



Disagreeing Disagreeably: Freedom of speech and public authorities

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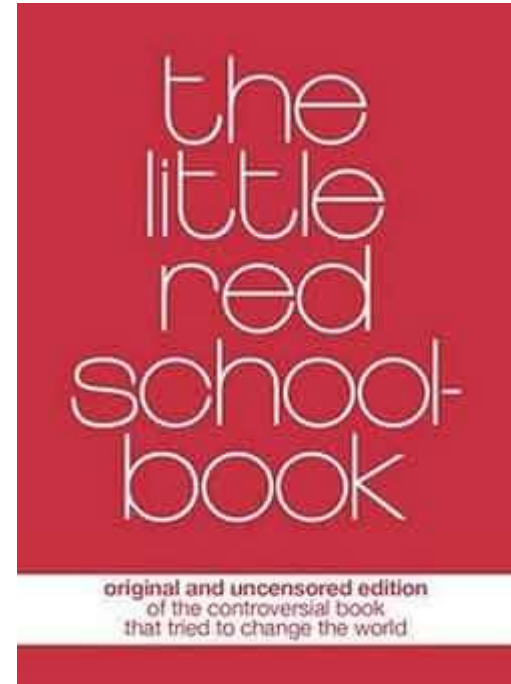


The ECHR – Basic Principles

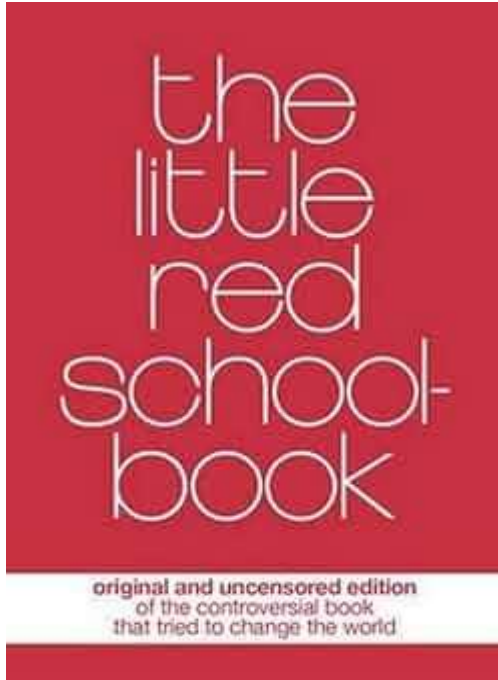


Handyside v United Kingdom (1976)

- Aimed at over-12s.
- C, publishing house owner, prepared and distributed inspection copies pending wider distribution in the UK
- Newspapers published contents
- Met Police seized copies
- C convicted of possession for publication for gain under Obscene Publications Acts; book liable to “deprave and corrupt”.



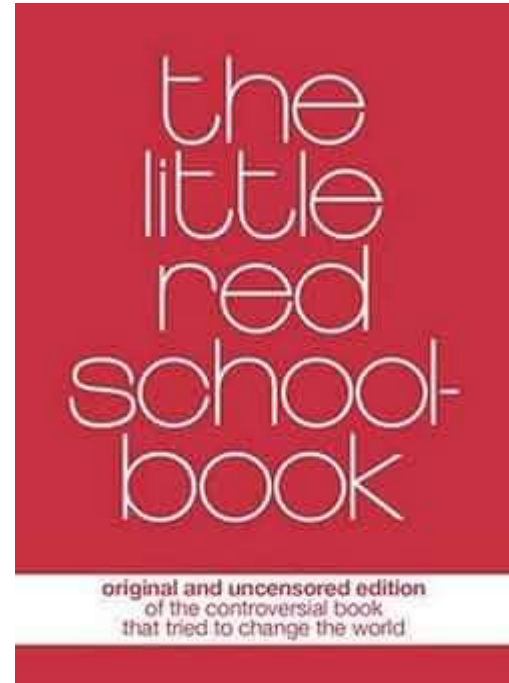
Handyside v United Kingdom (1976)



