdom videos with voiceovers that praised the attackers' bravery and encouraging others to emulate them. His defence that the attackers acted out of self-defence and were not terrorists was rejected. He was convicted on five counts of disseminating terrorist publications contrary to s.2 of the 2006 Act and sentenced to 5 years imprisonment.

⁶² [2010] 1 AC 43.

⁶³ *The Guardian* (2006) February 7.

⁶⁴ [2009] UKHL 13, at para 43.

⁶⁵ *R v K* [2008] 2 WLR 1026, 1031.

⁶⁶ *Ibid.*, at para.81.

⁶⁷ *R v F* [2007] EWCA Crim 243.

III.8. Expression and public morality/harm to minors

III.8.1. The Obscene Publications Act 1959

The test in section 1 of a tendency to corrupt and deprave persons likely in all the circumstances to read, see or hear the article reaches beyond pornographic images and has been applied in the past to violent imagery,⁶⁸ drug-taking⁶⁹ or the public sale of t-shirts appearing to promote a gun culture.⁷⁰ In respect of offline materials, the courts have rejected the standards of the most vulnerable audience member in deciding whether the 'likely reader' would be depraved or corrupted.⁷¹ As far as online materials are concerned, the Court of Appeal in *Perrin* has said that, where these are not age-restricted, then vulnerable young persons can be included in the likely audience.⁷²

III.8.2. Protection of Children Act 1978

'Making' an indecent photograph/pseudo-photograph of a child extends to downloading an image from the Internet,⁷³ opening an attachment accompanying an email.⁷⁴ The jury is left to determine whether an image is indecent.⁷⁵ The term 'indecent' refers to prevailing standards of propriety.⁷⁶ The purpose of the defendant in 'making' an indecent photograph/pseudo photograph is not relevant to the question of indecency.⁷⁷

III.9. Criminal Justice and Immigration Act 2008 s.63

This statutory provision makes it a criminal offence to possess a 'grossly offensive, disgusting or ... otherwise ... obscene' image produced solely or principally for the purpose of sexual arousal. For liability to arise, the image must portray in an explicit and realistic way a range of specified acts including those that threaten a person's life, serious injury to a person's breasts or genitals, sexual intercourse with a human/animal corpse or with a live animal. In proceedings brought under s.63, the crucial question is whether the image has been created for the purposes of the sexual arousal of anyone who comes into possession of it.⁷⁸

III.10. Expression and Reputation

For liability in the civil law of defamation to arise, the publication complained of must cause or be likely to cause 'serious harm' to a person's reputation. In *Lachaux v AOL* the Court of Appeal

⁶⁸ *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159.

⁶⁹ *R v Skirving* [1985] 1 QB 159.

⁷⁰ Cited in J Rowbottom, *Media Law* (2018, Hart, Oxford) at pp.166-7.

⁷¹ But note the difference of approach between *R v Calder & Boyars* [1969] 1 QB 151 and *DPP v Whyte* [1972] AC 849.

⁷² [2002] EWCA Crim 747 and see further A Gillespie, *Child Pornography and the Law* (2011, Routledge, London).

⁷³ *R v Bowden* [2001] QB 88.

⁷⁴ *R v Smith, R v Jayson* [2002] EWCA Crim 683.

⁷⁵ *R v Owen* [1988] 1 WLR 134.

⁷⁶ *R v Graham-Kerr* [1988] 1 WLR 1098.

⁷⁷ *R v Smethurst* [2001] EWCA Crim 772.

⁷⁸ *R v Baddiel* [2016] EWCA Crim 474.

said that the issue was whether the statement 'substantially affected in an adverse manner the attitude of others or had a tendency to do so'.⁷⁹ The court can look at all relevant circumstances including evidence of what actually happened after publication. Trivial harm to reputation is not actionable.⁸⁰ In the case of social media such as *Twitter*, the number of retweets may be relevant to an assessment of the degree of harm caused to the claimant.⁸¹ Where a prompt apology is made, this can in specific circumstances prevent the harm to reputation being considered 'serious'.⁸² The standards by which 'serious harm' are to be judged are those of the reasonable reader.⁸³ The hypothetical reasonable reader is not naïve but neither is he/she unduly suspicious, nor avid for scandal. That is to say the reasonable reader will not prefer a defamatory meaning when other non-defamatory meanings are available. To protect speech about the workings of government, public authorities may not sue in defamation.⁸⁴ It should be noted however that this rule does not prevent individuals (including prominent, high-ranking individuals) working in public authorities from suing. In 1993 the then Prime Minister John Major successfully sued *Scallywag* for falsely reporting details of an adulterous affair.⁸⁵ Unlike their legally incorporated counterparts,⁸⁶ unincorporated associations such as trade unions also lack a legal capacity to bring defamation actions.⁸⁷

