

Public Order Act 1986

When the **police** exercise **public order powers** they have to do so in a way that **complies with their obligations** as a **public authority** under section 6 HRA.

Public power & obligations:

- **obligations:** s 6 HRA
- **statute:** POA 1986
- **common law:** breach of the peace

POA requires **written notice** to be given of any proposal to hold a **public procession** for any of the following 3 purposes:

1. to demonstrate **support for** or **opposition to** the views or actions of any person(s);
2. to **publicise a cause or campaign**; or
3. to **mark or commemorate** an event.

POA does **not** require written notice to be given if it is **not reasonably practicable** to give any advance notice of the procession.

A **public procession** takes place in a **public** place.

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#### Section 11(1): **advance notice**

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Organisers must give a **minimum of 6 clear days' notice** of the **date, time** and **route** of the procession.

Failure to give notice amounts to an **offence under s 11(7)**.

**Commonly/customarily** held processions or **funeral** processions are **exempt** from this requirement.

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#### Section 12: **conditions on processions**

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Conditions can be imposed upon a procession if the **senior** police officer **reasonably believes** that:

- (a) **serious public disorder, damage to property or disruption** to community life may result;
- (b) the **noise** from the protest may **seriously disrupt** a nearby organisations' activities;
- (c) the **noise** generated may **significantly impact** persons in the vicinity;
- (d) the **purpose** of the procession is the **intimidation** of others.

**Intimidatory** behaviour must be such that it **intends** to **compel** another to act **against their will**.

The **senior** police officer may impose conditions on the **organisers** of those **taking part** as are (to him) **necessary** to prevent disorder, damage, impact or intimidation.

Where a condition is imposed **in advance** of the procession, it must be **in writing**.

The **senior** police officer must provide **sufficient reasons** to the organisers for the need to impose conditions.

A person is **guilty** if they **organise** or **take part** and **fail to comply with a condition** they **knew or ought to have known** about.

**Inciting another** to commit this offence is **guilty** of this offence.

A person will have a **defence** if the failure arose from circumstances **beyond their control**.

**A guilty organiser OR person inciting another**= imprisonment for no more than **51 weeks** *and/or* no more than a **level 4 fine**.

**A guilty participant** = no more than a **level 4 fine**.

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#### Section 13: **power to prohibit**

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The **chief** police officer has the power to apply for a **prohibition order** from the **local authority**.

The **chief** must **reasonably believe** that imposing **conditions** will **not** be sufficient to prevent **serious public disorder**.

Orders **cannot** exceed **3 months**.

The **local authority** must obtain **consent** from the **Home Secretary**.

The **local authority** may make an order:

- (i) in terms requested by the police; or
- (ii) with any modifications approved by Home Secretary.





### Public Order Act 1986 (cont)

The local authority **cannot** itself initiate a prohibition.

**London is exempt**: an application to the local authority is **not** required.

The **Commissioner of Police** can make the order (for the same reasons as the **chief** would).

Prohibition orders can be **challenged** by applying for **judicial review**.

### Section 14: conditions on assemblies

For the **same reasons** as conditions on processions, conditions may be imposed upon **public assemblies** where the **senior** police officer has **reasonable belief**.

A **public assembly** is a meeting of **2 or more** persons in a **public** place that is **wholly or partly** open to the air.

A **one-person protest** may exist largely where an individual causes **noise disruption**.

Unlike with **processions**, the **purpose** of the assembly is **irrelevant** and there is **no** obligation to give **advance notice** of a public assembly to the police.

The **senior** police officer may impose **conditions on those organising/attending assemblies if he believes it necessary\*** to prevent the risks of disorder, damage, impact or intimidation.

Where a **condition** is imposed in advance of the assembly, it must be **in writing**.

The police **cannot** instigate or make a prohibition order to **ban assemblies** as they can with processions.

The police have the power to prohibit **trespassory assemblies**, which are those of **20+ people** held **only** on land that is **wholly** in the open air. The **chief** must apply for an order from **local authority** if they **reasonably believe** a trespassory assembly is intended to be held which is likely (i) **without/in excess of the occupier's permission** and may result in **serious disruption** or **significant damage** to something of **historical, architectural, archaeological or scientific** importance.

These powers must be used in a **proportionate** manner.

Again, **intimidatory behaviour** must be such to compel another not to do something. It is **not** enough to put people in **fear or discomfort**.

