

Why truth is important in expressing freedom

Law



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Do the laws in this country relating to obscenity and indecency compromise the right to freedom of expression, and if so are they, in your view, justified in doing so?

Freedom of expression is outlined in article 10 of the European Convention of Human Rights and is arguably one of the most important rights that we are granted by the Convention. Through this right we are able to promote truth, democracy and self-fulfilment, which collectively promote the idea of teleological rights that aim to deliver good to society. One of the reasons the right is listed in the Convention is to enhance the liberty and autonomy of individuals.

The concept of truth is very important when considering liberty and autonomy as it enables us to develop a market place of ideas, which are based upon the truthful factual views that have been put forward by the individual. By collating the views of others we are able to enhance our own individual personal autonomy by considering what other people believe, thus enhancing our own choices and knowledge in order to make a decision that we feel is right.

There is a large amount of suspicion that surrounds modern life and there are many issues that, as of yet remain unanswered. This is where truth and freedom of expression play a vital role. Take for example the controversy over the MMR vaccination. Many people are left unsure as to whether or not the vaccination is safe. The Government strongly defend the vaccination, however views have been expressed that it could be potentially dangerous. Here truth and freedom of expression is vital as doctors and other individuals

who have had experience with the vaccination are able to say what they really think, even if it does not agree with the common 'school of thought' of the Government and the medical profession. By putting peoples individual personal opinions forward on matters such as this it enables the parents of the child to be aware of the advantages and disadvantages of the vaccine, and make a decision accordingly.

It could be argued that the truth is very unstable, because if you take the example given above about the MMR vaccine, each person who states their opinion on the issue will believe it to be true, so it makes it difficult to gain an accurate positive answer as to the safety of the vaccine, as each individual will have a different opinion on the matter.

The truth is a precious virtue and the only way to let everyone know the truth, or what you believe to be the truth is to publish views and let them be available to all who want to know about a matter. This can only be done by virtue of exercising you own freedom of expression .

Freedom of speech is vital in democracy, as democracy itself requires that each individual's opinions be heard. This allows society to develop in a way which is desirable for the majority of the people. Freedom of expression plays a vital role in parliament it has been stated that ' Members of the House of Commons and the House of Lords are free to say anything in Parliament without being called to account in the courts for what they say .' Parliament and the House of Lords require and rely on freedom of expression, so as to come to justice and make democratic decisions.

There is a large amount of self-fulfilment that is attached to the freedom of expression, by allowing an individual to be heard equally with others, it allows individuals to theoretically say what they like. The ability to talk and be listened to, enhances an individuals autonomy, as it gives a feeling of satisfaction and self-fulfilment.

Article 10(1) states;

‘ 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. This article shall not prevent States from requiring the licence of broadcasting, television or cinema enterprises. ’

This article starts off very open ended, as it recognises that everyone has the right to hold opinions, receive and impart information without interference by public authority regardless of frontiers. Immediately after this sentence it then provides for discretion that is allowed in each of the states, which encroaches upon an individuals freedom of expression.

Article 10(2) states;

‘ The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to 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 rights of others, for preventing

the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary .’

Here a list of duties and responsibilities are imposed through restrictions on the right. It is important to notice the restrictions are imposed, when they are ‘ prescribed by the law’ and are ‘ necessary in a democratic society’ so discretion is left to the domestic law of the state as to the limitations placed upon the individual. From the article it is clear in the way that it is worded, that freedom of expression is subject to many limits.

In order to understand the laws on obscenity and Indecency within the United Kingdom, it is best to look to the case law that has arisen as a result of the right stated in Article 10 ECHR.

Handyside v United Kingdom (1976) ECHR

This case was heard before the European Court of Human Rights existed.

The case was about a publisher who was charged under the Obscene Publications Act 1959 and 1964 for having in his possession ‘ obscene books entitled The Little Red Schoolbook for publication for gain .’ The books were seized and later destroyed and the applicant was fined £50 and ordered to pay costs. The court held with 13 votes to 1 the interference with the applicants freedom of expression was prescribed by law and that it was necessary in a democratic society for the protection of morals under Article 10(2). So it held that there had been no violation with the right of the applicant as outlined in Article10.

