MULTILATERAL LEGAL RESEARCH GROUP

The European Law Students' Association
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Foreword

1. WHAT IS ELSA?

ELSA is a non-political, non-governmental, non-profit making, independent organisation which is run by and for students. ELSA has 44 Member and Observer countries with more than 375 Local Groups and 50,000 students. It was founded in 1981 by 5 law students from Poland, Austria, West Germany and Hungary. Since then, ELSA has aimed to unite students from all around Europe, provide a channel for the exchange of ideas and opportunities for law students and young lawyers to become internationally minded and professionally skilled. Our focus is to encourage individuals to act for the good of society in order to realise our vision: "A just world in which there is respect for human dignity and cultural diversity". You can find more information on http://www.elsa.org.

2. LEGAL RESEARCH GROUPS IN ELSA

A Legal Research Group (LRG) is a group of law students and young lawyers carrying out research on a specified topic of law with the aim to make their conclusions publicly accessible. Legal research was one of the main aims of ELSA during our early years. When ELSA was created as a platform for European cooperation between law students in the 1980s, sharing experience and knowledge was the main purpose of our organisation. In the 1990s, our predecessors made huge strides and built a strong association with a special focus on international exchange. In the 2000s, young students from Western to Eastern Europe were facing immense changes in their legal systems. Our members were part of such giant legal developments such as the EU expansion and the implementation of EU Law. To illustrate, the outcome of the ELSA PINIL (Project on International Criminal Court National Implementation Legislation) has been the largest international criminal law research in Europe. In fact, the final country reports have been used as a basis for establishing new legislation in many European countries.

The results of our more recent LRGs are available electronically. ELSA for Children (2012) was published on Council of Europe's web pages and resulted in a follow up LRG (2014) together with, among others, Missing Children Europe. In 2013, ELSA was involved in Council of Europe's 'No Hate Speech Movement'. The final report resulted in a concluding conference in Oslo that same year and has received a lot of interest from academics and activists in the field of discrimination and freedom of speech. The results of the LRG conference, a guideline, have even been translated into Japanese and were presented in the Council of Europe and UNESCO!

3. WHAT IS THE LEGAL RESEARCH GROUP ON THE RIGHT TO PROTEST?

The Legal Research Group on the right to protest is a cooperation between ELSA LSE, ELSA Iceland and ELSA Nanterre. The LRG serves as a significant step towards increasing knowledge about the right to protest and providing additional learning opportunities to law students everywhere.

The right to protest is one of the most important rights because the ability to demonstrate is one of the hallmarks of democracy. Demonstration of public opinion has led to some of the most important changes around the world. In the UK, the introduction of "poll tax" by the Thatcher government led to large scale protests across the UK. The national opposition to tax contributed to the diminishing popularity of the Conservative Government and led to the eventual establishment of Council Tax. In the United States, the March on Washington for Jobs and Freedom was a huge influence for the development and legislative initiative of civil and economic rights for African Americans in the 1960s. Thus, protesting has been a key method used to display public will. As a result, protection of the right to protest is vital in democratic countries.

Legally, all three jurisdictions involved in the project (Iceland, UK and France) are subscribed to the European Convention on Human Rights. Although the right to protest is not an explicit right in the Convention, a combination of Article 10 (the freedom to expression) and Article 11 (the freedom of assembly and association) have been interpreted by the courts to cover the right to protest. The academic framework of this Legal Research Group aimed to cover the most important aspects regarding the right to protest. The questions included discussions about constitutional protection, effective remedies, impact of the ECHR, state obligations in times of emergency, restrictions on the right to protest with reference to prevention of order or crime, positive obligations required by the state, digital protests, and freedom of speech and the right to protest in academic institutions. The Legal Research Group on the right to protest formally began last year in March. Each ELSA Group was tasked with recruiting researchers, supervisors and linguistic editors to assist with the project.

The project covers the legal framework of the right of protest under each jurisdiction and how these may be applied in different contexts. We are very grateful to Professor Björg Thorarensen for establishing the questions within the Academic Framework. In addition, we are very grateful for all researchers, national supervisors and linguistic editors for their time and effort dedicated to this Legal Research Group. After the research questions were answered and evaluated by the supervisors, each group's submission was sent to Professor Björg Thorarensen for her input. We regret that one of the answers is missing from ELSA Nanterre's report due to unavoidable circumstances.

Finally, the research report was collated and published in the present format.

We hope that this report will help students build their interest on the right to protest and human rights generally. Furthermore, we anticipate that this report will be a helpful resource in informing students across different ELSA Groups of the current protections of the right to protest in three different jurisdictions.

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1. How is the right to protest guaranteed in the constitutional framework of your country and how has it adapted in reaction to national social movements?

The Constitution of the Republic of Iceland No. 33/1944 does not state explicitly that people have the right to protest. That right is nevertheless guaranteed on the grounds of two separate provisions of the Constitution, Article 73 para 2, that guarantees the freedom of expression and Article 74, which ensures both the right to freedom of association and the right to peaceful assembly. Both of these rules are regarded as being fundamental for a democratic society to prosper.[1] The freedom of assembly and the freedom of expression are in many aspects intertwined. If a public protest is stopped or banned in an unlawful way it is not always clear whether the right to freedom of expression or the right to peaceful assembly has been violated, or both.[2]

The human rights provisions of the Constitution remained unchanged for over 120 years, as non-substantial changed were made to these provisions from the time the first Icelandic Constitution was issued by the King of Denmark in 1874[3] until 1995 when extensive revision took place on the human rights chapter by Constitutional Act No. 97/1995.[4] In 1994, the Icelandic parliament passed a resolution to review the human rights provisions of the Constitution and modernize them. Many of these provisions were seen as outdated both in wording and content and not consistent with a modernized society. In addition, there were no provisions on many fundamental rights that were guaranteed in international human rights treaties that Iceland had ratified. One of the main reasons for the amendments in 1995 was to modernize these provisions and make them coherent with the international commitments on human rights that Iceland had become a party to at that time, in particular the European Convention on Human Rights (here after "the Convention").[5] The Convention had been ratified by Iceland in 1953 but first incorporated in its entirety into domestic law in 1994 by Act 62/1994. The status of these laws and the hierarchy in comparison with the Constitution was however uncertain. The amendments were supposed to ensure that these rights were guaranteed on a constitutional level. Following these changes, the Constitution covered rights that had not been protected by it before and other provisions were modernized.[6]

Article 73 para 2 concerning the freedom of expression and Article 74 para 3 regarding the right to peaceful assembly both existed before the constitutional review took place in

[1] Gunnar G. Schram, *Stjórnskipunarréttur* (Háskólaútgáfan 1997) [Schram] 449.
[2] Schram, 601.
[3] Stjórnarskrá um hin sérstöku málefni Íslands
[4] Björg Thorarensen, *Stjórnskipunarréttur.Mannréttindi* (2 th edn, CODEX 2008) [Thorarensen] 27, 30-31; Schram, 589.
[5] Thorarensen, 32-33, Schram, 459-460.
[6] Thorarensen, 33-34.

1995.[7] The review resulted in considerable changes being made to these Articles, especially to Article 73.[8] One of the main reasons was to broaden its scope so that the wording of the provision would no longer be restricted to the right to express thought on print but would include all forms of expression and provide them the status of constitutional protection.[9] The changes were furthermore supposed to make the provision compatible with Iceland's international commitments, in particular Article 10 of the Convention.[10] Article 73 para 2 now simply states that everyone has the right to express their thoughts and does not specify what kind of expression is protected. As is evident from scholarly writings and judgments by the Supreme Court of Iceland the scope of the provision is interpreted in a broad sense so that it applies to all forms of expression.[11]

The Supreme Court of Iceland has since the constitutional amendments were made in 1995, on a few occasions dealt with the issue of the constitutional right to protest. In 1999 the Court addressed the question whether and in what way the right to gather for a peaceful protest was guaranteed in the Constitution. The case in question regarded damages claims made by eight individuals against the Icelandic government. They had been arrested in Austurvöllur, a traditional assembly forum in Reykjavík, when they were protesting while an episode of the television show "Good Morning America" was broadcasted directly in the United States. The protestors were yelling, chanting and carrying both signs and the national flags of the United States and Cuba, with the protest aimed at the American government. The Court found that these actions were expressions of thought and were therefore protected under Article 73 para 2. The Court then went on to state that the right to express one's thought through peaceful protest was inherent in Article 73 para 2 and Article 74 para 3 of the Constitution. Furthermore, the Court emphasized that the right to a peaceful protest was guaranteed with these provisions, and would not be limited unless the conditions put forth in Article 73 para 3 were fulfilled.[12] As the arrests were considered to lack clear legal basis they were deemed to be in violation of the protestors right to freedom of expression.

[7] Thorarensen, 34; In the first Constitution of the Republic of Iceland, from 1874, (Stjórnarskrá um hin sérstöku málefni Íslands), a limited freedom of expression was protected in Article 54: Every man has the right to express his thoughts on print, even so shall he be responsible for them before a court of law. Censorship and other limitations on the freedom to print can never be legalized. Article 56 stipulated the freedom for peaceful assembly: Men have the right to assemble without arms. The police has the authority to attend public gatherings. Public gatherings in the open may be banned, if feared that they will lead to disorderly conduct.

[8] Schram, 461.

[9] Thorarensen, 349.

[10] Thorarensen, 350; Eiríkur Jónsson and Halldóra Þorsteinsdóttir, *Fjölmiðlaréttur* (Fons Juris 2017) [Jónsson & Þorsteindóttir] 54.

[11] Schram, 572; Jónsson & Þorsteinsdóttir, 75; Hrd. 819/2014; Hrd. 65/1999.

[12] Article 72 paragraph 3 reads as follows: Freedom of expression may only be restricted by law in the interests of pulic order or the security of the State, for the protection of health or morals, or for the protection of the rights or reputation of others, if such restrictions are deemed necessary and in agreement with deocratic traditions.

The constitutional protection of the right to protest was further confirmed when the Supreme Court addressed a similar issue in 2014. The case regarded a protest by a group of people who were protesting what they saw as the irreversible damage to the environment caused by constructions taking place in Gálgahraun, an area in the neighborhood of Reykjavik. While the protest was peaceful, the presence of the protesters prevented the work from taking place, since they were situated on the construction site and did not obey orders to leave the premises. This concluded with the police forcefully removing them from the construction site, while this took place some protesters were arrested. Just as in the case from 1999 mentioned above, the Supreme Court found that the actions of the protesters were expressions of thought guaranteed in Article 73 para 2 of the Constitution. In addition to this the Court found that the general right to protest was guaranteed in Article 73 para 2 and Article 74 para 3. The Court nonetheless came to the conclusion that these limitations on the right to protest were justified in the case and that the conditions set forth in Article 73 para 3 were fulfilled.

It is clear from these cases that the Icelandic Constitution guarantees everyone's right to use their freedom of expression to gather in protest. It is furthermore equally clear that this right is not without limitations. Certain conditions need to be met in order for an obstruction on the right to protest to be lawful. An interference with the freedom of expression, protected under Article 73 will be justified only if the conditions specified in Article 73 para 3 are met, where it is stated that the freedom of expression may only be restricted by law in the interests of public order or the security of the State, for the protection of health or morals, or for the protection of the rights or reputation of others, if such restrictions are deemed necessary and in conformity with democratic traditions. In summary the restrictions need to be prescribed by law and in the interest of one of the aims specified in the Article. Furthermore, and most importantly the restrictions must be necessary in a democratic society, and in this respect special emphasis is laid on the requirement of the principle of proportionality All limitations need to meet all of these three conditions.[13] The same applies to the right to peaceful assembly guaranteed in Article 74 para 3.[14] Peaceful assembly may be restricted and public gatherings in the open may be banned if there is a threat of riots. In addition to this, similar conditions as the one's that pertain to the limitation on freedom of expression apply, according to Article 11 para 2 of the Convention. There it is stated that no restrictions shall be placed on the exercise of the right of peaceful assembly other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety. The Supreme Court of Iceland looks to these conditions in its decision making as they did in the cases mentioned above, this is in accordance with the fact that domestic laws in Iceland are interpreted in light of international commitments.

[13] Schram, 581.
[14] Schram, 601.

The constitutional guarantee regarding the right to protest has not been adapted explicitly as to apply to national social movements but rather due to international commitments. The Convention had considerable influence on the amendments and the official aim of the changes made in 1995 was in fact to make the provisions consistent with international commitments, in particular the Convention.[15] It is evident from the fact that these are the only amendments to these provisions of the Constitution that they were not made in relation to pressure from national social movements but rather for the purpose of fulfilling international commitments.

It is relevant to note here that from 2010 until 2013 there was a process in place regarding the rewriting of the Constitution. This came in the aftermath of the collapse of the Icelandic banks in 2008 and was an attempt to address the repercussions of the economic breakdown and the extensive distrust towards the political parties.[16] A large protest referred to as the "Pots and Pans Revolution" had taken place in 2008, which resulted in the government resigning.[17] The Icelandic parliament passed a law in 2000[18] establishing a consultative Constitutional Assembly, whose purpose was to empower citizens to come together in drafting a new constitution. The process was not without complications and there were considerable setbacks along the way. In March 2011 the parliament appointed a new body, called the Constitutional Council to finish the task of making a new constitution. The Council submitted its draft in July 2011. This process concluded in 2013 when a bill based on the Council's proposals was blocked in the parliament.[19] In the draft made by the Council the right to association and the right to assembly were split up into two separate provisions, in the Article on the right of assembly the right to protest was taken as an example of the rights guaranteed by the Article.[20] This would have been the first time that the right to protest was explicitly identified in the Constitution.