The **Chief Constable** must give **reasons** for imposing conditions in advance.

Extensive detail is **not** required and the Chief does **not** have to prove sufficient information on the reasons.

### Breach of the Peace

Police have **common law powers** to maintain public order by preventing a breach of the peace.

Breach of the peace = whenever a person **fears, actually experiences** or is **likely to experience** harm done to **themselves or their property** in their presence.

Breach is **not** a criminal offence.

Certain police powers for a breach include:

- **arrest**
- **detention**
- having a person **bound over** to maintain good behaviour
- **entering a meeting** to prevent anticipated breaches and asking participants to disperse.

**Reasonable apprehension** of a **sufficiently imminent** breach is required to **justify preventative action**.

E.g. if there is a **history of violence**, **preventative action** is more likely **justified**.

Preventative action taken **must** be **proportionate**.

**Kettling measures** may be **lawful** when deployed in **good faith** and not **arbitrarily**.

## ECHR Article 2: Right to Life

*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

- (a) *in defence of any person from unlawful violence*
- (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained*
- (c) *in action lawfully taken for the purpose of quelling a riot or insurrection*

### .....Introduction.....

Contracting states **cannot** derogate from article 2.

Article 2's provisions are **strictly construed**.

Article 2 is **not** an **absolute right**.

If the state takes a life, it must show that the **degree of force** used against A was **proportionate** to achieve the **legitimate aim** of protecting B.

### .....Investigative Duty.....

The state has a duty to **investigate** all situations where the state **directly takes a life**.

There should be some form of **effective official investigation**

This requirement extends **extra-territorially** where the state has **sufficient control** over that territory.

The state has a duty to **investigate** all situations where **agents of the state**, e.g. institutions, cause a death.

Investigations must be **public, independent** and involve the **full participation of the family**.

Investigations should be **proactively pushed** by a public authority and not on request.

Investigations should give **recommendations**.

### .....Protect/Preserve Life.....

There can be a **positive obligation** on the state to protect or preserve life.

This requires states to have **criminal justice systems** that punish and deter homicide.

It can also include an **operational obligation** on states to take **preventative measures** when a person's life is at risk from others or from suicide.

State authorities are **only** liable if they **knew or ought to have known** that there was a **real and immediate risk** to life, but failed to take **reasonable steps**, especially where there is **assumed responsibility and control** over the person.

## ECHR Article 3: Prohibition of Torture

*No one shall be subject to torture or to inhuman or degrading treatment or punishment*

### .....Negative Obligation.....

The **negative** obligation that no one be subjected to torture and/or inhuman or degrading treatment is an **absolute right**.

**Derogation** is **not** permitted.

**Inhuman & degrading treatment:** This standard is set at a **high level**.

Only **serious ill-treatment or neglect** falls within scope.

The **nature and context** of treatment, the **manner** of its execution, its **duration**, its **physical and mental effects** and its **impact on health** may be relevant factors.

For a **breach**, the conduct of the state must be of a **serious and wholly unacceptable kind**.

**Torture:** Torture is an **aggravated, deliberate and cruel** form of treatment/punishment.



## ECHR Article 3: Prohibition of Torture (cont)

Torture should be regarded as **qualitatively different** from inhuman or degrading treatment or punishment.

The standard for torture is **higher** than that of inhuman/degrading treatment.

### .....Positive Obligation.....

The positive obligation on authorities to **take action to prevent** individuals being subjected to torture and/or inhuman and degrading treatment is **not an absolute right**.

C can raise an article 3 claim where the authorities **knew or ought to have known** of particular circumstances likely to **expose C** to the risk of article 3 ill-treatment.

Extends to cases where removing an individual from a territory - through **extradition** or **deportation** - would cause a **significant deterioration** in their physical or mental **health** due to not having access to the same standards of medication/healthcare in home countries as they do in host state.

UK has obligation **not to deport** on medical grounds, if there are **substantial grounds** for believing C would face a **real risk** of being exposed to a **serious, rapid and irreversible** decline in health resulting in **intense suffering** or a **significantly reduced life expectancy**.

### .....Investigative Duty.....

An operational duty to conduct a **proper investigation** may fall upon the police.

A more **restrictive** view is that **only structural or systematic** failings by the police should attract liability.

## ECHR Article 5:

### Right not to be Arbitrarily Detained

Article 5 protects the right to **liberty and security** of the person.

