

*THIS PIECE HAS BEEN CREATED BY AN OUTSIDE CONTRIBUTOR FOR THE PURPOSE OF STIMULATING THOUGHT AROUND CIVIL LIBERTIES AND DOES NOT NECESSARILY REFLECT THE VIEWS OF THE DECISION PROBLEM.*

With the increasing relevance of the private sector and in particular social media companies as platforms for debate and discussion, it is submitted that there needs to be more protection for freedom of expression against the private sector as well as the state.

## **WHAT PROTECTIONS EXIST FOR FREEDOM OF SPEECH UNDER BRITISH LAW?**

Under British law, there are two key protections for the right to freedom of speech. The first is Article 10 of the European Convention on Human Rights, which was incorporated into British law by the Human Rights Act passed in 1997, this states that "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." However, this right can be limited for several reasons as stated in Article 10 (2) including those as vague as "necessary in a democratic society". The other is through common law rights which are uncodified "gaps in the law" whereby the judiciary interprets legislation in a way which is compatible with civil liberties such as freedom of speech, the press and association and freedom of religion. Simply put prior to 1997 there were no statutory rights however if parliament passed an Act to limit a common law right the courts would interpret this in a way which was compatible with such rights as far as possible.

## **DO THEY APPLY TO THE PRIVATE SECTOR?**

Even with statutory protections for freedom of speech, it is difficult to apply them to social media which has revolutionised political discourse over the last 10 years. Up until now, the prevailing view has been that private companies cannot violate your civil liberties and the main concern for the framers of the ECHR was the state violating the basic rights of its citizens as the Nazis and the Soviet Union had done. Therefore, you cannot make a complaint if a newspaper you have submitted an article to refuses to publish it, that is not a violation of the right to freedom of expression as they would be classified as a publisher rather than a platform. What was not envisaged by the framers of the ECHR was the power that social media companies could exercise in controlling the public discussion as has recently been shown even the President of the United States can be taken down by all social media companies at once if they choose.

## WHAT LAWS GOVERN SOCIAL MEDIA?

The current legal position governing social media liability in the UK is Article 15 of the e-commerce directive, transcribed into UK law by the Electronic Commerce (EC Directive) Regulations 2002 which states that: "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, the provider complies with rules regarding the updating of 13 and 14, to monitor the information which they transmit or the information, specified in a manner widely recognised store, nor a general obligation actively to seek facts or used by industry; circumstances indicating illegal activity." This legal position has not changed since the UK left the EU in 2020.

The UK currently operates a "notice and takedown" policy where these companies are requested to remove content that is found to be illegal such as copyright infringement by a court order or notification from the government. While there is no general obligation on social media providers to monitor the content that is posted on their sites, they are not precluded from doing so. However, if they do monitor content they are no longer acting as platforms and therefore the blanket exclusion of liability for certain content such as false information, libel or defamation is harder to justify.

## POLAND

Poland has recently published a bill that would impose a free speech requirement on social media platforms, the law would prevent social media companies from banning users or deleting accounts so long as Polish law has not been breached. The law would create a special council with the power to order social media companies to restore deleted accounts or posts or face a fine of up to £10 million, users who had not received a response after complaining to the social media company could complain. This is moving towards what has been called "speakers' corner" regulations where social media companies are regulated as spaces for open public discussion and debate.

## THE EQUALITY ACT 2010

Private employers may also sanction or fire employees for expressing political opinions which gain a negative reception, while it can be argued that it is acceptable for a company to dismiss employees who bring it in to disrepute, this risks sacrificing people's careers to the whims of the mob. Under the Equality Act 2010 a person's "philosophical belief" is a protected characteristic which prevents employers from discrimination on that ground. However, this is very subjective and has shown not be resilient when an employee goes against a prevailing orthodoxy. In the case of *Maya Forester v CGC Europe and others*, the claimant has her contract terminated with an American based think tank for expressing the view that biological sex was defined in reality and could not be changed. She challenged this decision based on s.10 of the Equality Act which protects religious and philosophical belief. However, both s.10 protection is subject to an "acceptable in a democratic society" test. In this case, the judge ruled that the claimant had no protection saying that "I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others." And then listed what he thought were acceptable opinions to qualify for protection under the Equality Act.

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