

## **CHAPTER EIGHT**

# **PUBLIC ORDER AND FREEDOM OF EXPRESSION**

# Constitutional and Administrative Law

## PUBLIC ORDER AND FREEDOM OF EXPRESSION

### PART 1 : FREEDOM OF EXPRESSION

#### INTRODUCTION

Freedom of Expression relates to the degree of freedom afforded by the law to the individual to express opinions and to impart and receive information. There are two ways of approaching the topic :-

- 1). To consider the various view points as to how much freedom of expression one needs in a democratic society.
- 2). To detail legal restrictions on the freedom of expression and provisions to facilitate freedom.

The content of the second is governed by the considerations in the first. The lawyer uses the second in court directly but can have recourse to the first to justify judicial extension or restriction of the laws on free speech.

From the Constitutional perspective we are interested in Freedom of Expression in relation to that degree of freedom needed in a democratic society to protect society from abuse by those in authority and to enable society to engage in democratic governance.<sup>1</sup> Information, its possession and control is a powerful tool. Modern communications systems ranging from television to the electronic super-highway have only served to enhance this power since information can be put into the public domain so rapidly that there is little opportunity to respond to / rebut information and counter its impact. Uninformed and selective information can have severe adverse effects on public perceptions and can threaten to destabilise society.

The individual needs to be able to express views in relation to acts of the administration that affect both

- personal rights and interests, and
- rights and interests of the public in general.

The public do not necessarily have to agree with that individual's views. The individual here includes the press as a non-government force. The press often claim that they should have greater rights and more freedom of expression to report on affairs than the individual since they act as the watchdog of the public interest.

It is possible for the interests of the public to be injured by what the individual says or publishes where

- public morality is undermined;
- the judicial process is prejudiced;
- state security and the carrying out of legitimate government business is threatened,

especially by persons privy to information the public is not entitled to know about. If those in authority are to engage in honest open discussion, even about the politically or morally unthinkable, they require their privacy to be protected to enable them to do so. The reporting of what others say or think needs on occasions to be controlled. Thus Ministers need to be at liberty to 'Brain Storm' in private and *play devil's advocate* in order to explore both sides of affairs of state.

Sometimes what amounts to the public interest is clear cut. Difficult questions however arise in respect of organisations with legitimate ideological aims which are considered to be detrimental to the state. Extreme political views, religious views and racist attitudes have a potential for harm. The degree of openness in societies is variable and often depends on how developed a state is. Even in the US the views of Louis Fackarhan on Black and White Supremacy could lead to violent civil disorder. On the other-hand banning organisations and their access to the media can also be counter productive and heighten credence in their message. It is widely considered that preventing Sinn Fein spokesmen from appearing live on T.V. achieved very little. Banning organisations often makes them more attractive to rebels who will support "the underdog".

Freedom of Expression is also controlled by Private Law provisions regarding persons privy to confidential information regarding personal health and family relations, business secrets and in relation to libel and slander, though arguably this is not a Constitutional issue.

<sup>1</sup> Controls over the Freedom of Expression in relation to public order are considered in Part II below.

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### Accountability, Democracy, Freedom of Speech and the Media.

The media plays an important public role in exposing public wrong doing and holding both government and powerful private interests to account. However, the main objective of the media is to make money. Accuracy is not always its strong point and issues targeted are highly selective and the media can do much to unnecessarily undermine public confidence. It is possible to over emphasise the intrusion of the media and to place too much of a straight jacket over its activities, since this plays into the hands of those that might abuse power and public office.

It is the art of investigative journalism and the T.V. EXPOSÉ that delved deep into government affairs to reveal Watergate, Irangate and the White Water scandal. The atrocities in Bosnia were covered up by the West for a long time. Information on Gulf War Syndrome was suppressed for a long while preventing victims from recovering compensation. Whistle blowers provide a valuable protection to the public interest by exposing the corruption of superiors. Legitimate whistle-blowers need the protection of the law to evade liability for breach of rules regarding National Security and State Secrets and confidentiality. Otherwise the whistle blower may be subject to criminal sanction, loss of livelihood and pension rights.

However, what amounts to corruption in a given situation and what is in the public interest may be highly subjective. Thus, manipulation of the media by single subject pressure groups can be very suspect as epitomised by the Greenpeace campaign against the decommissioning of the Brent Spar Oil Rig which mobilised public opinion through misinformation.

Statutory duties to provide information for the public record and public inquiries such as Scott and Nolan are invaluable aids to the flow of information essential to the scrutiny of officialdom and democratic accountability. Nonetheless these may be evaded by superiors who provide inaccurate public records and public inquiries only come about after a problem has been exposed.

The notion of freedom of speech can be considerably restricted if the public does not have access to information. Thus the freedom relates both to the imparting and the receiving of information.

### THE RIGHT TO FREE SPEECH

Apart from the various International Conventions on Human Rights there is no 'Right' to freedom of expression under English law. English law unaided by European Community Law and the European Convention on Human Rights and Fundamental Freedoms may assist a person deprived of the freedom to express himself by declaring that such deprivation is illegal and may issue a declaration or injunction to prevent future interference, but there is no compensation available to the individual for the deprivation of that freedom, though if other rights are infringed in the process, compensation for those other rights may be claimable eg false imprisonment, trespass to the person, breach of publishing contract or discrimination etc.

Where statute imposes a duty on a body to act in a certain way or not to act in a particular manner, decisions which are outside that power may be subject to judicial review. This however is very rare.

**R v University of Liverpool ex parte Caesar Gordon**,<sup>2</sup> a decision to impose high standards of supervision for a meeting on a student body wishing to organise a meeting was ultra vires. The young conservatives wanted to hold a meeting but the University feared outsiders would cause damage to the University during anti-conservative protests. It was the university's duty to promote freedom of expression so the decision imposing the restrictions was quashed by the Q.B.D.

Freedom of Expression in the United Kingdom is or has up to now been residual ie. one can J could only express anything provided that freedom to express such things has not been made unlawful. However, even in removing rights the law has often provided some protection.

### The Universal Declaration of Human Rights : UN Charter

Art 18 *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, worship and observance.*

<sup>2</sup> **R v University of Liverpool ex parte Caesar Gordon** Times 12.6.90

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Art 19 *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

### European Convention on Human Rights.

Art 10 *The right to freedom of expression includes the freedom to hold opinions and to receive and impart information without interference by the public authorities regardless of frontiers.*

### Article 13 : American Convention on Human Rights 1969 - Costa Rica

Art 1 *Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.*

It is arguable that such freedom is fundamental for an individual's quality of life in a democracy, though there must be many far more essentials in life. Thus the freedom of speech is a small crumb of comfort to a person who also enjoys the freedom to starve, to remain uneducated, to go without medication or to be unemployed. To the extent that such freedom of expression may inhibit the ability of the 'State' to promote the general interests of the individual it may be seen as counter productive and not a priority. However, the person who is ostracised from society and prevented from participating in society because of the things he has said may be deprived of the opportunity to provide for himself and his family. An inability therefore to express views on government removes the accountability of the state to its citizens and is anathema to democracy. Third world countries and states with a very fragile political situation may not be able to afford the luxury of freedom of expression as enjoyed in developed western states.

English Law has relied on the principle that what is not prohibited is allowed. The restrictions on liberty in the interests of the public or for the public good have changed over the years as attitudes and the needs of government have changed. One problem for law is that it has sometimes been closely allied to moral considerations. Morality being an indefinite concept itself the law has at times been imprecise, resulting in either the law making a mockery of itself at times or of people making a mockery of the law. Dicey described freedom of expression in the following manner. '*Freedom of expression in England is little else than the right to write or say anything which a jury consisting of 12 shopkeepers think it is expedient or should be said & done.*'

### Restriction on Freedom of Expression

It should be obvious that there must be restrictions on the liberty of expression in any society otherwise one man's liberty would become a burden or imposition on others. Thus a person's liberty to preach religion to his neighbour needs to perhaps be restricted by their right to be left in peace. However, censorship to protect others from harassment by others or to safeguard society from subversive thoughts is problematical.

Mill points out that to try and restrict the expression of a point of view amounts to an assumption of infallibility on the part of the censor. The problem is that the censor may be wrong or he may have a vested interest. The adage 'What you don't know can't harm you' is dangerously paternalistic and a charter for abuse.. The suppression of information regarding the dangers of mad cows disease come to mind. If the public had known they would have pressurised the government to take action much earlier and perhaps saved lives and the British Beef industry. However, equally economically damaging could be scare-mongering and unsubstantiated pseudo-scientific reports of health dangers.

Cox remarked that the danger of censorship is highlighted by the appeasement policy that preceded the second world war. Churchill was ostracised as a warmonger. The result was that Britain had not prepared even to defend itself. It took several years before the armed forces recovered and military production could be put in place. Britain had an enormous amount of research and development work to do and was severely outgunned by the Axis forces for most of the war. A difficult problem here is where those who control the content of the media are not interested in a person's message and the censorship is effectively commercial.

Devlin, in his contribution to the Hart / Devlin debate, famously observed that "*No man is an island.*" This rejects the notion that people should be allowed to express themselves in private because they do not thus harm the rest of society. Devlin perceived however that those same people will then mix with the rest of society and may thus pollute them. The current debate on child pornography on the internet falls into this category.

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### Article 10(2) European Convention on Human Rights.

The earlier statement (in Article 10) is subject to such formal restrictions or penalties as are prescribed by law and which 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 representation of the rights of others ; for the prevention of the disclosure of information received in confidence ; or for maintaining the authority and impartiality of the judiciary.