Once a publication is found to be defamatory, recovery in damages may be sought against the author, publisher and others involved in the dissemination of the publication. At this stage, the burden falls on the defendant author, publisher etc. to make good one of the defences that exists in statute or common law. If any of these are successful, the claimant's action fails. On account of this Report's word limit, very brief details only of some key defences are outlined in the section of materials that follows.

(i) Truth (formerly known as 'justification') is available for defamatory allegations of fact, not opinion. Here the defendant does not have to prove that every single word he/she published was true, merely that the essence or 'sting' of the defamatory statement is true.⁸⁸

(ii) Honest opinion (formerly known as fair comment) is available for defamatory allegations of opinion or comment. The defence can be defeated if the claimant can show that the defendant did not in fact hold the opinion but this is considered to amount to a high evidential threshold that claimants will struggle to satisfy.⁸⁹ In cases where the defendant has repeated a claim

⁷⁹ [2017] EWCA 1334.

⁸⁰ *Sim v Stretch* (1936) 52 TLR 669. See now *Jameel v Dow Jones* [2005] EWCA Civ 75 - where it was held to be an abuse of the processes of the court to bring libel proceedings unless there has been a 'substantial' publication in the jurisdiction. On the facts in *Jameel v Dow Jones* there were only 5 hits on the Dow Jones website complained of by the claimant and this not considered 'substantial'.

⁸¹ *Monroe v Hopkins* [2017] EWHC 433.

⁸² *Cooke & Midland Heart Housing Association v MGN* [2014] EWHC 2831.

⁸³ *Skuse v Granada Television Ltd* (1996) EMLR 278.

⁸⁴ *Derbyshire County Council v Times Newspapers* [1993] AC 534.

⁸⁵ <https://www.theguardian.com/media/2002/oct/04/pressandpublishing.conservativeparty>. As matters later transpired, it emerged that Mr Major had been having an affair at the time reported by *Scallywag* but with a woman other than the person named in the magazine.

⁸⁶ *Metropolitan Saloon Omnibus Co Ltd v Hawkins* (1859) 4 H & N 87. These bodies must show that the publication causes or is likely to cause a 'serious financial loss', Defamation Act 2013, s.1(2).

⁸⁷ *Derbyshire County Council v Times Newspapers* [1993] AC 534.

⁸⁸ For a recent example of a successful truth defence, see *Ward v Starr* [2015] EWHC 1987.

⁸⁹ The test laid down in s.3(5) of the 2013 Act replaces the old test of malice laid down in *Tse Wai Chun Paul v Albert*

made by another, the defendant may not rely on this defence if the claimant proves that the defendant knew or ought to have known that the original author did not hold the opinion advanced.

(iii) Publication on a matter of public interest

This defence extends to statements made on a matter of public interest and whose publication was reasonably believed by the defendant to be in the public interest though subsequently acknowledged by the defendant to be false. It largely replicates the previous common law test of 'responsible journalism' laid down in *Reynolds v Times Newspapers*.⁹⁰ In that case Lord Nicholls indicated that the following non-exhaustive list of matters would be relevant to deciding whether a publication could claim the defence: the nature and sources of any report; the steps taken to verify the information; whether the claimant had been given a chance to respond to the statement; the tone and timing of the statement. This is an intentionally flexible test whose main downside is that clarity on its precise meaning will develop slowly over time as case law precedents emerge.

III.11. Expression and Broadcasting

III.11.1. Communications Act 2003, s.321 Ban on political advertising in broadcast media

The UK courts upheld the blanket ban on political advertising in the broadcast media in the case of *Animal Defenders International Ltd (ADI) v Secretary of State for Culture, Media and Sport*.⁹¹ ADI an animal welfare organisation wanted to place a 20 second advertisement on commercially-owned broadcast channels. Its aim was to highlight the fate of primates held for the purposes of providing entertainment. The advertisement asked viewers/listeners to fund further campaigning. Broadcasting authorities refused to accept the advertisement for broadcast on the basis that the objectives of ADI were of a 'wholly or mainly political nature' and therefore prohibited under s.321(2) of the 2003 Act. In the House of Lords, the ban was declared to be consistent with Article 10 of the ECHR notwithstanding the fact that it imposes a draconian limitation on freedom of political expression. The ban was necessary to avoid the problem of the viewpoints of wealthy sponsors dominating the advertising spaces on broadcast media. This would be to the detriment of informed public debate in which a range of views including those of less well off speakers and groups were heard. Parliament had given close consideration to the matter in 2003 when enacting the Communications Act and decided to pass s.321(2) into law. The opinion of the legislature in this matter should be accorded 'great weight'.⁹²

