Where Are We With Freedom of Expression?
The Right Honourable Dame Siobhan Keegan
15th June 2023

On the 5th of December 1972, Lord MacDermott, newly retired Lord Chief Justice of Northern Ireland, delivered the inaugural lecture named in his honour at Queen's University, Belfast entitled 'The Decline of the Rule of Law'[1]. This was at a troubled time in Northern's Ireland's history when obvious issues arose in relation to the control of public disorder. I will say no more of that this evening. However, on reviewing the lecture Lord MacDermott gave, I was struck by his general opening comments which seem to me to apply to this discussion, some fifty years later. Lord MacDermott said this:

"We know from the history of law and its institutions that the vitality and fortunes of its people are closely linked with the quality of their laws and can ebb and fail if these cease to be effectual or to serve the requirements of the society they purport to rule. And knowing that, it is only prudent that we should from time to time scrutinise the health and condition of our principal legal concepts and mark any trend or sign which might injure or imperil the common weal."

While I cannot within the confines of this talk deliver a fully comprehensive analysis of the current law, I will endeavour, via a brief health and condition check to provide you with some thoughts as to where we are on freedom of expression.

I begin with a recent decision. In July 2022, the Supreme Court heard a reference by the Attorney General for Northern Ireland regarding the Abortion Services (Safe Access Zones) (Northern Ireland) Bill. In broad terms, the Reference concerned the question of whether a criminal offence created by the Bill of influencing a protected person within a safe access zone around a clinic offering abortion services was a disproportionate interference with the rights of those who sought to express opposition to the provision of abortion treatment services in Northern Ireland.

Following that hearing, I went on holiday to Italy. While I was in the country, not actually in the art gallery, environmental protesters from the activist group Ultima Generazione entered the Uffizi gallery and glued

[1] *(1972) 23 Northern Ireland. Law Quarterly 475*

themselves to the glass that protects Botticelli's masterpiece Primavera. The painting, which was undamaged, was targeted because of its subject matter – it is said to represent hundreds of botanical species that bloom in Spring which the protestors claimed we are in danger of losing. The protesters also wished to highlight the care and attention societies give to preserving art and culture in contrast to the care and attention that is given to preserving our planet.

Whilst the principle of freedom of expression itself has not altered over the years the messages and how they are voiced have and of course of greater interest to us is how the law adapts to the changing norms of social behaviour.

Against this brief contextual backdrop, I begin my health check with a fundamental question: why do we protect freedom of expression?

In answering this question, I think it uncontroversial to say that freedom of expression is the lodestar of our democratic society and is highly valued at an instinctual level. As Lord Bigham observed in R (Animal Defenders International) v Secretary of State for Culture[2]:

"Freedom of thought and expression is an essential condition of an intellectually healthy society. The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government."

The framework offered in Eric Barendt's text Freedom of Speech[3] also provides a useful starting point from which to apprehend why freedom of expression is valued in our society.

Broadly speaking, Barendt outlines four arguments in support of the principle that speech is entitled to special protection from regulation or suppression. In brief, these are that freedom of speech: 1. enables the discovery of truth; 2. is crucial to the working of a democratic constitution; 3. is an integral aspect of human self-fulfilment; and 4. is necessary because of what he terms 'suspicion or distrust of government'.

Lord Bingham in his seminal work, The Rule of Law[4] alludes to the first and third of Barendt's arguments when he observes that:

"Since the publication of Milton's Areopagitica in 1644 the importance of free speech has been understood, if – in Britain and elsewhere – very incompletely honoured. It is important for the reason which he gave: 'Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do

[2] R *(on the application of Animal Defenders International) (Appellants) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, at paragraph 27
[3] Eric Barendt *Freedom of Speech* 2nd Edn (2005)
[4] Tom Bingham *The Rule of Law* (2010), pp 78 -79

injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'
In a modern democracy where the ultimate decisions rest with the people, it is the more important that they should be fully informed and empowered to choose between conflicting opinions and alternative courses of action."

Two centuries after Milton, John Stuart Mill[5] articulated the well-known 'harm principle', by virtue of which restrictions on the actions of individuals should be imposed only to prevent harm to others. Mill said:

"The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. …. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

With these historical foundations laid which explain why we protect freedom of expression I turn to look at where we are today.