It contains limited rights from which states can seek to **derogate in emergency situations**.

### .....5(1): Deprivation of Liberty.....

*no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law*

'Cases' The cases are circumstances in which the state can **lawfully** deprive a person of their liberty.

The cases cover circumstances including **criminal and immigration arrest and detention**.

Deprivation of liberty must fall into a **case** and be **prescribed by law**.  
 i.e. there must be a **sufficiently clear legal basis** for the deprivation.

**Deprivation of liberty:** **Restrictions** on liberty will not engage article 5.

The **concrete situation** the person is in should be considered.

The **type, duration, effects** and **manner of implementation** of the measure should be considered.

Detention in **prison** and **strict** arrest are deprivation of liberty.

**Kettling:** Placing a cordon around a large crowd for several hours.

Kettling is **not** a deprivation of liberty if it is **proportionate** and not imposed **arbitrarily**.

Kettling is **not** a deprivation if it is the **least intrusive** and **most effective** measure to avoid a **real risk of serious injury or damage** to property.



## ECHR Article 5: (cont)

Kettling may become a deprivation had it **not remained necessary** across the time implemented.

**Control orders:** Anti-terrorism measures designed to **control the movements and activities of certain individuals**

Non-derogating control orders can amount to a deprivation.

The **periods of physical confinement** should be considered.

**Prescribed by law:** Interference with the right must have **some basis in national law** either in **legislation** or **case law**.

The **Sunday Times** test: The law must be

(i) **adequately accessible** (published);

(ii) **sufficiently precise** to enable citizens to regulate their conduct; and

(iii) there must be a **degree of foreseeability** with regards to the consequences of such a violation.

**Foreseeability** will depend on the **content** of the legal provision, the **field** it is designed to cover and the **number** and **status** of those to whom it is addressed.

The law must indicate with **sufficient clarity** the scope of any discretion conferred on the competent authorities and the manner of its exercise.

**Article 5(1) (c):** To be lawful, deprivation must be **justified** by one of the **cases**.

A person may be deprived of liberty when lawfully **arrested and detained** on **reasonable suspicion** of having committed an offence.

Reasonable suspicion requires **evidence** of facts or information which would satisfy an **objective observer** that the person concerned may have **committed the offence**.

Previous convictions are **not** evidence enough.

A person may be deprived of liberty when arrest and detention is **reasonably considered necessary** to prevent their **committing or fleeing** from an offence.

Detention should only be **proportionate** and continue for long enough for the person to be **brought before the court**.

### .....5(2): Reasons.....

Everyone arrested shall be **informed promptly**, in a **language which he understands**, of the **reasons** for his arrest and of **any charge** against him.

Simply informing someone that they are being arrested for something is **not** enough reason.

A person need **only** be able to **work out** the reasons for their arrest within a **reasonable timeframe** - **enough detail** is needed to this extent.

### .....5(3): Length of Detention.....

A person must be brought **promptly** before a judge.

A detention of **4 days and 6 hours** after arrest of terrorism is **too long**.

## ECHR Article 5: (cont)

**Shorter periods** than 4 days can still be **incompatible** where no **special difficulties** or **exceptional circumstances** prevent authorities from bringing the person before a judge sooner.

Where a person is in **preventative detention**, the **promptness** should be a matter of **hours** rather than days.

### .....5(4): Lawfulness of Ongoing Detention.....

A person deprived by arrest or detention is entitled to **take proceedings** to decide the lawfulness of the detention **speedily** by a court.

If detention is **not** lawful, the persons **release** shall be ordered.

This provides a **right to review** any detention's lawfulness.

Where **automatic period review** is required by law, decisions must follow at **regular intervals**.

Intervals of **more than 1 year** are generally **not reasonable**.

### .....5(5): Compensation.....

A victim of an **article 5 breach** is entitled to claim an **enforceable right** to compensation under 5(5).

However, **section 8 HRA** provides a **remedy** in UK courts.

## ECHR Article 6: Right to a Fair Trial

The rights and obligations under article 6 do **not** always fall under one paragraph.

### .....6(1): Fair & Public Hearing.....

**Scope:** A person has the right to a **fair and public hearing** within a **reasonable time** by an **independent and impartial** tribunal established by law.

Applicable with regards to an applicant's **civil** rights or **criminal** charges.

6(1) only refers to **hearings**, not necessarily **trials**.

