Offence, Hate and Harassment

1. Introduction

The concept of free speech was of English origin --but never part of our law as such. Instead, we had the role of the jury (and its ability to acquit) which was thought to be a better protection for speech than any constitutional guarantee when combined with a rule against prior restraints by the courts on speech.

Generally speaking, English law was traditionally a negative rights culture –so that a citizen could do all that was not prohibited.[1] That was the position until the Universal Declaration on Human Rights (UDHR) adopted by the United Nations General Assembly on 10 December 1948. The UK became the first state to deposit its instrument of ratification of the Convention on 8 March 1951.

Speech is governed by Art. 19 UDHR: *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."* The UDHR was followed by a treaty, the International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by UN General Assembly on 16 December 1966. The UK ratified it in 1976. It protects speech in a fuller version of art. 19,[2] with art. 19(3) providing that restrictions on the right to speech must meet the three part test: (1) be proscribed by law (and formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly); (2) pursue a legitimate aim of the ICCPR (and these are enumerated), and (3) be necessary and proportionate in a democratic society.

The UK also ratified the European Convention on Human Rights (ECHR) in 1953. The ECHR art. 10 reads as follows:

> *"10 (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive[3] and impart information and ideas without interference by public authority and regardless of frontiers.[4] This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to*

[1] Barendt, Freedom of Speech, OUP Second Edition, p. 40.

[2] Art.19 of the ICCPR: *"1. Everyone shall have the right to hold opinions without interference.*
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."

[3] The Public has a right to receive information under Art.10. This can be interpreted as a right to internet access-see Case C-275/06 *Promusicae v Telefonica, Yildirim v Turkey* [2012] App no. 3111/10.

[4] In the EU Charter of Fundamental Rights (EUChFR), binding member states this is protected in art.11.

> *such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

Both the ECHR and ICCPR were treaty obligations only and Freedom of Expression only became enforceable domestic law in the UK with Human Rights Act 1998 (which entered into force in 2000).

The ECHR binds the UK courts which is how it enters the law (the courts must interpret the law in a way compatible with it, including when there are disputes between private citizens) but it also directly binds public authorities (includes private ones with a public function).

Art. 10 is not absolute and art.10 (2) says the right is subject to responsibilities and restrictions meeting the three step test (familiar from art. 19) and for one of the reasons listed in art.10 (2). Further, art. 10 Freedom of Expression does not have US First Amendment type pre-eminence. Under the ECHR, when two convention rights are in conflict, the court adopts an intense focus on the comparative importance of the specific rights engaged in the individual case together with the justifications for interfering with or restricting each right --and then applies the proportionality test.[5]

Art. 10 is often balanced against other rights including the art. 8 right to private life and reputation. Art.8 provides: *"Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society, in the interests of national security, public safety, or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others."*This encompasses the reputation, honor, privacy and data rights of the individual.[6]

There are many different types of speech and not all are equally deserving of art. 10 protection.

> *"There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organization of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures,*

[5] *Axel Springer AG v Germany* (No.1) [2012] App. No. 39954/08 [89-95].

[6] See the Spanish Supreme Court in *El Pais* decision 2015.

> *especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value…. "*[7]

The UN Human Rights Council in resolution 12/16, says restrictions on speech should *never* be applied to:

- Discussion of Government policies
- Political debate
- Reporting on human rights
- Government activities and corruption in Government
- Engaging in election campaigns
- Peaceful demonstrations or political activities, including for peace or democracy;
- Expression of opinion and dissent
- Religion or belief, including by persons belonging to minorities or vulnerable groups.

2. Offence

It is sometimes said we have the *'right to offend'* as art. 10 protects speech which is offensive, shocking or disturbing:

> *"Freedom of expression constitutes one of the essential foundations of a democratic society…it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also as to those that offend, shock or disturb …"*[8]

This is important, but not absolute as the right, when exercised by the professional media, and broadcasters in particular, may be said to be subject to responsibilities.[9]

It can however be criminal to offend under §1 of the Malicious Communications Act and §127 of the Communications Act 2003. The DPP Guidelines on Prosecuting Cases in Social Media under these acts adopt a public interest approach—but in practice the CPS may prosecute if there are enough complaints --so it can be a numbers game.