III.11.2. Freedom of Information Act 2000

One of the most important decisions made in the courts concerning the duty on public bodies to disclose information is *R (on the application of Evans) v AG*. The case concerned the Ministerial Veto in s.53 of the 2000 Act which had been used by then Attorney General to refuse to comply with a ruling of the Upper Tribunal. The latter had ruled that letters written to the Blair Government from HRH Prince Charles about a variety of matters including building styles and

Cheng [2001] EMLR 31.

⁹⁰ [2001] 2 AC 127.

⁹¹ [2008] UKHL 15.

⁹² *Ibid.*, at para.33 (Lord Bingham).

planning permissions, environmental matters and the countryside must be made public. In the UK Supreme Court, it was held that AG Grieve's use of the veto was unlawful and could not be used simply because of a disagreement with the ruling of the Upper Tribunal on its merits.

IV. The concept of freedom of expression and its current and possible future limits

IV.1. The concept of freedom of expression

Freedom of expression for is seen as valuable for a number of reasons that are either instrumental in nature or essentially good for the individual him/herself.

The main rationale that is cited in support of freedom of expression in both academic and legal practice circles is the instrumental rationale concerning the promotion of an informed democracy. In the case of *R v Secretary of State for the Home Department ex parte Simms* Lord Steyn identified an array of interconnected democracy-supporting features of free expression.⁹³ These were that the legitimacy of public bodies' decisions depends in part upon the opportunities afforded through freedom of expression to affected parties to influence those decisions; and the (i) scrutiny and (ii) exposure of error functions served by open discussion. Previously in *Derbyshire CC v Times Newspapers* Lord Keith had remarked that it was of the 'highest importance that a democratically elected governmental body ... should be open to uninhibited public criticism.'⁹⁴

A less frequently cited instrumentalist rationale for freedom of expression is the argument from truth. This was famously expounded by JS Mill in *On Liberty*⁹⁵ in two connected claims, both of which assume that human judgment is fallible. Mill's first argument is that society ought not suppress what is considered by most to be a false opinion in case it transpires that majority opinion is mistaken.⁹⁶ Censors, including official ones, wrongly assume that their judgments are infallible. If true knowledge is to be gained, be attained, all must be able to access the views and opinions of others and enjoy freedom for self-expression for themselves. In this way, established orthodoxies can be challenged to see if it still convinces. In turn, newly accepted opinion must be subject to the possibility of displacement/refinement by other views. The argument from truth assumes that in the longer term false knowledge claims will be exposed for what they are and that society will be the beneficiary. Rational progress will ensue as truthful claims emerge freshly vindicated. Mill's second claim is that obviously false claims should not be censored either. When a mistaken speaker asserts that the moon is made of cotton wool, this speech is valuable since it forces those in possession of the truth about the composition of the moon to come forward to remind us why we know the first speaker to be in error. The benefits of more rigorous thinking come from having to defend the true belief. These are not so evident if the false opinion is suppressed and the true belief is held without an understanding of why it is held.

Non-instrumentalist arguments for free speech take the view that free speech is valuable for each individual, regardless of the benefits and detriments the exercise of such freedom brings to the rest of society (such as a more informed citizenry). On this view, freedom of expression assists the intellectual development of the individual, promoting the autonomy and/or dignity of each person. This development occurs for persons both as speakers and as listeners

⁹³ [2000] 2 AC 115.

⁹⁴ [1993] 1 All ER 1011, 1017.

⁹⁵ *On Liberty and the Subjection of Women* (2006, Penguin Classics, London).

⁹⁶ CL Ten, *Mill on Liberty* (1980, Clarendon Press Oxford) ch.8.

receiving information and ideas from others. This rationale features less prominently in the domestic jurisprudence although it is remarking that in *Handyside v. UK* the European Court of Human Rights noted that freedom of expression was 'one of the basic conditions for the progress of democratic societies and *for the development of each individual*.'(emphasis added)⁹⁷

IV.2. What legal concepts come into conflict?