**Marshall** : observes that Conventions tend to commence with high sounding declarations, followed by necessary reservations. Thus, **Article 13 American Convention on Human Rights Costa Rica**

2. *The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law and be necessary in order to ensure:*
  - a. *respect for the rights or reputation of others; or*
  - b. *the protection of national security, public order or public health or morals.*

The problem here is that it may be too late after the event. The damage may already have been done. The effect can be seen in the way that lawyers often ask questions in court which are not permitted. The opposing side objects. The judge orders the statement or question to struck from the record but it is too late to prevent the jury being influenced. Incitements to anti-social behaviour can be equally damaging. Similarly with libel and slander, even when disproved assertions of 'no smoke without fire' may continue to cause harm. The Convention continues as follows :-

3. *The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or implements or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.*
4. *Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship, for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.*
5. *Any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitement to lawless violence or any other similar illegal action against any person or groups of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.*

### QUESTIONS

- Why is freedom of speech necessary in a democratic society?
- How much freedom is necessary to fulfil these needs?
- What constraints on freedom are necessary to protect other important rights and needs of that democratic society?
- Compare and contrast the various provisions in the Conventions and under UK law. Which if any provide the best solutions to the problems ?

### LIBERTY OF THE PRESS / MEDIA

**The Royal Commission on the Press**,<sup>3</sup> *"We define freedom of the press as that degree of freedom from restraint which is essential to enable proprietors editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot make responsible judgements."*

Compare this with the opinion of A.J.Liebling *"Freedom of the press is guaranteed only to those who own one"* promoting the question 'Is Freedom of the Press only a Freedom of the Wealthy ?', since it is they who control the editorial policy, or is it a '**Freedom of the Public** ?' on the basis that it is the public who control the press by only buying what they want?

<sup>3</sup> **The Royal Commission on the Press** 1977 Cmnd 6810 para 2-3

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Government spending on advertising has become topical, with criticisms of Local and Central Government using public funds to promote political views. The EC is actively promoting the single European currency and the proposed new Constitution. State propaganda is viewed with suspicion and differs from public awareness campaigns.

The liberty of the press and increasingly today, the broadcaster, consists of laying no prior restrictions on publication. The main restrictions on the freedom of the press are based on the ordinary law of Sedition as demonstrated by **ex parte Choudhury**,<sup>4</sup> regarding the Satanic Verses, and Libel law. Barendt sees it as the most significant legal restriction. Barendt discusses developments in the US where some states have attempted a Right To Reply in newspapers who defame individuals - and discusses whether the editors rights are infringed or whether this in fact removes the argument that only the rich have the freedom to publish since it places a duty on the press to publish material.

Barendt is against the UK concept of the 'defence of truth' in Libel cases. It places a heavy burden on a publisher reporting on the affairs of public figures. Unless a publisher is confident that he can prove something in court he cannot publish even though he believes in its truth. Barendt supports the 'chilling effect' thesis considered by the Faulks Committee in the U.K.. The Committee considered but subsequently rejected the idea of introducing a qualified privilege for the press having reached the conclusion that such a legal development was not needed.<sup>5</sup>

There has been an increase in the restrictions regarding banned organisations (IRA) and anti-terrorist legislation eg **R v S.S. ex parte Brind**,<sup>6</sup> and in relation to state security especially regarding duties owed to the administration by civil servants e.g. the Ponting Trial and Spycatcher.

The irony of the situation is that in recent years the most censorship has come from people involved in the media itself eg the use of unions who have refused to permit publication and have controlled the use of freelance contributions. A Hood Phillips Article, intended for the 1977 Times, about censorship was itself censored by the print unions for about 24 hours.

Television by its nature also creates problems. Programs tend to be one sided. The program needs to attract an audience and therefore often takes a stance. Balanced intellectual programs seldom attract a mass audience and may be regarded as boring. Regarding political party coverage television probably manages to give a relatively balanced amount of coverage to the main political parties, but on many other issues only one side of a situation is presented to viewers.

The aggressive or cynical interviewer and the politically one-sided news report have come in for criticism. The sneering interviewer epitomises this. Interviewers frequently badger interviewees repeating a question many times if the answer does not satisfy them or they don't believe what is said and questions are frequently rhetorical. Some interviews don't even give the interviewee the time to answer, giving the impression that the answer to the question is self-evident. This can be very dangerous especially if the subject matter is very delicate.

An example is an interview with Tony Blair on progress in talks on Northern Ireland. The interviewer made a simplistic but highly inflammatory statement and repeatedly invited the Prime Minister to confirm that the statement was accurate. The Prime Minister repeatedly set out his view of the situation and avoided apportioning blame to Catholics and Protestants in the Province since to do so would have ensured that no progress in the talks could take place. Eventually the Prime Minister had to formally end the interview.

Another tactic is to pose a variation on the theme of Catch 22 questions, epitomised by the infamous "When did you stop beating your wife?" Any answer will wrong foot the interviewee. However, a bold assertion of denial can lead to allegations of avoiding the question, and a failure to be frank and open. Skilled TV journalists can make their subjects appear to be stupid and incompetent. On the other hand, any attempt to prevent journalists from robustly interviewing politicians and discussing sensitive issues is potentially detrimental to public interest. The infamous witch hunt against the BBC over the questions whether or not the government overstated the threat from weapons of mass destruction prior to the invasion of Iraq is well documented and illustrates the dangers.

<sup>4</sup> **ex parte Choudhury** Times 9 April 1990

<sup>5</sup> See also Richard Abel. "Public Freedom ! Private constraint". Hamlyn Lecture. Journal of Law and Society vol 21 1994 p374 regarding the Sweet & Maxwell saga.

<sup>6</sup> **R v S.S. ex parte Brind** [1990] 1 AER 469

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### The Theatre.

This is no longer a red hot issue. Theatres used to be censored by the Lord Chamberlain's Office (of the Royal Household : Responsible for management of the House) till 1968. **The Theatre's Act 1968**. The system was reformed and the prior licensing removed. The theatres are still subject to health and safety and the ordinary laws of the land regarding obscenity, incitement of racial hatred, causing a breach of the peace etc. Cinemas. Cinematograph Act 1909 : Introduced licensing to cinemas on the grounds of public safety. This was extended in practice to cover the contents of the films. **The Cinematograph Act 1952** confirmed the system of licensing regarding the need to protect children. Licenses were to be issued by the Local Authority though they could delegate the duty to a committee or a local magistrate. The decisions were influenced by decisions of the British Board of Film Censors set up in 1912 by the film industry with the approval of central and local government. It classifies films ( in 1984 into 4 categories - U, P.G. (parental guidance), 15 + and 18 + : The committee at local level will normally follow it though they must make up their own mind. Cox gives examples that have gone both ways.

**Video Part VII of the Criminal Justice and Public Order Bill 1994 sections 79 to 82** introduces new offences in relation to obscenity and pornography and videos.

**Belium v Sweden** 1996. The E.C.J. ruled that only member states can regulate T.V. broadcasts made in their countries. A Swedish ban on pornographic satellite T.V. broadcast from the U.K. by a Belgian company was ruled to be illegal and contrary to Art 30 T.E.U.. Similarly, it would appear that the U.K. ban on satellite decoders preventing Red Hot Belgium from being received in the U.K. is likewise illegal. The Internet pornography screening system is presumably also unlawful. **National**

### Blasphemy

A publication is said to be blasphemous that contains any contemptuous reviling scurrilous indecent and grossly abusive or ludicrous matter relating to God, Jesus Christ or the Bible or the principles of the Church of England. Mr Rushdie is safe since he merely reviled Moslems.

It is not blasphemous to speak or publish opinions hostile to christianity or to deny the existence of God if the statement is made in decent or temperate language. Prosecutions are rare. The tendency is that a breach of the peace must be liable - eg in Northern Ireland this would be more likely than in mainland U.K. : The Last Temptation of Christ was ignored when it went into print - and despite criticisms the film was never censored.

**Stephens** : *"Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves."*

**R v Attwood**.<sup>7</sup> Blasphemy is a common law misdemeanour taking the form of both blasphemous words or writing.

**Thomas Paine's Case**.<sup>8</sup> "all offences of this kind are punishable as such, in as much as they tend to destroy those obligations whereby civil society is bound together".

**Bowman v Secular Society**.<sup>9</sup> A mere attack on the truth of christianity and vilification, ridicule and irreverance is not sufficient to found blasphemy - assumed that a breach of the peace also induced.

**R v Lemon**.<sup>10</sup> Poem and drawing in Gay News vilifying the crucifixion of Christ : The House of Lords held that it was blasphemous if there was an intention to publish and if it seriously offended ordinary Christian churchgoers by Insulting or Vilifying the deity, Christ or Christianity. Test - *likelihood of outrage and insult*.

<sup>7</sup> **R v Attwood** (1617)

<sup>8</sup> **Thomas Paine's Case** (1797) : Per Ashurst J

<sup>9</sup> **Bowman v Secular Society** [1917]

<sup>10</sup> **R v Lemon** [1979] House of Lords.

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Scarman would have had the offence of blasphemy extended to cover other religions. **Law Commission Report No 145 Offences against Religion and Public Worship 1985** - recommended abolition. Recommended offences of disorderly behaviour disrupting a service of religious worship.

**R v Chief Metropolitan Stipendiary Magistrate ex pte Choudhury** [1991] AER 306. Magistrate refused to issue summonses for blasphemous libel and seditious libel against Salman Rushdie and Penguin for publishing the Satanic Verses. Applicant sought judicial review to quash the magistrate's decision : The court held

- 1) Blasphemy restricted to christian religion - not contrary to Art 9 E.C.H.R. - but there is no duty to prosecute - and contrary to Art 10 on freedom of speech to prevent publication.
- 2) Seditious libel had to provoke violence, resistance or defiance to constituted authority of the state - such intention by Rushdie not proved.