In 2023, any examination of the health of the law on freedom of expression in the UK will inevitably be undertaken through the lens of article 10 of the European Convention on Human Rights. Purely to take article 10 as the starting point would, however, be to neglect the importance afforded to freedom of speech by the common law. It is to the common law that I turn.

As Lord Justice Laws observed in Advertising Standards Authority Ltd[6], 'freedom of expression is as much a sinew of the common law as it is of the European Convention.' Therefore it is worth diverging slightly at this point to consider the common law tradition of protecting freedom of expression, not least because it helps inform our rights-based analyses of today.

In his essay, 'Responsible Journalism and the Common Law'[7], Lord Phillips opened by observing that lawyers like to congratulate the common law on the recognition it has always granted to freedom of speech as a fundamental right. He quotes Lord Goff in Attorney General v Observer[8] where he said:

'we may pride ourselves on the fact that freedom of speech has existed in this country as long as, if not longer than, it has existed in any other country in the world.'

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[5] John Stuart Mill *On Liberty* (1859)
[6] *R v Advertising Standards Authority Ltd, ex parte Vernons Organization Ltd* [1992] 1 WLR 1289 at 1293A
[7] In *Freedom of Expression: Essays in honour of Nicholas Bratza* (2012).
[8] *Attorney General v Observer Ltd* [1990] 1 AC 109, 284 (Lord Goff of Chieveley).

Lord Phillips went on to note that what Lord Bingham referred to as the 'land of Milton, Paine and Mill'[9] could never deny the modern democratic imperative to allow an ample flow of information to the public and vigorous discussion of matters of public interest to the community. As Lord Phillips noted, the approach of the common law has always been somewhat different from that taken under the European Convention. The principle of liberty has meant that there has been an assumption of freedom of speech in the UK and that we turn to the law to define any exceptions to this. The Convention, on the other hand, states the fundamental right and then proceeds to qualify it.

A striking domestic law statement of the importance of free speech is contained in the observation of Lord Justice Hoffmann in Central Independent Television Plc[10] that 'a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom.' Important and more detailed statements of the value placed by the common law on freedom of expression include the speeches of Lord Steyn in a trilogy of cases decided by the House of Lords in the years immediately following enactment of the Human Rights Act 1998[11]. In the interests of brevity, I will confine myself this evening to Lord Steyn's observations in one of those cases, Reynolds v Times Newspapers[12] .

In that case, he reflected that the new landscape within which the Human Rights Act sat provided the taxonomy against which questions relating to freedom of expression that came before the UK's highest court could be considered. The starting point, he told us, was the right of freedom of expression, a right based on a constitutional, or higher legal order, foundation. Exceptions to freedom of expression had to be justified as being necessary in a democracy. In other words, as Lord Steyn observed, 'freedom of expression is the rule and regulation of speech is the exception requiring justification'. The existence and width of any exception could only be justified if it was underpinned by a pressing social need. These, Lord Steyn stated, were the fundamental principles governing the balance to be struck between freedom of expression and defamation.

The balancing of rights is familiar territory for me given my background as a family lawyer, yet it throws up many challenges and, in my experience, requires much more than a cursory thought. Two examples spring to mind which I will mention briefly.

First, in the sphere of adoption, a rather formulaic expression that 'the rights of a child predominate' is often relied upon to ostensibly validate State intervention over parental objection. The authority for this proposition is often cited as Yousef v Netherlands[13]. In that case, however, what the court meant was that return to parental care as well as removal to State care may equally encompass and validate the rights of a child as an outcome in a given case after a qualitative assessment:

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[9] *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862, 909 (Lord Bingham of Cornhill CJ).
[10] *R v Central Independent Television Plc* [1994] Fam 192
[11] *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862; *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115; *McCartan Turkington and Breen v Times Newspapers Limited* [2001] 2 AC 17
[12] Ibid
[13] 2003 36 EHRR 20

"73. The Court reiterates that in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing exercise is necessary, the interests of the child must prevail."