Leading up to the case the applicant was issued with a summons under section 1 (1) Obscene Publications Act 1964, for having in possession a copy
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of the obscene publication. In the judgement of the case both the 1959 act and the 1964 act were read together, and the court spent time outlining exactly what was in the different parts of the legislation. Section 1 stated that an article was deemed to be obscene if it was likely to deprave or corrupt any person who reads, hears or sees the matters contained or embodied in it . Section 2 stated that any person who publishes an obscene article for gain or not, shall be liable. On summary conviction a fine of up to £100 or imprisonment not exceeding a term of six months will be issued, and on indictment a fine or imprisonment, not exceeding three years could be issued . Section 3 allows a warrant to be issued if there are reasonable grounds for suspecting that at a premises obscene articles are being held for publication or gain . Section 4 states when a person will not be liable. It states that a person shall not be liable under section 2 if the information is thought to be for the public good on the grounds that it is in the interests of science, literature, art or learning or of other objects of general concern .

The legislation here is not very clear as it appears to be relying on the courts to assess subjectively, exactly what the court feels is obscene or indecent and exactly what is for the public good. It would seem that a lot of discretion is left to the courts when passing judgement in these cases, which is potentially hazardous, as what is regarded as obscene or indecent to one person will not be to another. This leads to a large area of uncertainty and eats away at the concept of consistency within the English legal system.

English law in this case put strong limitations upon Article 10. This seems to be unjust as it could be argued that the information contained in the publication was for the public good and it was a useful process of learning for

the school children, as the topics covered by the publication are important knowledge for children and teenagers of twelve years and above. Arguably the court was wrong to have held that there had been no violation of the applicants right under article 10 ECHR as the applicant could have relied upon a defence in section 4 Obscene Publications Act, thus proving that there had been a violation of article 10, when the books were seized and destroyed.

R v Gibson [1990] 595 3 WLR

This was a Court of Appeal case that concerned earrings that had been displayed in an art gallery, that were made from a freeze-dried human foetus of three or four months gestation. The appellant at first instance was charged of the offence at common law of offending public decency. The Court of Appeal considered the Mens rea of the offence, so the court had to decide whether or not it was relevant that the defendant intended to outrage public decency or appreciated that it would run the risk of doing so. The appeal was dismissed as it was held that there was no requirement for the prosecution to prove that that the person charged had an intention to outrage or appreciated the risk of public outrage. It was sufficient to show that the act of displaying the foetus was a public one for the purpose of the common law offence. Feldman draws upon an interesting argument in this case. He was concerned with the cause of the outrage in this case. He brought up the point, ' Did it lie with the fact that the earrings were made of a human foetus? Would the offence have been made out if the earrings had merely looked like human foetuses but had been modelled realistically in clay or plastic? ' He then goes further in his chapter to list other scenarios,

but it is important to consider exactly what part of displaying the human earrings caused the outrage?

It seems hard to believe that a set of earrings, regardless of what they are made of, could corrupt anyone, nor could it really outrage their sense of decency. People may find the earrings a little tasteless, but surely not enough to convict the producer of outraging public decency. It would be interesting to know if the case would have been decided in the same way, in reference to Feldman's comments about the earrings being made out of clay or plastic. This would be left to the discretion of the judge, but it would seem unreasonable to prosecute someone for displaying a set of earrings that resembled a real foetus when it was really made of plastic, as does it still outrage their sense of decency.

R v British Broadcasting Corporation ex parte ProLife Alliance

This is one of the more recent cases to date, that has been heard. The court when considering the case discussed article 10 the freedom of expression. In this case the claimants were a political party that were opposed to abortion. The party was entitled to broadcast a Party Election Broadcast as part of their campaign. It submitted its tape to the broadcasters, which showed an honest and unsensational view of what went on during an abortion. The footage showed clear images of a foetus in a mangled and mutilated state. The broadcaster unanimously agreed not to show the PEB by the ProLife Alliance, as they had an obligation under section 6(1) Broadcasting Act 1990 not to include any programmes which offend good taste and decency. An application for Judicial Review was made, and was granted by the Court of Appeal. The court then considered, whether or not it was 'necessary in a

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democratic society' to stop the tape from being broadcast. The court rightly held that that freedom of expression was imperative during a PEB and the broadcasters had not given sufficient weighting to freedom of expression and so the appeal was allowed. The court also added that censorship could be justified during a political speech but only in extreme circumstances, where it involved gratuitous sensationalism and dishonesty.