**Marcus Tregilgas-Davey**<sup>11</sup> argues that in a multi racial society all religious irreverance can shake society. King Hamilton in **R v Lemon** would have extended blasphemy to other denominations if relevant to the case - neither approved nor dissented from by C.A. or H. L. Tregilgas claims Watkins LJ in **Choudhury** was mistaken in believing an extension to other religions would cause doctrinal problems between various sects etc : and crank religions : could be limited to churches with registered places of worship or a new statute could name specifically the religions to be protected. He further claims a failure to protect is contrary to **Art 9 E.C.H.R.** which guarantees freedom of religion. But does Art 9 insist on protection ? No, merely right to religious beliefs : and **Art 14** - which forbids discrimination ! but the discrimination is regarding freedom to worship. He is correct in pointing out however that reliance by Watkins on **Art 10** to protect freedom of speech is a contradiction - since 10(2) allows exceptions regarding public order etc and these would have to be relied on to permit blasphemy as an offence against the Christian religion.

Religious education. Large number of state funded / aided Church of England and Wales schools. Muslim Schools are not recognised as a viable alternative for education and are not state aided. Schools forced to operate in evenings and weekends. The freedom to educate is not therefore prevented but is indirectly discriminated against.

### Obscene Publications .

The notion of what is obscene is perhaps subjective eg. a butcher's shop window to a vegetarian. In the U.K. it relates mostly to sex and nudity especially. The law is in a mess. According to **Cox** : The law is so muddled one can buy a book in an airport lounge and then be prosecuted for entering the country with it. The test for owning and the test for sending matter by post are different. The law has not always ignored the difference between public and private obscenity.

**Obscene Publications Act 1959.** Established a statutory offence of publishing obscene matter. An obscene matter includes material to be read, sound, record, film or anything intended to be used for the reproduction of obscene material eg a video machine. The test of obscenity for the purpose of the Act is : If taken as a whole there is a tendency to deprave and corrupt persons who are likely having regard to all the circumstances to read see or hear the matter contained or embodied in it.

**Obscene Publications Act 1964.** This stated that obscenity was to be determined by reference to the circumstances of the intended publication that the defendant may be reasonably inferred to have contemplated.

There is a defence to a charge of obscenity. The publication can be justified as being to the public good either in the interests of science literature art or learning or of any other interests of general concern. The opinions of experts can be called on to establish or negative the defence.

Under the **1959/1964 Obscenity Acts**, obscenity is not confined to sexual matters. It also covers books dealing with the effects of drug taking cards depicting scenes of violence when sold with chewing gum to children etc.

### Part VII Criminal Justice & Public Order Act 1994 Pornography

s84 Indecent pseudo-photographs of children

s85 Arrestable offences include obscenity and indecency.

<sup>11</sup> Leading article : Marcus Tregilgas-Davey - Modern Law Review - vol 54 1991 p294.

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s86 Indecent photographs of children : imprisonment.

s87 Scottish provisions.

### Video recordings

s88 Video penalties

s89 Video restriction of exceptions s90 Video, suitability

s91 Enforcement

s92 Obscene offensive or annoying telephone calls, increased penalty.

### Conspiracy to corrupt public morals.

**Shaw v D.P.P.**<sup>12</sup> It has been argued that this case amounts to the courts creating a criminal offence. If this is so it is an example of the judges as law makers. The appellant had published a directory (illustrated magazine) called the Ladies Directory, which contained the names, addresses and other details of prostitutes and the services that they provided. The H of L upheld the conviction of the offence of conspiracy to corrupt public morals.

**Per Viscount Simonds** : *“the law must be related to the changing standards of life having regard to fundamental values and the purposes of human values. (He made no attempt to define these concepts) There remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law to conserve not only the safety but also the moral welfare of the state’ i.e. the courts are guardians of the nations’ morals.”*

**Knüller v D.P.P.**<sup>13</sup> Reaffirmed Shaw's case. Similar facts. A magazine for homosexuals and a vehicle for them to make and maintain contact. The H of L upheld the conviction for conspiracy to corrupt public morals. The majority in the House were prepared to recognise that it was an offence to outrage public decency and to conspire to outrage public decency.

There are many opinions as to where the law should go next ranging from more leniency to stricter controls especially on pornography. Arguably, **DPP v Shaw** and **Knüller v DPP** offend Article 7 ECHR 1950 since it was not predictable at the time of the conduct that offences were being committed - in Shaw's situation the police had assured him albeit grudgingly that his proposed conduct would be lawful. Does Article 7 now preclude judicial activity in this sphere ?

### Elections and political fairness :

The control of political broadcasts by the major political parties is designed to create a balance between the amount of time each major political party is allowed and proportionately to the smaller parties both in party political broadcasts and in political debates. The system is criticised from time to time. Thus Tony Benn in the 1970's and in the early 1980's by David Owen both considered the system to be unfair to minority parties. Similar objections have been raised by the Green Party, UKIP, Plaid Cymry and the SNP.

### CONCLUSIONS

Is Freedom of Expression getting greater or is it reducing ? Is this a good thing ? The nineteen sixties triggered off a period of social tolerance which demanded greater freedom of expression. However, recent statutes have sought to reduce the freedom of expression in specific areas.<sup>14</sup>.

### STATE INTERESTS AND FREEDOM – NATIONAL SECURITY

#### Security and Censorship - the System of D Notices.

These are popularly portrayed as a form of censorship. An examination of the extreme width of the present Secrecy Acts however reveals that the D notices act as a protection from the rigours of the Act. A committee views topics subject to the Act and decides if they may nonetheless be published.

Since 1912 the Official Services Press and Broadcasting Committee composed of civil servants from the Defence Department with representatives from the sphere of the press and broadcasting has been established, The purpose of the committee is to indicate to the media the circumstances in which they can safely commit an offence against the Official Secrets Acts. The actual D notice itself will indicate the few times that certain information may not be published on the grounds that it is prejudicial to national interests. The B.B.C. is responsible to a Minister and to Parliament. The I.T.V. networks are answerable to the I.B.A.

<sup>12</sup> **Shaw v D.P.P.** [1961]

<sup>13</sup> **Knüller v D.P.P.** [1973] House of Lords.

<sup>14</sup> E.g. the **Indecent Displays (Control) Act 1981** : Advertising hoardings for theatres and clubs etc in Soho likely to offend passers by

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### Censorship and the Gulf War (No1)

There was much criticism in some quarters regarding the media and the amount and quality of information (or disinformation) made available to the press about military developments during the Gulf War Crisis. The Americans made a conscious effort to avoid repeating the type of media coverage that took place during the Vietnam War - where the realities of, and the obscenity of war became peak time viewing and so revolted the nation that internal pressure to end the war forced the Americans to pull out of Vietnam. Ostensibly, media coverage and briefings were restricted for security reasons but there was undeniably a political motive behind the way media coverage of the Gulf Conflict was controlled.

### Media censorship of the I.R.A

**R v S.S. for Home Dept ex pte Brind**.<sup>15</sup> Judicial review of the Home Secretary's directive to the BBC & IBA not to broadcast or publicise the IRA by way of interviews etc. The court held that the directive was not ultra vires **s29(3) Broadcasting Act 1981**.

There have been a number of actions against the media to gain access to media coverage of events to further the prosecution of criminal offences. The media have attempted to resist handing over footage of such events on the basis that knowledge of the use of coverage for prosecutions would endanger film crews since the perpetrators of such offences would attack film crews to prevent filming. **X Ltd v Morgan-Grampian Publishers**,<sup>16</sup> A journalist's moral obligation to protect source is unlawful - and contrary to **s10 Contempt of Court Act 1981**.

The Spy Catcher Saga also highlights restrictions, which have been placed upon or have been attempted to be placed upon, the media's freedom of expression.<sup>17</sup> Offences against the State. In a wide sense all crime is an offence against the state since the state determines what is a crime. However, in a narrower context offences against the state relate to those offences which have a political connotation and which directly overlap with constitutional law.

### Offences against the Crown & Government

Treason, Incitement to Mutiny, Sedition, Disclosure of Official Secrets, Illegal military drilling & training (private armies) : illegal wearing of uniforms associated with military organisations : incitement to disaffection.

**s1 Official Secrets Act 1911** : It was an offence for any person who for any purpose prejudicial to the safety or interests of the state :

- a) approached or entered a prohibited place.
- b) made a sketch or plan or similar item which was calculated or intended to be or might have been useful to an enemy or
- c) obtained or communicated to any person any sketch document or information or similar material calculated or intended to be or might have been useful to the enemy.

**Chandler v D.P.P.** <sup>18</sup> Members of the Committee of 100, the ringleaders, were convicted under s1 O.S.A. 1911 of entering ministry of defence property. They sat on the runway to prevent aircraft from taking off, ostensibly to force the government to bring about a program of Nuclear Disarmament.

The House of Lords upheld the conviction. They stated that the Act covers sabotage. The question of whether or not the action of the accused was or was not prejudicial to the state was a question of fact for the courts to decide and that they would be guided by the opinion of the government on this issue.

**s2 O.S.A. 1911** Unauthorised disclosure : This section was repealed and replaced by the Official Secrets Act 1989.

**s3 O.S.A 1911** Prohibited place included any defence works, arsenal, naval or airforce camp, ship or aircraft belonging to the Crown.

**s8 O.S.A 1911.** The consent of the A.G. was required for the purposes of bringing a prosecution.

<sup>15</sup> **R v S.S. for Home Dept ex pte Brind** [1990] 2 WLR 787

<sup>16</sup> **X Ltd v Morgan-Grampian Publishers** : Times April 5 1990 HL.

<sup>17</sup> Eg **A.G. v Guardian Newspapers No 2** [1988] 3 WLR 776. Compare **The Observer & Guardian v UK** - Strasbourg - Times 27.11.1991 - each paper awarded £100,000 damages against the UK government.

<sup>18</sup> **Chandler v D.P.P.** [1964].

