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Freedom of Expression as a Necessity in a New Possible Bill of Rights

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Abstract

With the discussion of the implementation of a British Bill of Rights by the Conservatives, this would ensure that all human rights would be set forth by the UK parliament, or by another body directly on its behalf.¹ The ability to alter what constitutes a "right" would thus ultimately rest with the current UK parliament of the time. As a result of this, the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights would no longer be directly enforceable before domestic courts. This will, subsequently, mean that the rights of the ECHR are no longer going to be given further effect. Therefore, it is essential to try to save the importance of keeping the right of freedom of expression.

Keywords

Bill of Rights, ECHR, Freedom of Expression, Human Rights

¹ House of Commons, 'A British Bill of Rights? Briefing Paper' (19 May 2015).

According to Article 10 of the European Convention on Human Rights and Fundamental Freedoms 1951 (ECHR) “everyone has the right to freedom of expression.” It is important for it to be included first in the proposed Bill of Rights as it constitutes a “shield” to the democratic constitution and the foundation in which many other rights are based upon.² That was especially emphasised in *Handyside v The United Kingdom* [1979-80], where it was held that “freedom of expression was 'prescribed by law' and 'necessary in a democratic society ... for the protection of morals' under Article 10 (2)”.³ Nevertheless, the right is not absolute and there are some restrictions on freedom of expression. This was highlighted in the case of *Norwood v DPP* [2003], where the court held that the expression of hate in the case that it was “a public expression of attack...” and “clearly racially directed and racially insulting”, thus it is unlawful.⁴

The ECHR officially came in force in 1953 and its purpose is to protect basic human rights.⁵ Section 2 of the Human Rights Act 1998 incorporates the rights of the Convention into UK law. It provides UK citizens with the ability to take a case relatable with their convention rights to a national court, saving them time, money and energy, instead of taking it to the European Court of Human Rights in Strasbourg.⁶ Their importance in national law is demonstrated by the fact that, ministers have to make a statement whenever they introduce a Bill, to confirm that it is respectful to the rights of the Convention.⁷ The judiciary also, have to take it into account. Specifically, they must read and interpret law in a way which is consistent with the ECHR. If this is not possible then they must declare that the law is incompatible with the ECHR.

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2 'Freedom of expression: A fundamental human right underpinning all civil liberties' (*Unesco*)

<https://en.unesco.org/70years/freedom_of_expression > Accessed 7 March 2019.

3 *Handyside v The United Kingdom* [1979-80] 1 EHRR 737.

4 *Norwood v DPP* [2003] WL 21491815.

5 A. Bradley, K Ewing and Christopher Knight, *Constitutional and Administrative Law* (16th edition, Pearson Education UK 2014) 359.

6 S.7 Human Rights Act 1998.

7 Helen Fenwick, Gavin Phillipson & Alexander Williams, *Text, Cases & Materials on Public Law & Human Rights* (4th edn, Routledge 2016) 46.

8 A. Bradley, K Ewing and Christopher Knight, *Constitutional and Administrative Law* (16th edition, Pearson Education UK 2014) 371.

Nevertheless, the Conservative party have expressed concerns over the relationship between the ECHR and national law, about a frequent confusion and “misapplication” of the law.⁹ A clear example of this is their view against prisoner’s voting, something that the Human Rights Act seems to be in favour of.¹⁰ As a result of this, it has been suggested by the Conservative party in the 2015 election a new manifesto, which proposed that the UK shall repeal the Human Rights Act 1998 and instead, introduce a new Bill of Rights which will protect the basic rights of the United Kingdom’s citizens.¹¹ A new human rights legislation, would involve repealing the Human Rights Act and introducing a specific Bill of Rights. It is in the interests of the UK that in the case of a new Bill of Rights should include the rights that were protected by the Convention by virtue of the Human Rights Act 1998, and most importantly, the right to ‘freedom of expression’.

It is essential, at this point, to be explained the definition and importance of freedom of expression, along with its infringements. According to Article 10:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”¹²

It is a qualified right, meaning that it is limited to a degree, in best interest of the common good. In particular, “Qualified rights under the European Convention on Human Rights may be interfered with where the interference is prescribed by law, in pursuit of a legitimate aim, necessary in a democratic society and proportionate.”¹³ Nevertheless, article 10 also states that there are some purposeful restrictions to the freedom to preserve its integrity.¹⁴

⁹ Alexander Horne and Lucinda Maer, ‘From the Human Rights Act to a Bill of Rights?’ (*House of Commons Library Research*) <https://www.parliament.uk/documents/commons/lib/research/key_issues/Key-Issues-From-the-Human-Rights-Act-to-a-Bill-of-Rights.pdf> Accessed 4 March 2020.

¹⁰ “Human Rights Act versus a British Bill of Rights” (BBC, 11 May 2015) <<http://www.bbc.co.uk/newsbeat/article/32692758/human-rights-act-versus-a-british-bill-of-rights>> accessed 7 March 2019.

¹¹ House of Commons, ‘A British Bill of Rights? Briefing Paper’ (19 May 2015).

¹² Article 10 ECHR.

¹³ Halsbury’s Laws Rights and Freedoms (5th edn, 2018) (Vol. 88A) 85.

¹⁴ Article 10(2) ECHR.

“Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins.”¹⁵

There are many reasons why this right is of crucial significance. First and foremost, it enables people to freely express their opinion and themselves in general, through many different ways, through art or through protesting, for instance.¹⁶ This was demonstrated in the recent case of *DPP v Ziegler* [2019], that stated “in a democratic society, great weight must be placed on the importance of the right to express political opinions...”¹⁷ Expressing one’s opinions is a fundamental protection provided by the article and a vital part of its’ definition.¹⁸ Other than that, it also protects democratic education. Lately, there have been discussions about eliminating racism in higher education.¹⁹ Universities seem to have to balance the needed restrictions, while at the same time ensure that the right to freedom of expression and more specifically freedom of speech, is not violated.²⁰ In a discussion in Westminster Hall on the subject it was said about freedom of speech that:

“It is important in all settings, but especially in universities, where education and learning are advanced through dialogue and debate. It underpins academic freedom. Universities are places where ideas are developed. A diverse range of interesting and sometimes controversial topics should be debated.”²¹

It should also not be taken for granted, the power that the right gives to the media to inform the public. This was especially highlighted in the vital case of *R. (on the application of BBC) v Secretary of State for Justice* [2012]. This case gave emphasis on the importance of disclosing how the criminal justice system is working, from someone on the inside.²² Of equal importance was the decision in *Sunday Times v The United Kingdom* [1979-80], where the Court ruled that “the thalidomide disaster” was “a matter of undisputed public concern.”²³

¹⁵ Benjamin Franklin, ‘On Freedom of Speech and the Press.’ (The Pennsylvania Gazette, November 1737)

¹⁶ Julia Farrington, ‘The arts, the law and freedom of speech’

(The Guardian, 7 Aug 2015) <<https://www.theguardian.com/stage/2015/aug/07/arts-law-freedom-speech-legal-knowledge-packs-arts-organisations>> accessed 08/03/2019.

¹⁷ *DPP v Ziegler* [2019] EWHC 71 (Admin).

¹⁸ Article 10 ECHR.

¹⁹ HL 10 July 2019, vol 798, col WA1805.

²⁰ Rachel Schraer & Ben Butcher, ‘Universities: Is free speech under threat?’ (BBC, 23 October 2018) <<https://www.bbc.co.uk/news/education-45447938>> accessed 17 March 2019.

²¹ HC Deb 17 May 2018, vol 641, col 222.

²² *R. (on the application of BBC) v Secretary of State for Justice* [2012] EWHC 13 (Admin).

²³ *The Sunday Times v The United Kingdom* [1979-80] 2 EHRR 245.

These cases are some obvious examples of how freedom of expression gives power to public information and further, to public protection. It also gives them the powerful ability to scrutinise the power organs of the state and the status quo, as seen in the recent case of *R. (on the application of Evans) v Attorney General* [2015] where the court said that it was “in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government.”²⁴ This is another way in which freedom of expression acts as a safeguard for democracy and a fair political system.

Freedom of expression gives people the ability to express their feelings and opinions, either that is by speaking, writing in a newspaper or a tabloid, writing song lyrics or even painting, and thus it is crucial to protect it and include it first in the new Bill of rights. However, it is not in the absolute rights league, which means that there are purposeful limitations to it, because it is often misinterpreted and infringed. These limitations are most of the time considered justified in contemporary democratic societies, for their prosperity.²⁵ One of these is hate expressions.²⁶ As it was seen in *DPP v Collins* [2006], all that needs to be proven is if the alleged message would be perceived by the reasonable person as “grossly offensive”.²⁷

This was also emphasized in a media instance, as Lord Nicholls of Birkenhead said in *Regina v British Broadcasting Corporation* [2003] “Television broadcasters must ensure, so far as they can, that their programmes contain nothing likely to be offensive to public feeling.”²⁸ The law is also cautious with this freedom, in respect to matters of national security, public safety and territorial integrity. For example, in *Guardian News and Media Ltd v Incedal* [2016], the media tried to gain permission in publishing material for a terrorism trial.²⁹ The courts decided to only allow some journalists to be present during parts of the trial, but without the ability to publish anything about it, for the further good of public interest. More specifically, “it was directed that up to ten accredited journalists (selected by the media parties) could attend the trial, on the basis that their presence would serve to minimise the extent of the departure

24 *R. (on the application of Evans) v Attorney General* [2015] UKSC 21.

25 Sydney Kentridge “Freedom of speech: is it the primary right?” [1996] ICLQ 45(2) 253-270.

26 Antoine Buyse, ‘Dangerous expressions: the ECHR, violence and free speech’ [2014] ICLQ 63(2), 491-503.

27 *DPP v Collins* [2006] UKHL 40.

28 *Regina v British Broadcasting Corporation* [2003] UKHL 23.

29 *Guardian News and Media Ltd v Incedal* [2016] 1 WLR 1767.

from the principle of open justice, although they would be prohibited from reporting what took place, subject to review at the conclusion of the trial.”³⁰

In conclusion, freedom of speech is one of the most important freedoms and after the possible repeal of the Human Rights Act, any new Bill of Rights needs to ensure that the right is adequately protected. Its inclusion in the Bill would continue to recognise the importance of freedom of expression and ensure that it is guaranteed in domestic law as well as European human rights legislation. The right itself, as it has been proved, seems to be an imperative necessity in today’s society. With democracy progressing universally, freedom of expression can be considered as the foundation and the touchstone of the constitution. There are, though, some restrictions for the better application of it. In order for this freedom to one day exist without them, we all have to use it responsibly. Ethical, moral cultivation and respecting each other seems to be the key in this situation and may be even more effective and long term than a restrictive legislation.³¹ After all, as Evelyn Beatrice Hall has famously said, “I disapprove of what you say, but I will defend to the death your right to say it.”³²

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30 Guardian News and Media Ltd v Incedal [2016] 1 WLR 1767.

31 Tarlach McGonagle, ‘Wresting (racial) equality from tolerance of hate speech’ [2001] DULJ 23, 21-54.

32 S. G. Tallentyre, *The Friends of Voltaire* (John Murray, Albemarle Street, London, 1906) 199.