- A alleges breach of Art 10 by the UK.
- Freedom of expression an essential foundation of democratic society, “one of the basic conditions for its progress”
- Applies even to information/ideas that “offend, shock or disturb the State or any sector of the population”
- Such are the demands of “pluralism, tolerance and broadmindedness without which there is no democratic society” (para 50)

Handyside v United Kingdom (1976)

- But ultimately no breach.
- Interference had a legitimate aim of protecting morals
- Necessity principally a Qn for national authorities
- Having regard to margin of appreciation and circumstances, interference wasn't disproportionate
- But what about public-interest speech?



Jersild v Denmark (1994)

- C worked for Danmarks Radio
- Broadcasts “Greenjackets” TV documentary
- Interviewees convicted for making racist/derogatory remarks
- C also convicted, of aiding/abetting
- C claims breach of Art 10 ECHR



Jersild v Denmark (1994)



- Grand Chamber – finds Art 10 breach
- FOE one of the “essential foundations of a democratic society”
- Incumbent on the press to impart information and ideas of public interest
- Public has a right to receive those ideas
- Otherwise, press can’t play its vital role as public watchdog

Jersild v Denmark (1994)

- The piece was journalism; not there to propagate racist views/ideas
- Sought to expose, analyse, explain the youths, on a matter already of great public concern
- Greenjackets' views offensive but didn't justify convicting C for airing them
- Legitimate aim (protection of rights/freedoms of others) but disproportionate interference



Haldimann v Switzerland (2015)

- Cs, journalists, interested in malpractice in the insurance market
- They covertly interview an insurance broker during negotiations
- They air the footage but disguise the broker's identity
- Cs are convicted/fined in connection with covert recording



Haldimann v Switzerland (2015)



- Cs allege breach of Art 10 ECHR
- ECtHR outlines importance of FOE (for democracy's progress and for individual self-fulfilment); cites *Handyside & Jersild*
- But serious attacks on personal reputation also protected by Art 8 ECHR
- Margin of appreciation applies
- But public interest matters important

Haldimann v Switzerland (2015)

- Interference with reputation wasn't so serious as to override the public interest in receiving this information
- Report wasn't focussed on the broker himself; he wasn't identifiable
- On balance, breach of Art 10
- Judge Lemmens dissents – considerable weight to protecting private conversations; margin of appreciation; no breach





Political speech



*“Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. **Freedom only to speak inoffensively is not worth having.**”*

Sedley LJ, *Redmond Bate v DPP* [2000] HRLR 249



A right to offend?



The image shows a screenshot of a Facebook post and a comment. The post is from a user with a profile picture of a woman, dated 16 March 2023. The text of the post reads: "Uneducated responses like this from so called 'leaders' of the community are part of the reason why my brother has moved away. I dread to think how many family members u have angela that are scared to come out because of ur poor examples of living in a community 😞". Below the post is a comment from a user named Angela Kilmartin, with a generic profile picture. Her comment reads: "I don't want pride sex flags along my high street. I don't even want heterosexual flags along my high street. Sex is for the bedroom and private life not for displaying preferences in public." The comment has 13 reactions (likes, love, and wow) and was posted 19 hours ago. At the bottom of the screenshot, there are icons for Like, Comment, Send, and Share, along with a total of 62 reactions and 235 comments for the post.

16 March 2023 · 🌐

Uneducated responses like this from so called "leaders" of the community are part of the reason why my brother has moved away. I dread to think how many family members u have angela that are scared to come out because of ur poor examples of living in a community 😞

Angela Kilmartin

I don't want pride sex flags along my high street.
I don't even want heterosexual flags along my high street. Sex is for the bedroom and private life not for displaying preferences in public.