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**s10 O.S.A 1911.** The provisions of the Act applied to offences committed in any part of H,M, Dominions which would include the Commonwealth though just what the status of some of Britain's interests is, is of some doubt. Also covers offences committed anywhere by a British Officer or British Subjects. Communication with a foreign agent provided evidence of obtaining or attempting to obtain information calculated or intended to be useful to an enemy contrary to **s1 Official Secrets Act 1911**.<sup>19</sup>

### **The Frank's Committee of Inquiry 1972**

**Unauthorised disclosure : Departmental Committee on s2 Official Secrets Act 1911** Suggested that the provisions of s2 were too wide. It covered information and material that could not seriously be suggested would be useful to an enemy. The Committee suggested that s2 be repealed and replaced by an Official Information Act with offences designed to protect certain types of information eg Defence, National Security and the System of criminal Justice.

From the point of view of freedom of expression the problem in recent years has been in respect of the so called 'whistle blower' - a person privy to information regarding what that person regards as misdeeds by government officials - or plans to do things which the person concerned considers to be against the national or public interest. Who is to be the arbiter of the public interest and should the public interest and interests of the state be equated with the perceived interests of the government as presently constituted. Perhaps the only interest at stake is that of a corrupt or incompetent minister. If it is the government that is arbiter how can the truth be established and what can an individual do to prevent an honestly believed unlawful act from occurring or to expose a misdeed by other government officials ?

In public international law as demonstrated by the Nurembourg Trials it is an offence to follow illegal orders and an absolute defence to a so called illegal act against a particular state to prove that one's actions were in the interests of humanity - and it is one's duty to prevent state obscenities from occurring. However, whilst this is a defence under some foreign jurisdictions it was not a defence in the UK. The problem is age old. Sir Thomas More lost his head for treason having declared 'I am the King's good servant, but I am God's servant first'. It didn't save him.

**R v Aitken**,<sup>20</sup> published a report in the Telegraph which contradicted the U.K. view of what was happening in the Biafran War : a s2 prosecution failed - the judge required mens rea to be established.

**R v Berry**,<sup>21</sup> held : the intention to publish is sufficient mens rea - the mental attitude towards the interests of the state of the individual irrelevant. (the opposite of Aitken)

**R v Fell**,<sup>22</sup> s2(1) is (was) an absolute offence.

**S.S. for Defence v Guardian Newspapers**,<sup>23</sup> and the Sara Tisdall trial : Tisdall learnt that the Secretary of State intended to announce the arrival of Cruise Missiles at Greenham Common after the event to prevent questions being asked in the House of Commons - she regarded this as objectionable political subterfuge by the Minister and so leaked the information : She was imprisoned for 6 months.

**R v Ponting**.<sup>24</sup> Ponting revealed information to Tam Dalyell MP about the sinking of the Belgrano during the Falklands conflict because he believed that the government was misleading parliament. Despite very strong pressure by the judge the jury acquitted Ponting.

**s1 Official Secrets Act 1989** : present and past security and intelligence officers and other notified persons commit an offence if they unlawfully disclose information relating to security which they come by in relation to their work : offence by crown servants of disclosing damaging information : defence - didn't know it was security related or damaging.

<sup>19</sup> It should be noted that the **Official Secrets Acts** have now been repealed and replaced by the **Freedom of Information Act 2000**.

<sup>20</sup> **R v Aitken** [1971]

<sup>21</sup> **R v Berry** [1979] C.L.R. 284 :

<sup>22</sup> **R v Fell** [1963] CLR 207 -

<sup>23</sup> **S.S. for Defence v Guardian Newspapers** [1984] Ch156

<sup>24</sup> **R v Ponting** [1985] C.L.R. 318:

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**s2 O.S.A. 1989** : crown servants and disclosures of damaging information relating to defence : men rea regarding nature of information required

**s3 O.S.A. 1989** : disclosure of information damaging international relations.

**s4 O.S.A. 1989** : disclosure of information leading to commission of a crime.

**s5 O.S.A. 1969** : Unauthorised disclosure of information & breach of confidence.

The main criticisms are that members of security services can never disclose information legally : there is no public interest defence : the burden of proof of the general defences are placed on the accused - ie guilty till proven innocent as opposed to innocent till proven guilty.

**Sedition.** This involves 3 indictable but non-arrestable offences.

- 1). Publication of seditious libel.
- 2). Utterance of seditious words.
- 3). Conspiracy to do an act in furtherance of a seditious intention.

Seditious intention is required in all three offences. Hood Phillips defines seditious intention as an intent to bring into hatred or contempt or to incite disaffection (to cause disloyalty) against the person of the sovereign or the government or the constitution of the U.K. or either House of Parliament or the administration of justice or the incitement of Her Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in church or state, or to raise discontent or disaffection among H.M's subjects or to promote feelings of ill will or hostility between different classes of her subject.

**Seditious libel** : The publication in a permanent form of matter which is seditious.

**Seditious Conspiracy** : Two or more persons acting together with seditious intent. Sedition has attracted much criticism of its breadth and that any harm to the constitution could be protected by other laws.

**Incitement to Mutiny & Disaffection : s1 Incitement to Disaffection Act 1934.** It is an offence for any person to maliciously endeavour to seduce any members of H.M. Forces from his duty of allegiance.

**s2 Incitement to Disaffection Act 1934.** It is an offence to be in possession with intent to commit, abet, council or procure the commission of an offence under **s1 I.D.A. 1934**. Any document such that dissemination of copies amongst members of the forces would be an offence under si. If this seems spurious it should be remembered that it was extensively used during and after the 2nd World War.

**S91 Police Act 1996** : It is an offence to cause disaffection and beaches of discipline amongst the ranks.

### Offences against the Public Peace & morals

Blasphemy (almost dead till resurrected recently) : Libel of various categories eg obscenity etc : riot : public nuisance : unlawful assembly : discrimination.

### Incitement to Racial Hatred

**s6 Race Relations Act 1965.** Incitement of racial hatred is an offence. The offence is committed by publishing or distributing written matter or using words in a public place or at a public meeting where it is threatening, abusive or insulting and in addition where there is an intention and a likelihood of stirring up hatred against any section of the public against any other section of the public distinguished by colour race ethnic or national origins.

**s70 Race Relations Act 1976.**<sup>25</sup> It maintains the aspects of publishing distributing and insulting but it REMOVES the requirement of an intent to stir up hatred. Thus it is easier to commit the offence and the task of the prosecution is made easier. A defence is afforded within the particular sphere of publications ie. Reports of Judicial or Parliamentary Proceedings. As long as the report is fair and accurate one is allowed to claim that one did not have the intent to incite Racial Hatred and that one did not suspect that the material had that effect.

### Public Order Act 1986 Part III s17-24

**s17 P.O.A. 1986** Racial hatred is hatred against a group of persons in G.B. defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

<sup>25</sup> Amended **s6 Race Relations Act 1965** by adding a **s5(a) Public Order Act 1936**.

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**s18 P.O.A. 1986** Use of words or behaviour or display of written material

**s19 P.O.A. 1986** Publishing or distributing written material

**s20 P.O.A. 1986** Public performance of a play

**s21 P.O.A. 1986** Distributing showing or playing a recording

**s22 P.O.A. 1986** Broadcasting or including programme in cable programme service

**s23 P.O.A. 1986** Possession of racially inflammatory material

**s24 P.O.A. 1986** Powers of entry and search.

**Offences against Public Justice** : Perjury : Bribery : Interference with witnesses Contempt of court : Resisting the police : Illegal and corrupt practices at elections.

**Contempt of Court Act 1981** : This imposed strict liability regarding behaviour that will prejudice or impede the course of justice. A reverse aspect of freedom of expression is the duty to disclose information. In this respect the duty to give evidence under the Insider Dealing legislation in company law, and the inferences that may be drawn from accused's silence.

**s34-39 CJPOA 1994** are also relevant. Offences consequent with trade & commerce : Trading with the enemy : Smuggling Coinage offences.

**s155 CJPOA 1994**. Offence of racially inflammatory publication is an arrestable offence.

**s161 & 162 CJOPA 1994** deals with information held on computers.

**s165 CJOPA 1994** deals with copyright and illicit recordings.

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## PART II : FREEDOM OF ASSEMBLY AND PUBLIC ORDER

The common law attitude to freedom of assembly and association is that there is no law forbidding people who chose to go to the same place at the same time. If they in fact chose to do so they may then be subject to common law and statutory provisions, individually or collectively governing situations which may arise when people gather together. There is an immense amount of law that can be relevant to this, both local and national. Statutory offences are of a specific nature.

The law targets meetings held to achieve what are considered as undesirable consequences, such as illegal interference with the exercise of lawful rights. There are laws against unlawful picketing and against picketing in an unlawful manner. Trespass to land is both a civil wrong and in specific situations a criminal offence. There are laws to ensure free movement of citizens and to ensure that public demonstrations are conducted peacefully. In addition behaviour at meetings which is deemed to be unlawful, such as discriminating against sectors of the community and against harassment, both general and specific, including obstructing the police and racial harassment. The list of forms of behaviour prohibited by statute has been expanded by a series of statutes over the last 25 years.

**The Tumultuous Petitioning Act 1661.** It is an offence for more than 10 persons to try to present a petition to either the Queen or Parliament and for more than 20 people to seek signatures for such a petition.<sup>26</sup>

**s51(1) Police Act 1964.** Possibly not arrestable at common law<sup>27</sup> : possibly arrestable under **s25 P.A.C.E.** if the general conditions apply.

- 1) *Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on conviction to imprisonment or a fine or both*
- 3) *Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty shall be guilty of an offence ...*

Regarding the applicability of older case law, be careful that many of the cases given were based on legislative provisions that may no longer apply or on common law. Sometimes the new provisions are very similar, sometimes not. The value of the cases where statute law has changed may merely be illustrative of judicial attitudes. If the statutory provision is similar to the original rules old cases may be useful to indicate how the judiciary might apply the new provision.