[15] Alþingistíðindi. A 1994-1995. Document, 389. 2104, 2108.
[16] Björg Thorarensen, 'Why the making of a crowd-sourced Constitution in Iceland failed' (Constitution Making & Constitutional Change, 26 February 2014) accessed 18 June 2018.
[17] Thorvaldur Gylfason, 'Constitution on Ice' (SSRN, 24 November 2014) accessed 18 June 2018.
[18] Act No. 90/2010 (ICE).
[19] Björg Thorarensen, 'Why the making of a crowd-sourced Constitution in Iceland failed' (Constitution Making & Constitutional Change, 26 February 2014) accessed 18 June 2018.
[20] Article 21 of the Proposal for a new Constitution for the Republic of Iceland: "All shall be assured of the right to assemble without special permission, such as in meetings or to protest. This right shall not be abridged except by law and necessity in a democratic society."

2. Does the national legal system provide an effective remedy to individuals who claim that their right to protest has been violated?

The Icelandic legal system does provide effective remedies to individuals who claim that their right to protest has been violated. If an individual feels that his right to protest was restricted in an unlawful manner or his right has in other regards been violated, he can bring a case before the appropriate district court and make a claim for punitive damages on the grounds of Article 26 of the Tort Act No. 50/1993 (ICE). If the restriction in question also regards an unlawful arrest, as many of them do, then compensations can further be based on Article 246 para 3 of the Criminal Procedure Act No. 88/2008 (ICE). The Article states that a person has the right to compensations if that person has suffered a loss as a result of measures described in chapters IX-XIV of the Act.[21]

As illustrated in the answer to the first question, the right to protest is guaranteed in the Constitution, on the grounds of two separate provisions, Article 73 para 2, that guarantees the freedom of expression and Article 74 para 3, which protects the right to peaceful assembly. Furthermore, that the right to protest is not without limitations and that certain conditions need to be fulfilled in order for a restriction on this right to be justified. If the freedom of expression is to be limited then the conditions specified in Article 73 para 3 need to be met. According to that provision restrictions need to be prescribed by law, in the interest of one of the aims specified in the provision and the restrictions need to be necessary in a democratic society. All of these three conditions need to be fulfilled.[22] The right to peaceful assembly can likewise be restricted and public gatherings in the open may be banned if there is a threat of riots. In addition to these similar conditions as the ones that pertain to the limitations on freedom of expression have been applied on the grounds of Article 11 para 2 of the Convention[23]. This means that if the limitation in question meets all of these conditions then there has not been a violation on the right to protest and the individual will have to tolerate the restriction and does not have the right to get compensations.

The vast majority of cases concerning the right to protest involve an unlawful arrest and that is the reasons for claims being made on the grounds of Article 246 para 3 of the Criminal Procedure Act in addition to Article 26 of the Tort Act.[24] It is important to bear in mind that Article 246 para 3 is not restricted to an unlawful arrest but applies to other

[21] Chapter XIII regardes Arrests.
[22] Schram, 581, 601.
[23] According to that provision no restrictions shall be made on the exercise of the right of peaceful assembly other than such as are prescribed by law and are necessary in a democratic society. They furthermore need to bee in the interests of national security or public safety. When assessing weather or not an interference with the right to protest is justified the Supreme Court of Iceland has applied these conditions as is evident from its jurisprudence; Hrd. 65-70/1999; Hrd. 812-820/2014.
[24] Hrd. 802/2014; Hrd. 65-70/1999; E-2924/2013; E-1441/2013; E-4007/2008.

measures as well that are described in chapters IX-XIV of the Criminal Procedures Act, for example the use of wiretaps and other similar electronic surveillance measures. It is quite clear from assessing the case law from the district courts and the Supreme Court that claims regarding violations on the right to protest are generally based on both Article 246 para 3 and Article 26. There was a case in 2009 regarding a violation of the right to protest where claims for compensations were only made on the grounds of Article 246 para 3[25] but this is the exception, claims are generally made in these cases on the grounds of both provisions.[26]

An example of this is the Supreme Court judgements in Hrd. 65-70/1999, were eight individuals claimed that their constitutional right to expression guaranteed in Article 73 of the Constitution had been violated when they were arrested while they were protesting and furthermore detained in the police station for three hours. They based their claim for compensations on Article 246 of Act No. 88/2008 and Article 26 of Act No. 50/1993. The Court found that these arrests had been unlawful and they received compensation for non-pecuniary damage. It was the Supreme Courts assessment that the first condition in Article 73 paragraph 3 which states that the restrictions need to be prescribed by law was not fulfilled.

[25] E-6474/2009.
[26] Hrd. 802/2014; Hrd. 65-70/1999; E-2924/2013; E-1441/2013; E-4007/2008.

3. What is the impact of the European Convention on Human Rights and the case law of the European Court of Human Rights on the right to protest in your country?

The human rights chapter of the Constitution of Iceland was revised in the year 1995 with the aim to modernize the human rights provisions and update it in accordance with international obligations that the Icelandic state had undertaken with participation in various international agreements.[27] One of those agreements was the European Convention on Human Rights (*ECHR)* which was enacted as law in Iceland on the 19th of May 1994, as Act No. 62/1994. In the explanatory report on the parliamentary bill on the Act it was stated that the human rights provisions, as they were before the revision in 1995, had become obsolete. Even though the enactment of the Convention would not change their meaning, it would result in a broader interpretation of the rights in accordance with the Convention. In the report it also said that the Constitution would have to be revised, especially in regard to the ECHR.[28] Thus when the Constitution of Iceland was revised in 1995, regard was taken to the ECHR. It is also apparent that the intention of the legislator was that Icelandic courts of law would interpret the constitution in light of international commitments.[29]

In the practice of Icelandic courts, it is acknowledged as a rule that the courts should seek to interpret national law in accordance to international commitments, in general.[30] For example in the judgement by the Supreme Court of Iceland in the case *Hrd. 1998, p. 401 (274/1991),* it states that certain Icelandic law provisions should be interpreted with regard to international agreements, for example the ECHR.[31]

The Icelandic courts did rarely apply or refer to the provisions of the ECHR following its ratificiation in 1953. But in the case *Hrd. 1990, p. 2 (120/1989)* there was a shift in the influence of the ECHR. This case was epoch-making regarding the use of the Convention in interpreting Icelandic law.[32] The first case where the Court referred to the Convention regarding the freedom to expression[33] was the case *Hrd. 1992, p. 401 (274/1991)*. In this case a journalist was indicted for offensive comments and defamatory imputations towards a civil servant. The comments were annuled by the court. In its conclusion the court states

[27] Björg Thorarensen, *Stjórnskipunarréttur. Mannréttindi* (Codex 2008) 106.
[28] Alþt. 1992-1993, A-deild, p. 5892.
[29] Thorarensen, *Stjórnskipunarréttur. Mannréttindi (*n 1) 107.
[30] Davíð Þór Björgvinsson, 'Beiting Hæstaréttar á lögum um Mannréttindasáttmála Evrópu' (2003) 4 Tímarit lögfræðinga 348.
[31] See also case *Hrd. 1994:2497*.
[32] Björg Thorarensen, 'Áhrif Mannréttindasáttmála Evrópu á vernd tjáningarfrelsis að íslenskum rétti' (2003) 4 Tímarit lögfræðinga 392-393.
[33] ibid *393*.

that a certain provision in The General Penal Code[34] should be explained with regards to Article 72 [now article 73] of the Constitution:

> Those provisions should be explained with regards to the commitments on protection of honor, freedom of the individual and freedom of expression in international agreements that Iceland is a part of.

The court then specifically mentions that the ECHR should be used in those interpretations.

A few years after the judgement *Hrd. 1992, p. 401 (274/1991)*, in the *case of Thorgeir Thorgeirsson vs. Iceland*[35], the European Court of Human Rights (*ECtHR*) came to the conclusion that the Icelandic state had been in violation of Article 10 of the ECHR. Subsequently the Minister of Justice appointed a committee to examine if it was timely to enact the ECHR as law in Iceland. It was decided to do so and in their reasoning the committee emphasized that the provision on freedom of expression in the Constitution did not secure the rights of individuals properly, as it did only cover the freedom of the press. The enactment of the ECHR would therefore serve the purpose to bridge the gap in the Icelandic law.[36] One of the changes that was made on the provision regarding freedom of expression was that a provision where the conditions for interfering with the freedom of expression were added to the Icelandic provision in accordance with Article 10 paragraph 3 of the ECHR.[37]

After the modification of the Constitution in 1995 a number of judgements have been concluded regarding the freedom of expression, and some of them involving specifically the right to protest. In the case *Hrd. 1999, p. 3386 (65/1999)* the right to gather and protest was put to the test. In the case eight men had claimed compensation from the Icelandic state on the grounds that they had been unlawfully arrested when they were protesting at the same time an American television show, *Good Morning America,* was being filmed and broadcasted, in front of the Parliament of Iceland. The protest was directed against the American Government. The men had with them flags and signs with various slogans. They had yelled some slogans and were arrested within a half a minute. They were taken in for questioning and then released three hours later when filming of the show was over. The court stated that the right to protest was both protected by the provisions on freedom of expression and the freedom to assembly in the Icelandic constitution. In their conclusion the Court stated that:

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[34] Act No. 19/1940. (ICE).
[35] *Þorgeir Þorgeirsson v. Iceland* (1992) Series A no. 239.
[36] Thorarensen 'Áhrif Mannréttindasáttmála Evrópu á vernd tjáningarfrelsis að íslenskum rétti' (7) 394-395.
[37] ibid 400.

> "This right would not be restricted unless on lawful grounds and for the sake of upholding general rules and to protect the state, health and morals of individuals, and be necessary and in accordance to democratic traditions, cf. article 73, paragraph 3, cf. also Articles 10 and 11 of the European Convention on Human Rights, enacted in Iceland with law no. 62/1994."

The conclusion of the case that the law which allowed the police to arrest individuals who were protesting was not clear enough, as the laws that restricted the freedom of expression should be very clear.

In a more recent judgement, *Hrd. 28th of May 2015 (802/2014),* also regarded an individual who claimed compensation from the Icelandic state on the grounds of an unlawful arrest while protesting. The complainant had been arrested twice. The first time was regarded as necessary but the second one was regarded as unlawful as the law provision that the police based its arrest on did not apply. The Court did not specifically cite the ECHR, but both the plaintiff and appellee pointed out that political views are protected by article 73 of the Constitution, cf. Article 10 of the ECHR. Also that an arrest is a great interference with the right to hold a meeting which is protected by Article 74 of the Constitution, cf. Article 11 of the ECHR. It could be concluded that in light of this judgement that the interpretation of the right to protest with regards to the ECHR has become a norm for the Icelandic Courts.

This is also evident in the case *Hrd. 28th of May 2015 (820/2014)* (Gálgahraun) where protesters were arrested. The court found that the arrests had been lawful. The defence of the accused relied upon that actions of the police had gone against Articles 73 and 74 of the Constitution, cf. Articles 10 and 11 of the Convention. The Court did not cite those provisions in its conclusion. Though it mentioned Articles 10 and 11 in connection to article 73 paragraph 3, regarding their arguments that the right to protest can be limited.
An example of where paragraphs 1 and 2 of Article 11 of the ECHR had a determinant effect on the interpretation of Article 74 of the Constitution is the judgement in case *Hrd. from November 14th 2002 no. 167/2002*, where it was concluded that Article 74 should be interpreted in a broad light with regard to Article 11 of the ECHR. Even though there is not a provision in Article 74 of the Constitution that is analogous to Article 11 paragraph 2 of the ECHR, the Supreme Court explains those provisions of the Constitution with regard to article 11, paragraph 2.

It can be concluded that the impact of the Convention and the case law of the ECtHR has broadened the interpretation of the provisions of the Icelandic constitution. First of all Article 73 was modernized when the Constitution was changed in 1995. Second of all the Courts in Iceland have used the relevant provisions of the Constitution to interpret and broaden the meaning of Articles 73 and 74 in the Icelandic Constitution. It can be said

that the Convention and the case law of the ECtHR has had a positive impact on the right to protest in Iceland, especially with regards to the rights of the individual and that those rights will not be limited unless a specific criterion is upheld.

4. How has your country applied derogations from state obligations regarding the freedom of assembly in times of public emergency threatening the life of the nation according to Article 15 of the ECHR?