19 h Like Reply 13 👍 😍 ❤️

👍 🤔 😞 62 235 comments

👍 Like 🗨 Comment 📧 Send 🔄 Share

A right to offend?



Witham Town Council



16 March at 12:30 · 🌐

Witham Town Council has been made aware of comments that have been posted overnight by one of its elected Members. These views are not those of Witham Town Council as a corporate body and as such, we disown them.

The Leader of the Council, Councillor Michael Lager, said: "I was disappointed to hear of this post as Witham Town Council have policies to promote equal and fair treatment for all that have been subscribed to by all its elected Members. We celebrate the diversity of Witham and recognise this within our own organisation in everything we do. We expect our Councillors and staff to do the same."

Codes of conduct and political speech

**Respect,
bullying,
disrepute, etc.**

**Enhanced
protection**

**Findings of
breach
exceptional**

Prohibited speech

**Personal
abuse**

Lies

**Dis-
information**

**Incitement
to violence**

**Racial
hatred**

**Statements
online**



Restricting freedom of expression

Article 10 – some other examples



“Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As enshrined in article 10 , freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly ...”

European Court of Human Rights (Grand Chamber),
Couderc v France [2016] EMLR 19 at [88]





Protest cases & limiting freedom of expression

Dulgheriu v Ealing London Borough Council [2019]

EWCA Civ 1490; [2020] 1 W.L.R. 609

- Using public spaces protection orders: s.59 of the Anti-social Behaviour, Crime and Policing Act 2014
- **Balancing** article 8 rights against the rights of protestors
- The question: whether the public spaces protection order made by the local authority was both a **necessary and proportionate** restriction of the protestors' rights in order to accommodate the rights under article 8 of women visiting the centre
- It is a question for the court by forming its own judgment on **justification**
- A public spaces protection order was necessary to strike a fair balance

Other examples – abortion cases

**Tossici-Bolt v
Bournemouth,
Christchurch
and Poole
Council**
[2023] EWHC 3229
(Admin)

**Abortion
Services (Safe
Access Zones:
Northern
Ireland) Bill**
[2022] UKSC 32
[2023] A.C. 505

**R. (on the
application of
Hacking) v
Stratford
Magistrates'
Court**
[2022] EWHC 2733
(Admin)

Other examples

**Valero Energy
Ltd v Persons
Unknown
[2024] EWHC 134
(KB)**

**Hicks v DPP
[2023] EWHC 1089
(KB)**

**Shell UK Ltd v
Persons Unknown
[2023] EWHC 1229
&
National Highways
Ltd v Persons
Unknown [2023]
EWHC 1073 (KB)**

Possession actions

- The London School of Economics was granted a possession order indefinitely barring encampments in one of its buildings after students slept in its atrium for more than a month in support of Palestine.
- A judge granted it an interim possession order on 14 June.
- 28 June 2024 - District Judge Morayo Fagborun-Bennett granted a possession order.

<https://www.theguardian.com/education/article/2024/jun/28/court-order-bans-encampments-in-lse-building-after-pro-palestine-protest#:~:text=The%20London%20School%20of%20Economics,month%20in%20support%20of%20Palestine.>



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Behaviour & limiting freedom of expression

Injunctions

- **Part 1, Anti-social Behaviour, Crime and Policing Act 2014**
 - *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB); [2020] 4 W.L.R. 168 and [2020] EWHC 864 (QB)
 - Technically another protester case but using injunctions under Part 1.
 - The freedom to speak offensively, though important, was not unqualified.
 - The legislation relied on permitted the local authority to seek, and empowered the court to grant, injunctions of the kind that were claimed.
- **Policing and Crime Act 2009 & gang injunctions**
 - Term sought: “[not to] publish, communicate, disclose, copy or video record any witness statements and/or exhibits provided in these proceedings, except for disclosure to his legal advisers.”
 - Allowed but subject to a second rider – with permission of the court
 - Also engaged when want to prevent drill videos and other types of social media



Questions?