In **Duncan v Jones**,<sup>28</sup> Jones, a P.C., told Duncan not to hold a meeting in a certain place because he feared a breach of the peace. A similar meeting previously had led to an alleged breach of the peace. At the time obstructing a police officer was dealt with under the **Prevention of Crimes Act 1871 and 1885**. Duncan continued in her attempt to hold a meeting. Jones arrested her on the grounds that she was obstructing a police officer in the exercise of his duty, i.e. to stop a breach of the peace. The court held that the behaviour of the police was lawful. He had a power to arrest to prevent a breach of the peace.<sup>29</sup>

**Public Meetings Act 1908** as amended by the **Public Order Act 1936**. This deals with disorderly conduct designed to break up a lawful public meeting.

- 1) any person who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together shall be guilty of an offence.
- 2) any person who incites others ... shall be guilty of an offence
- 3) if any constable reasonably suspects any person of committing an offence under the foregoing he may if requested to do so by the chairman of the meeting require that person to declare to him immediately his name and address and if that person refuses or fails to so declare or gives a false name and address he shall be guilty of an offence .<sup>30</sup>

**s1 Public Order Act 1936** : It is an offence to wear in any public place or at any public meeting a uniform signifying association with any political organisation or the promotion of any political object.<sup>31</sup>

<sup>26</sup> Semble **Seditious Meetings Act 1817**.

<sup>27</sup> Now **s61 Police Act 1994** : compare **Wershof v Metropolitan Police Commissioners** and **Gelberg v Miller** :

<sup>28</sup> **Duncan v Jones** [1936]

<sup>29</sup> Compare **Beatty v Gillbanks** : see also De Smith.

<sup>30</sup> Couple this failure with **s25 P.A.C.E.** and it may be arrestable.

<sup>31</sup> established to deal with Mosley's Brown Coat Fascists.

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**s7(3) P.O.A. 1936** A constable may without warrant arrest any person reasonably suspected by him to be committing an offence under s1. (To be repealed January 2006)

**O'Moran v D.P.P.**<sup>32</sup> The wearing of black berets by a group marching in London under the banner of the Provisional I.R.A. constituted an offence under s1.

**s2 P.O.A. 1936.** It is an offence to be involved in the organisation and or training of groups (or their supporters) who are organised and trained with the view to usurping the role of the police or the armed forces or to use force for political purposes or to cause reasonable apprehension that they have done so.

**Sections 3, 4 and 5 Public Order Act 1936** have now been repealed. Consider what the result of the following cases would be now under **Public Order Act 1986**.

**Jordan v Burgoyne.**<sup>33</sup> The main speaker at a national front rally was convicted. His speech was provocative beyond endurance to Jews, coloureds and ex-servicemen of the Crown. The tenet of his speech was that Hitler had the right idea and that the British had fought the wrong people.<sup>34</sup>

**Brutus v Cozens.**<sup>35</sup> Wimbledon tennis match. Brutus and others, anti apartheid supporters, went to one of the tennis courts whilst the match was in progress. They sat down on one of the courts and distributed leaflets. Brutus was convicted under **s5 O.P.A. 1936**. He appealed and the House of Lords decided that his behaviour was not insulting. The conviction was quashed. Lord Reid made it clear that **s5** did not prohibit all speech and conduct which is liable to cause a breach of the peace. The offence also had to be threatening abusive and insulting.

### PUBLIC MEETINGS AT COMMON LAW

A public meeting may be defined as a meeting held for the purpose of expressing views on matters of public interest and which the public or any sector thereof is invited to attend. There is a general constitutional liberty to promote or take part in meetings in a private place though there may be obstacles in so doing or a practical nature eg to obtain the permission of the owner of a venue and the cost of hiring it.

### MEETINGS IN PUBLIC PLACES

It is very doubtful that there is any general liberty to hold such meetings since they may well lead to offences of obstruction and or public nuisance. Attempts to hold meetings on public highways may infringe the rights of others to use the highway to pass and re-pass and to engage in behaviour incidental to that purpose. It is technically trespass to land owned by the Highway Authority. Repetition may amount to a public or a private nuisance and may possibly give rise to criminal liability.

**s137 Highways Act 1980** replacing the **1959 Act**. It is an offence to wilfully obstruct the highway. This has often been used to control demonstrations and sit-ins. If a person without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine. The offence is arrestable under **s25(3)(d) PACE** if the general conditions are fulfilled.

**Arrowsmith v Jenkins**<sup>36</sup> : Miss Arrowsmith held a C.N.D. meeting on a part of the highway that had been used for meetings in the past. The police asked her to get her audience to draw closer. She complied with the police request but some traffic was still partially blocked. She was convicted of obstructing the highway though clearly in her mind she had not intended to do so. The court held that it was sufficient that she had intended to do the thing, i.e. to hold the meeting that led to the obstruction.

**Burden v Rigler.**<sup>37</sup> A meeting was held on the highway. It had been advertised in advance and the police were present and did not object. Rigler and others tried to break up the meeting and they were successfully prosecuted under the **Public Meetings Act 1908** for disorderly conduct designed to break up a lawful public meeting. Thus, just because a meeting is held on a highway does not mean that the meeting is automatically unlawful and that criminal liability will follow for the organisers of the meeting.

<sup>32</sup> **O'Moran v D.P.P.** [1975]

<sup>33</sup> **Jordan v Burgoyne** [1963].

<sup>34</sup> Compare **s17/18/19 Public Order Act 1986**.

<sup>35</sup> **Brutus v Cozens** [1973]

<sup>36</sup> **Arrowsmith v Jenkins** [1963]

<sup>37</sup> **Burden v Rigler** (1911).

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**R v Dubbing** [1986]. No warning is required by police but without a warning use of the highway may be reasonable. It is advisable for the police to give one first.

**R v Clark No2** [1964] 2 QB 315. A procession is lawful and reasonable unless it amounts to a public nuisance.

There is no need to actually inconvenience any one but such inconvenience would help to establish the existence of obstructing of a part of the highway according to **Wolverton UDC v Willis**.<sup>38</sup>

**Homer v Cadman**.<sup>39</sup> D caused a partial obstruction whilst addressing a crowd. He left room for persons & vehicles to pass but it was nonetheless an obstruction. It amounted to a considerable inconvenience to persons wanting to use the part of the highway occupied by him for 1 1/2 hours.

**Cooper v M.P.C.**<sup>40</sup> The court must apply the following criteria Was there an obstruction ? This depends on all the circumstances including duration, reasonable use of highway, the location, the purpose of the obstruction, was it an actual obstruction ? If a prima facie case is established then, was D exercising his ordinary right of passing and repassing ? Secretary of Committee 100 of the Campaign for Nuclear Disarmament led a crowd through London streets during a visit of King & Queen of Greece. The jury was only instructed regarding the existence of an obstruction and not on the issue of whether use was reasonable, so the conviction was quashed.

**Hirst v Chief Constable of West Yorkshire**.<sup>41</sup> a spacious but busy pedestrian precinct was used by animal rights protestors regarding a shop in the precinct which sold furs. They held a banner and offered leaflets : Not incidental to use of highway : Considers hunt saboteurs - hunting itself - the assembly - conviction quashed : Glidewell LJ

- 1) Was there an obstruction ? Unless de minimis - prima facie obstruction.
- 2) Was the obstruction wilful or deliberate ?
- 3) Was there lawful authority or excuse i.e. reasonable exercise of lawful activities ?

**Hubbard v Pitt**.<sup>42</sup> 6 people spent three hours outside an estate agent's office on a Saturday morning - they did not interfere with traffic - held a trivial obstruction for a short period of time - no offence.

**R v Moule**.<sup>43</sup> It is an offence to incite others to cause a public nuisance by obstructing the highway regarding leaders of a crowd at a sit in on the highway.

### CONTROL OF PUBLIC MEETINGS AND PROCESSIONS

**Public Order Act 1936** defined a public procession as a procession in a public place. Many of the general common law rules that apply to meetings are equally applicable to processions. They have in fact been described as meetings on the move. Liability can occur through breach of the peace, unlawful assembly, rout and riot (But now see the Public Order Act 1986 which has replaced some of the common law offences with statutory offences).

**Public Nuisance** : A public nuisance is caused if a use of the highway is not reasonable from the point of view of the public at large. Reasonableness depends on the circumstances of the case, duration of the activity and the actual place the activity occurs, the time of day and whether the inconvenience to the public is trivial or serious, casual or intentional, temporary (brief or longer). The nuisance can be caused by the procession itself or by the people attracted to it (peacefully or otherwise). Public nuisance is an offence but requires a decision to prosecute by the Attorney General.

#### The Tort of Public Nuisance.

**Definition** : A public nuisance committed in a public place may constitute a tort where an individual suffers harm over and beyond that of the public at large in respect of enjoyment of his land, blocked access being the most common.

<sup>38</sup> **Wolverton UDC v Willis** [1962] 1 All ER 243.

<sup>39</sup> **Homer v Cadman** (1886) 66 LJ MC 110

<sup>40</sup> **Cooper v M.P.C.** [1986] 82 Cr App R 238.

<sup>41</sup> **Hirst v Chief Constable of West Yorkshire** [1986]

<sup>42</sup> **Hubbard v Pitt** [1976] QB 142

<sup>43</sup> **R v Moule** [1964] Crim LR 303 and see also **R v Adler** p304

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**Lowdens v Heaveney**.<sup>44</sup> Northern Ireland. A band of marchers marched through Belfast playing tunes. A crowd gathered. It was decided on the facts that the band were not responsible for obstruction.

**Beatty v Glenister**.<sup>45</sup> Salvation Army and the Skeleton Army. A member of the Salvation Army marched down the street playing a cornet. A hostile crowd gathered and people in the neighbourhood were disturbed by the crowd. An action was brought for behaviour likely to cause a breach of the peace. The action failed. It has been claimed that if an action had been brought for public nuisance it could have been successful.