The second, more recent, example I mention follows the Court of Appeal decision in England and Wales regarding parents' rights publicly to critique doctors in end-of-life cases in the case concerning Abbassi and Hasstrup[14]. In that case each of the applicants asked the court to remove reporting restrictions orders preventing them from naming healthcare staff involved in the end-of-life care of their respective deceased children, each of whom had been the subject of separate end of life court proceedings. The Family Division evaluated the competing rights under articles 8 and 10 of the Convention and found that continuation of reporting restriction orders was justified and proportionate. The Court of Appeal disagreed. Discharging the reporting restrictions orders, it found that the intense focus on the specific rights being claimed delivered the clear conclusion that the article 10 rights of the parents in wishing to tell their story outweighed such article 8 rights of clinicians and staff as might still have been in play.

On the international plane article 13 of the UN Convention on the Rights of the Child specifically protects a child's right to freedom of expression. Children are independent rights holders who have a voice within proceedings, subject to an obvious check that no harm is done. We saw this principle in action in the case of Re W[15], when the Supreme Court reformulated the approach a family court should take when exercising its discretion regarding whether a child should give live evidence in family proceedings. In so doing, the court removed the rarely, if ever, rebutted presumption of the previous law that only in the exceptional case should a child be called and settled for an approach of balancing the various interests in play, the article 8 rights of the child and the article 6 rights of a parent accused of harm.

The debate on these issues will, I expect, continue.

Having meandered through the common law, and taken a short diversion into balancing rights, I return to the article 10 pathway.

As we know article 10 encompasses the freedom to hold ideas and incorporates the right to receive opinions and information, as well as the right to express them. As the European Court of Human Rights said in its 1976 judgment in Handyside v United Kingdom[16], freedom of expression:

"… constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its

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[14] *Abbasi and another v Newcastle Upon Tyne Hospitals NHS Foundation Trust (Royal College of Nursing and others intervening)* [2023] EWCA Civ 331
[15] Re W (Children) [2010] UKSC 12
[16] (1976) 1 EHRR 737 at §49

progress and for the development of every man."

Nowadays, that would read 'every person', I suspect.

Unlike other qualified Convention rights, article 10(2) specifically states that the exercise of the freedoms 'carries with it duties and responsibilities.' As an aside, I note also that article 10 has the distinction of being the first provision in a human rights instrument to restrict freedom of expression.[17]

Article 10(2) defines when restrictions on freedom of expression may be lawful in the following terms:
"2. 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."

The European Court of Human Rights has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society." As enshrined in article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly.[18]

Three types of expression have been identified by the European Court of Human Rights. The highest degree of protection is afforded to political expression, broadly defined to include comment on a matter of general public interest.[19] Less rigorous protection is afforded to the other two categories identified: artistic expression; and commercial expression.

By way of additional comment, I note that the European Court has consistently emphasised that there is little scope under article 10(2) for restrictions on political expression or on debate on questions of public interest. Correspondingly, the limits of acceptable criticism are wider in the case of politicians acting in their public

[17] See Clayton and Tomlinson *The Law of Human Rights* (2000) Vol. 1 at 15.138.
[18] See *Lilliendahl v Iceland* (Application no. 29297/18) 12 May 2020 at [28]
[19] The House of Lords held in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204 *per* Lord Nicholls, that it would be wrong in principle to distinguish between political discussion and other matters of serious public concern.

capacity than they are in the case of private individuals[20]. Acting in that public capacity, politicians knowingly lay themselves open to close scrutiny of their words and deeds and must display a greater degree of tolerance[21]. Also, while the protection of article 10(2) extends to politicians, where a politician seeks that protection, 'the requirements have to be weighed in relation to the open discussion of political issues'[22].

Since the case of Sunday Times v United Kingdom[23], the approach to determining whether an interference is justified has comprised three stages, that is to say, consideration of whether (i) the interference was 'prescribed by law', (ii) it 'pursued one of the legitimate aims' within the meaning of article 10(2) and (iii) the interference was 'necessary in a democratic society.' In the majority of cases, it is this final question which determines the court's conclusion.