6(1) is engaged **at the moment someone is charged**.

The applicant **must** have been **charged** with an offence.

6(1) **only** covers everything at the point of **detention**.

**Access to justice:** A person must be able to **bring proceedings** and have access to **professional legal advice and representation**.

There is no **general right to (free) legal aid**.

Legal aid is one measure, but others might include a **simplified legal procedure** to reduce complexity and costs.

The **severity** of the penalty at stake and the **complexity** of the case is relevant when considering a person's access to justice.

**Impartiality of the courts:** The **manner** of member appointment, members' **terms in office**, the existence of **guarantees against outside pressure** and the **appearance of independence** is relevant in a tribunal's **independence**.

The tribunal must be **subjectively free of personal prejudice or bias**.

The tribunal must be **objectively impartial**, offering **sufficient guarantees** to exclude any legitimate doubt.

**Timely process:** **Delays** which **jeopardise the effectiveness and credibility** of the administration of justice should be avoided.





## ECHR Article 6: Right to a Fair Trial (cont)

In determining the **appropriate standard of time**, 3 areas should be considered:

- (1) **complexity** of the case
- (2) the conduct of D; and
- (3) the **manner** in which the case has been dealt with by the **authorities**.

A delay of **20 months** may **not** be excessive if there is a ongoing **thorough investigation**.

A delay of **27 months** was **excessive** considering the young age of D.

### .....6(1) & (3): Fair Legal Process.....

The fairness of an **eventual trial** may be affected by the **whole legal process** beforehand.

Article 6 may be applicable to the **preliminary investigations** where the fairness of the subsequent trial could be **prejudiced** by an **initial failure** to comply, but **ONLY** where the suspect is **eventually charged**.

The **presence of a police officer** during **solicitor consultations** would inevitably prevent the applicant from speaking frankly and is thus **unfair**.

### .....6(1) & (2): Right to Silence.....

A person has the **right to remain silent** and the **right not to incriminate oneself**.

The courts are permitted to **draw adverse inferences** when the accused **fails to mention** before or when charged, a **fact** or **material piece of evidence** which they later **rely upon in their defence**.

The right to silence is **not absolute**.

Silence **can** be taken into account where there is other **sufficiently strong evidence** against them calling for an explanation.

The prosecution must seek to prove their case without resorting to evidence obtained through methods of **coercion** or **oppression** in defiance of the will of the accused.

### .....6(1) & (3): Admissibility of evidence.....

Restrictions on the admissibility of evidence can violate article 6 if they **undermine the fairness of a trial**.

A person **criminally** charged has the right to **examine/have examined witnesses** against him and to obtain the **attendance and examination** of witnesses on his behalf under the same conditions as witnesses against him.

A statement **not made in oral evidence** in proceedings to be **admissible** in certain specific circumstances.

### .....6(1): Closed evidence procedures.....

Closed material/evidence procedures **withdraw** evidence from suspects where disclosure would **not be in the public interest**.

The suspects interests are represented by a **special advocate** who has been **security vetted**.

This is mostly the case in **immigration, national security and anti-terrorism cases**.

The involvement of a **special advocate** is deemed to be capable of **assuaging any disadvantage** flowing from non-disclosure and so does **not** breach article 6.

However, a suspect must be given **sufficient information** about the allegations made against them to enable the giving of **effective instructions** to satisfy **procedural fairness**.

### .....Extra-territorial application of article 6.....

There is **no general obligation** to impose these standards on other states.

Article 6 may **prohibit the extradition/deportation** of a person to another state where that person has suffered or risks suffering a **flagrant denial of a fair trial/justice** in that state.



### ECHR Article 7: No Punishment Without Law

This article **bans the use of arbitrary power** in the **criminal law** context.

States **cannot derogate** from this article.

.....**Scope**.....

A person **cannot be convicted of a criminal offence for an act that was not a crime when it was committed**.

Authorities **cannot** impose a **more serious punishment** than was **available at the time** that the offence was committed.

Relevant laws must be **clearly defined** so people know which acts are criminal.

A person **cannot** avail themselves of article 7 protection if they have been convicted of an offence which, although **not an offence** in the contracting state, was an **offence by international law at the time** it was committed.

.....**Wording**.....

**Guilty concept:** Article 7 only applies where an applicant has been **held guilty of any criminal offence**.

The article is **not** engaged where there is an **ongoing prosecution**.