Article 15 of the European Convention on Human Rights affords to the contracting states, in exceptional circumstances, the possibility of derogation, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention. The use of that provision is governed by the certain procedural and substantive conditions set out in the article. In emergency situations the Republic of Iceland is bound by the limitations imposed by Article 15 of the ECHR.[38]

The Icelandic Constitution doesn't contain any provisions authorising any derogations in time of emergency.[39] In extreme circumstances, it may be argued that the unwritten principle allowing for derogation in times of crisis applies as per the circumstances of each case and are inherently unpredictable. Such an emergency is difficult to implement in detail in the Constitution, and it is also unfortunate to legislate as such a clause can easily increase the tendency to consume emergency rights. An unregulated rule of constitutional right of emergency is therefore considered sufficient to cover the most extreme exceptions. An example of this in practice, is when the Althingi decided to entrust the Icelandic Government with the hand of the king's power in 1940 and the new office of the Governor of 1941.[40]

The principle encompass authority for the government to recede from the constitution, as circumstances require it. An example of this is Article 28 of the Icelandic constitution which allows executive branch to impose provisional law. The principle by its nature, contradictory, constitutions are precisely the tools for ensuring the community and its citizens a certain basic framework and rights, so that they won't yield in time of crisis.[41]
Scholars have thought that three conditions must be met in order for the principle to apply. First, the principle can refer in times of war. From the provisions of Article 15, MSE might also target "another general emergency that threatens the existence of the nation. Secondly, the application of the rule must be based on the structure of the state authority, the division of labor and the distribution of powers. Finally, the proportionality of the decision must

[38] Hjördís Björk Hákonardóttir, Skerðing réttinda á hættutímum (in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* 2nd end, Codex 2017) 527-528; 'Guide on Article 15 of the convention' (Human right law, updated 30. April 2018) accessed 7. June 2018. https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.
[39] Hjördís Björk Hákonardóttir, Skerðing réttinda á hættutímum (in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* 2nd end, Codex 2017) 527.
[40] 'Frumvarp til stjórnarskipunarlaga' (Stjórnskipunarlög, updated 13. November 2012) accessed 7. June 2018.
[41] Ragnhildur Helgadóttir, 'örlítið um stjórnskiulegan neyðarrétt' (Fundur í Hr, Háskólinn í Reykjavík 12. November 2008) accessed 7. June 2018 https://www.ru.is/media/skjol-lagadeildar/Stjornskipulegur-neydarrettur-RH-_2_.pdf.

be considered. It is therefore a prerequisite that the legislator's intention is to respond effectively to the distress and the conspicuous effects of the distress on Icelandic society. Clear consequences or false statements about the possible effects of certain cases can not therefore be used as the basis for the application of constitutional rights.[42]

The Icelandic Constitution contains provisions which guarantee the right to protest on the grounds of two separate Articles, that is Article 73 paragraph 2 on the one hand, protecting the freedom of expression and Article 74 paragraph 3 on the other hand which guarantees the right to a peaceful assembly. Those rights may only be restricted by law if certain requirements set out in the articles are met. Even though it is safe to say that the corresponding Articles in the Convention and the Courts case law has had quite an impact on the way the provisions in the Icelandic constitution have been interpreted the rights protected in the constitution nonetheless provide an independent right for the citizens. Those rights will not be impaired unless it can be justified according to the substantive conditions set out in the articles or if such an internetion can be based on an unwritten principle of derogation.

In the event of a crisis it would therefore not be sufficient for the Icelandic state to declare a derogation from its obligations according to the Convention in order to restrict the right to protest. Even though the Icelandic Constitution doesn't contain any provisions authorising any derogations in times of emergency such derogations might however under very exceptional circumstances be justified on the basis of an unwritten principle allowing for derogation in times of crisis. The Icelandic government has never declared derogation from its obligations to protect its citizens rights to protest with reference to Article 15 of the Convention nor has it done so in connection with the Articles in the constitution.This is mainly due to the fact that Iceland does not have an army and has therefore never been directly involved in war or armed conflicts. situations that demand such a measure and hopefully that won't ever happen in the future. Iceland frequently faces natural disasters as volcanic eruptions, earthquakes and glacial floods occur frequently. Fortunately such events most often occur far away from people's homes without it impacting much the daily lives of Icelanders and has therefore not caused major uproars or riots. In the event of a major natural disaster it is not unthinkable that a situation would rise that would raise questions on whether it is necessary to derogate from the convention or the constitution.[43]

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[42] Bjarni Benediktsson, 'Stjórnskipulegur neyðarréttur' [1959] PL 19-22; Ragnhildur Helgadóttir, 'örlítið um stjórnskiulegan neyðarrétt' (Fundur í Hr, Háskólinn í Reykjavík 12. November 2008) accessed 7. June 2018 https://www.ru.is/media/skjol-lagadeildar/Stjornskipulegur-neydarrettur-RH-_2_.pdf; Róbert Spanó, 'Ritstjórnargrein: Stjórnskipulegur neyðarréttur' [2010] PL 107, 111.

[43] Davíð Þór Björgvinsson, 'Beiting Hæstaréttar Íslands á lögunum um annréttindasáttmála Evrópu' [2003 PL 345-347; 'Guide on Article 15 of the convention' (Human right law, updated 30. April 2018) accessed 7 june 2018. https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf; Hjördís Björk Hákonardóttir, Skerðing réttinda á hættutímum (in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* 2nd end, Codex 2017) 528.

However, in the context of Icelandic law, it must be ensured that the obligations inherent in MSE are the minimum rights. Icelandic governance laws and human rights that go further maintain their value. On the basis of Article 15, MSE alone could not, for example, ignore Article 72. of the Constitution and do not provide compensation for the acquisition of property. However, It has fallen under conditions of the Article 15, that are not related to war or riots, e.g. announced Georgia in connection with avian flu. It may considered impossible to exclude circumstances that arise from natural disasters can call on such things if the circumstances cause riots due to lack of necessity. in addition, it is probably not entirely excluded that economic collapse due to the consequences which it can justify the reduction of rights. In the unlikely event that the incident which the provision assumes will occur, is normal to conclude that the provision and its powers will be applied in a similar manner to those which the Human Rights Tribunal has proposed in the framework of the provision.[44]

[44] Davíð Þór Björgvinsson, 'Beiting Hæstaréttar Íslands á lögunum um annréttindasáttmála Evrópu' [2003 PL 345-347; Hjördís Björk Hákonardóttir, Skerðing réttinda á hættutímum (in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* 2nd end, Codex 2017) 527-533.

5. How can restrictions on the right to protest be justified with reference to the prevention of order or crime in your country?

There is no doubt that demonstrations, marches, sit-ins and other gatherings are powerful tools in every person's arsenal to execute their right to express their opinions and to provide them with followers.[45] That right, however, needs to be restricted under certain circumstances.

As previously stated the right to protest is protected by Article 73 para 2 and Article 74 para 3 of the Constitution of the Republic of Iceland no. 33/1944.[46] The aim of this chapter is to discuss the restrictions that Icelandic legislation has imposed on civil rights amended by the Constitution. The main focus will be set on the restrictions on the freedom of assembly unarmed, since that is generally the most common approach to protesting in Iceland, alongside a brief coverage on Article 73 of the constitution and the restrictions that it contains.

According to Article 73 para 2 everyone shall be liable to answer for their expressions of thought in court, which means an individual or a group cannot protest without accepting simultaneously liability. The paragraph reads as follows:

> "Freedom of expression may only be restricted by law in the interests of public order or the security of the State, for the protection of health or morals, or for the protection of the rights or reputation of others, if such restrictions are deemed necessary and in agreement with democratic traditions."

The restriction itself will be enforced *after* the thought has been expressed or the protest commenced. Before the amendments to the Constitution in 1995 it wasn't clear under which circumstances such liability could be established and therefore the legislature had unconstrained power regarding the liability itself and its preconditions.[47]

Article 73 para 3 contains three preconditions that every restriction should fulfill. In order to restrict an expression of thought, every single one of the preconditions shall be fulfilled. The freedom of expression can only be restricted by law and in accordance with the justifiable aims set forth in the third paragraph, but the restriction also needs to be deemed

[45] Páll Sigurðsson, 'Lagasjónarmið varðandi hópgöngur og útifundi' (1970) 3 Úlfljótur 207.
[46] Hereafter: the Constitution.
[47] Björg Thorarensen, *Stjórnskipunarréttur Mannréttindi* (Codex 2008) [Thorarensen] 370-371.

necessary in a democratic society. Since 1990 Icelandic courts of law have adopted the ECHR's[48] method of application regarding the preconditions in the second paragraph of Article 10 of the European Convention on Human Rights. This includes the application of the principle of proportionaliy, when assessing the necessity of restricting freedom of assaembly in every individual case. [49] After the above-mentioned amendments to the Constitution in 1995 the court's reasoning's have altered drastically in terms of giving a much more detailed judgement when it comes to restricting the freedom of expression.[50] Article 74 para 3 of the Constitution protects everyone's right to assemble unarmed, which is intertwined with the freedom of expression. Public gatherings, especially in order to protest, is a crucial instrument to express feelings, thoughts and opinions and in order to restrict those important rights there needs to be a justification to do so.[51] The paragraph reads as follows:

> "People are free to assemble unarmed. Public gatherings may be attended by police. Public gatherings in the open may be banned if it is feared that riots may ensue."

It's interesting to compare the Constitution to the second paragraph of Article 11 of the Convention because the latter one has some general restrictions on the freedom of assembly and association, just like Article 10 of the Convention and the Icelandic provision regarding the freedom of speech in Article 73. However, the paragraph cannot be interpreted in a way that all public gatherings in the open are always free, just as long as they are "weapon free." Accordingly, the restrictions on that that right are applied in a similar manner and on the basis of similar critieria as deriving fram paragraps 2 of Article 10 and 11 of the ECHR.[52]

As the second sentence of the paragraph states *the police may attend public gatherings*, whether they take place outside or inside. The police, in the context of the paragraph, are those who have the right to exercise police authority according to Article 9 of the Police Act of 1996.[53] This is of course a permit or a warrant for the police, but not an obligation

[48] European Court of Human Rights. Hereafter: ECHR.
[49] Hereafter: the Convention.
[50] Thorarensen, 372-373.
[51] Thorarensen, 426.
[52] Thorarensen, 433.
[53] Hereafter: the Police Act.

regarding their work duties. The main reason behind this sentence is the police's role of maintaining national security, preventing disorder or crime and to protect the wellbeing of the citizens. This is implemented by Article 15 of the Police Act. The first paragraph reads as follows:

> "The police may intervene in the conduct of citizens in order to maintain public peace and quiet and public order or to prevent an imminent disturbance in order to protect the safety of individuals or the public or to avert or stop criminal offences."

The police must maintain some proportionality, while carrying out their duties, by picking the right events and the right situations to step in, for there is a chance that it could have abnormal and repressive effects on a gathering if way too many police officers would show up in no proportion with the attendance or the occasion.[54]

The third sentence of Article 74 para 3 is probably the most important one, in the terms of restricting the right to protest, since it's purpose is to ensure that *„public gatherings in the open may be banned if it is feared that riots may ensue."* This warrant is open to interpretation on behalf of the authorities but, just like the abovementioned permit according to the second sentence of para 3, proportionality must be present in the decision making and assessment whether the gathering should be shut down or not.[55] If a public gathering is banned on these grounds, the decision can be brought before a court that will ultimately decide if the action was legitimate or not.[56] Instead of shutting down the gathering itself where there is perhaps fighting, or other type of disturbance, the police can arrest a person for the purpose of maintaining law and order.[57] The police shall though explain to the person the reason for the arrest and transportation to a police facility.[58]

[54] Thorarensen, 433-434.
[55] Thorarensen, 435.
[56] That right is guaranteed in Article 60 of the Constitution. The paragraph reads as follows: *„Judges settle all disputes regarding the competence of the authorities. No one seeking a ruling thereon can, however, temporarily evade obeying an order from the authorities by submitting the matter for a judicial decision."*
[57] Article 16 para 1 of the Police Act. According to Article 67 para 1 of the Constitution, "no one may be deprived of his liberty except as permitted by law."
[58] Article 16 para 2 of the Police Act.

A gathering is deemed public when the admittance is free to everyone who wishes to be there. The same goes for a gathering that is limited by age. However, a gathering is not public when admittance is limited to a certain group of people, like a club or organization.[59] There are examples of events where the police had to intervene a public demonstration by making arrests without banning and/or shutting down the assembly. In 1949 the police had to arrest numerous civilians that were protesting Iceland's participation to the North Atlantic Treaty Organization. The people who had organized the event were prosecuted for rioting and attacking public employees alongside the parliament building itself.[60]

In 1999 the so-called *Good Morning America* case was brought before the Supreme Court of Iceland. The Court found that the arrest on the demonstrators didn't have a sufficient reason in legislation to back it up. The protest wasn't deemed to generate disorder and the protestants behaviour didn't disturb the broadcasting of the television show beyond what the producers could've anticipated. Therefore, the arrest wasn't justified and the police should've chosen another, more suitable action regarding the demonstration.[61]

In 2003 the Althing Ombudsman investigated the decision of the Icelandic government to deny members of Falun Gong, a Chinese spiritual movement, entry into Iceland during an official visit of the President of China. Approximately 70 practitioners were arrested and detained in a nearby school to Keflavik Airport. The government decision was based on the reason that the sole purpose of their visit to Iceland was to protest against the President.[62]

Truck drivers protested in March and April of 2008, because of oil prices and their working hours, which climaxed on April 23rd where the police had to arrest around twenty people because they had interrupted traffic and put other vehicles, and people, in danger.[63]The police had enough on it's plate after the financial crisis in 2008 with the so-called *Búsáhaldarbylting* or the "Pots and Pans Revolution" that mostly took place at Austurvöllur,

[59] Sigurðsson, 229-320.
[60] Case *Hrd. 1952, page 190*. The prosecution was based on (the predecessor of) Article 100 and Article 107 of the General Penal Code of Iceland no. 19/1940 (ICE). Hereafter: the General Penal Code.
[61] Case *Hrd. 1999, page 3386*. The facts of the case are stated/revised in Question 1.
[62] Althing's Ombudsman case no. 3820/2003. It was The Ombudsmans opinion that Icelandic officials had legal grounds to ban individuals from entering the country. The decision was based on the former Foreigners Act from 1965, Article 10 regarding a threat to public order and national security.
[63] Article 168 of the General Penal Code and Article 15 of the Police Act.

a square in front of parliament. The Police Commissioner of the Capital Area even published in 2014 a report on every single protest from the year 2008 to 2011.[64]

In previously mentioned case, *Gálgahraun* in question one, the restriction on the protest on behalf of the police was justified with a reference to the Police Act, more specifically Article 15 to guarantee public order and Article 1 para 2.[65] The individuals did not obey the instructions given by police officers and therefore violated their obligation to obey orders given by the police according to Article 19 of the Police Act.[66]

More restrictions on the right to protest can be found in Icelandic legislation. Here are few examples: The Minister of Health and Welfare can, in accordance with The Directorate of Health, decide that all public gathering must obey rules regarding quarantine measures in case of an epidemic in Iceland.[67] Landowners can restrict or ban any kind of traffic or stay of other people on their property.[68] Children aged 12 and under may not be out of doors after 8 P.M. unless accompanied by an adult and therefore is their right to demonstrate restricted by the presence of an adult.[69] A police commissioner is permitted to ban every kind of traffic or stay of people on certain areas when he has deemed it to be dangerous.[70] In the General Penal Code the right to gather unarmed is restricted to guarantee national security by banning a rebellion to change the constitutional structure of the state[71] and punishing whoever starts a civil commotion in order to employ violence against persons or objects.[72] These kind of gatherings, that have the sole purpose of enticing violent behavior or crimes against the state and its employees, do not enjoy the protection of Article 74 para 3 of the Constitution.