IV.2.1. Freedom of expression and conflicting public and private interests

Though of vital importance to democratic self government and the intellectual maturation of each individual, the non-absolute freedom of expression must on occasion give way in a proportionate manner to more pressing public interests in national security, public safety, the prevention of crime and disorder, the administration of justice and the fair conduct of elections. Freedom of expression cannot thus be said to extend to speech which causes a clear threat to national security interests or puts ordinary citizens at serious risk of physical harm from others from terrorist or other criminal activity. It is important to realise the public interest in receiving information can require an unwilling speaker (usually the Government or other public authority) to disclose factual information that it would prefer to keep secret. Here again a balance is required to be struck between the public interest in disclosure and the public interest in maintaining secrecy. The passage of time may mean that the confidentiality claims of government business become less strong.⁹⁸

Neither does freedom of expression extend to disproportionate interferences with private rights to reputation, privacy or in intellectual property. In each case, UK law attempts to weigh and balance the competing interests at stake. To give an example from privacy versus freedom of expression conflicts that play out in national media outlets from time to time, expression interests in disseminating the details of celebrity's family life or sexual liaisons will usually be treated as less compelling than that person's countervailing privacy interests. It is almost certainly the case that the same conclusion would not be reached in cases where a national politician who had publicly defended family values was revealed in his/her private life to be a serial adulterer.

IV.2.2. Possible future limits

In the 20th century, the system of mass communications facilitated public access to information and debate supplied by a few media outlets employing professionally trained journalists. Today however, this model of a few, professional speakers to the listening/viewing masses no longer accurately pertains. Just when national and regional newspapers have been losing advertising to online platforms and have accordingly reduced the breadth and depth of news reporting,⁹⁹ a new set of online speakers have emerged. Few of these new speakers possess formal qualifications in journalism or are in receipt of editorial support. Nonetheless these new speakers are publishing stories and commenting about events that they believe others will be interested in receiving. A pressing question to arise is whether (and if so, to what extent) should these new speakers be able to claim 'journalists' privileges' in respect of their content. It is submitted that the Council of Europe has yet to properly engage with this

⁹⁷ (1979-80) 1 EHRR 737.

⁹⁸ *AG v Jonathan Cape* [1976] QB 752.

⁹⁹ The Cairncross Review *A Sustainable Future for Journalism* (February 12, 2019) available electronically at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf (last accessed August 2019).

emerging phenomenon of digital speech. There are concerns about 'low quality' and anonymous expression on matters of public interest. Some instances of anonymous expression are abusive and/or are threatening to others. Additionally, the dissemination of deliberately false claims or unintentionally misleading stories (not entirely unknown in professional media outlets either) poses acute problems for bodies charged with regulatory functions, including the courts and national legislators. The wider political frame must also acknowledge the rise of anti-establishment, anti-elite political movements who wish to disturb the status quo and rightly see digital speech as the means by which campaigns can generate impetus and acquire new supporters. What sorts of standards ought the law to impose in respect of newer online sources of news and comment? Might the application of Article 10 ECHR 'duties and responsibilities' result in a relatively narrow range of viewpoints as non-professional speakers are excluded from public discourse? What sorts of liabilities ought to be imposed on digital intermediaries that host problematic content? Should they face a form of strict liability the instant abusive/threatening material is uploaded and visible to other users? What kind of political pluralism should free expression guarantees uphold? How open should the channels of political communication be? How do social media platforms' algorithmic ranking of news stories shape political debate? Ought this to be a concern given the unwillingness of *Google* and other companies to reveal their ranking methodologies? For a short period, the top result for a Google search on the US Presidential Election of 2016 was a website *70News* that inaccurately reported that Donald Trump had not only won the Electoral College but had also secured more popular support across the US electorate than his Democratic Party rival Hillary Clinton.¹⁰⁰ More generally, there are questions of the democratic accountability of private corporations that increasingly act (and are trusted to act by governments) as the gatekeepers for expression. Access to a wide range of competing views and opinions is the very lifeblood of a democracy. How can this be guaranteed when commercial and shareholder pressures might push towards the exclusion of certain viewpoints?