Blackstone's Guide to the Human Rights Act puts it thus:

"In applying the three-stage test, the ECtHR generally resists the notion of 'balancing' freedom of expression under article 10(1) against the purported legitimate aim under article 10(2). As the ECtHR put it in the Sunday Times case, it 'is faced not 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.' Thus, the two paragraphs are not equal; the right protected by article 10(1) has presumptive weight."[24]

This is not, however, to undervalue the status of article 10 as a qualified right. We see this even in the sphere of political expression. Contrast the position in the constitutional setting of the United States of America[25] where, as Baroness Hale has observed, restrictions on political advertising 'have a tough time getting past the First Amendment'.[26]

Freedom of expression issues have arisen in many domestic cases, which, by their nature, involve matters of significant public concern and/or controversy. In one such line of cases, the UK courts have considered the relationship of the criminal law with the right guaranteed by article 10, at times alongside the rights guaranteed by its close cousins, articles 9 (freedom of thought, conscience and religion) and 11 (freedom of assembly and association). Over the course of those cases, the need to adopt a nuanced approach has emerged reflective of the context in which the issue arises.

I have already mentioned the UK Supreme Court case which decided the Attorney General for Northern Ireland's reference of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill[27]. This was an ab

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[20] *Jerusalem v Austria* (Application no. 26958/95) (27 May 2001) at [36]
[21] *Ibid* at [38]
[22] *Lingens v Austria* (1986) 8 EHRR 103 at [42]
[23] *Sunday Times v United Kingdom (No. 1)* (1979) 2 EHRR 245
[24] Wadham *et al*, *Blackstone's Guide to the Human Rights Act 1998* (7th edition, 2015) at 7.423.
[25] See *Buckley v Valco*, 424 US 1 (1976)
[26] In 'Political Speech and Political Equality', in *Freedom of Expression: Essays in honour of Nicholas Bratza* (2012).
[27] Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022]

ante challenge which asked the court to consider the compatibility of a Bill prior to Royal Assent pursuant to specific provisions of the Northern Ireland Act 1998[28] which require any legislation passed to comply with the European Convention on Human Rights. Whilst the Northern Ireland Assembly was not able to deal with the substance of abortion reform which is a highly controversial subject matter in Northern Ireland an MLA introduced the safe access Bill post Westminster legislation which provided for abortion services in the jurisdiction. I will return to that in a moment.

In the Safe Access Zones case, among other issues, a number of overlapping questions were raised in relation to the decisions of the Supreme Court in Ziegler[29] and the England & Wales Divisional Court in Cuciurean[30]. The judgment confirms that during a criminal trial it is not always necessary to assess whether a conviction for an offence would be a proportionate interference with a particular defendant's rights under articles 9, 10 and 11 of the Convention.

What all of this means is that the ingredients of an offence can in themselves ensure that a conviction can be compatible with those Convention rights. This may be the case even if the offence does not include a defence of lawful or reasonable excuse. The assessment of whether an interference with a Convention right is proportionate is not an exercise in fact-finding but rather involves the application of a series of legal tests in a factual context. As a result, it does not necessarily need to be conducted by the body responsible for finding the facts at any trial.

Moving on to the substance of the Attorney General's Reference, it may be helpful if I briefly provide some further context. Until recently, abortion was prohibited in Northern Ireland unless there was a risk to the mother's life or of serious long-term or permanent injury to her physical or mental health. When responsibility for justice was devolved to the Northern Ireland Assembly in 2010, that brought with it responsibility for abortion law. Attempts during 2016 to have the Assembly legalise abortions to a very limited extent - in cases of fatal foetal abnormality or pregnancy resulting from sexual crimes - were unsuccessful. In February 2018, the UN Committee on the Elimination of Discrimination against Women, which monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women[31], or 'CEDAW', published a report[32] which found that the UK was responsible for grave and systematic violations of the rights of women in Northern Ireland under CEDAW.

Two of the report's recommendations focused on Northern Ireland, one being that the UK should repeal the law then in force in Northern Ireland specifically sections 58 and 59 of the Offences Against the Person Act

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UKSC 32

[28] Section 6(2)(c) of the Northern Ireland Act 1998

[29] *DPP v Ziegler* [2021] UKSC 23

[30] *DPP v Elliot Cuciurean* [2022] EWHC 736

[31] 1979

[32] *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*

1861 and adopt legislation to provide for expanded grounds to legalise abortion and the other being that the UK should "protect women from harassment by anti-abortion protestors by investigating complaints and prosecuting and punishing perpetrators".

