What limits, if any, should we place on the right to freedom of expression?

The right to freedom of expression has been internationally recognised as a tenet of the modern democratic state, as a prerequisite for the existence of meaningful free elections and political scrutiny. Current UK human rights legislation integrates a negative conceptualisation of rights, whereby any infringements of institutional authority upon specified rights are prohibited by law. For example, Article 10(1) of the Human Rights Act (1998) stipulates 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority,' a provision lifted almost verbatim from the Universal Declaration of Human Rights. The HRA protects freedom of speech as an individual liberty, necessitating the ability to communicate an intended message through academic, artistic, or commercial means; this also encompasses the corresponding positive right to receive adequate information from independent media sources (Bychawska-Siniarska, 2017).

Conventional legal scholarship views the right to freedom of expression as fundamental, but not absolute, with several exceptions cited as necessary and proportional outliers, that are excluded from the right under extenuating circumstances in order to protect the integrity of democratic society. The Human Rights Act prescribes the specific circumstances in which the absolutism of human rights legislation can be overridden, in a three-part legal test. According to the Act, interferences with freedom of expression are legitimate only if they are 1) prescribed by law, 2) pursue a legitimate aim, and 3) are necessary for the functioning of a democratic society. This essay will explore three of the manifold grounds whereupon violations to the right to freedom of expression may be lawfully restricted, namely the interests of national security, the protection of public health or morals, and the non-disclosure of information received in confidence. It will conduct an evaluation of whether each ground adequately fulfils the HRA's criteria for overriding freedom of speech.

Traditionally, infringement upon the right to freedom of speech has been viewed as just when abuse of such freedoms constitutes a threat to 'national security, territorial integrity or public safety' (HRA, Article 10:2). During the Second World War, the public safety defence was used to justify wartime censorship of information that might assist the enemy or injure morale (Murray, 2020). In contemporary Britain, however, threats to public safety mostly involve use of language that would

exacerbate a violent situation or cause breaches of the peace, such as inciting terrorism or racial violence. The rationale for limiting the ability to express such sentiments is that- unmitigated- they can inspire others to cause extensive harm to the public welfare, and in some cases loss of life: in short, they may infringe upon other fundamental human rights, including the absolute right to life.

The Terrorism Act (2006) includes a specific provision prohibiting the glorification of terrorism; this is used to prevent the dissemination of terrorist propaganda if it can be proven that a defendant held material which qualifies as a terrorist publication, alongside the criminal intent to distribute it. In October 2021, Stefan Aristidou was sentenced to 28 months' imprisonment for sharing Daesh beheading videos, a conviction instituted upon the anti-glorification provision (CPS, 2021). Many analogous prosecutions in recent years indicate the efficacy of this counterterrorism measure.

The existence of the ratified Terrorism Act (2006) fulfils the first criterion of interference prescribed by law; it also pursues the legitimate aim of counterterrorism, fulfilling the second. However, abundant controversy has arisen as to whether limitations on free speech in the Terrorism Act are truly necessary. A democratically necessary measure must be a proportional response to a pressing social need: terrorism could arguably be considered a pressing factor. Despite this, critics argue that constraints on 'glorification' damage basic liberties, raising the example that contemporary praise of Nelson Mandela's fight against apartheid could be construed as endorsing terrorism, and therefore would be grounds for prosecution (BBC, 2006). In modern Britain, such a conviction would be considered wildly unjust; as such, detractors argue that the potential detriment posed to freedom to speech by this form of censorship threatens its viability as a democratically proportionate response to the threat of terrorist propaganda. This engenders uncertainty as to whether prosecutions for the glorification of terrorism constitute a lawful breach of the right to freedom of speech.

The right to freedom of speech can be further restricted on the grounds of public health or morals; increasingly, these are cited as the rationales behind the removal of content from social media platforms. The COVID-19 pandemic has highlighted a need to supress the dissemination of deleterious misinformation- particularly pertaining to vaccine hesitancy- that can cause substantial detriment to public health. In an increasingly post-truth society, the preponderance of misinformation,

whether malicious or otherwise, can obstruct the capability of public health authorities to convey clear, accurate messaging during crises, posing a threat to the common welfare. Alongside this, due to the diversity of user-generated content on social media, hate speech (or similarly abusive content) has become pervasive. If the speech constitutes a gratuitous personal attack based on a protected characteristic, it is prohibited under anti-discrimination legislation, thus must be censored.