[64] Geir Jón Þórisson, 'Samantekt á skipulagi lögreglu við mótmælin 2008 til 2011 (Lögreglustjórinn á höfuðborgarsvæðinu 2012) <http://kjarninn.s3.amazonaws.com/old/2014/10/report.pdf> accessed 22 June 2018.
[65] According to that paragraph, the police's role is to "give the authorities protection or assistance with the execution of their functions" but the demonstrators were disturbing constructions on a new road through a beautiful lava field just outside of Reykjavik, the capital.
[66] Cases *Hrd. May 28th 2015 no. 812-820/2014*. There were 9 individuals prosecuted for their protest. The facts of the case are stated/revised in Question 1.
[67] Chapter IV of the Quarantine Act no. 19/1997 (ICE).
[68] Article 18 para 1 of the Conservation Act no. 60/2013 (ICE).
[69] Article 92 of the Child Protection Act no. 80/2002 (ICE).
[70] Article 23 of the Civil Protection Act no. 82/2008 (ICE).
[71] Article 98 of the General Penal Code.
[72] Article 118 of the General Penal Code.

6. What positive obligations does your state assume to guarantee the enjoyment of the right to protest and protection from the interference of private parties?

The right to protest is guaranteed on the grounds of Article 74 Constitution of Republic of Iceland no. 33/1944 (ICE) where it´s stated in paragraph 3 that people are free to assemble unarmed. In addition, the provision states that under certain circumstances police may be present and that an assembly which is held outdoors can be banned if it is feared that riots may ensue.[73]

Also the Article 73. of the constitution lays certain obligations on the government to consider the public's right of freedom of expression when it's considered to assess the positive obligations of the government to ensure the right to protest and protection from the interference.

Provisions of the Constitution and Article 11 of the ECHR are generally considered to be similar in both definition and interpretation, even though the terms used are somewhat different . According to Article 11 any assembly must be peaceful in order for the provision to apply. Restrictions require justification under the second paragraph of the provision. The Icelandic Constitution however states protects people's freedom to gather unarmed. However the provision doesn't state that assemblies can go unnoticed despite that people attending the assemblies are unarmed. Despite this difference in terms the Constitution has been interpreted in accordance with Article 11 of the ECHR. Thus, the provision includes Article 73 of the Constitution of freedom of expression and expression provides a certain level of protection for the public to express its views and thoughts in a peaceful manner. In this context, it is worth mentioning the Supreme Court judgment of 30 September 1999 in case no. 65/1995. Where It can be concluded from the judgment that no distinction is made between the claims submitted under paragraph 1. Article 11 ECHR.[74]

When the provisions of the Constitution and Article 11 of the European Convention on Human Rights are compared one can see a difference in words and structure. The provision of the first paragraph of Article 11 ECHR protects and makes it possible for assemblies to be held peacefully. The second paragraph sets out exemptions on the basis of the conditions listed therein. It is clear that meetings don't necessarily have to be more

[73] Björg Thorarensen, *Stjórnskipunarréttur Mannréttindi* (Codex 2008) 425-426; Elín blöndal og Ragna Bjarnadóttir, 'Tjáningarfrelsi' in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* (2nd end, Codex 2017) 412-413.

[74] Björg Thorarensen, *Stjórnskipunarréttur Mannréttindi* (Codex 2008) 437-440; Elín blöndal og Ragna Bjarnadóttir, 'Tjáningarfrelsi' in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* (2nd end, Codex 2017) 412-413.

peaceful, even though there is no weapon at hand. It may also be assumed that similar positive obligations of states as derive from Article 11 are inherent in the provisions of the Constitution on freedom of expression and assembly. For example, it has repeatedly been confirmed in the case-law of the European Court of Human Rights that Article 11 imposes certain positive obligations on the state to provide certain police protection to peaceful assemblies and shouldn't matter whether controversial sentiment and opinions are the subject of such assemblies. In addition, the duty may be imposed on the authorities to provide public access to open areas and control traffic so that meetings can be conducted without obstacles and to ensure access to them. Thus, the provisions of Article 11 of the ECHR impose positive obligations on the government to take action to ensure effective freedom of assembly. This has been confirmed by the ECHR in the case of the Plattform Ärste für Das leben v Austria App no 10126/82 (ECHR, 21. June 1988)[1][75] There the Court stated that while it's the duty of the member states under Article 11 of the convention to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. Furthermore, the member states have a wide margin in deciding which measures are necessary to be taken.[76]

The human rights provisions in the Icelandic constitution were originally set for the purpose of limiting the powers of public authority towards the individual, particularly actions from the police. The main course to the provisions of the ECHR and the constitution state that the authority mustn´t evade their obligation. In order to fulfill these positive obligations, this right is granted certain protection stipulated in Article 122 of the Penal Code (ICE). The provision prohibits persons from hindering or disturbing a lawful assemblies. Anyone who is in charge of such conduct may be liable for imprisonment. It is also prohibited, pursuant to the provision, to arrange for a meeting of public prosecutions on public matters with overbearing behavior or public clamor, in addition, the provision prohibits a party from interfering with public religious service or other church sermons. It should be noted that in the last decades there has never been a charge for violation of the provision. In addition with the above it is stated in Article 3 of Act no. 32/1997 (ICE) that it's prohibited to interfere with religious services, church sermons or other ceremonies with noise or anything else that is contrary to the holy service of any religion. The provision isn't bound by particular beliefs and consequently covers all assemblies intended to practice legally defined religion. The provision gives people opportunity to practice their faith together in a company without interference.

[75] Plattform 'Ärzte Für Das Leben' v Austria, Merits, App no 10126/82, A/139, [1988] ECHR 15, (1991) 13 EHRR 204, IHRL 79 (ECHR 1988), 21st June 1988, European Court of Human Rights [ECHR].
[76] Plattform 'Ärzte Für Das Leben' v Austria, Merits, App no 10126/82, A/139, [1988] ECHR 15, (1991) 13 EHRR 204, IHRL 79 (ECHR 1988), 21st June 1988, European Court of Human Rights [ECHR] [34]-[39]; Elín Blöndal og Ragna Bjarnadóttir, 'Tjáningarfrelsi' in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* (2nd end, Codex 2017) 398-339.

In this context it is worth mentioning the case Plattform Ärste für Das leben v Austria App no 10126/82 (ECHR, 21. June 1988) The case asserts that the provisions of the European Convention on Human Rights are deemed to impose positive obligations on the government in the case of organizing meetings. In supreme court of Iceland from 30. September 1999 in case no. 65/1999. Where among other things, it was believed that the conduct of men had not been more disturbing than usually, and that there had not been interruption of organized assemblies or celebrations. Consequently, it was not considered that they had violated the provisions of the Penal Code no. 19/1940 (ICE).[77] The judgment seems to give the freedom of expression of the Constitution more weight in its position as to whether the protest was permitted.

Under Icelandic law, it can be asserted that the Icelandic government has certain positive duties to prevent interference unless it's likely that unpredictable actions will be taken at protes assemblies or similar assemblies. F.e. according to paragraph 3 of Article 15 of the Act no. 90/1996 (ICE) the Icelandic law enforcement are only allowed to interfere with protests under certain circumstances, if there's probability that the assemblie will disturb public liberty and public order.

[77] Björg Thorarensen, *Stjórnskipunarréttur Mannréttindi* (Codex 2008) 427-428; Elín blöndal og Ragna Bjarnadóttir, Félaga- og fundafrelsi (laga annarsstaðar líka) in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* (2nd end, Codex 2017) 398-339.

7. How equipped is your country's legal system to face the challenges presented by digital social movements such as #metoo and how might the right to protest be exercised in this context

Social movements are important tools for people who lack power and influence to get the attention of authorities for the sake of various causes. A good example of the force of digital social movements is the *Arab Spring*.[78] First of all the Internet and social media have given people a place to state their dissatisfaction in greater quantities. Access to those media and the Internet has made it possible to efficiently start large-scale collective actions in shorter time then has ever been possible.[79]

The hash tag *#metoo* spread on Twitter in October of 2017 and was used in 12 million posts in the first 24 hours. With the hash tag, women tweeted about their experience of sexual assault and harassment.[80] There is a "growing trend of the public's willingness to engage with resistance and challenges to sexism, patriarchy and other forms of oppression via feminist uptake of digital communications."[81]

Digital social movements can be powerful tools for individuals. They can grow fast and bring social changes or different outlooks, like the *Arab Spring* and *#metoo* movement go to show. However there are some legal challenges that need to be considered regarding digital social movements, because they are in their nature different from *traditional* protests, where people gather at one place to protest or send letters to their lawmakers. As seen from the judgements which were discussed in question three before, the main point of the cases was if an arrest of protesters by the police had been lawful or not.

The challenges that Iceland has to face regarding social movements on the Internet are that they may be directed in greater quantities at individuals, rather then the government. Also it is possible for individuals to be anonymous on the Internet and write things on social media without having to take responsibility for it. As with the case of #metoo several individuals were named as possible perpetrators. If such statements are given in anonymity and the named perpetrator would want to challenge the statement, there would be some difficulties involved.

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[78] Suzanne Staggenborg *Social Movements* (Oxford University Press 2015) *2*

[79] Boyu Chen and Da-chi Liao 'Social Media, Social Movements and the Challenge of Democratic Governability' (Natinao Sun Yat-sen University 2014) 1 https://fsi-live.s3.us-west1.amazonaws.com/s3fs public/chen_boyu.stanford_2014_oct_10.pdf> accessed 10th of July 2018

[80] Nicole Smartt 'Sexual Harrassment In The Workplace In A #MeToo World' 2017 Forbes <https://www.forbes.com/sites/forbeshumanresourcescouncil/2017/12/20/sexual-harassment-in-the-workplace-in-a-metoo-world/> accesed 10th of July 2018

[81] Kaitlynn Mendes, Jessica Ringrose and Jessalynn Keller: '#MeToo and the promise and pitfalls of challenging rape culture through digital feminist activism' (2018) 25 (2) European Journal of Women's Studies 2018 <https://doi.org/10.1177/1350506818765318> accesed 10th of July 2018

Therefore, it can be said that the challenges regarding social movements like #metoo, is the balance between the freedom of expression and the right to respect for private life. Like the movement showed, it can be very powerful when it comes to challenging power structures and calling for action. The biggest challenge is to weigh and balance the conflicting rights of different individuals against each other. As it says in Article 73 paragraph 2 of the Constitution every individual is free to their opinion and to express themselves, but they have to be able to vouch for their thoughts in a court of law. It also says in paragraph 3 that laws can limit this right for example to protect individuals' honour. Another challenge is how the state and the police can exercise their power of limiting the right to protest on the Internet. It is nearly impossible to control discussion on the Internet without risking limiting the freedom of expression greatly. Article 15, paragraph 3, of the Police Act, states that the police can interfere with a protest if there is a chance of riots.[82] If the police were to interfere with movements on the Internet some problems arise. First of all it is nearly impossible for the police to stand guard over the Internet and second of all there is no provision that allows the police to interfere with a person who is expressing their opinion on Twitter or Facebook. If the police were to monitor all of the communication that foregoes on a daily basis on the Internet, we would quickly run the risk of creating a Big Brother community. And as mentioned above, the challenge is more the rights of the individuals rather then public interests, so the police would probably need to get a complaint from an individual before acting on discussion on the internet. Accordingly, the individual may initiate defamations proceedings in a civil case before the courts against a person who violates his or her privacy or reputation with degrading or hateful public statements, and request compensation.

In the case *Hrd. 20th of November 2014 (214/2014)* a young man had published a picture of a well-known man on the Internet where he had written the words 'fuck you rapist bastard'. The man that those words were directed against went to court and requested that the statement be declared null and void The Supreme court stated that the young man had his freedom of expression and that the well-known man was himself in a way responsible, with his earlier behaviour, for starting up this flack public debate surrounding him.

If we compare this case to the cases that were discussed in question three it can be seen that in the cases regarding 'traditional' protesting the question was if an arrest made by the police had been lawful. The court evaluates each time if the actions of the police were necessary and proportional in each case. Thus, the protester himself has to go to court to find out if his right to protest has been violated or not.

