

W201 The Individual and the State

Study notes on civil liberties: a comparison of English law and Articles 9 and 10

This course requires

- an understanding of civil liberties in England and Wales and
- an ability to compare English law with convention rights

Freedom of thought conscience and religion

English law

English law does not restrict these rights and there have been few cases here.

Convention

Article 9 sets out this freedom.

Freedom of expression

English law

Freedom of expression exists so far as it is not made illegal by specific acts of parliament.

To define the extent of this right one has to examine each area and the limiting statute:

Administration of justice

English law

Contempt of Court

Contempt is a criminal offence. It exists because courts need a means of stopping publications which might prejudice the outcome of both civil and criminal cases. It also covers unruly behaviour in the courtroom. Punishment can include imprisonment. Originally an offence at common law the law was partially revised in the Contempt of Court Act 1981 (the Act) after the ECHR found a breach of Article 10 had occurred in **Sunday Times v UK** 1979 ECHR (the Thalidomide case).

The Act tries to balance two competing interests. The interest in freedom of expression

and information and the interest in achieving a fair trial. Sometimes the first has to be limited to achieve the second.

Strict liability

In Section 1 the Act creates a strict liability rule for publishers. It makes publication a contempt of court **regardless of intent** where

- the writing is addressed to the public at large (or a section) (Section 2(1))
- it creates a substantial risk of serious prejudice (Section 2(2))
- the proceedings are active (Section 2(3))

It is a defence for the publisher to prove he did not know the proceedings were active (Section 3).

It is also a defence if the publication is a fair report of legal proceedings published in good faith (Section 4).

It is also a defence if the publication is part of a discussion in good faith of public affairs and the risk to the particular proceeding is incidental (Section 5).

Protecting sources

This is another attempt to balance competing interests. Journalists like to protect their sources or no one would speak to them and they could not do their job. Courts in contrast like to insist on questions (even about sources) being answered if they affect the fairness of a trial. For a witness to refuse to answer a question may be a contempt.

The Act (Section 10) provides that a court will not require disclosure unless it is for

- the interests of justice
- national security
- prevention of disorder or crime.

The case of **X Ltd v Morgan Grampian** 1991 Lords (which later became **Goodwin v UK** 1994 ECHR) illustrates the different approach in the UK compared with the ECHR towards freedom of expression and particularly press freedom.

In **X Ltd v Morgan Grampian** Goodwin a journalist with 'The Engineer' was given information about Tetra Ltd's financial problems. He contacted Tetra Ltd for comment. Tetra Ltd (believing the information came from their confidential corporate plan a copy of

which had gone missing) obtained an ex parte injunction to prevent publication by Morgan Grampian (publishers of The Engineer) and an order that Goodwin disclose his source on the basis that it was necessary 'in the interests of justice' under Section 10 of the Act.

The decision of the Divisional Court was upheld in the Court of Appeal and the Lords.

Lord Bridge said that it was a "balancing exercise" the importance of the 'ends of justice' having to be balanced against the importance of 'protecting the source'.

Lord Bridge then focused on how the confidential information had been obtained "if it ... was obtained illegally this will diminish the importance of protecting the source".

Goodwin appealed to the ECHR and in **Goodwin v UK** the Court took a different approach. They did **not** describe it as a balancing exercise. They stressed the primary importance of freedom of expression and press freedom. Protection of sources was a basic condition of press freedom. Any restriction had to be **proportionate** to the legitimate aim pursued.

The ex parte injunction had already achieved press silence. The purpose of the disclosure order (tracking down the source in order to sack the person if he was an employee) was not 'an overriding requirement in the public interest'.

"There was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed". It was not 'necessary in a democratic society' for the protection of Tetra's rights in English law even allowing for the margin of appreciation of national authorities.

The failure of the Lords to give **primacy** to the convention right was crucial to the different outcomes.

AG v Punch 2002 Lords (where no member of the court referred to any Strasbourg jurisprudence) also suggests that UK courts may still not be comfortable endorsing Strasbourg jurisprudence on the primary importance of freedom of expression.

Deliberate contempt

This is not dealt with by the Act and remains punishable at common law. Outside the courtroom contempt can take the form of either publication when aware of a real risk of prejudice or intemperate criticism of a judge.

Convention

Article 10

1 Everyone has the right to freedom of expression.

2 The exercise of these freedoms ... may be subject to restrictions as are prescribed by law and are necessary in a democratic society,

- in the interests of national security
- 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
- maintaining the authority and impartiality of the judiciary.

In **Sunday Times v UK** 1979 ECHR the paper published an article about children deformed as a result of their mothers taking the drug thalidomide during pregnancy. At the time there was a civil case pending against the manufacturer for compensation. The manufacturer asked the Attorney General to intervene and he sought an injunction which was granted. The Court of Appeal reversed this but the Lords reinstated it. The Sunday Times went to the ECHR. The court found the common law of contempt to be uncertain. They also found that there was no trial imminent and the authority of the judges not at risk. Article 10 had been breached.

One reason why the ECHR came to a different conclusion was that they took a different approach.

They started by considering the positive right to freedom of expression. In contrast the House of Lords had begun by considering the needs of protecting the administration of justice from 'trial by the press'. They then focused on

- (1) the fact that publication would pressure on the parties to settle
- (2) the publication prejudged the outcome and constituted 'trial by press'.

In Lord Reid's words in **AG v Times Newspapers Ltd** 1974 Lords

"a balance must be struck between the public interest in freedom of speech and the public interest in protecting the administration of justice from interference".

The ECHR in contrast stated:

"freedom of expression constitutes one of the essential foundations of a democratic society ... not only do the media have the task of imparting ... information and ideas: the public also has a right to receive them.

The Court is not faced with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted".

Obscenity

English law

The position is governed by the Obscene Publications Act 1959 (OPA).

This Act does not penalise members of the public who simply possess obscene articles - only those who publish them or possess them for publication for gain (Section 2).

The test for obscenity is whether an article would 'deprave or corrupt' persons likely to read it (Section 1). The court will consider the effect on only a limited group if the readership is likely to be restricted. The test is therefore relative and not absolute.

There is also a defence based on public good (ie the interests of art literature or science) (Section 4).

These provisions limit the inroads the Act would otherwise make on the right to freedom of expression.

Convention

Article 10

Everyone has the right to freedom of expression.

Article 10. 2

subject to conditions ... for the protection of health or morals.

The ECHR had to consider how to apply this condition in **Handyside v UK** 1976 ECHR. A publication *The Little Red Schoolbook* was seized under the OPA 1959. The publishers claimed the OPA violated Article 10. The condition relating to morals provided a wide margin of appreciation for governments and courts as long as the restriction was proportionate to the aim pursued (in this case protecting under 18s from promiscuity). The Court said that state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements (of morals) as well as on the 'necessity' of a restriction.

Note that this wide margin of appreciation applies only to morals.

When considering Article 10 and the restriction based on the authority of the judiciary the ECHR in the **Sunday Times v UK** 1979 (the Thalidomide Case) after quoting *Handyside* (as set out above) went on:

“Precisely the same can not be said of the far more objective notion of the ‘authority’ of the judiciary. Here a more extensive European supervision corresponds to a less discretionary power of appreciation”.

The power or margin of appreciation will therefore vary from restriction to restriction depending on the view the ECHR takes of how far there are differing national viewpoints affected by legitimate local factors and how far there is a broad European consensus.

And finally

Other areas of law which affect freedom of expression include (for example) Defamation, Sedition, Official secrets, Public Order Act offences, Incitement to racial hatred and Terrorism. These are dealt with in passing only in Unit 9 in Manual 2.