**Beatty v Gillbanks**.<sup>46</sup> Beatty held a meeting and procession despite a notice from the magistrate instructing him to desist and instructions from the police to desist. In the holding of a meeting and procession Beatty knew that a rival organisation to the Salvation Army of which he was a member would oppose the meeting and that as a result of intervention by the Skeleton Army a disturbance would be likely to occur. The Divisional Court in examining Beatty's behaviour held that it was essentially legal regardless of the consequences and so he would not be guilty of a crime of unlawful assembly. Since the Magistrate's order was unlawful the organisers were entitled to ignore it.

The police can and should respond to situations where they believe that there is a threat to public order. However, the view of the police as to the existence of such a threat is apparently not challengeable.

**R v Chief Constable of Devon & Cornwall ex pte CEGB**.<sup>47</sup> Mandamus will not issue to force the police to instruct officers to remove demonstrators where the Chief Constable does not apprehend a breach of the peace. Denning clearly thought a breach was likely and hoped the Chief Constable would reconsider. Lack of reasonable grounds under *Wednesbury* did not appear to be a basis for the court to force the issue. An honest opinion was all that was required according to Lawton J - presumably if the Chief's opinion was not honestly reached the court could have acted. Templeman LJ stated that '*The court cannot tell the police how and when their powers should be exercised*' but if this is true what is the point of the judicial remedy of mandamus?<sup>48</sup>

**Humphries v Connor**<sup>49</sup> P was wearing an orange lily in public. The Policeman on seeing this removed it from P's clothing. P alleged this amounted to an assault. The court held that the policeman had acted to prevent a disorder.

**O'Kelly v Harvey**.<sup>50</sup> A magistrate dispersed a lawful meeting. He was entitled to do this in order to preserve the peace. He had suggested that a group of Orangemen would use violence against the meeting. Compare with **Beatty v Gillbanks**.

**Wise v Dunning**<sup>51</sup> A protestant crusader was of the habit of addressing meetings in a Catholic area of Liverpool. A public disturbance occurred. The court held that his conduct was such that he should be bound over to keep the peace.

**Feldman in Civil Liberties and Human Rights** discusses the issue of breach of the peace as a question of fact which has nothing to do with fault. What is the role of the police, to protect the peace or to protect those carrying out lawful activities? This is where the distinction between rights and liberties becomes important since there is no legal right to the protection of liberties.

<sup>44</sup> **Lowdens v Heaveney** [1903]

<sup>45</sup> **Beatty v Glenister** [1884]

<sup>46</sup> **Beatty v Gillbanks** [1882] This is now covered by the P.O.A. 1986. Compare with **Duncan v Jones**.

<sup>47</sup> **R v Chief Constable of Devon & Cornwall ex pte CEGB** [1982] 1 QB 458.

<sup>48</sup> **Part V. Criminal Justice and Public Order Act 1994** now gives the police powers and duties in respect of trespass on private land.

<sup>49</sup> **Humphries v Connor** [1864]

<sup>50</sup> **O'Kelly v Harvey** [1883] :

<sup>51</sup> **Wise v Dunning** [1902] :

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### Breach of the peace and power of arrest.

**R v Howell.**<sup>52</sup> Howell and others held a noisy street party. Neighbours arrived. P.C. asked them to disperse. Howell was abusive. He was warned that he would be arrested if he continued. He swore at a P.C. who went to arrest him. He struck the P.C. and was convicted of assault occasioning actual bodily harm. Appealed. Was there an arrest in anticipation of breach of the peace & what is a breach? The court held that an arrest is lawful if general shouting and swearing is likely to lead to the use of violence by a defendant or others in the P.C.'s presence.

**Albert v Lavin.**<sup>53</sup> off duty PC intervened to prevent breach of the peace when D tried to jump a queue and board a bus : held - everyone has the duty to prevent breach of the peace - this includes power of arrest and measures less than arrest such as the power to detain without arrest. Only statutory powers of arrest have been replaced by statute - so the common law power of arrest continues to apply.

Shouting and swearing is an offence under **s28 Town Police Causes Act 1847** : Under **s25 P.A.C.E.** plus general conditions it is arrestable (though to arrest under **s5 POA 1986** harassment alarm & distress and an ignored warning are required for arrest).

### The prevention and dispersal of meetings.

The executive have no power to prohibit a specific meeting in advance unless it is on government property and then they still have to prevent it. The police have a duty to preserve peace and may act to prevent a meeting starting or may order it to cease and the people disperse either to preserve or to restore order. The powers of the police are now contained in the **Public Order Act 1986** though other powers such as those under the **Highways Act 1980** also apply.

### Racial Hatred and public meetings.

**s70 Race Relations Act 1976** It is an offence for a person to publish or distribute written matter which is threatening or abusive or insulting or to use in any public place words which are threatening abusive or insulting where (in either case) in all the circumstances hatred **IS LIKELY TO BE STIRRED UP** against any racial group in Great Britain.

### Public Order Act 1986

#### s1 Riot.

- 1) where 12 or more persons who are present together use or threaten unlawful violence for a common purpose & the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety each of the persons using unlawful violence for the common purpose is guilty of riot.
- 2) the use or threat does not have to be simultaneous by all 12.
- 3) common purpose may be inferred from conduct.
- 4) person of reasonableness is hypothetical : no one need be present.
- 5) may be committed in public or private places.
- 6) sentence : up to 10 yrs. arrestable offence under s24 P.A.C.E. 1984.

#### s2 Violent disorder. (by s9(1) common law unlawful assembly abolished)

- 1). 3 or more persons : present together : use or threaten unlawful violence : and their conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder.
- 2) 1 person so acting is sufficient.
- 3) no person of reasonable firmness need be present or be likely to be present.
- 4) may be committed in public or in private.
- 5) sentence : 5 years or a fine or both on indictment : 6 months summary.

#### s3 Affray (s9(1) abolishes the common law affray)

- 1) a person is guilty of affray if he uses or threatens unlawful violence towards another & his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

<sup>52</sup> **R v Howell.** [1982] QB 416

<sup>53</sup> **Albert v Lavin** [1982] AC 546 -

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- 2) if 2 or more so act - combined effect must be considered.
- 3) words alone do not constitute a threat.
- 4) no person of firmness need be present.
- 5) can be committed in public or in private.
- 6) constable may arrest those he reasonably suspects is committing affray. (To be repealed January 2006)
- 7) 3 years or fine or both on indictment : 6 months summary.

### **s4 Fear or provocation of violence.** (new offence to replace s5 P.O.A. 1936.)

- 1) a person is guilty of an offence if he
  - a) uses towards another threatening abusive or insulting words or behaviour or
  - b) distributes or displays to another any writing sign or other visible representation which is threatening abusive or insulting,  
with intent to cause that person to believe that immediate unlawful violence will be used against him or another, by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.
- 2) may be committed in public or from a private place to a public place.
- 3) constable may arrest on reasonable suspicion. (To be repealed January 2006)
- 4) summary conviction : 6 months.

### **s4A Intentional harassment, alarm or distress.**

- 1) a person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he
  - a) uses threatening abusive or insulting words or behaviour or disorderly behaviour or
  - b) displays any writing sign or other visible representation which is threatening abusive or insulting  
thereby causing that person harassment alarm or distress.
- 2) may be committed in public or a private place. No offence if committed inside a private dwelling and victim was also inside.
- 3) defences
  - a) perpetrator inside and no reason to believe outsiders would be affected or
  - b) his conduct was reasonable.
- 4) arrestable, by constable on reasonable suspicion (To be repealed January 2006)
- 5) penalty - summary conviction 6 months or up to a level 5 fine.

### **s5 Harassment alarm or distress.**

- 1) a person commits an offence if he
  - a) uses threatening abusive or insulting words or behaviour or disorderly behaviour or
  - b) displays any writing sign or other visible representation which is threatening abusive or insulting  
within the hearing or sight of a person likely to be caused harassment alarm or distress thereby.
- 2) may be committed in public or from a private place to a public place.
- 3) defences
  - a) no reason to believe anyone within hearing or sight likely to be harassed alarmed or distressed or
  - b) a person indoors having no reason to believe those outside affected. c) his conduct was reasonable.
- 4) P.C. may arrest without warrant if
  - a) D commits offensive conduct & is warned to stop &
  - b) D continues immediately or shortly after the warning.
- 5) offensive conduct = conduct P.C. reasonably suspects constitutes an offence.
- 6) fine : summary : level 3.

## Constitutional and Administrative Law

**D.P.P. v Orum.**<sup>54</sup> Being abusive to a P.C. may amount to harassment justifying arrest. The defendant foolishly thought that a P.C. could not intervene in a domestic dispute in the street and told a P.C. to 'F-Off'. When the P.C. went to arrest him after first giving him a warning the defendant hit the P.C. : The court held that there had been a valid arrest and offence contrary to **s51(1) P.A. 1964.**

### **s6 Mental element**

- 1) Riot : intention to use violence or awareness that conduct may be violent required.
- 2) Violent disorder or affray : intention to use or threaten violence or awareness that conduct may be violent or threaten violence required.
- 3) s4 - fear or provocation of violence : must intend his words or behaviour or the writing sign etc to be threatening abusive or insulting or awareness etc.
- 4) s5 Harassment alarm or distress : intention that words etc be threatening abusive or insulting or awareness etc required.
- 5) self induced intoxication equals awareness.
- 6) intoxication means drink or drugs or both.
- 7) Riot & incitement to riot. Requires D.D.P. to institute prosecution.

**Jordan v Burgoyne.**<sup>55</sup> National Socialist Rally in Trafalgar Square - crowd contained CND communist and jewish people. Speaker suggested Hitler had the right solution. A conviction under s5 POA 1936 was upheld. How would this fare under **s4 POA 1986 ?**

### **Part II : Processions and Assemblies.**

Green Paper : The freedom to demonstrate peacefully under the law is in a democracy essential to the health of the community as a whole.