[82] If it seems likely that disorder will break out at a protest meeting, procession or other such gathering in a public place, the police may prohibit people from changing the appearance of their faces, or covering their faces or part of them with masks, hoods, paint or other means intended to prevent them from being recognised.

In the case regarding expression on the Internet, the police does not really have any sources to interfere with those expressions as they are happening. So instead of it being a case of if a government body was in the right to limit the freedom of expression it is rather a question if the person who expressed herself on the Internet interfered with someone else's individual right.

An example from Iceland where it can be said that the right to protest was exercised on the Internet is a movement that happened at the same time as the #metoo movement. It used the hash tag #höfumhátt (#letsbeloud) and started from a political discussion regarding a sentence paedophile who had formally gotten a restoration of honour by a decision of the Ministry of Justiy and was therefore able to get back his license to practice as an advocate. The public wanted the law to be changed so the concept of restored honour would be abolished. There were both regular protests and many people who used the hash tag #höfumhátt on social media. The effect was so immense that it ended with the government to resign. This is an example of where traditional protest and social movements work together to put pressure on the people in charge.

Even though digital social movements can be powerful weapons for people to secure their rights towards executive powers, there is also the challenge of protecting the right to privacy of individuals, which those movements can be directed towards. The right to protest can very well be exercised through digital mediums and is a good tool for individuals, as it is possible to share information faster and the state does not have the sources to stop these movements as it brings forward the danger of limiting freedom of expression too much. But regard must be taken to the right of all individuals and make sure that their right to privacy is also protected.

8. What role and responsibilities do academic institutions in your country have regarding promoting freedom of speech and the right to protest within and outside their campuses?

There are seven universities in Iceland, of which three are private and four are public. The role of a university is to promote creation and communication of knowledge and skills to the students and to society as a whole.[83] The role of junior colleges in Iceland is to promote full development of all students and guarantee their participation in a democratic society[84] and the same applies for grade schools. Their role is to prepare the students for taking part in building up a society that's constantly evolving.[85]

These objectives are also to be found in the curriculum that the Ministry of Education, Science and Culture publishes but their legal status is equivalent to a regulation. In that sense, and in the context of the question, the right of freedom of speech and protesting is something that has a clear connection to the school system in Iceland, even though there is nothing in the legislation that addresses the freedom to protest in a direct way.[86]

The discussion in Icelandic society, regarding freedom of speech and protests, is quite different from what can be seen in the United States, Australia and Europe. No anti-protest laws have been passed nor discussed in Iceland and the whole 'safe space idea' hasn't quite reached to our academic institutions. In Iceland you're free to protest, just as long you're not interrupting public order or jeopardizing national security.[87]

If Icelandic students are not satisfied with certain things or situations, they will stand up and protest. The students of Reykjavík Junior College protested their poor financial contribution in 2013,[88] the students and teachers of two junior colleges protested a proposed unification of the two schools[89] and students of UI protested the proposed and controversial constructions of students housing on a square by the UI.[90]

To guarantee students participation in decision making, students receive two representatives in the University's Council if number of students are over 5,000 but if the

[83] Article 2 para 1 of the University Act no. 63/2006 (ICE).
[84] Article 2 para 1 of the Junior Collage Act no. 92/2008 (ICE).
[85] Article 2 para 1 of the Grade School Act no. 91/2008 (ICE).
[86] In addition the University of Iceland is governed by regulation no. 569/2009 for the University.
[87] Restriction to the right to protest is the subject of Question 5.
[88] Stefán Árni Pálsson, 'Á fimmta hundrað nemenda mótmæla fyrir utan menntamálaráðuneytið' (Vísir, 25 November 2013) http://www.visir.is/g/2013131129456 accessed 22 June 2018.
[89] Erla Björg Gunnarsdóttir, 'Tæplega 800 mótmæla sameiningu FÁ við Tækniskóla: "Hrædd um að týnast í kerfinu"' (Vísir, 12 May 2017) http://www.visir.is/g/2017170519498 accessed 22 June 2018.
[90] Stefán Óli Jónsson, '"Með ólíkindum að stúdentar þurfi að standa í slag við háskólann"' (Vísir, 2 November 2017) http://www.visir.is/g/2017171109802 accessed 22 June 2018.

number is under 5,000 they'll get one representative.[91] The students have their own Students Council, SHÍ, which is a way for them to influence the University itself, improve the community and to ensure the students rights. All students of UI can vote and run for the Council. In the UI there are two active student body organizations, Röskva and Vaka. Their role is mainly to be a force that fights for students right.

Since the University isn't restricting the right to protest, the students themselves are constantly finding ways to criticize the existing systemand protest to any wrongdoings or discriminations that take place within the walls of UI. The main focus for the past years has relied mainly in various campaigns regarding specific issues[92] and in establishing associations that fight for a better school and society.[93]

[91] Article 6 para 2 and 3 of the Public University Act no. 85/2008 (ICE).
[92] For example the Equality Committee of UI protested the lack of accessibility for people that have to rely on wheelchairs by making a video series on social media where
[93] For example the Feminist Association of UI and Q, the association for queer students of UI.

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1. How is the right to protest guaranteed in the constitutional framework of your country and how has it adapted in reaction to national social movements?

1.1. Introduction

In the United Kingdom (UK), in the absence of a codified constitution, the legal framework which protects and regulates a person's exercise of their right to protest consists of a corpus of common law principles, complemented by principles derived from the jurisprudence of the European Court of Human Rights (ECtHR) on the European Convention on Human Rights (ECHR), other international human rights treaties (such as the International Covenant on Civil and Political Rights (ICCPR)), as well as domestic public order legislation. The English common law, being quite adaptive, has been informed by the ECHR, especially since the 'bringing home' of Convention rights with the Human Rights Act 1998 (HRA).[1]

It must be noted at the outset that it is largely in reaction to specific demonstrations – rather than national social movements – that the law in this area has historically evolved. The UK legal system draws a conceptual distinction between communicative and direct action protests,[2] treating the former more favourably than the latter.[3]

The following sections will aim to show that although there has been a gradual strengthening of the constitutional protection of the right to protest in the UK, this has been counteracted by an expansion of police powers under both statutory and common law.

1.2. Historical foundations of the right to protest

Until the enactment of the HRA, the concept of positive enforceable rights was alien to English law.[4] Instead, judges were the guardians of common law liberties – "a negative residual concept" denoting those individual freedoms which remain "after all legal

[1] Home Office, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997). The 'right to protest' has since come to be understood as an amalgamation of the freedom of peaceful assembly and association (Article 11 ECHR, Article 19 ICCPR) and the freedom of expression (Article 10 ECHR, Article 21 ICCPR), which have been recognised by UK and Strasbourg judges as 'fundamental right[s] in a democratic society and … one of the foundations of such a society' -*Ziliberberg v Moldova* App no 61821/00 (ECtHR, 4 May 2004) at [2].

[2] Examples of communicative protests are, *inter alia*, marches, rallies, shouting slogans and distributing pamphlets. Direct action protests, in contrast, specifically aim to disrupt or obstruct the target body or activity.

[3] David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Bloomsbury UK 2010) 9-11.

[4] Mead (n 4) 25.

restrictions have been imposed and taken account of."[5] This is an expression of the principle of parliamentary sovereignty – the paramount principle underpinning the whole constitutional framework of the UK – which places Acts of Parliament at the apex of the hierarchy of norms, and common law liberties at its foot.[6] Thus, participation in public assemblies or processions would only be lawful to the extent that it was not prohibited by statute or the common law.[7] Individuals had no *right* to invoke against public authorities which interfered with their protests.[8]

Historically, public order concerns have taken precedence over freedom of assembly in the UK. The first judge to acknowledge the existence of a *right* to protest in the common law was Lord Denning, in his dissenting judgment in *Hubbard v Pitt*, where he stated that:

> "...the right to demonstrate and the right to protest on matters of public concern … are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done."[9]

1.3. Domestic public order legislation

Despite the incremental recognition of the common law *right* to protest in the UK, statutory restrictions on its exercise still prevail. The main statute concerning the policing of protest is the Public Order Act 1986 (POA), which was passed in the aftermath of the 1984-85 miners' strike and aimed to give the police stronger and more effective powers to deal with similarly serious public disorders in the future.[10] If a senior police officer 'reasonably believes' that a public procession or assembly "may result in serious public disorder, serious damage to property or serious disruption to the life of the community," or that its purpose "is the intimidation of others," he can impose such conditions on the maximum duration, number of people, date or location "as appear to him necessary to prevent such disorder, damage, disruption or intimidation."[11]

In addition, before their repeal, sections 132-138 of the Serious Organised Crime and Police Act 2005 (SOCPA) criminalised demonstrations in the vicinity of Parliament for

[5] ibid. 4.
[6] Orsolya Salát, *The Right to Freedom of Assembly: A Comparative Study* (Hart Publishing 2015) 39.
[7] Mead (n 4) 26.
[8] ibid.; Orsolya Salát is sceptical whether this has changed since the HRA. Its drafting having been guided by the principle of parliamentary sovereignty, even its most powerful weapon – the declaration of incompatibility – 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given': Salát (n 9) 39.
[9] *Hubbard v Pitt* [1976] QB 142, 178 (Lord Denning); Lord Denning considered that 'the right of protest is one aspect of the right of free speech', the latter having been recognised almost a century earlier in the 1891 case of *Bonnard v Perryman* [1891] 2 Ch 269, 284.
[10] Salát (n 9) 19.
[11] Non-compliance with the imposed conditions is a criminal offence: Public Order Act 1986, ss 12, 14.

which the police had not been notified, but which nevertheless took place without authorisation.[12] It is likely that these provisions were specifically aimed to apply to Brian Haw's "permanent peace protest" against the Iraq War in Parliament Square.[13] In assessing the operation of SOCPA in its seventh report, the Joint Committee on Human Rights (JCHR) referred to the prosecutions of the peace campaigners Maya Evans and Milan Rai for organising an unauthorised demonstration contrary to section 132 of SOCPA. The Divisional Court (DC) upheld their convictions, citing the ECtHR rulings in *Ziliberberg v Moldova* and *Rassemblement Jurassien Unité v Switzerland* that "subjecting peaceful demonstrations to a prior authorisation procedure does not encroach upon the essence of the Article 11 right."[14] Despite this, the JCHR concluded that the SOCPA provisions in question were "unjustifiable and disproportionate interferences with the Convention rights to freedom of expression and assembly."[15] Confident that adequate measures of policing protest around Parliament already exist under the POA, the JCHR recommended that sections 132-138 of SOCPA be repealed, and Parliament duly did so in the Police Reform and Social Responsibility Act 2011.

A rather negative recent development is the bringing of charges against protesters for offences not intended to apply to the regulation of protest. These include the offence of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, anti-social behaviour orders and anti-harassment injunctions.[16] Until its repeal in 2012, section 44 of the Terrorism Act 2000 was also used against peaceful demonstrators. It allowed a chief police officer to designate areas where the police may stop and search people and vehicles for "articles of a kind which could be used in connection with terrorism," without needing to have any ground for reasonable suspicion.[17] The whole of Greater London had been designated as such an area.[18] The JCHR considered that while "there may be circumstances where the police reasonably believe… that a demonstration could be used to mask a terrorist attack or be a target of terrorism," stop and search powers under the Terrorism Act should not be applied in a blanket manner against peaceful protesters.[19]

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[12] Joint Committee on Human Rights, *Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest* (*seventh report)* (hereinafter JCHR seventh report) at [40]; Section 137 also made the unpermitted use of loudspeakers in the designated area a criminal offence.

[13] Mead (n 4) 148; Haw's 'peace camp' opposite Carriage Gates began in 2001 and lasted for almost ten years, blocking the main vehicle entrance to the House of Commons. His loudspeakers had been audible inside parliamentary buildings: JCHR seventh report (n 19) at [111].

[14] *Rassemblement Jurassien Unité v Switzerland* App no 8191/78 (ECtHR, 10 October 1979).

[15] JCHR seventh report (n 19) at [114].

[16] David Mead, 'Dropping the case against the Fortnum protesters is not as interesting as their charges of aggravated trespass. This is yet another threat to the freedom to protest' (Blog post from London School of Economics and Political Science, 25 July 2011).

[17] In *Gillan and Quinton v UK* App no 4158/05 (ECtHR, 12 January 2010) the ECtHR ruled that section 44 was incompatible with Article 8 ECHR.

[18] JCHR seventh report (n 19) at [41].

[19] ibid. at [92].