The article is **not** engaged where the case concerns a decision to **extradite rather than a criminal law** decision.

A criminal **penalty without** a formal charge and conviction amounts to a **guilty finding**.

Criminal liability does **not** need to be determined in a **criminal court**.

There has to be at least a **formal declaration of criminal liability** by the contracting state.

**Criminal offence:** In determining whether a charge is criminal, consideration should be had for:

- the **classification** of the offence in **domestic law**;
- the **nature** of the offence;
- the degree of **severity** of the proposed **penalty**.

A **disciplinary offence** does **not** qualify as criminal.

A **breach of a military disciplinary measure** is **not** classed as a criminal act.

**Law:** The law recognising the offence at the time it was committed must fulfil **certain requirements**.

The **Sunday Times Test** can be applied.

The law can be in **legislation** or **case law**.

The law must be **accessible**.

The law must be **foreseeable**.

A law may have been foreseeable if it does no more than **continue a perceptible line of case law development**.

**International law:** A criminal offence imposed in accordance with **international law** at the relevant time may **not** fall foul of article 7.

International law =

- international **treaties ratified** by the contracting state;
- **customary** international law (e.g. customs of war, crimes against humanity, genocide).



### ECHR Article 7: No Punishment Without Law (cont)

**Penalty:** Is the measure in question **substantively a penalty** within the meaning of article 7?

The court will **not** focus upon the description of the penalty in domestic law.

The ECtHR will consider:

(i) Was the measure imposed following a **conviction for a criminal offence**?

- this is **indicative** but not necessarily decisive.

(ii) The **nature and aim** of the measure.

- does it have a **punitive** aim?

- how is it **classified** under domestic law?

- what are its **adoption/execution procedures**?

- how **severe** is the measure?

**Procedural law:** In principle, the rule against **retroactivity** does **not** apply to procedural laws.

It **only** applies to the **offence** and corresponding **penalties**.

Where **domestic law classified as a procedural provision** affects the **severity of the penalty**, the ECtHR could treat that as **substantive criminal law** so that article 7 applies.

### ECHR Article 8: Right to Private & Family Life

*The state must respect each person's private and family life, their home and correspondence.*

Article 8 is a **qualified right** and so can be **restricted**.

.....**Structure of Article 8**.....

**Article 8(1): Is article 8 engaged?** Article 8 will be engaged if the the state has interfered with a person's right to respect for their private life, family life, home, or correspondence.

**Article 8(2): Can the state justify the interference?** The interference must be:  
- in **accordance with the law** (the Sunday Times test);  
- in pursuit of a **legitimate aim**;  
- necessary in a democratic society (**proportionate**)

.....**Private Life**.....

**Private life:** Covers a person's **physical, mental and moral integrity**.

Extends to aspects relating to **personal identity**.

Parliament is **inherently better qualified** to assess whether the **right to die** encompasses human **dignity**.



### ECHR Article 8: Right to Private & Family Life (cont)

**Sexual orientation and fulfilment** are **protected** in rights to privacy at **home** and in the **workplace**.

Policies interfering with the right to private life of **transgender people** may be **incompatible** unless it is **proportionate** if there are **safeguards** and **complexities**.

**Stop and search powers** are **not** incompatible if there are **sufficient legislative safeguards**.

**Surveillance** by the state will **not** be incompatible if a **clear statutory framework** exists and the surveillance is **necessary** and **proportionate**.

**Family life:** Family is **not** restricted to the **traditional family** unit.

Any action by a public authority that might **disrupt a family unit** (e.g. deportation/refusal) may engage article 8.

The state is **not** obliged to accept **non-national spouses** for settlement.

There should be a **balance** between competing family interests.

Article 8 may be engaged by a state's **policy on abortion**.

**Home:** This does **not** give a right to be **provided with a home**.

Home life should be **respected** and **protected from invasion/intrusion**.

Extends to **maintaining** the situation to which a person has become **accustomed** and the **permanence** which gives comfort.

**Unannounced visits** by authorities for monitoring purposes are **acceptable** if they are **not overly frequent** and do not lead to **disclosure of private information** about an offender.

Extends to the right to be **free of interferences/nuisances** such as **noise, smells or leakages of waste**.