The government response followed a long and winding road after which the Secretary of State for Northern Ireland ultimately took a power to commission abortion services in Northern Ireland and the Abortion Services (Safe Access Zones) (Northern Ireland) Bill was introduced in the Northern Ireland Assembly on 13 September[33]. This Bill made provision for the designation of 'safe access zones' adjacent to premises where abortion services are provided. Within such zones, under clause 5 of the Bill, specified types of behaviour would be prohibited, including acts intended to influence persons accessing such premises.

The Supreme Court began by considering whether clause 5 restricted the exercise of rights protected by articles 9, 10 and 11. It is of note that not all activities falling within the scope of clause 5 were protected by articles 9 to 11 of the Convention. Some of the behaviour by protesters described in the evidence before the court, such as spitting at individuals, chasing, threatening and assaulting them and subjecting them to verbal abuse, fell within the ambit of clause 5 but was not protected by articles 9, 10 or 11, either because it did not fall within scope or because it fell within the scope of the article 17 prohibition of abuse of rights. Clause 5 was, however, capable of applying to other types of behaviour, such as holding a vigil, praying, and engaging in other non-violent demonstrations. On that basis, the Supreme Court was satisfied that clause 5 imposed a restriction on behaviour falling within the scope of one or more of articles 9 to 11. The court was satisfied also that the restriction was prescribed by law and pursued a legitimate aim.

The remaining issue was whether the restriction was necessary in a democratic society to achieve the legitimate aims pursued, in other words, whether the restriction was proportionate. The court approached that question in the customary way by breaking it down into four elements applying the Bank Mellat[34] tests. Time does not permit me to go through this in too much detail so I will focus on the final element, that is to say, the question of whether there was a fair balance between the rights of the individual and the general interest of the community, including the rights of others. The focal point was therefore the issue of necessity.

In considering the balance of the competing rights in this case, there were a number of considerations that were of particular importance. These included the article 8 rights of those using the clinics who were self-evidently vulnerable and for whom exposure to even wholly peaceful advocacy by those opposed to abortion was bound to be distressing.

Of course the Bill did not prevent the exercise of any right protected by articles 9 to 11 of the Convention but merely imposed a limitation upon the places where those rights might be exercised. The decision in Appleby

[33] The Bill received Royal Assent on 6 February 2023.
[34] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38 & 39

v United Kingdom[35] establishes that there is no 'freedom of forum'. Legislative restrictions on the location of a protest or demonstration do not destroy the essence of the rights protected and consequently attract a wider margin of appreciation than outright bans.[36]

A wide margin of appreciation is generally appropriate in situations where it is necessary to strike a balance between competing Convention rights, especially in a context, such as abortion, which raises sensitive and controversial questions of ethical and social policy.[37] Ultimately, the court concluded that the Attorney General's Reference should be answered in the negative – the referred provision in the Bill was not incompatible with the Convention rights of those who seek to express opposition to the provision of abortion services in Northern Ireland. Even though the clause under scrutiny was directed against non-violent protest it was in an area where women wished to access medical services. In the court's view such behaviour could be said to amount to improper influence against the individual rather than the policy itself, the opponents of which could validly protest outside of the immediate clinic grounds.

This case tells us where we are with freedom of expression cases by applying a general measure approach. If the law itself strikes the right balance, there is no necessity for a further proportionality exercise to be undertaken. So far so good.

Issues may arise, however, in areas where the law is not so bespoke. Cases involving so called "hate speech" are one such area where particular challenges arise which I will discuss in a little detail. In Northern Ireland, criminal prosecution for incitement to hatred has been a feature of our law for a considerable period, with legislation dating back to the Prevention of Incitement to Hatred Act (Northern Ireland) 1970. A more recent incarnation is found in the Public Order (Northern Ireland) Order 1987 which contains offences relating to the use or display of threatening, abusive or insulting words or behaviour with the intent, or likelihood, of stirring up hatred or fear towards or among specified groups of persons defined by religious belief, sexual orientation, disability, colour, race, nationality, including citizenship, or ethnic or national rights. The 1987 Order also contains publication-type offences in the same context.

Additionally, the Communications Act 2003 by section 127 criminalises the use of a public electronic telecommunications service to send messages which are grossly offensive, indecent, obscene or menacing. This includes telephone calls, an issue considered in England and Wales in DPP v Collins[38] where racially offensive terms were used. That case makes it clear that a high threshold is required to sustain a prosecution. A communication has to be more than simply offensive to be contrary to the criminal law. The content expressed in the communication may be in bad taste, controversial and unpopular, and may cause offence to individuals or a specific community, but this is not in itself sufficient reason to engage the criminal law.