1.4. Breaches of the peace and permissible restrictions on protest under the common law

The statutory framework outlined in the previous section is complemented by common law principles guarding the balance between the protection of the exercise of the right to protest and the prevention of public disorder. Arguably, the common law power – in fact duty – of police officers to enter and remain on private premises without warrant, to arrest, or to take action short of arrest so as stop or prevent actual or anticipated breaches of the peace,[20] has proved so broad as to "defea[t] any claim as to the existence of a 'right.'"[21]

In *Thomas v Sawkins*, it was established that as "part of [his] preventive duty," "a police officer has ex virtute officii full right" not only to enter premises to stop a breach of the peace which was taking place at the moment of his intervention, but also "when he has reasonable ground for believing that an offence is imminent or is likely to be committed."[22] In the same vein, in *Duncan v Jones*, Lord Hewart CJ held that when a police officer "reasonably apprehended a breach of the peace … [it] became his duty to prevent *anything* which in his view would cause that breach of the peace," even in the absence of any unlawful conduct.[23]

Until the turn of the millennium, this decision was used in cases brought by protesters against whom the police had exercised their powers to stop or prevent breaches of the peace, or who had been bound over by magistrates to keep the peace or to be of good behaviour.[24] Seemingly further widening the scope of permissible restrictions on the right to protest, in *R v Morpeth Ward Justices ex parte Ward* the DC held that "it is not necessary to show that that person put anyone in bodily fear if his disorderly conduct would have the *natural consequence* of provoking others to violence."[25] In *Nicol v DPP*, a group of at most

[20] Breach of the peace was defined in *R v Howell* [1981] 3 All ER 383 as 'harm … actually done or likely to be done to a person or, in his presence, his property or is put in fear of being harmed through an assault, affray, riot, unlawful assembly or other disturbance'.
[21] Salát (n 9) 15.
[22] The appellant had addressed a public meeting at The Caerau Library Hall in Glamorgan to protest against the Incitement to Disaffection Bill. The venue had been privately hired for the event, and the police had been repeatedly refused entry. The DC agreed with the Glamorgan justices that the 'police officers had reasonable grounds for believing that, if they were not present at the meeting, there would be seditious speeches and other incitements to violence and breaches of the peace would occur': *Thomas v Sawkins* [1935] 2 KB 249, 252-255.
[23] Neither the appellant, Mrs Duncan, nor anyone else present at the public meeting held in front of the unemployed training centre in Deptford, 'committed, incited or provoked any breach of the peace'. However, when Mrs Duncan had spoken at a public meeting at exactly the same venue the previous year disturbance had taken place. This was sufficient evidence on which the police officer could base his 'reasonable apprehension' that a breach of the peace would be committed again this time if he did not arrest Mrs Duncan upon her refusal to discontinue the meeting: *Duncan v Jones* [1936] 1 KB 218, 223 (Lord Hewart CJ) (emphasis added).
[24] Mead (n 4) 329.
[25] *R v Morpeth Ward Justices ex parte Ward* [1992] 95 Cr App R 215 was a judicial review of a decision of a magistrates' court to bind over protesters who 'invaded a field where a pheasant shoot was in progress, shouting and swearing in an attempt to stop the shoot' (emphasis added).

ten protesters were bound over for disrupting an angling competition by throwing sticks into the water and at the fishing lines.[26] Simon Brown LJ held that there was 'a real risk' that the appellants 'would, unless inhibited by bind over, conduct themselves similarly in the future' and thereby provoke the anglers to resort to violence.[27]

It is notable that both *ex parte Ward* and *Nicol* concerned direct action protests. Unlike communicative protests – which are tolerated more as they are seen as signs of a healthy democracy – such orchestrated attempts to impose one's will on others arguably present an affront to democracy and can justifiably be restricted more harshly.[28] The decision of the DC in *Nicol* was guided by this logic.

Unsurprisingly, the case representing the first judicial attempt at narrowing police discretion in favour of protecting the right to protest – *Redmond-Bate v DPP* – concerned an activity which was anything but obstructive. After three female Christian fundamentalists were asked by a police officer to stop preaching, having attracted some hostile companions, they refused and were charged with wilful obstruction.[29] For Sedley LJ, the determinative question was 'whether, in the light of what the officer knew and perceived at the time …it was reasonable to fear an *imminent* breach of the peace', the threat of which was coming from the person who was to be arrested.[30] Appropriately, he held that the women's activity could not cause a reasonable apprehension of an imminent breach of the peace for which they would be responsible.[31]

The decisions of the HL in *Laporte* and *Austin* represent the most recent judicial re-statement of the balance between the common law powers of the police to prevent breaches of the peace, and the legal protection of the right to protest. Since both cases were decided after the enactment of the HRA, a brief overview of its impact on the constitutional framework of the UK is required before we proceed any further.

1.5. Impact of the HRA

The HRA marked the true emergence of a *right* to protest in the UK.[32] This right consists of a negative obligation not to place unnecessary restrictions in the way of those wishing

[26] *Nicol v DPP* [1996] Crim LR 318.
[27] ibid 319.
[28] Mead (n 4) 9.
[29] *Redmond-Bate v DPP* [2000] HRLR 249.
[30] ibid (emphasis added).
[31] ibid 251.
[32] Salát (n 9) 15; Article 11 of the ECHR only protects peaceful protests (*Ciraklar v Turkey* App no 19601/92 (ECtHR, 19 January 1995). ECtHR jurisprudence on Article 11 also makes clear that its protection extends to both organisers and participants ((*CARAF*) *v UK* App no 8440/78 (ECtHR, 16 July 1980), both static assemblies and moving processions, held either in private or on public thoroughfares (*Rassemblement Jurassien Unité* (n 22)).

to protest peacefully, as well as a positive obligation to facilitate protest by, for example, providing adequate police presence and making public space available.[33]

Articles 10 and 11 of the ECHR are qualified by clawback clauses by which an interference with an individual's right to protest could be justified as a permissible restriction. First, the measure must be "prescribed by law," meaning that it must have an accessible and certain legal basis. Second, it must seek to achieve one or more of the legitimate aims listed in the second paragraph of either Article. This stage is usually satisfied by raising 'the prevention of disorder or crime' as a legitimate objective.[34] Finally, the measure must be 'necessary in a democratic society' and justified as meeting a "pressing social need."[35] This is usually the crucial question on which the compatibility of a measure with Articles 10 and 11 falls to be decided, and it involves an assessment of the *proportionality* of the interference.[36] Indeed, another significant impact of the HRA was the inauguration of proportionality as the ground on which to challenge administrative decisions as illegitimate interferences with fundamental (Convention) rights.

Lastly, under section 6 of the HRA, public authorities such as the police and the courts have a duty to act compatibly with Convention rights. In *Steel v UK*, the Strasbourg judges subjected to the three-stage Convention compatibility test the decisions of the police to arrest and detain five protesters for breach of the peace, as well as magistrates' orders to bind over two of them.[37] The applicants challenged the actions taken against them as unlawful interferences with their rights.[38] The ECtHR found that the general concept of breach of the peace, as well as the particular binding over orders that were issued against the first two applicants, were formulated with sufficient precision to satisfy the requirement of lawfulness under Article 5(1) as well as the "prescribed by law" test under Articles 10(2) and 11(2). However, only the arrest and detention of the first two applicants – who had engaged in deliberately disruptive action[39] – was in accordance with English law as the police and national courts had reason to believe that they had caused or were likely to cause a breach of the peace. In contrast, the protest of the last three had been entirely communicative and peaceful,[40] and in the absence of a decision of a UK court, the

[33] Mead (n 4) 71; In *Platform "Arzte fur das Leben" v Austria* App no 10126/82 (ECtHR, 21 June 1988) the Strasbourg court ruled that 'effective freedom of peaceful assembly cannot … be reduced to a mere duty on the part of the State not to interfere … Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be', including protection against counter-demonstrations.
[34] Mead (n 4) 34-36.
[35] ibid 52.
[36] ibid.
[37] *Steel v UK* App no 68416/01 (ECtHR, 15 May 2005).
[38] ibid. Their claims regarded Articles 5, 10 and 11 of the ECHR.
[39] One had attempted to obstruct a grouse-shoot and the other had repeatedly broken into a construction site.
[40] They handed out leaflets and held up banners in protest against the sale of fighter helicopters.

Strasbourg judges felt able to rule that their arrest and detention did not comply with English law. Their right to liberty under Article 5 had therefore been violated.[41]

1.6. Recent common law development

1.6.1. The test of imminence: R (Laporte) v Chief Constable of Gloucestershire

Ms Laporte was one among a group of protesters travelling from London to the Royal Air Force (RAF) Fairford base in Gloucestershire to take part in an anti-war demonstration. As directed by the respondent chief constable, the coaches were intercepted before arrival, and the passengers were searched. Concluding that some, but not necessarily all, intended to cause a breach of the peace at the demonstration, the police officers conducting the search ordered all protesters to return to their coaches and escorted them back to London. The chief constable maintained that he had information that some of the protesters were members of a group called 'Wombles', one of whose recent demonstrations had escalated into serious violence, and that it was therefore likely that a breach of the peace would be committed at RAF Fairford. Ms Laporte brought judicial review proceedings, asserting that the actions of the police constituted unlawful interferences with the exercise of her freedom of expression and assembly, protected by Articles 10 and 11.[42]

The HL – overturning the Court of Appeal (CA) and finding for Ms Laporte – developed the common law in relation to police powers to prevent breaches of the peace, so that it accords more closely with Articles 10 and 11 of the ECHR. Giving the leading judgment, Lord Bingham reaffirmed that the test of lawfulness applicable to both the power to arrest and take action short of arrest remained as stated in *Albert v Lavin*:[43] "whether it reasonably appeared that a breach of the peace was about to be committed."[44] In other words, the *imminence* of the breach of the peace, and not the reasonableness of the police response was the test which would have to be satisfied for the interference to be 'prescribed by law' in ECHR terms.[45] The test of reasonableness which the DC and the CA had preferred was not established in any previous authorities,[46] and was too "uncertain and undefined" – according to Lord Brown – because it "would allow for reduced imminence for lesser restraint … on some sort of sliding scale," [47] and thus lead to 'too great an inroad upon liberty'. [48]

[41] *Steel v UK* (n 53). For the same reasons, the measures taken against applicants one and two were proportionate, whereas those taken against applicants three, four and five – disproportionate.
[42] *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.
[43] *Albert v Lavin* [1982] AC 546.
[44] *R (Laporte)* (n 59) at [39] (Lord Bingham).
[45] Mead (n 4) 337.
[46] *R (Laporte)* (n 59) at [47] (Lord Bingham).
[47] ibid at [114]-[115] (Lord Brown).
[48] ibid.

The question of reasonableness is still relevant to the assessment of the proportionality of the police decision.[49] For Lord Bingham, the police officers' inference that all of the passengers were likely to cause a breach of the peace at Fairford because some of them were 'Wombles' or were found to carry "offending articles" (which were seized) was not reasonable. Neither was the fear of disorder at the air base given that the police had already imposed conditions under section 12 of the POA and had established a sizeable presence so as to be able to identify and arrest individuals who violated them.[50] In light of these and other considerations, the Lords decided that "It was wholly disproportionate to restrict [the appellant's] exercise of her rights under articles 10 and 11 because she was in the company of others some of whom might, at some time in the future, breach the peace."[51] The right to protest is fundamental in a democratic society and so it must not be unnecessarily restricted.

According to David Mead, "*Laporte* mark[ed] a significant change in judicial approach to what is permissible when it comes to policing peaceful protest" and "provided a clear signal to the limits of tolerable pre-emptive action."[52] The police may lawfully arrest or take action short of arrest only when the threat of a breach of the peace is imminent, and only against individual protesters who appear likely to cause it.[53] However, when evaluated against the Lords' decision in *Austin* three years later, *Laporte* is far from a landslide victory for the right to protest. The test which was reformulated this time was not one from the common law but from ECtHR jurisprudence on Article 5, namely the test for deprivation of liberty. Arguably, later cases such as *Austin,*[54] have removed from the scope of Article 5 indiscriminate measures of crowd control and legitimised their usage against peaceful protesters and even passers-by. To that extent, it represents an erosion of the protection of the right to protest in the UK.

1.7. Conclusion

The last half-century has seen the transformation of the right to protest from a mere common law liberty to a fully-fledged positive right guaranteed both under the common law and the ECHR. Its constitutional elevation has been aided by the passage of the HRA, which imposes a duty on public authorities to act compatibly with Convention rights, including Articles 10 and 11. This has not, however, displaced the maintenance of public order as the primary concern of the UK legislature in the context of public protest. To the contrary, the scope of permissible restrictions on the right to protest has widened as the

[49] Mead (n 4) 338.
[50] *R (Laporte)* (n 59) at [55] (Lord Bingham).
[51] ibid.
[52] Mead (n 4) 340.
[53] ibid 348.
[54] *Austin and Others v UK*, no 39692/09, 40713/09 and 41008/09.

legal powers of the police to arrest or take action short of arrest to prevent breaches of the peace has expanded, and the HL judgment in *Austin* represents the most recent evidence of this development.

2. Does the National Legal System Provide an Effective Remedy to Individuals Who Claim That Their Right to Protest Has Been Violated?

2.1. Introduction

The freedom to protest is a human right recognised under national and international legislation and should afford victims of violations an effective remedy. The meaning of what is 'effective' will depend on each case, its facts, and the expected satisfaction of the individual, however a basic assumption can be made to hold that effectiveness 'effectiveness' meaning something which does the job it is meant to. The sections below will look at whether a claiming individual receives the remedy that they deserve.