Other important questions arise about the role of artificial intelligence in distorting electoral campaigns. Evidence concerning the use of bots to generate support for viewpoints and campaigns is now emerging.¹⁰¹ In 2017 around 9%-15% of users on *Twitter* were considered to be bots.¹⁰² Whilst there are positive uses of bots (for example helping to align voters' political preferences with political movements and candidates), more sinister uses are also apparent in which bots are disguised to appear to be humans and interact with humans on this basis. These bots may organise political campaigns and boost artificially the popularity of ideas that in truth have little popular support. In turn, these may affect the outcome of General Elections and referendums. The possible distortion of democratic politics is likely to be a focus of regulatory attention in the short and medium term.

The micro-targeting of political advertising and the identities of advertisers is also being addressed. In November 2018, *Twitter* forced political advertisers to publish their identities, how much money had been spent and which demographics are being targeted in the political advertisement. *Twitter* claims that this information will allow voters to see the 'meaningful context' around those who are spending money on political advertising on the platform. It says that it has suspended hundreds of accounts that is said are linked to Russia and Iran. *Facebook*

¹⁰⁰ N Wingfield, M Isaac and K Benner, 'Google and Facebook Take Aim at Fake News Sites' (2016) *New York Times* November 16 B1.

¹⁰¹ T Keller & U Klinger, 'Social Bots in Election Campaigns: Theoretical, Empirical, and Methodological Implications' (2019) 36 *Political Communication* 171.

¹⁰² O Varol et al 'Online human-bot interactions: Detection, estimation, and characterisation' *Proceedings of 26th Annual CHI Conference* cited in Keller and Klinger *ibid*.

also claims to be open to 'meaningful regulation'. In October 2018 it announced new verification requirements for those wishing to place political adverts (by driving licence, passport etc. to be checked by a third party). Those advertisers suspected of 'promoting misinformation or disinformation' can be reported and if the advertisement contains 'falsehoods' it can be taken down. The House of Commons Select Committee on Digital Culture, Media and Sport has said that it wants to see 'absolute transparency of online political campaigning' - including 'clear, persistent banners on all paid-for advertising and videos, that indicate source and advertiser, where in the world it was uploaded from, who uploaded it and who paid for it.'¹⁰³ It is expected that electoral law will be revised to address the concerns of the Select Committee.

¹⁰³ *Disinformation and 'fake news'*; Final Report (8th Report of Session 2017-19) HC 1791 (February 2019) at paras. 201-205.

V. Conclusions

V.1. Current situation

Notwithstanding the welcome move away from residual protection for freedom of expression in the domestic constitution brought about by the Human Rights Act 1998, the latter has not engendered an expansive reconfiguring of freedom of expression. Instead the boundaries of expressive freedom in the domestic constitution remain to be balanced against other legitimate public and private interests that point towards restricted speech. One worry however is that the legislature driven understandably by short term political pressures in specific cases such as terrorist activity, so called 'fake news' or unidentified political advertising online finds itself impelled to enact disproportionate restrictions upon disfavoured speech, thereby assuaging high profile concerns but also diminishing the scope to comment on public affairs. Domestic law lacks the US First Amendment's hostility towards contents-based regulation of speech. A distrust of governmental motives for intervening with expression is not a feature of the domestic legal landscape. Instead, speculative notions of 'harm' to national security, the administration of justice or public order sit alongside disciplining concepts such as the requirement to speak non-offensively and foster the means by which non-mainstream viewpoints may be kept out of public discourse. Judicial attempts to re-interpret and apply pre-digital era statutes such as the Public Order Act 1986 or the Malicious Communications Act 1988 to criminalise digital speech raise their own distinct issues of legitimate policy making, especially when the harms of such speech may be more diffuse than their offline equivalents. As a matter of practice, problematic digital speech forms may be more effectively curtailed by imposing strict liability upon digital intermediaries, including social media corporations whose *raison d'être* lies in growing shareholder value, not a principled commitment to freedom of unpopular expression. The Defamation Act 2013 does provide certain incentives to website operators to remove content that provokes libel complaints. Whether this accords sufficient importance to the airing of public matters is the subject of some debate.

V.2. Possible approaches to future challenges

From a democratic perspective any effort to move towards a more principled treatment of the complex regulatory issues posed by digital communications would do well to start from the position that all citizens have a valid interest in being able to participate in shaping the laws by which they consent to be governed. As such, a presumptive hostility to restrictions on speech that is intended as a contribution to public debate might be thought necessary. That said, clear challenges are posed by speech opportunities afforded by new technologies in respect of the integrity of the democratic process. Evidence exists concerning the targeted use of artificial intelligence (eg Twitter accounts run by bots) to create the false impression that a cause is more popular than in fact it is. This may have the consequence of altering citizens' voter preferences and political alignments. Clearly voters decision-making will be more informed when there is greater transparency about the sources of online micro-targeted political advocacy, their funding and geographical location. On the question of how regulation is to occur, serious accountability questions arise about whether it is defensible in a democracy to allow social media corporations and other digital intermediaries to be the arbiters of false news and mis/disinformation.