The Court of Appeal came to a reasonable decision in this case as the video was not dishonest nor was it sensationalistic, it was simply an honest and factual account of what happened during the abortion procedure. The Court was right to give sufficient weight to Article 10 ECHR, as during a PEB to promote a political party's campaign freedom of expression is imperative. PEB should be statements of truth, which everyone should have the option of seeing or hearing. The broadcasters were right in some respects to have reservations to broadcast the tape. For example it would be inappropriate for them to show the tape during the daytime, when children could be watching. It would be better for it to be shown after the 'watershed', as this would be when the target audience of the campaign would be watching television. The target audience would be adults over the age of eighteen years who were eligible to vote. The broadcaster should also have to produce a warning before the footage was screened, so the individual has the choice of whether or not they want to watch the broadcast. However there are still problems with this, by making a broadcaster show the footage after a certain time in the evening and producing a warning before it is shown, there is still a limitation to the Prolife's right under Article 10.

It would appear from the cases that have been mentioned, that freedom of expression is severely limited and as Feldman comments on *R v Gibson* ' it appears to be an example of where the defendant's rights were abridged by the prosecutor's discretion .'

It is very difficult to establish how the law identifies obscenity or indecency as it is impossible to produce an objective test that could be applied to every case. The courts will have to impose a subjective test but even this is not without difficulty, as this will lead to heavy reliance on the judge's discretion. The categories of obscenity and indecency are an entirely personal issue that are based upon an individual's opinion and morals. What offends one person might not necessary offend another.

Emphasis must be placed upon the wording in Article 10 ECHR. Article 10(2) places emphasis on the phrases ' necessary in a democratic society' and ' as prescribed by law.' These phrases significantly limit an individual's freedom of expression and the ability to rely on article 10. This reinforces the idea that it is entirely based on discretion which can lead to injustice.

It is also important to consider does article 10 include a right to be offensive. It would seem unjust to allow people to be unnecessarily offence however the article would cover this by asking whether or not it is necessary to be offensive in a democratic society. It could be argued that the footage that the Prolife Alliance submitted to the broadcasters was offensive, but this would be ill founded. The footage was simply a mere insight into a real life scenario it was in no way over exaggerated or glamorised. On this basis how can a real life scenario be offensive? The same could be argued in the case

of The Little Red School Book this was a book of fact and not fiction, so it goes further to show how can a realistic portrayal of fact be in any way indecent or cause outrage?

The right to be offensive is not included in Article 10 and it should not be as it is unnecessary in a democratic society. However the tolerance of what the public will regard as an outrage on grounds of obscenity and indecency is wholly down to the individual's personal opinions and morals.

The Freedom of Expression is a very contentious issue and it is difficult to establish just how free individuals are able to say and do as they like. There are many barriers to freedom of expression in the United Kingdom and the laws of obscenity and indecency are just one of the categories.

It is important when considering an individual's right under article 10, to consider a balancing act. It can be argued that section one of the articles is balanced out by section 2 of the article. Individuals should be able to express freely their own feelings and opinions however not when it interferes with other people's rights. Ultimate freedom of expression will enhance an individual's choice by collating all the ideas of others and making decisions accordingly.

The United Kingdom's laws relating to obscenity and indecency, on the basis of the case analysis earlier, do interfere heavily with an individual's freedom of expression. A lot of discretion is left to the courts as to exactly what is for the public good and the interpretation of exactly what is obscene or indecent, however to pass judgement the court must balance the benefits of freedom of expression against the burdens.

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Within the United Kingdom the laws on obscenity and indecency are based upon the morals and opinions of other individuals and ultimately through censorship you end up with the views of others being subjected upon us all, this can lead to feelings of discomfort that everything we see and hear is being controlled on behalf of us and is being monitored without us being able to comment or form our own opinion.