The right to protest is enshrined within Article 11 of the European Convention on Human Rights (ECHR), and is most frequently read in conjunction with Article 10 (the freedom of expression). Before the enactment of the Human Rights Act (HRA) in 1998, individuals would have to petition the European Court of Human Rights (ECtHR) in order to uphold their human rights. Today, the rights are directly enforceable in the UK by way of the HRA which imposes obligations upon the state to not only enable the rights but also protect and safeguard them i.e. positive and negative obligations.[55]

Within the HRA, Section 6 lays out the main rule, making it "unlawful for a public authority to act in a way which is incompatible with a Convention right. "[56] Section 7 then lists the proceedings which should be undertaken when claiming a breach of this prohibition by identifying more specifically who can bring such a claim, who it should be brought against and other conditions which have to be met for the claim to be accepted. Section 8 lists the judicial remedies that a claimant may be entitled to, should his case succeed. Where the court finds that the public authority has acted unlawfully, due to failing to meet the standards required of them by the act, the court may award relief or remedies which it "considers appropriate."[57]

2.2. Procedure

Before the implementation of the HRA, the individuals relied on the 'good grace' of the authorities to have their claim heard, having only the option of taking their claim to the ECtHR in Strasburg if their claim was not deemed worthy of a hearing.[58] Today, the 'good

[55] These sections conclude that although the public benefit from the implementation of the HRA, the procedure is highly complex and difficult to navigate thus discouraging many from claiming their remedies. The alternatives also fail to provide an effective way of putting right the violations due to strict procedural complications and an effective escape clause for violators of the right.
[56] Human Rights Act 1998, s 6.
[57] Human Rights Act 1998, s 8(1).
[58] *Hubbard v Pitt* [1976] CA 1 QB 142, as opposed to *Director of Public Prosecutions v Jones and Lloyd* [1999] HL 4 MAR.

grace' approach has disappeared and individuals can now depend on a standardised and secured set of statutory authority. Upon reflection then it may be said that the implementation of the HRA has increased the effectiveness of reaching a remedy, as it allows this to be done based on statutory footing, not the discretion of authorities. Likewise, individuals are no longer required to take their legal action to the ECtHR in order to argue their violation but can enjoy directly applicable rights within the UK which not only imposes obligations upon the state to both enable and protect the right but also eases the process for the individual.

Within the HRA itself, Section 6 requires public authorities to act in line with the rights enshrined within the ECHR, the failure of which enables an individual to initiate the proceedings within Section 7. There are positive obligations on the state which requires it to respect, protect and fulfil the right in questions, the last of these requiring that the state makes available a range of remedies for possible violations and infractions.[59] These proceedings have a range of complex and complicated qualifications and requirements which have to be met in order for the action to be successful.

2.2.1. Assessment of the Procedure

The first requirement within Section 7(1) requires that a claim can only be undertaken if a "public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1).[60]" Although no comprehensive definition of a public authority is given, this requirement of a *public authority* causes potential issues as it will not be possible to bring forward a claim against a private individual. At the same time, another grey area concerns organisations which have been outsourced or have been assigned part of the functions of a state, or that of a 'public nature' as stated by Section 7(3) such as in *Donoghue v Poplar Housing & Regeneration Community Association Ltd*,[61] where the organisation was seen as fulfilling the Local Authorities' statutory obligation. The worry here is that the courts have adopted a very narrow and state-centric approach to what they interpret a function of a state to be[62]. This decreases the chance of remedying the violation of an individual due to a whole class of defendants being immediately disregarded. It is correct to say that it is indeed public authorities which are most likely to cause the most damage to the rights, a claim should nonetheless be possible against private individuals. This, therefore, removes "the protection of proportionality inherent in Convention law and often lacking in domestic private law"[63] and leaves a dangerous way of allowing the state to organise its affairs in a way which hedges their liability and prevents effective remedies.

[59] Section 7 of the HRA explains the procedure which needs to be undertaken by individuals seeking to bring their action.
[60] Human Rights Act 1998, s 7(1).
[61] *Donoghue v Poplar Housing & Regeneration Community Association Ltd* [2001] CA 27 APR 2001.
[62] *YL v Birmingham City Council* [2007] UKHL 27 A care home given the task of looking after individual by the public authority was seen as private and not public due to being privately owned.
[63] J Landau, *'Functional public authorities after YL'* [2007] PL 630.

A second challenge arises with the requirement that a claim can be made but only "if he is (or would be) a victim of the unlawful act.[64]" Section 7(7) of the HRA directs the reader to Article 34 of the ECHR, and allows the person to claim they are a victim under limited circumstances. Under the test, a person cannot bring a claim unless 'he or she has been personally affected by the alleged violation'.[65] The issue that a whole class of interest groups "will be denied access to the courts"[66] has been mentioned and continues to affect many by acting as an effective bar to the claims of human right violations[67] Once again it is clear here that the burden is placed upon the victim to prove that the right has been violated, a process which may deter some and discourage others to attempt the action for fear of failing to be a victim in the proper sense which as Clayton[68] points out causes a chilling effect and imposes a restriction on the right of access to the court.

Lastly, there are significant time limits imposed within s7(5) which requires the claim to be filed within a year of the act complained of. Alternatively, the court has the ability to increase this where it would be equitable to do so in the circumstances. This once again not only presents a difficulty within the complaints process but also implies that the violation is not deemed worthy enough in the long period of time and demonstrates of the arbitrary and highly discretionary system upon which the courts operate upon. Despite the disadvantages outlined above, the complaints mechanism envisaged in the HRA is still more desirable than the process that existed prior to the implementation of the HRA, which required individuals to take their claim to the Strasburg court and fight their battle outside of the UK.

2.2.2. Judicial Remedies Available

Supposing that a claim is successful, the court then considers section 8 and "may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate"[69] in relation to "any act (or proposed act) of a public authority which the court finds is (or would be) unlawful."[70] Here, all circumstances must be considered within the making of such an award to ensure "just satisfaction to the person in whose favour it is made."[71] This can include injunctions which order a public authority to remedy the wrong through acting in a certain way or not acting in another way or award financial damages to compensate the individual if there has been a financial loss.

64 Human Rights Act 1998, s 7(7).
65 *Knudsen v Norway* No 11045/84, 42 DR 247 (1985).
66 Edward Gamier MP, HC Deb v. 314 col. 1065, 24 June 1998.
67 S Chakrabarti, J Stephens and C Gallagher, *'Whose Cost the Public Interest?'* [2003] PL 697.
68 R.Clayton, *'Public interest litigation, costs and the role of legal aid'* [2006] PL 429.
69 Human rights Act, s8.
70 Human Rights Act, s(1).
71 ibid.

2.3. Testing the effectiveness

The procedure itself demonstrates the difficulties which are placed in the way of the individual claiming his rights have been violated. This, in turn, reflects the balancing act that the courts have to perform when assessing the violation. However, it must also be remembered that the decision of whether the right has or has not have been violated may have limited if any, impact.

With relation to financial damages, the courts have been highly unreceptive to financial compensation within public law unless there has been an element of malice or the claim resembles one which could be successfully claimed in tort[72] and is in general considered to be a "residual remedy."[73] When deciding to award damages the court must also consider Article 41 of the ECHR, therefore are also required to take into account the 'just satisfaction' criteria within ECHR. This does not provide any set formulation or quantitative criteria however it most often uses the 'equity principle' which considers the seriousness of the violation, applicant related factors and overall context-related factors in order to deliver 'flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case'.[74]

Injunctions, on the other hand, are usually seen as one of the most significant ways in which an individual may be seen to have had sufficient redress. The courts have previously shown to be careful and limited with imposing injunctions where free speech or freedoms of expression have been concerned as seen in Bonnard.[75] This "exceptional caution in exercising the jurisdiction to interfere by injunction"[76] has continued in later cases,[77] however, has more recently time evolved[78] to allow a more just and effective remedy to be awarded to individuals who suffered from a violation of rights.

Although judicial remedies within Section 8 may satisfy the individual to some extent, many people claiming that their right to protest has been restricted would want to see the laws changed as to ensure that a violation does not happen again, especially in cases where the violation may be seen as lawful due to it being an acceptable qualification *"prescribed by*

[72] I Leigh, L Lustgarten, '*Making Rights Real: The Courts, Remedies, And The Human Rights Act'* [1999] 58(3) Cambridge Law Journal 527
[73] ibid Leigh et al. 527.
[74] S Altwicker-Hàmori, A Peters, T Altwicker, *'A Peters Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights'* [2016] Heidelberg Journal of International Law (HJIL) 16.
[75] *Bonnard V Perryman* [1891] CA 2 JAN 1891.
[76] ibid.
[77] *Laporte*, *Regina (On The Application Of) V Chief Constable Of Gloucestershire* [2006] UKHL 55.
[78] *Herbage v Pressdram* Ltd [1942] CA.

the law."[79] The legislation is clear in not entitling an individual to a remedy, but only allowing the court to provide this where it sees fit,[80] making the remedies highly discretionary.

A criticism that can be levelled against the granting of these judicial remedies is that in cases where a piece of legislation may be seen as violating the rights, the courts do not have the power to overturn or see the law as unlawful but rather have to respect its validity in line with the principle of the sovereignty of Parliament. This "dialogue approach" which relies on the judiciary and legislature to communicate in order to resolve conflicts within our system also gives Parliament the ultimate power decide whether the violation is sufficient enough to warrant a change in law or whether to admit that a violation has occurred. Not only this, its power stretches further as even where a violation is found, it may also claim that such a violation necessary within the national system and file a declaration of incompatibility in line with section 4 of HRA.[81] Where the latter path is taken, there can be no way in which an individual can be said to have received a just remedy as such a declaration "affords no direct remedy to the litigant."[82] This is also the position taken by the ECtHR who states that such declarations do not constitute effective remedies, mostly due to the fact that it provides the correct authority with "a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention."[83] The ineffectiveness of the remedy is made yet more clear when considering that in situations like this, the individual may still take their claim higher to the ECtHR where the declaration of incompatibility may indeed be held to not provide an effective remedy.[84]

In consequence, although the state we are in today is better than that based on "good grace" of the police and public authorities before the implementation of the HRA, it nonetheless fails to secure effective remedies by providing a difficult and rigid procedure as illustrated above.

2.4. Judicial review

The other way in which an individual may seek to claim a remedy may be through judicial review. The concept of judicial review provides individuals with the chance to challenge the decision-making process and actions of public authorities where they believe those authorities have acted in a way that contradicts or abuses the power conferred upon them, these "abuses of power may and often do invade private rights…that is to say misuses of

[79] European Convention on Human Rights, Art 10(2).
[80] H Fenwick, G Phillipson '*Judicial Reasoning under the UK Human Rights Act*' PL 2000 627
[81] Human Rights Act 1998, s4(6).
[82] M Amos, *'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer'* 72 Mod. L. Rev. 883 (2009) 892
[83] ibid Amos 892
[84] ibid (n 22) Fenwick 40

public power."[85] The claims are, thus, not against substantive decisions (merit-based review) but rather the process which was undertaken to make a decision.

If successful, the individual may ask for the decision to be quashed,[86] financial compensation[87] to be awarded if there has been a loss or a prohibitory or mandatory order imposed on the institution.[88] In these cases a different and separate set of difficulties also arises, not only as a claim can only be made by permission being first given by the High Court but also due to the detailed requirements contained within the Civil Procedure Rules and the Judicial review Pre-Action protocol[89] which must be complied with.

First, there is a time limit of three months which constitutes a 'prompt' application under Part 54.4,[90] the individual must have 'sufficient interest' or be a 'victim' from the act complained of,[91] and the institution must also be a public authority.[92] Finally, the claim must be based on one of the grounds which give rise to judicial review (illegality, unfairness, unreasonableness) here 'illegality' being the main one as a public authority can be seen as not acting illegally where it acts counter to the "the law that regulates [their] decision-making power."[93]

The obvious question to address at this stage is whether this procedure, therefore, improves the state of affairs that leads to the ineffective remedies an individual may receive under the HRA and whether it provides a more appealing alternative. Many have argued that judicial review does not increase the chances of delivering justice to an individual, leading some to argue that this is one of the main ways in which the court plays a role in protecting human rights.[94] Judicial review has, however, been previously described as a 'straitjacket,' due to its highly complex and technical nature which is highly inaccessible and presents an undesirable approach to seeking remedies for human rights violations.[95] It is significant that the HRA implements the majority of the rights from the Convention with the exception of Article 13, the right to an effective remedy for violation of these rights. The question of whether the current HRA is sufficient in satisfying Article 13 (effective remedies)[96] is met is an important one since this is one of the articles which is

[85] Sedley J *in R v Somerset CC ex parte Dixon* [1997] QBD COD
[86] Senior Courts Act 1982, s 31(5).
[87] *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406
[88] *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 QB 299
[89] Pre-Action Protocol for Judicial Review, available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv accessed 10 June 2018.
[90] ibid s 31(6); *Hardy v Pembrokeshire CC* [2006] EWCA Civ 240.
[91] Senior Courts Act 1981, s 31(3).
[92] *R (on the application of Beer (t/a Hammer Trout Farm)) v Hampshire Farmers Markets Ltd.* [2003] EWCA Civ 1056 1085.
[93] *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374.
[94] F Klug, S Weir, K Starmer, *The three pillars of liberty: Political rights and freedoms in the United Kingdom* (Routledge, London 2003) 91.
[95] ibid 91.
[96] Human Rights Act, s1(1)(a).

excluded from the HRA since its very own implementation is seen as securing this, especially within *Smith and Grady v UK*,[97] where it was held that judicial review does not provide an effective remedy due to the fact that the irrationality standard is too high thus requiring the courts to carry out more intensive reviews of each case.[98] Many hold the view that the very narrow character of judicial review proceedings does not make them suitable for the resolution of human rights issues.[99]

2.5 Conclusion

In conclusion, the remedies provided are limited in their effectiveness. The process and procedure which is required of the individual is difficult and complex and portrays itself as being designed in order to deter complaints of human rights violations. Assuming the claimant is successful, the remedies are limited by the constitutional structure of our legal system which provides the option of simply declaring itself incompatible with human rights. Judicial review may be seen as an alternative option, however, it too throws up issues of procedure as well as being narrow in its analysis, failing to provide an effective alternative for the weaknesses within the default system of seeking an effective remedy. When returning to the beginning of these sections, it was held that a balance is often struck, and when this balance is left uneven the remedy should aim to correct it.

[97] *Smith and Grady v The United Kingdom* [1999] ECHR 27 Sep 1999.
[98] ibid (n 22) Fenwick et al 176.
[99] ibid (n 13) 522.