**Correspondence:** Applies to **letters, emails, texts** & other modern forms of communication.

**Interceptions of communications** by the police must be in **accordance with the law** and **necessary**.

**Monitoring of emails/calls/internet usage** by a **public employer** may engage article 8.



## ECHR Article 8 (cont.)

### .....Accordance with the Law.....

There must be a **legal basis** to justify the interference with the right.

The **Sunday Times** test applies: The law must be **accessible** and **sufficiently precise**.

Executive discretion should **not** be expressed in terms of **unfettered power**.

### .....Legitimate Aims.....

**National security:** The ECtHR affords a **sizeable margin of appreciation** but an assertion of national security will **not** be **automatically accepted**.

**Control orders** have previously engaged article 8.

**Public safety/economic well-being:** The balance between **preserving family ties** and **economic well-being of a state** should fall in favour of the former.

**Balancing budgets** and **apportioning public resources** as fairly as possible is in legitimate pursuit of economic well-being.

**Prevention of disorder/-crime:** **Retaining DNA** samples and fingerprints of suspects who had been cleared of criminal charges is *justified if it is effective in preventing crime\**.

**Blanket and indiscriminate** policies may be **disproportionate**.

e.g. DNA retention policies may fail to consider the lack of gravity of offences.

e.g. The blanket approach to disclosing convictions of paedophilia to organisations affiliated with the paedophile may be disproportionate if they do not work with children.

**Police records:** Blanket recording schemes may be **disproportionate** if they go **beyond what is necessary** for public protection.

Schemes which **discriminate between the seriousness of offences** are likely a **proportionate** interference.

Systems of **data retention** operating may be **proportionate** if they seek to fulfil the legitimate aim of **crime prevention**.

**Protection of health & morals:** **Strip and body searches** for **visitors** of inmates are likely **not proportionate** in preventing crime and protecting prisoner health if they are **intimate** and **poorly regulated**.

**Protection of rights and freedom of others:** Facilities by **publicly funded employers** should not be abused.



### ECHR Article 8 (cont.) (cont)

Monitoring of calls, internet usage, emails etc. by public employers **must** have a **basis in domestic law**.

This can also involve the **media's right to freedom of expression**.

### ECHR Article 10: Freedom of Expression

Covers a persons right to **express views**, whether in **public or private**.

Includes the freedom to **hold opinions** and to receive and impart information/ideas **without interference by public authorities** and regardless of frontiers.

Article 10 is a **qualified right** and can be **restricted** in the same way as article 8.

Expression covers **words, pictures, images** and **actions** intended to express an idea or to present information.

This article protects:

- **political opinion**
- **journalistic freedom**
- **artistic expression**
- **commercial information**.

The courts give **stronger protection** to **political and journalistic** expression.

It is appropriate to afford a generous margin of appreciation to the state to decide how the **integrity of the national democratic system** should be upheld with respect to **political advertising**.

This article does **not** create a general right to freedom of information.

.....**Legitimate Aims**.....

**National security:** **Injunctions** to protect national security may be **necessary** where **relevant, sufficient** and **proportionate** to the aim pursued.

National security measures may not be **prescribed by law** if there is a lack of **adequate safeguards**.

Even where article 10 rights are engaged, they may not be **sufficiently significant** to risk a **fragile but imperative** relationship with another state.

**Prevention of disorder/crime:** There must be an **imminent breach of the peace** for authorities to take **preventative action**.

Authorities may take **premature and indiscriminate action** which is a **disproportionate restriction**.

Where **rights to protest** remain intact in other aspects, like banned only from certain areas, there will **not** be a violation of article 10.

**Protection of health & morals:** The ECtHR has often afforded a **wide margin of appreciation**.

There is **no** uniform European concept of morality, so **national authorities** are in a **better position** to assess the necessity of restrictions on expression to **uphold moral code**.



### ECHR Article 10: Freedom of Expression (cont)

**Protecting reputation:** A conviction of defamation for a journalist would **criminalise statements of opinion** and impose an **impossible burden** on them to justify the opinion.

Limits of acceptable **criticism** are **wider for politicians** than for ordinary citizens.

Politicians must display a **greater degree of tolerance of criticism**.

**Protecting the rights of others:** morality; blasphemy/offence on religious grounds; and racist or terrorist rhetoric.

Article 10 can protect not only the **substance** of ideas/information expressed, but also the **tone or manner** in which they are conveyed.

Restrictions on **freedom of political speech** should be **examined rigorously**.