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[35] (2003) 37 EHRR 38

[36] See for example, *Lashmankin v Russia* (2017) 68 EHRR 1

[37] See *A, B and C v Ireland* (2011) 53 EHRR 13

[38] *DPP v Collins* [2006] 1 WLR

This provision gave rise to a high-profile prosecution of a well-known pastor in Northern Ireland in 2016[39]. The matter was heard in the magistrates' court by a legally qualified district judge sitting alone, as is the practice in Northern Ireland. Pastor McConnell preached at the Whitewell Metropolitan Church in Belfast and on 18 May 2014, he preached a sermon that was broadcast over the internet during which, among other things, set out his mistrust of Muslims in strong terms.

The prosecution conceded, and the judge held, that the defendant was entitled to express his views as they were protected by articles 9 and 10 of the Convention. In acquitting the Pastor, the district judge found himself in agreement with Lord Justice Laws who said in the Chambers[40] case that the courts need to be very careful not to criminalise speech which, however contemptible, is no more than offensive. Whether speech is offensive or not will of course depend on the facts of an individual case.

More recently, the Northern Ireland Court of Appeal dealt with the issue of hate speech in Lee Brown v PPS[41]. The prosecution was brought under the Public Order (Northern Ireland) Order 1987 and concerned the distribution of a leaflet on behalf of a far-right political party called 'Britain First' complaining about an 'influx' of migrants in the town of Ballymena in County Antrim. Perhaps predictably, the article 10 argument only arose at a later stage before the appeal court. The case was ultimately remitted for lack of reasons, the Court of Appeal concluding that article 10 was engaged.

The core issue for the Court of Appeal was based upon the principle that political speech qualifies for enhanced protection. In order to qualify as political speech, it is not necessary that the speaker holds a political office and nor does it follow that because the speaker holds a political office, the speech attracts protection. It is for the court in each case to assess whether or not the speech is on a matter of public interest or debate. In that regard, cases such as Willem v France[42] and Feret v Belgium[43] demonstrate that politicians who abuse their position in order to stifle public debate or to promote their personal prejudices will lose the enhanced protection.

It is clear from the jurisprudence in this area that the European Court of Human Rights acknowledges that each state has a margin of appreciation in respect of the restriction of the right to freedom of expression, subject to supervision by Strasbourg. This means that the court will review the intensity of the analysis of the nature of the speech and the corresponding strength of the ground upon which a restriction is proposed. Where the analysis and reasons for the restriction are explained, bearing in mind the applicable European case law, the European Court of Human Rights will not normally interfere with the proportionality assessment

[39] *DPP v James McConnell* [2016] NIMag 1
[40] *Chambers -v- DPP* [2012] EWHC 2157 (Admin)
[41] *DPP* v *Lee Brown [2022]* NICA 5
[42] 10883/05
[43] 15615/07

made by the domestic court. Proportionality also plays a role in the extent and nature of any interference with the right.

What is clear also from both these Northern Ireland cases is that context will determine the outcome. In cases where there clearly are competing interests, there is a strong imperative to carefully consider the arguments and analyse the facts in order to strike a fair balance and reach a Convention-compliant outcome. Whether or not offending speech is criminal will depend on a careful analysis of the facts of each case applying the law and crucially any interference with this fundamental Convention right must be supported by relevant and sufficient reasons.

As these two examples illustrate, the law relating to hate speech is a complex and developing area. To my mind particular definitional issues arise. Intent is not required; the law targets an emotional state of hatred, and the severity threshold may not be simple to set. One might also, in passing, enquire what implications there might be from all of this for a defendant's rights under article 7 of the Convention (no punishment without law) since the risk may be that the criminality or otherwise of a particular statement in a particular context may only be capable of being determined by an ex post facto analysis, the conclusions of which will not have been available to the defendant when the statement was made.

In December 2021, the Law Commission of England and Wales published its Hate Crime Final Report[44] to which the government response remains pending.[45] The Report looks at who should be protected by hate crime laws, including whether the range of existing protected characteristics[46] should be expanded to include, for example, sex and gender characteristics. It looks also at how hate crime laws should work.