3. Hate

Hate speech and speech inciting violence is not protected by art.10[10] and may also be

[7] *Campbell v. MGN Ltd* [2004] AC 457 Baroness Hale at [158-159].

[8] *Handyside v United Kingdom* (5493/72)at [49] and *Sunday Times v UK* (No 2) [1992] 14 EHRR 123 (Spycatcher) at [50].

[9] *MTE & Index.hu zrt v Hungary* (Application no. 22947/13) and *Delfi v Estonia* (Application no. 64569/09).

[10] *"…tolerance and respect for the equal dignity of all human beings constitute the foundation of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, promote or justify hatred based on intolerance (including religious intolerance) provided that any 'formalities, conditions, restrictions or penalties imposed are proportionate to the legitimate aim pursued. Furthermore, there can be no doubt that concrete expressions constituting hate speech which may be insulting to particular individuals or groups, are not protected by Article 10.." Gündüz* (the leader of an Islamic sect, had been convicted of incitement on account of statements reported in the press. He was sentenced to four years and two months' imprisonment and to a fine. Held the

an abuse of rights under ECHR art. 17, (preventing the rights under the convention being used to exploit or subvert other convention rights for the advancement of totalitarian aims).[11] As a rule, the Court will declare inadmissible, on grounds of incompatibility with the values of the Convention, applications which are inspired by totalitarian doctrine or which express ideas that represent a threat to the democratic order and are liable to lead to the restoration of a totalitarian regime.[12]

Holocaust denial is considered Hate Speech and removed from Art. 10 protection by art. 17: *"..denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and result ..is to rehabilitate the National-Socialist regime…denying crimes against humanity is one of the most serious forms of racial defamation of Jews and of incitement to hatred of them…..incompatible with democracy and human rights…"*[13]

But while denial of the Holocaust is hate speech, the denial of the Armenian genocide is not, see *Perinck v Switzerland.*[14] The class has not been extended much beyond Holocaust denial as yet –although raised in relation to excuses for Petain and casting doubt on heroes of the French resistance and advocating drug use (see *Lehideux*[15], *Chauvy* and *Palusinski*).

The media have special responsibilities not to disseminate Hate Speech and the context is important. Compare a broadcast of a serious debate with racists, which was protected in *Jersild*[16] with a newspaper

penalty could not be regarded as disproportionate as hate speech or glorification of or incitement to violence are incompatible with the notion of tolerance and counter to the fundamental values of the Convention. The offence had been committed by means of mass communication and was severe.

[11] See *Norwood v UK* (Application no. 23131/03) (The applicant had displayed in his window a poster supplied by the British National Party, of which he was a member, representing the Twin Towers in flame. The picture was accompanied by the words "Islam out of Britain – Protect the British People". He was convicted of aggravated hostility towards a religious group. Held such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the Convention). See also *Seurot v. France*, decision on the admissibility of 18 May 2004 (*"[T]here is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 [freedom of expression] by Article 17 [prohibition of abuse of rights] (...)"*)

[12] See, *Communist Party of Germany v. the Federal Republic of Germany*, 20 July 1957; B.H, M.W, H.P and G.K. v. Austria (application no. 12774/87), Nachtmann v. Austria, 9 September 1998 and Schimanek v. Austria, decision of the Court on the admissibility of 1 February 2000.

[13] See *Garaudy v France, (no. 65831/01).*

[14] The ECHR ruled that a Turkish politician had the right to deny that a massacre of Armenians during the Ottoman empire in 1915 was a genocide. The court said that when Dogu Perincek said the: "Armenian genocide is a great international lie." He should not have been found guilty of racial discrimination. The ECHR judges said that denying the genocide was not an attack on the dignity of individuals in the Armenian community.

[15] The applicants wrote an item for *Le Monde* and which portrayed Marshal Pétain in a favourable light, defending Marshal Pétain's memory and seeking to have his case reopened. The authors were convicted of publicly defending war crimes and crimes of collaboration with the enemy. Held there had been a violation of art. 10 as the impugned text, although polemical, could not be said to be negationist since it had praised a particular individual and the events referred to in the text had occurred more than forty years ago.