#### **s11 Advance notice of public processions. 6 days.**

- 1) Required in respect of
  - a) processions that support or oppose views or actions of persons & bodies or
  - b) publicise causes or
  - c) commemorate events, UNLESS advance notice is impracticable.
- 2) Not applicable to regular events in a local area or in respect of funerals.

#### **s12 Imposing conditions on public processions : Failure uniformed P.C. can arrest.**

If senior Police Officer, having regard to time or place & circumstances of procession & its proposed route reasonably believes a) it may cause serious public disorder, damage to property or disrupt community or b) purpose is to intimidate, he may redirect it. Replaces **s3(1) P.O.A. 1936.** Arrestable for failure to comply while offence continues.

#### **s13 Prohibiting public processions.**

If a CHIEF OFFICER reasonably believes because of circumstances existing in a district that s12 is insufficient he can apply to the council to prohibit all processions for up to 3 months. - replaces **s3(2)(3) P.O.A. 1936.**

#### **s14 Imposing conditions on public assemblies.**

Senior P.C. : Most important P.C. at the scene. Must be in writing : Same beliefs as in s12 above : Failure to comply an offence : defence if beyond a person's control : P.C. in uniform may arrest.

#### **s14A Prohibiting trespassory assemblies**

Chief of Police may apply to local council for an order to prohibit an assembly on land to which the public have no right of access or limited rights of access - including highways if the owner of the land is unlikely to consent to access and access may result in serious disruption to the life of the community or damage to land, buildings or archeology of the site, for a specified period of time. Stonehenge - protest rallies etc are affected.

#### **s14B Offences re trespassory assemblies and arrest therefor**

Organisers of such assemblies, participators and incitors with knowledge of the prohibition commits an arrestable offence, without warrant on reasonable suspicion.

<sup>54</sup> **D.P.P. v Orum** [1988] 3 AER 449

<sup>55</sup> **Jordan v Burgoyne** [1963] 2 QB 744

## Constitutional and Administrative Law

### s14C Stopping persons from proceeding to trespassory assemblies

Persons suspected of heading to a trespassory assembly can be ordered to stop. 5 mile radius. Offence to fail to comply with order. Arrestable without warrant on reasonable suspicion.

### s15) Delegation. To less senior officers - deputy or assistant chief constable.

### s16 Interpretation.

*Public assembly* = 20 persons in the open air. public place :

*Highway* : any place to which at the material time the public or any section of public has access - on paying or otherwise, as of right, express or implied permission.

**Public procession** = a procession in a public place.

### Racial Hatred : s17 Racial Hatred (Old s5(A) P.O.A. 1936.)

Racial hatred : Hatred against a group of persons in G.B. defined by reference to colour, race, nationality, citizenship, ethnic or national origins.<sup>56</sup>

### s18 Use of words or behaviour or display of written material.

- 1) Person who uses threatening abusive or insulting words or behaviour or displays any written material which is threatening abusive or insulting commits an offence if
  - a) he intends to thereby stir up racial hatred or
  - b) having regard to all the circumstances racial hatred is likely to be stirred up.
- 2) In public or private - if it can affect those outside.
- 3) P.C. may arrest without warrant - reasonable suspicion.,
- 4) Defence if inside & no reason to believe it could get out.
- 5) No offence if D did not intend and was not aware of likely effect.

### s19 Publishing or distributing written material

- 1). OFFENCE IF
  - a) intention to stir up racial hatred.
  - b) it is likely having regard to all the circumstances.
- 2) defence : no intention and a lack of awareness.

### s23 Possession of racially inflammatory material.

Possession with intention to broadcast with intent to stir up racial hatred.

### s24 Powers of entry & search.

Warrant by J.P. : P.C. can use reasonable force

### s25 Power to order forfeiture.

Once someone has been convicted forfeiture may be ordered.

### s39 Power to direct trespassers to leave land.

Offence by 2 or more persons.

### Criminal Justice & Public Order Act 1994

**Part V** of the Act deals in **s61 to s80** with Public Order : Collective Trespass or Nuisance on land. The Act provides the police with powers of arrest in a wide number of situations involving protest and demonstration on private land and would effect anti motorway demonstrations etc.

- s61 Power to remove trespassers on land. 2 or more persons - damage to property or abuse or possessing 6 or more vehicles can give directions to leave.
- s62 Supplementary powers of seizure - of vehicles
- s63 Powers to remove persons attending or preparing for a rave. 100 or more persons - amplified music at night causing disturbance.
- s64 Supplementary powers of entry and seizure of vehicles and sound equipment. s65 Raves: power to stop persons from proceeding - if within 5 miles of a rave. s66 Power of court to forfeit sound equipment.
- s67 Retention and charges for seized property.

<sup>56</sup> see **s3 Race Relations Act 1976** : and see **Mandala v Lee** [1985]. includes gipsies.

## Constitutional and Administrative Law

### s68 Offences of aggravated trespass (Aimed at protesters).

- 1) A person commits the offence of aggravated trespass if he trespasses on land in the open air and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land in the open air, does there anything which is intended by him to have the effect -
  - a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
  - b) of obstructing that activity, or
  - c) of disrupting that activity.
- 2) The activity is lawful if the person is not committing an offence or trespassing.
- 3) summary conviction - 3 months or level 4 fine.
- 4) Constable can arrest on reasonable suspicion without warrant
- 5) Public Highways are excluded from the definition of land (ie once completed).

### s69 Power to remove persons committing or participating in aggravated trespass.

A person believed to have committed, to be committing or intending to commit aggravated trespass or 2 or more persons present with a common purpose to commit the same. May be directed to leave. Arrestable offence not to leave.

### s70 Trespassory assemblies. See s14 A & B P.O.A. 1986

### s71 Trespassory assemblies: power to stop persons from proceeding. s14C P.O.A. 1986

s72 Violent entry to premises.

s77 Power of local authority to direct unauthorised campers to leave land.

Local Authority has powers to require mobile home owners to vacate the highway and occupied and unoccupied land. It is an offence not to obey.

s78 Power to remove mobile homes.

## Anti-social Behaviour Act 2003 PUBLIC ORDER AND TRESPASS

### 57 Public assemblies

In section 16 of the Public Order Act 1986 (c. 64) (which defines "public assembly" for the purposes of the power in section 14 of that Act to impose conditions on public assemblies), in the definition of "public assembly" for "20" substitute "2".

### 58 Raves

58(1) Section 63 of the Criminal Justice and Public Order Act 1994 (c. 33) (powers in relation to raves) is amended as follows.

58(2) In subsection (1) for "100" substitute "20".

58(3) After subsection (1) insert-

"(1A) This section also applies to a gathering if-

- (a) it is a gathering on land of 20 or more persons who are trespassing on the land; and
- (b) it would be a gathering of a kind mentioned in subsection (1) above if it took place on land in the open air."

58(4) In subsection (2) omit "in the open air".

58(5) In subsection (7) for "this section" substitute "subsection (6) above".

58(6) After subsection (7) insert-

"(7A) A person commits an offence if-

- (a) he knows that a direction under subsection (2) above has been given which applies to him, and
- (b) he makes preparations for or attends a gathering to which this section applies within the period of 24 hours starting when the direction was given.

(7B) A person guilty of an offence under subsection (7A) above is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both."

## Constitutional and Administrative Law

### 59 Aggravated trespass

59(1) The Criminal Justice and Public Order Act 1994 is amended as follows.

59(2) In section 68 (offence of aggravated trespass), in subsection (1) (which defines the offence by reference to trespass on land in the open air and lawful activity on land in the open air) omit "in the open air" in both places where those words appear.

59(3) In section 69 (powers to remove persons committing or participating in aggravated trespass), in subsection (1) (which confers the power by reference to trespass on land in the open air) omit "in the open air" in both places where those words appear.

### 60 Power to remove trespassers: alternative site available

After section 62 of the Criminal Justice and Public Order Act 1994 (c. 33) insert-

#### "62A Power to remove trespassers: alternative site available

62A(1) If the senior police officer present at a scene reasonably believes that the conditions in subsection (2) are satisfied in relation to a person and land, he may direct the person-

- (a) to leave the land;
- (b) to remove any vehicle and other property he has with him on the land.

62A(2) The conditions are-

- (a) that the person and one or more others ("the trespassers") are trespassing on the land;
- (b) that the trespassers have between them at least one vehicle on the land;
- (c) that the trespassers are present on the land with the common purpose of residing there for any period;
- (d) if it appears to the officer that the person has one or more caravans in his possession or under his control on the land, that there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans;
- (e) that the occupier of the land or a person acting on his behalf has asked the police to remove the trespassers from the land.

62A(3) A direction under subsection (1) may be communicated to the person to whom it applies by any constable at the scene.

62A(4) Subsection (5) applies if-

- (a) a police officer proposes to give a direction under subsection (1) in relation to a person and land, and
- (b) it appears to him that the person has one or more caravans in his possession or under his control on the land.

62A(5) The officer must consult every local authority within whose area the land is situated as to whether there is a suitable pitch for the caravan or each of the caravans on a relevant caravan site which is situated in the local authority's area.

62A(6) In this section-

"**caravan**" and "**caravan site**" have the same meanings as in Part 1 of the Caravan Sites and Control of Development Act 1960;

"**relevant caravan site**" means a caravan site which is-

- (a) situated in the area of a local authority within whose area the land is situated, and
- (b) managed by a relevant site manager;

"**relevant site manager**" means-

- (a) a local authority within whose area the land is situated;
- (b) a registered social landlord;

"**registered social landlord**" means a body registered as a social landlord under Chapter 1 of Part 1 of the Housing Act 1996.

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62A(7) The Secretary of State may by order amend the definition of "relevant site manager" in subsection (6) by adding a person or description of person.

62A(8) An order under subsection (7) must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament."