The Report notes that the Commission's public consultation on hate crime received a high proportion of responses from individual members of the public, a significant majority of whom indicated strong opposition to hate crime laws altogether or to any extension of those that currently exist. By contrast, responses on behalf of organisations were, in the main, supportive of the broad direction of the proposals. The Commission notes that the lack of community consensus for hate crime laws is an important consideration in any calls to widen the scope of such laws.

While the Commission considered, and decided against, recommending that sex and gender be added to the list of protected characteristics within the hate crime framework, on the basis that it would be the wrong solution to the problem, it did recommend that an offence of stirring up hatred on the basis of sex or gender should be created in response to the growing threat of 'incel' ideology and its potential to lead to serious criminal offending. The Commission considers that this is one context where existing hate speech offences

[44] Hate-crime-report-accessible.pdf (publishing.service.gov.uk)
[45] Implementation Table - Law Commission
[46] Race, religion, sexual orientation, disability and transgender identity.

may be usefully adapted to address extreme misogynistic content.

The Report considers the express freedom of expression protections in the Public Order Act 1986 which limit, or clarify, the reach of the criminal law in respect of 'stirring up' offences. It concludes that these provisions help clarify the extent of the law and avoid a 'chilling effect'. The Report recommends that the existing protection for discussion and criticism of religious practices should be extended to cultural practices and a new protection introduced for discussion and criticism of, or expressions of antipathy towards, individual countries and their governments, and for discussion and criticism of immigration, citizenship and asylum policy.

In 2019 within a Northern Ireland context, the Department of Justice commissioned a judge-led independent review of hate crime legislation in Northern Ireland. The terms of the Review, led by Judge Marrinan, were to consider whether the existing legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice, including hate crime and abuse which takes place online. The Marrinan Report[47], containing 34 recommendations, was published in December 2020. In July 2021, the Minister of Justice indicated that she accepted 23 of the recommendations wholly, partially or in principle and that the remainder required further consideration.

In contrast to the Law Commission, the Marrinan Report recommends that gender should be a protected characteristic.[48] The Report notes that the inclusion of gender as a protected characteristic causes a divide among advocates of hate crime laws and that there was no clear consensus from the consultation responses on the issue. It also notes that a recurring argument made by consultation respondents was that the inclusion of gender and gender identity as protected characteristics would pose a serious threat to freedom of speech and religious expression with respondents having concerns regarding the undermining of meaningful discussion and debate and the potential criminalisation of the expression of religious beliefs and opinions. There are presently no express provisions in the Public Law (Northern Ireland) Order 1987 protecting freedom of expression in relation to criticism of religious beliefs.[49]

The Marrinan Report recommends that there should be no express defences for freedom of expression in relation to any protected characteristic, however, there should be formal statutory recognition of the importance of article 10 freedom of expression rights and all other rights guaranteed by the ECHR, in particular rights guaranteed under articles 6, 8, 9 and 14.

The differing approaches recommended by two Reports from separate UK jurisdictions prepared close together in time show just how complex it is to determine the boundaries of freedom of expression around

[47] Hate crime legislation independent review | Department of Justice (justice-ni.gov.uk)
[48] It also recommends that variations in sex characteristics, including transgender identity, and age should be protected characteristics and that all protected characteristics should be protected for all purposes.
[49] There is specific protection for discussion or criticism of marriage which relates to the sex of the parties to the marriage.

hate speech.

The fact that we now live in a digital age adds a further layer of complexity. In terms of freedom of expression, advances in digital technology have been an extraordinary force for individual liberation with more and more information available to more and more people. There are obvious benefits to these advances but also a downside which becomes increasingly apparent with time. The development of the internet has resulted in a very significant loss of control of personal data, and it has provided a platform for instantaneous global dissemination of defamatory material, an opportunity for the dissemination of extreme and violent views and, of course, the creation of so called "fake news."

I think that it is fair to say that the regulation of internet material has been a struggle in recent times. Of interest to me is how misinformation as a concept has now been overtaken by disinformation. In 2022 the EU strengthened its Code of Practice on Disinformation. The emphasis there is upon platforms regulating themselves rather than law. This means that platform owners effectively adjudicate upon freedom of expression in the first instance, what can and cannot be removed, where a breach of contract lies. Perhaps it is an algorithmic formula that is applied. The worry there is that context may be lost, and so unjustified censorship may occur.