[16] The applicant, a journalist, had made a documentary containing extracts from a television interview he had conducted with three members of a group of young people calling themselves the "Greenjackets", who had made abusive and

publishing letters calling for bloody revenge by the Kurds, which was not, in *Sörek* (No.1).[17]

Political speech which does not call for violence does not cross the line.[18] Similarly, restrictions on speech inciting religious intolerance may be valid. See *İ.A. v. Turkey* (no. 42571/98), the applicant, the owner and managing director of a publishing company, published a book insulting "God, the Religion, the Prophet and the Holy Book". The sentence of two years' imprisonment and fine was appealed. The Court held that there had been no violation of art. 10 as those who chose to exercise the freedom to manifest their religion, whether as members of a religious majority or a minority, could not reasonably expect to be exempt from all criticism and had to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. But the case concerned not only comments that were disturbing or shocking or a "provocative" opinion but an abusive attack on the Prophet. Notwithstanding the fact that there was a certain tolerance within Turkish society, which was deeply attached to the principle of secularity, believers could legitimately feel that certain passages of the book in question constituted an unwarranted and offensive attack on them. In those circumstances, the Court considered that the measure in question had been intended to provide protection against offensive attacks on matters regarded as sacred by Muslims and had therefore met a "pressing social need". It also took into account the fact that the Turkish courts had not decided to seize the book in question, and consequently held that the insignificant fine imposed had been proportionate to the aims pursued by the measure in question.

Domestically in the UK, possession of terror related or enabling publications and materials to create them may be caught by the 2000 Terrorism Act (TA). §57 TA creates an offence of possession of an article for a purpose connected with the commission, preparation or instigation of an act of terrorism. The section catches publications as it was widely drafted but really intended to catch household items

derogatory remarks about immigrants and ethnic groups in Denmark. The applicant was convicted of aiding and abetting the dissemination of racist remarks. The Court drew a distinction between the members of the "Greenjackets", who had made openly racist remarks, and the applicant, who had sought to expose, analyse and explain this particular group of youths and to deal with "specific aspects of a matter that already then was of great public concern". The documentary as a whole had not been aimed at propagating racist views and ideas, but at informing the public about a social issue. Held there had been a violation of art. 10.

[17] The applicant in Sörek was the owner of a weekly review which published two readers' letters vehemently condemning the military actions of the authorities in south-east Turkey and accusing them of brutal suppression of the Kurdish people in their struggle for independence and freedom. The applicant was convicted of "disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people". He complained that his right to freedom of expression had been breached. The Court held that there had been no violation of art. 10 as the impugned letters amounted to an appeal to bloody revenge and that one of them had identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence.

[18] See *Faruk Temel v. Turkey* (the applicant, the chairman of a legal political party, read out a statement to the press at a meeting of the party, in which he criticized the United States' intervention in Iraq and the solitary confinement of the leader of a terrorist organization. He also criticized the disappearance of persons taken into police custody. Following his speech the applicant was convicted of disseminating propaganda, on the ground that he had publicly defended the use of violence or other terrorist methods. Held that there had been a violation of art. 10