List of legislative acts and regulations

Children and Young Persons Act 1933
Communications Act 2003
Contempt of Court Act 1981
Copyright, Designs and Patents Act 1988
Counter Terrorism and Border Security Act 2019
Criminal Justice and Courts Act 2015
Criminal Justice and Immigration Act 2008
Defamation Act 1996
Defamation Act 2013
Defamation (Operators of Websites) Regulations
Electoral Administration Act 2006
Freedom of Information Act 2000
Human Rights Act 1998
Indecent Displays (Control) Act 1981
Jurors Act 1974
Malicious Communications Act 1988
Obscene Publications Act 1959
Official Secrets Act 1989
Political Parties, Elections and Referendums Act 2000
Postal Services Act 2000
Protection from Harassment Act 1997
Public Order Act 1986
Protection of Children Act 1978
Representation of the People Act 1983
Serious Crime Act 2015
Terrorism Act 2000
Terrorism Act 2006
Theatres Act 1968
Youth Justice and Criminal Evidence Act 1999

List of cases

Abdul v DPP [2011] EWHC 242
Animal Defenders International v Secretary of State for Culture, Media and Sport [2008] UKHL 15
AG v Jonathan Cape [1976] QB 752
Brutus v Cozens [1973] AC 854
Campaign Against Antisemitism [2019] EWHC 9
Chambers v DPP [2012] EWHC 2157
Connolly v DPP [2007] EWHC 237
Cooke & Midland Heart Housing Association v MGN [2014] EWHC 2831
Derbyshire CC v Times Newspapers [1993] AC 534
DPP v A & BC Chewing Gum Ltd [1968] 1 QB 159
DPP v Collins [2006] UKHL 40
DPP v Oram (1989) 88 Cr App R 261
DPP v Whyte [1972] AC 849
Harvey v DPP [2011] EWHC 3992
Lachaux v AOL [2017] EWCA 1334
Lau v DDP [2000] 1 FLR 799
Metropolitan Saloon Omnibus Co Ltd v Hawkins (1859) 157 ER 792
Monroe v Hopkins [2017] EWHC 433
Percy v DPP [2000] EWHC 125
R (on the application of Evans) v AG [2015] UKSC 21
R v Baddiel [2016] EWCA Crim 474
R v Bowden [2001] QB 88
R v Byrne [2011] EWCA 3280
R v Calder & Boyars [1969] 1 QB 151
R v F [2007] EWCA Crim 243
R v G; R v J [2009] UKHL 13
R v Graham-Kerr [1988] 1 WLR 1098
R v Gul [2013] UKSC 64
R v K [2008] 2 WLR 1026
R v Owen [1988] 1 WLR 134
R v Perrin [2002] EWCA Crim 747
R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115
R v Shayler [2002] UKHL 11

R v Sheppard [2010] EWCA 65

R v Sherif [2009] 2 Cr App R (S) 33 (235)

R v Skirving [1985] QB 819

R v Smethurst [2001] EWCA Crim 772

R v Smith; R v Jayson [2002] EWCA Crim 683

Reynolds v Times Newspapers Ltd [2001] 2 AC 127

Sim v Stretch (1936) 52 TLR 669

Skuse v Granada Television Ltd (1996) EMLR 278

Taylor v DPP [2006] EWHC 1202

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Consulted websites

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This study forms part of a wider-ranging project which seeks to lay the groundwork for comparisons between legal frameworks governing freedom of expression in different legal systems.

The document will analyse, with reference to the United Kingdom and the subject at hand, the legislation in force, the most relevant case law and the concept of freedom of expression with its current and prospective limits, ending with some conclusions and possible solutions for future challenges.

In the absence of formal constitutional protection for freedom of expression, the approach of the UK is residual in nature. That is to say, the extent of a person's freedom of expression is what is left after statutory and common law (judge-made) incursions into the freedom. Notwithstanding the passage of the Human Rights Act 1998, it remains the case that the UK Parliament is free to modify and restrict freedom of expression.

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