Courts and legislatures have already had to wrestle with a wide variety of technologically challenging issues in the field of electronic communications and will probably either have to adapt conventional approaches or to develop new ones to see to it that the rule of law prevails and fundamental rights are suitably vindicated across the ever-expanding, trans-jurisdictional, universe that is cyberspace; a sphere in which apparently sinister forces lurk to manipulate and distort the truth and to jeopardise the unhindered exchange of genuine information and opinions which is the very object of the right to freedom of expression.

I can offer no concrete solutions to these issues, but I mention them as part of the necessary prognostication which should accompany any health check. This is an area which will require careful and detailed analysis across a range of collaborating disciplines and agencies to ensure that the core values of civilised society are not thrown into hazard.

Returning to the MacDermott lecture series I referenced at the outset of this talk, Judge Síofra O'Leary, President of the European Court of Human Rights, gave the 2022 lecture, 'Democracy, expression and the law in our digital age'[50]. Judge O'Leary highlighted the difficulties in regulation of unlawful forms of speech and the emerging concerns about the spread of misinformation in a democratic society, saying:

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[50] *Democracy, expression and the law in our digital age* NILQ Vol. 73 No. S1 (2022): Special Supplement: MacDermott Lectures Through the Years

"The court has sought to grapple with the 'conflicting realities' … to which the internet and new technologies give rise. It has recognised, on the one hand, that user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression. On the other hand, the internet can act as a forum for the speedy dissemination of unlawful forms of speech which may remain persistently online."

As I approach the end of my health check, I ask once more, where are we with freedom of expression? My final thoughts are these.

Clearly, we are in a digital age of "conflicting realities" where we have to consider if, and how, to regulate online expression. This, I believe, will dominate our law in years to come as we debate freedom of expression and privacy, the protection afforded to political speech and the boundaries of hate speech.

We also live in an age of protest. There is of course nothing inherently wrong with the exercise of freedom of expression in a healthy democracy. People, young and old, demonstrate time and again that they are well clued into their rights and to what they want to say. The freedom to do so is part and parcel of the rule of law.

However, there are boundaries which the law must try to regulate. The principle underpinning any restriction on the right to freedom of expression is of course the harm principle which I discussed at the outset.

Courts must also consider and properly calibrate the meeting point of article 10 rights and other rights, such as article 8 rights to a private life. Increasingly, I think that the conversation will also turn to a consideration of article 17 of the European Convention on Human Rights which provides for prohibition on the abuse of rights.

To conclude I will summarise by reiterating two points and offering one recommendation.

My first point is that freedom of expression remains a foundational and indispensable feature of our democratic tradition and one that enjoys a long legal and cultural heritage stretching back to the beginnings of the western democratic ideal. As the 5th century BCE Athenian, Euripides, observed in The Phoenician Women, "This is slavery not to speak one's thought." The long heritage associated with this principle is suitably illustrated in the UK today in the special emphasis laid upon the freedom of expression by the specific safeguards - going beyond the language of article 10 - which Parliament enacted in section 12 of the Human Rights Act 1998. This is not an unqualified right but any restriction must be within the law for a proper purpose.

My second point which flows from the first is that the law must adapt to our changing times, particularly to the digital age which frames how we communicate and the dissemination of ideas. With this the complexities of regulation have become apparent. One question that springs to my mind is whether self-regulation is

working. I have already alluded to this and to the pressing need for disciplined research, clear-sightedness, and flexible thinking to meet the challenges ahead if the law is going to continue to be effectual and to serve the requirements of society, to borrow Lord MacDermott's terminology.

And finally, my personal recommendation. Primary schools teach children about the rights they have under the UN Convention on the Rights of the Child To my mind we need to build on this ethos of education and encourage the teaching of law in schools to inform debates such as this at the earliest stage. It is my long-held view that law should be taught in schools much more widely and from an early age. Who knows, a topic such as freedom of expression might even capture the imaginations of our young people more than calculus! (apologies to the mathematicians among you)

Thank you very much for your attention. It has been a pleasure and an honour to join you tonight among many friends from the legal community.