that could be used to make weapons and bombs and enacted to assist in obtaining convictions prior to the commission of any crime and given the considerable difficulty of proving conspiracy. This is the most commonly charged terror related offence. It has been used to charge those found in possession of items such as common chemicals such as fertilizer (*R. v Khyam (Omar)* [2008] EWCA Crim 1612; [2009] 1 Cr. App. R. (S.) 77) and petrol (*R. v Lusha (Krenar)* [2010] EWCA Crim. 1761 but also, in that case were the computer hard drives containing instructions on the manufacture of bomb-making equipment). Documents and materials such as bomb-making instructions have been found to be articles within this section, see *R. v Rowe (Andrew)* [2007] EWCA Crim 635; [2007] Q.B. 975 (catching a W.H. Smith notebook containing notes and instructions on how to assemble and operate a mortar). See also R. v Muhammed (Sultan), *R. v Khan (Aabid Hassain)* [2009] EWCA Crim 2653; [2010] 1 Cr. App. R. (S.) 103 where the second accused was found in possession of a "vast collection" of terrorist related documentation stored on digital media. The evidence pointed to active engagement in the recruitment of others and involvement in an extremist website which published Al-Qaeda videos and articles encouraging others to fight and participate in bombings. In *R. v Zafar (Aitzaz)* [2008] EWCA Crim 184; [2008] Q.B. 810 it was found the section was capable of giving rise to uncertainty and should be read such that a person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that he intends it to be used for the purpose of the commission, preparation or instigation of an act of terrorism. In that case, in issue was extremist literature including ideological propaganda, stored on digital media where the prosecution alleged the defendants had used it to incite each other to travel to Pakistan, train there and fight in Afghanistan. Although there was evidence that supported the existence of travel plans, the use of the extremist literature to incite each other to go could not be proved and the appeal was allowed. It is a defence if it can be proved that it is not for this purpose. The low threshold of "reasonable suspicion" required to satisfy §.57(1) is balanced by the wording of s.57(2), which provides that it is a defence to "prove" that the possession was not for a terrorist purpose. In order to avoid offending basic concepts of due process and fairness, under art.6(2) of the ECHR, the burden on the defence is merely evidential and per §118, if the defence discharges the evidential burden, the defence is treated as satisfied unless the prosecution proves beyond reasonable doubt that the defence or reason relied upon is not true. There is also a §58 offence where a defendant has control of a record which contains information likely to be of practical assistance to a person committing or preparing an act of terrorism and knew he had the record and the kind of information it contained without a *reasonable* excuse for possession (none are listed) and the information is such that it calls for an explanation. See *R v G* [2009] UKHL 13. The focus of this section is the nature of the information rather than the circumstances in which it is possessed. The information must be of practical assistance to a would-be terrorist. Merely glorifying terrorism is insufficient, even where it has the effect of encouraging such activity, so in *R. v Malik (Samina Hussain)* [2008] EWCA Crim 1450 the conviction was based not on the propaganda documents, but those containing practical information about military techniques. Other examples

include information as to how to avoid surveillance and detection *R. v Muhammed (Sultan)* [2010] EWCA Crim 227; [2010] 3 All E.R. 759). These sections are an obvious interference with art.10 rights but will fall within the boundary of art.10(2) as for the enumerated purposes of public safety and national security.

3. Harassment

The Protection from Harassment Act 1997 (PHA) provides both civil and criminal liability. The essence of both is the same. Under §1 PHA, a person must not pursue a course of conduct- which amounts to harassment of another person and which he knows or ought to know amounts to harassment of the other.

This is defined as "*if a reasonable person… would think the course of conduct amounted to harassment"*. It is a defence if the conduct is reasonable.

A breach of §1 can create also create civil liability sounding under §3 in damages for anxiety and financial loss. Note that it is not possible under the PHA to harass a company, but a company can seek an injunction to protect its clients/employees. See the SOPA 2005 amendment.

Often the conduct is legal per se but disproportionate. Writing letters or emails can be enough if "oppressive or unreasonable," see *Thomas v News Group* [2001] EWHC 1233 and *Iqbal v Dean Manson* [2011] EWCA Civ. 123. For example, *Cheshire West Council v Pickhall* (private tenancy dispute where the tenant sent over 1200 emails to the solutions team at the council seeking its assistance and claimed Human Rights abuses and made allegations of corruption and also published a blog) and *QRS v Beach* (solicitor obtained injunction against blog by disgruntled client) and *Al Hamadani v Al Khafaf* (dispute between antique dealers and injunction granted after visit by defendant and his 3 brothers to C's home over a debt) and *National Farmers Union v Tierman* (injunction agst spokesman for Coalition of Badger Action Groups to protect farmers involved in badger cull).

4. Revenge porn

Art. 8 ECHR protects privacy and data but there is now a specific offence of Revenge Porn-- under §S.33 of the Criminal Justice and Courts Act 2015. This makes it an offence to disclose private sexual photographs and films without consent and with intent to cause distress. What is private is 'what is not ordinarily seen in public' and that which is sexual--shows genitals/pubic area or what a reasonable person would consider so. The offence is punishable with up to 2 years imprisonment. There are defences if there is public interest, for journalistic purposes and where there is belief in consent to disclosure for reward.