Social media companies have a legal and ethical responsibility to remove online content which could be considered objectionable or illegal. Most sites have a unilateral right to exercise discretion over the removal of incendiary content (Joseph, 2012); however, many allege that current levels of regulation are simply inadequate to prevent the propagation of tangibly harmful content. This has led to the Parliamentary introduction of the Online Safety Bill in 2021, which aims to extend the onus of duty of care placed on social media platforms whilst strengthening provisions protecting citizens from illegal content; it confers further moderation responsibilities upon Ofcom, as well as the ability to issue substantial fines, which act as a deterrent against the negligence of social media firms (BBC, 2021).

Debate has been raised over whether the Online Safety Bill is a proportional and necessary limitation to freedom of speech on the largely user-generated platform of the internet. Certainly, the aim of averting harm to children and adults through exposure to vitriolic online content is legitimate, fulfilling that aspect of a lawful exemption to freedom of speech. Nevertheless, the Online Safety Bill has pervasive flaws. Proponents of freedom of speech particularly object to the vagueness of language in the proposed legislation; another area of contention is clause 11 of the draft bill, which assigns the prerogative to define which technically legal content should be considered harmful- and thus be removed- to the culture secretary (Milmo, 2021). In essence, a government minister would be supplied a platform to independently determine what constitutes acceptable expression. Though there is a pressing need to moderate social media content to a greater extent, delegating full responsibility to a single government agent cannot be considered a proportional response to this demand. And, until the Bill is codified by the UK Parliament, such measures are not legally necessitated.

Thirdly, the right to freedom of speech may be encroached upon in circumstances where disturbing violations of privacy may arise from the third-party disclosure of information received in confidence.

This conflict is particularly focalised by the antipathy between freedom of the press and public figures' abilities to live private lives, an ability enshrined in Article 8 of the HRA. The 2011-2012 Leveson inquiry into the ethics of journalism followed several phone-hacking incidents perpetrated by members of the press, particularly the *News of the World* tabloid, which were later prosecuted as criminal offences (Waterson, 2021). Although no remedial actions were taken following the inquiry, it served to highlight the circumstances in which the right to privacy generates copious tension with the right to freedom of expression, and the cases in which each can be limited.

Whilst restricting the expression of information obtained through illegal means is justifiable, there remains ambiguity over the extent to which privacy from the press should be protected, in the interests of preserving due scrutiny of public figures. The existence of super-injunctions in English tort law has been denounced by many as excessive: these instruments not only prevent the publishing of any details from an ongoing legal case, but also the disclosure of the case itself (Sommerlad, 2018). They allow representatives to delay the freedom of the press to express allegations until a judge can ascertain the nature and veracity of the private information. Super-injunctions are lawful instruments, fulfilling the first criterion for acceptability, though it should be noted that they are instigated by individual court orders rather than Parliamentary statute, so do not require the consensus of democratic representatives to be enacted. Their objective is the legitimate protection of privacy, in accordance with Article 8 of the HRA, and they succeed in this respect. However, super-injunctions are a form of prior censorship and- due to the obscuration of their very existence from the public domain- are a form of unchecked power. Thus, it is unclear whether these legal instruments could be considered a proportional measure for the preservation of essential democratic rights.

To conclude, whilst the right to freedom of speech remains a touchstone of functioning democracy, there are many circumstances in which it can be legitimately and lawfully constrained. Nevertheless, extent clearly matters: infringements upon freedom of speech conducted in the name of public security, health or morals, or the distinct right to privacy are only justifiable if they are truly democratically necessary and create no ambiguity in application or opportunity for exploitation. The limitations placed on free speech under the outlined pieces of legislation lucidly illustrate the key

variable of proportionality when determining what constitutes an acceptable encroachment on freedom of speech. In each case, as legislation proposes restrictions on content that would otherwise be considered entirely legal, it faces insurmountable opposition. Hence, limits of the right to freedom of expression are justifiable only if they further the protection of another fundamental right.

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