The ECtHR allows a **wide margin of appreciation** in rights concerning **religion**, which has not just **national** but **regional** application within states.

The ECtHR provides a **lower degree of protection** for forms of expression which include **racist comment** or can be seen as **supportive of terrorism** unless they **promote or form part of a wider public debate**.

A person should **not** be able to rely on Convention rights which are based on **democracy and non-discrimination**, which they are effectively **seeking to undermine**.

**Journalists** engaged in **proper, critical** journalism of racist/terrorist groups should be allowed to play their role of **public watchdog** without **criminal measures**.

**Preventing disclosure of information received in confidence:** **Strong protection for serious journalism** is important.

Where journalists lawfully receive **confidential information**, they are **not** required to **disclose their source**.



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### ECHR Article 10: Freedom of Expression (cont)

Where confidential information is supplied to journalists in **breach of confidence/contract** by another (especially in a **hospital** setting), journalists **must** identify their sources, as there is a **significant risk** of further selling of confidential information and an **attack** on an area of confidentiality which should be **protected**.

#### Maintaining the authority & impartiality of the judiciary:

*Sunday Times v UK:*

- An article pre-judged the legal issues of a case.
- A preventative injunction restricting publication was imposed: a clear restriction on freedom of expression.
- The court justified it as it fell within the aim of 'maintaining the authority of the judiciary'.
- However, it held that the interference was not necessary in a democratic society.
- UK later amended its law through the Contempt of Court Act.

#### .....Restrains.....

Freedom of expression can be **restrained before it occurs**.

This demands a **very high level of justification**.

#### Super-injunction:

Restrains publication of material.

Restrains information about the content of the order itself.

Restrains even the fact that an order was made.

#### Other types of restraint:

Confiscation of property

Copyright laws

Decisions to refuse immigration entry

Limitations on election expenditure

It is argued that article 8 imposes a **positive obligation** on states to enact a legal measure that requires individuals to **receive notification** from media outlets **in advance** of them **publishing information that interfered with their private lives**.

### ECHR Article 8 & 10

#### Vertical direction:

Protection for **individuals** against **public authorities** that interfere with convention rights.





### ECHR Article 8 & 10 (cont)

**Indirect horizontal direction:** Influences the **legal determination** of claims between **private individuals and private organisations** with legal personality.

Courts are under a duty to act in a way that is **compatible with Convention rights**, applying and developing the common law in **accordance with Convention demands**.

#### .....Cause of Action.....

If private party A wishes to **invoke a Convention right in a dispute** with private party B, there must be a **pre-existing cause of action** against B upon which to **'hang' the Convention right**.

**Breach of confidence:** This provides **some protection** for invasions of privacy committed by private individuals.

It affords a **remedy** for the **unauthorised dissemination** of personal information.

It requires a **prior relationship of confidence** between the parties.

**Misuse of Private Information:** This is a **tortious action**.

This **removed the limiting constraint** that there must be an **initial confidential relationship**.

There are **2 elements** necessary to determine whether there has been misuse:

**1. Reasonable expectation of privacy:** Must ask whether the information is **obviously private**.

**Obviously private** = the person can reasonably expect their **privacy to be respected**.

**Not obviously private** = the courts will then consider whether a **reasonable person of ordinary sensibilities**, if in the **same situation as the subject**, would find the disclosure **offensive**.



### ECHR Article 8 & 10 (cont)

Relevant **considerations** = the **nature** of the information; the **form** in which the information is kept; the **attributes** of C; the **purpose** of the intrusion; the absence of **consent**, the **effect** on C; the **circumstances** in which the publisher came upon the information.

There is **no** reasonable expectation of privacy for information that is in the **public domain**.

Activities of a **purely private nature** engage article 8.

**2. Balancing articles 8 & 10:** When a person seeks to protect privacy under article 8, the media may argue this interfere with their right to publish under article 10.

When the courts are balancing these competing Convention rights, both parties are required to **justify the interference they propose to make with the other party's right**.

The **decisive factor** is the **contribution** that the published photos/articles make to a **debate of general interest**.

Published work that is **wholly in the sphere of private life** and satisfies nothing but the curiosity of the general public will likely **outweigh article 10** rights.

When balancing the rights, there are **5 relevant criteria**:

- debate of general interest
- prior conduct of relevant person
- form and consequences
- circumstances in which photos are taken
- was consent given?



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