### **61 Failure to comply with direction: offences**

After section 62A of the Criminal Justice and Public Order Act 1994 (c. 33) (inserted by section 60) insert-

#### **"62B Failure to comply with direction under section 62A: offences**

- (1) A person commits an offence if he knows that a direction under section 62A(1) has been given which applies to him and-
  - (a) he fails to leave the relevant land as soon as reasonably practicable, or
  - (b) he enters any land in the area of the relevant local authority as a trespasser before the end of the relevant period with the intention of residing there.
- (2) The relevant period is the period of 3 months starting with the day on which the direction is given.
- (3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.
- (4) A constable in uniform who reasonably suspects that a person is committing an offence under this section may arrest him without a warrant.
- (5) In proceedings for an offence under this section it is a defence for the accused to show-
  - (a) that he was not trespassing on the land in respect of which he is alleged to have committed the offence, or
  - (b) that he had a reasonable excuse-
    - (i) for failing to leave the relevant land as soon as reasonably practicable, or
    - (ii) for entering land in the area of the relevant local authority as a trespasser with the intention of residing there, or
  - (c) that, at the time the direction was given, he was under the age of 18 years and was residing with his parent or guardian."

### **62 Failure to comply with direction: seizure**

62(1) After section 62B of the Criminal Justice and Public Order Act 1994 (inserted by section 61) insert-

#### **"62C Failure to comply with direction under section 62A: seizure**

- (1) This section applies if a direction has been given under section 62A(1) and a constable reasonably suspects that a person to whom the direction applies has, without reasonable excuse-
  - (a) failed to remove any vehicle on the relevant land which appears to the constable to belong to him or to be in his possession or under his control; or
  - (b) entered any land in the area of the relevant local authority as a trespasser with a vehicle before the end of the relevant period with the intention of residing there.
- (2) The relevant period is the period of 3 months starting with the day on which the direction is given.
- (3) The constable may seize and remove the vehicle."

62(2) In section 67(1) (retention and charges for seized vehicles) after "section 62(1)" insert ", 62C(3)".

### **63 Common land: modifications**

After section 62C of the Criminal Justice and Public Order Act 1994 (c. 33) (inserted by section 62) insert-

#### **"62D Common land: modifications**

- (1) In their application to common land sections 62A to 62C have effect with these modifications.
- (2) References to trespassing and trespassers have effect as if they were references to acts, and persons doing acts, which constitute-
  - (a) a trespass as against the occupier, or
  - (b) an infringement of the commoners' rights.

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- (3) References to the occupier-
  - (a) in the case of land to which the public has access, include the local authority and any commoner;
  - (b) in any other case, include the commoners or any of them.
- (4) Subsection (1) does not-
  - (a) require action by more than one occupier, or
  - (b) constitute persons trespassers as against any commoner or the local authority if they are permitted to be there by the other occupier.
- (5) In this section "common land", "commoner" and "the local authority" have the meanings given by section 61."

### 64 Interpretation

After section 62D of the Criminal Justice and Public Order Act 1994 (inserted by section 63) insert-

#### "62E Sections 62A to 62D: interpretation

- (1) Subsections (2) to (8) apply for the interpretation of sections 62A to 62D and this section.
- (2) "Land" does not include buildings other than-
  - (a) agricultural buildings within the meaning of paragraphs 3 to 8 of Schedule 5 to the Local Government Finance Act 1988, or
  - (b) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979.
- (3) "Local authority" means-
  - (a) in Greater London, a London borough or the Common Council of the City of London;
  - (b) in England outside Greater London, a county council, a district council or the Council of the Isles of Scilly;
  - (c) in Wales, a county council or a county borough council.
- (4) "Occupier", "trespass", "trespassing" and "trespasser" have the meanings given by section 61 in relation to England and Wales.
- (5) "The relevant land" means the land in respect of which a direction under section 62A(1) is given.
- (6) "The relevant local authority" means-
  - (a) if the relevant land is situated in the area of more than one local authority (but is not in the Isles of Scilly), the district council or county borough council within whose area the relevant land is situated;
  - (b) if the relevant land is situated in the Isles of Scilly, the Council of the Isles of Scilly;
  - (c) in any other case, the local authority within whose area the relevant land is situated.
- (7) "Vehicle" has the meaning given by section 61.
- (8) A person may be regarded as having a purpose of residing in a place even if he has a home elsewhere."

### Crime and Disorder Act 1998

#### *Racially-aggravated offences: England and Wales*

#### Meaning of "racially aggravated".

- 28(1) An offence is racially aggravated for the purposes of sections 29 to 32 below if-
  - (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group; or
  - (b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.
- 28(2) In subsection (1)(a) above-

"membership", in relation to a racial group, includes association with members of that group;

"presumed" means presumed by the offender.

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- 28(3) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender's hostility is also based, to any extent, on-
- (a) the fact or presumption that any person or group of persons belongs to any religious group; or
  - (b) any other factor not mentioned in that paragraph.

- 28(4) In this section "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

### **Racially-aggravated assaults.**

- 29(1) A person is guilty of an offence under this section if he commits-
- (a) an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm);
  - (b) an offence under section 47 of that Act (actual bodily harm); or
  - (c) common assault,
- which is racially aggravated for the purposes of this section.

- 29(2) A person guilty of an offence falling within subsection (1)(a) or (b) above shall be liable-
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.

- 29(3) A person guilty of an offence falling within subsection (1)(c) above shall be liable-
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

### **Racially-aggravated criminal damage.**

- 30(1) A person is guilty of an offence under this section if he commits an offence under section 1(1) of the Criminal Damage Act 1971 (destroying or damaging property belonging to another) which is racially aggravated for the purposes of this section.

- 30(2) A person guilty of an offence under this section shall be liable-
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine, or to both.

- 30(3) For the purposes of this section, section 28(1)(a) above shall have effect as if the person to whom the property belongs or is treated as belonging for the purposes of that Act were the victim of the offence.

### **Racially-aggravated public order offences.**

- 31(1) A person is guilty of an offence under this section if he commits-
- (a) an offence under section 4 of the Public Order Act 1986 (fear or provocation of violence);
  - (b) an offence under section 4A of that Act (intentional harassment, alarm or distress); or
  - (c) an offence under section 5 of that Act (harassment, alarm or distress),
- which is racially aggravated for the purposes of this section.

- 31(2) A constable may arrest without warrant anyone whom he reasonably suspects to be committing an offence falling within subsection (1)(a) or (b) above.

- 31(3) A constable may arrest a person without warrant if-
- (a) he engages in conduct which a constable reasonably suspects to constitute an offence falling within subsection (1)(c) above;
  - (b) he is warned by that constable to stop; and
  - (c) he engages in further such conduct immediately or shortly after the warning.

The conduct mentioned in paragraph (a) above and the further conduct need not be of the same nature.

## Constitutional and Administrative Law

- 31(4) A person guilty of an offence falling within subsection (1)(a) or (b) above shall be liable-
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.
- 31(5) A person guilty of an offence falling within subsection (1)(c) above shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.
- 31(6) If, on the trial on indictment of a person charged with an offence falling within subsection (1)(a) or (b) above, the jury find him not guilty of the offence charged, they may find him guilty of the basic offence mentioned in that provision.
- 31(7) For the purposes of subsection (1)(c) above, section 28(1)(a) above shall have effect as if the person likely to be caused harassment, alarm or distress were the victim of the offence.

### **Racially-aggravated harassment etc.**

- 32(1) A person is guilty of an offence under this section if he commits-
- (a) an offence under section 2 of the Protection from Harassment Act 1997 (offence of harassment); or
  - (b) an offence under section 4 of that Act (putting people in fear of violence), which is racially aggravated for the purposes of this section.
- 32(2) In section 24(2) of the 1984 Act (arrestable offences), after paragraph (o) there shall be inserted-
- "(p) an offence falling within section 32(1)(a) of the Crime and Disorder Act 1998 (racially-aggravated harassment);".
- 32(3) A person guilty of an offence falling within subsection (1)(a) above shall be liable-
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.
- (4) A person guilty of an offence falling within subsection (1)(b) above shall be liable-
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.
- (5) If, on the trial on indictment of a person charged with an offence falling within subsection (1)(a) above, the jury find him not guilty of the offence charged, they may find him guilty of the basic offence mentioned in that provision.
- (7) If, on the trial on indictment of a person charged with an offence falling within subsection (1)(b) above, the jury find him not guilty of the offence charged, they may find him guilty of an offence falling within subsection (1)(a) above.
- (7) Section 5 of the Protection from Harassment Act 1997 (restraining orders) shall have effect in relation to a person convicted of an offence under this section as if the reference in subsection (1) of that section to an offence under section 2 or 4 included a reference to an offence under this section.

# Constitutional and Administrative Law

## Serious Organised Crime and Police Act 2005

### SCHEDULE 7

#### Section 111

#### POWERS OF ARREST: SUPPLEMENTARY

#### PART 1

#### SPECIFIC REPEALS

*Public Order Act 1986 (c. 64)*

26(1) The Public Order Act 1986 is amended as follows.

26(2) In section 3 (affray), omit subsection (6).

26(3) In section 4 (fear or provocation of violence), omit subsection (3).

26(4) In section 4A (intentional harassment, alarm or distress), omit subsection (4).

26(5) In section 5 (harassment, alarm or distress), omit subsections (4) and (5).

26(6) In section 12 (imposing conditions on public processions), omit subsection (7).

26(7) In section 13 (prohibiting public processions), omit subsection (10).

26(8) In section 14 (imposing conditions on public assemblies), omit subsection (7).

26(9) In section 14B (offences in connection with trespassory assemblies), omit subsection (4).

26(10) In section 14C (stopping persons from proceeding to trespassory assemblies), omit subsection (4).

26(11) In section 18 (use of words or behaviour or display of written material), omit subsection (3).

# Constitutional and Administrative Law

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