3. What is the impact of the European Convention on Human Rights and the case law of the European Court of Human Rights on the right to protest in your country?

3.1. Introduction

The European Convention on Human Rights (ECHR) was ratified by the UK in 1951, making it the first country to do so.[100] However, it was not until 1966 that the UK accepted the right of individuals to challenge the state in the European Courts of Human Rights (ECtHR) regarding claims of human rights violations.[101] The ability of individuals to challenge the UK [102]in Strasbourg ensured that any human rights violations committed by the UK could be held to account by the ECtHR. In this regard, the introduction of the ECHR has not only changed the British legal system's approach to the right to protest but all human rights claim incorporated within the ECHR.

3.2. How has the ECHR affected the UK domestic legal system generally?

The introduction of the right of individual petitions to the ECHR demonstrated the occasional limitations of the common law in protecting human rights and civil liberties. The British Courts have a rather checkered track record in protecting human rights and civil liberties through the common law. Whilst cases such as *Entick v Carrington*[103] do demonstrate the existence of "fundamental Common Law right(s),"[104] the effectiveness of the British courts can be sometimes be questioned. For example, in *Malone v Metropolitan Police Commissioner,*[105] Malone was subject to police wire-tapping through his telephones lines by the police outside his property. The High Court failed to find any violation of the right to respect for privacy under Article 8 of the ECHR. However, when the case was taken to the ECtHR, Malone was successful.[106] For example, in the 1942 case of *Liversidge v Anderson,*[107] the House of Lords concerned "the power of the Home Secretary to intern

[100] Chart of signatures and ratifications of Treaty 005, Council of Europe,(n.d.). Retrieved July 01, 2018, from https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=r0w2hXdi.
[101] Alice Donald, Jane Gordon, and Philip Leach, 'The UK and the European Court of Human Rights' [2012] Research Report 83 *The Equality and Human Rights Commission* v-vi.
[102]
[103] *Entick v Carrington* [1765] 95 E.R. 807. "The defendants broke into Entick's home 'with force and arms' and then proceeded over the next four hours to break down doors and open locks in an effort to find evidence of seditious libel that could lead to a criminal prosecution," Richard Epstein, 'Entick v Carrington and Boyd v United States: Keeping the Fourth and Fifth Amendments on Track' [2015] 82(1) The University of Chicago Law Review 27.
[104] Robert Alderson Wright, 'Liberty and the Common Law' [1945] 9(1) The Cambridge Law Journal 2, 6.
[105] *Malone v Metropolitan Police Commissioner* [1979] Ch. 344
[106] *Malone v United Kingdom* (1984) 7 EHRR 14.
[107] *Liversidge Appellant v Sir John Anderson and Another Respondents* [1942] A.C. 206.

persons where there was a reasonable suspicion that they posed a threat to national security."[108] The House of Lords decided that the Home Secretary should be allowed to exercise this power; it was characterised as a dismissal of the rule of law both by their contemporaries and later legal scholars.[109]

Any discussion in the respect of how the ECHR affects the UK system must now be conducted with the Human Rights Act 1998 in mind. The purpose of the HRA was to give further effect to the rights and freedoms guaranteed under the ECHR.[110] Although the declarations do not have legal effect and ultimately rely on government and parliament to usher in the changes required, more often than not the declarations have been responded too and subsequent changes made.[111]

3.3. How the ECHR changed the UK legal system in terms of the right to protest?

The seemingly checkered track record of the UK courts of protecting human rights is also apparent in the right to protest. The right to engage in public protest has not historically been recognised in British law. In *Duncan v Jones*, Lord Hewart stated that "English law does not recognize any special right of public meeting for political or other purposes."[112] Therefore, the introduction of the ECHR and the HRA has provided a more recognizable right to protest in the form of the combination of Articles 10 and 11 in British law. Article 10 guarantees the right to freedom of expression, "the right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[113] In addition, Article 11 guarantees the right to freedom of peaceful assembly and association with others.

However, both of these rights are not absolute, the exercise of both these rights may be subject to restrictions "as prescribed by law and are necessary in a democratic society."[114] Any interference with either of these rights must also be proportionate. The three-part proportionality test set out by the ECtHR seeks to establish: (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) whether the

[108] Francis Bennion, 'The terrorists should not be allowed to win' [2004] 13(1) The Commonwealth Lawyer 36, [Abstract].
[109] David Edmond Neuberger, 'Reflections on the ICLR top fifteen cases: a talk to commemorate the ICLR's 150th anniversary' [2016] 32(2) Construction Law Journal 149, 162.
[110] The HRA makes the rights in the ECHR accessible to people in Britain so that they can be directly relied on in domestic courts, while section 3 requires all British legislation to be read in a way that is compliant with the ECHR, at section 3(1). In addition, section 4 of the HRA grants the courts with the ability to issue declarations of incompatibility when legislation breaches human rights, at section 4(4).
[111] Alice Donald, Jane Gordon and Philip Leach, *The UK and the European Court of Human Rights* Equality and Human Rights Commission, Research Report 83.
[112] *Duncan v Jones* [1936] 1.K.B. 218, 222.
[113] European Convention on Human Rights, Article 10, section 1.
[114] ibid, section 2.

measures designed to meet the legislative objective are rationally connected to it; and (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[115] The third part of the test articulated in *De Freitas* protects the right to protest by ensuring that any policy that restricts either the right to expression or the right to peaceful assembly cannot be draconian and must be measured.

There is a positive obligation on the state to ensure that people can engage in lawful peaceful protest. In *Arzte fur das Leben v Austria*, the ECtHR noted that "Article 11 sometimes requires positive measures to be taken even in the sphere of relations between individuals."[116] Meanwhile, there is the negative obligation on the state, which establishes "the right not to be prevented or restricted by the state from meeting and associating with others to pursue particular aims, except to the extent allowed by Article 11(2)."[117] Before the enactment of the HRA, the protection of fundamental rights of British individuals often (albeit, not always[118]) relied on the *Wednesbury* test of reasonableness. Lord Greene stated that a decision is unreasonable when it is "so absurd that no sensible person could ever dream that it lay within the powers of the authority.[119]" The *Wednesbury* test that resulted was a strong indication of judicial restraint in ruling against authorities.[120]

Nonetheless, the British courts did recognize the importance of protecting human life and liberty by applying the 'anxious scrutiny' test, displayed in *Bugdaycay*, Lord Bridge states "the court must…be entitled to subject an administrative decision to more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines."[121] The 'anxious scrutiny' test, although milder than the *Wednesbury* test, was ultimately dismissed by the ECtHR in *Smith and Grady v The United Kingdom* and was described by the ECtHR as "still effectively excluding any consideration of whether the national security and public order aims pursued struck a balance with the interference with rights."[122]

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[115] For an application of the proportionality test see *De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others* [1999] 1 AC 69, 80.
[116] *Plattform "Ärzte für das Leben" v Austria* no. 10126/82, ECHR 1988 [32-33].
[117] *Aldemir v Turkey*, no 32124/02, ECHR 2009 [41], and Human Rights Joint Committee, *Demonstrating respect for rights? A human rights approach to policing protest* (Seventh Report, 2009) HL 45/HC 328 [17]-[18]. Retrieved on 01 July 2018 from https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4702.htm.
[118] Daniel Wei Wang, 'From Wednesbury Unreasonableness to Accountability for Reasonableness' [2017] 76(3) Cambridge Law Journal 642, and Michael Fordham, 'Wednesbury' [2007] 12(4) *Judicial Review* 266.
[119] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223, 229.
[120]"In Wednesbury… the licence [of a cinema operator] included a condition that no child under 15 could be admitted, whether accompanied by an adult or not. This decision was taken having regard to the well-being and moral health of children likely to visit the cinema. The local licensing authority had a wide discretion in relation to licences and could impose 'such conditions as the authority [thought] fit.'" Justin Leslie and Gavin McLeon, 'Judicial review: Wednesbury unreasonableness' (*Westlaw Insight*, 13 March 2015) [2]-[3].
[121] *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514, 531.
[122] *Smith and Grady v United Kingdom* [1999] 29 EHRR 493.

The introduction of the Human Rights Act, which allows individuals to rely on the ECHR in domestic courts led to the British Courts embracing the tests of proportionality, used by the ECtHR in assessing human rights claims.

3.3.1. Must the Courts follow ECtHR decisions?

The issue of whether the domestic courts must follow ECtHR decisions has been thoroughly discussed by the British Courts since the inception of the Human Rights Act. Section 2 of the Human Rights Act subsection 1(a) provides that "a court or tribunal determining a question which has arisen in connection with a Convention right *must take into account* any judgment, decision, declaration or advisory opinion of the European Courts of Human Rights."[123] The key words of the statute that answer the question are 'take into account,' the statute does not require the UK courts to follow all ECtHR decisions blindly. The mirror approach that was once advocated by members of the judiciary, such as Lord Rodger, who noted that in *AF (No 3)* that "Strasbourg has spoken, the case is closed"[124] and Lord Hoffman who further noted that the "UK is bound by the Convention, as a matter of international law, to accept the decision of the ECtHR on its interpretation"[125] is incorrect. Instead, the British Courts have transitioned into the 'partial-mirror' approach noted by Lord Bingham in *Ullah.*[126] Lord Bingham noted that the courts should follow the clear and constant jurisprudence of the Strasbourg court in the absence of special circumstances.

Lord Neuberger further supports this approach in *Pinnock v Manchester City Council* noting that the British courts "should usually follow a clear and constant line of decisions by the European Court...but we are not actually bound to do so."[127] The UK Courts have now reached a point in which they are fully capable of departing from ECtHR decisions when special circumstances arise.[128]

Occasionally, the ECtHR provides domestic courts with the ability to depart from its persuasive jurisprudence. In many cases, the ECtHR provides states with a 'margin of appreciation' which relaxes the requirement to follow ECtHR reasoning by providing

[123] Human Rights Act 1998 section 2(1).
[124] *AF v Secretary of State for the Home Department* [2010] 2 A.C. 269, 366.
[125] ibid 356.
[126] *R (Ullah) v Special Adjudicator* [2004] UKHL 26.
[127] *Pinnock v Manchester City Counil* [2011] UKSC 6.
[128] For an example see *Horncastle*: Article 6 of the European Convention on Human Rights guarantees a fair trial. In cases where a defendant's conviction is solely, or to a decisive extent, on statements from an absent witness, the ECtHR has ruled as a violation of the ECHR. In *Al-Khawaja v UK*, the chamber of the ECHR held that the use of a dead victim's witness statement to convict a man of sexual assault was incompatible with his right to a fair trial. The appellants in *Horncastle* relied on the 'sole or decisive' rule applied by the ECtHR to claim that their convictions were unsafe. The Supreme Court rejected this test as part of the Strasbourg jurisprudence. The Supreme Court noted that the Criminal Justice Act 2003 contained provisions that render hearsay evidence from witnesses who are dead, ill, missing or absent through fear admissible in court.

states with the ability to balance rights with domestic policy. For example, in *Handyside v UK* the applicant was convicted in England under the Obscene Publications Act 1959 for publishing a book aimed at children with explicit and obscene materials. The Court held that the domestic margin of appreciation embraced this case and was best left to contracting states to decide if the materials were permissible.[129] Another example of an issue covered by the margin of appreciation is the withdrawal of life-sustaining treatment, this is displayed in *Gard and Others v UK*. The ECtHR states that "where the case raises sensitive moral or ethical issues, the margin of appreciation of the domestic authorities will be wider."[130]

3.3.2. When do the courts depart from the ECtHR jurisprudence?

However, the answer to the question of what are the special circumstances that result in the departure of ECtHR decisions is less clear. An example of this special circumstance can be illustrated through *Horncastle,*[131] which concerned the admissibility of hearsay evidence. The Supreme Court noted, contrary to Strasbourg jurisprudence, that "the provisions of the 2003 [Criminal Justice] Act… strike the right balance between the imperative that a trial must be fair and the interests of the victims."[132] Hence, some reluctance can be noticed when the UKSC is confronted with the opportunity to side with the jurisprudence of the ECtHR. More recently, the prisoner-voting controversy that was initiated through the case of *Hirst*[133] in 2005 continues; in 2016 in *Millbank,*[134] the Court reached the same conclusion.[135] However, the UK has not followed suit and continues the blanket ban on prisoners, so as to prevent the latter from exercising their rights to vote.

3.4. What is the impact of the European Convention on Human Rights and the case law of the European Court of Human Rights on the right to protest in your country?

There have been numerous cases concerning the right to protest that shaped the way UK law treated civil liberties prior to the ratification of the ECHR (as well as after it), thereby showing the development of the right. In *O'Kelly v Harvey*[136] it was deemed by Law C that

[129] *Handyside v UK,* [1976] ECHR, no. 5493/72.
[130] *Gard and Others v UK* [2017] ECHR, no. 39793/17.
[131] *R v Horncastle & Others* [2009] UKSC 14.
[132] ibid [108].
[133] *Hirst v The United Kingdom* (*No2*) [2005] ECHR 681. The British government has enforced a blanket ban on convicted prisoners' voting, and the ECtHR has made it clear that it is "incompatible with Article 3 of Protocol 1 to the ECHR. Yet the British Prime Minister has insisted that the issue is for 'Parliament to decide, not a foreign court',[4] British Members of Parliament having voted to reject *Hirst* back in February 2011." Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' [2014] 14(3) *Human Rights Law Review* 503.
[134] *Millbank and others v The United Kingdom* [2016] ECHR 595.
[135] "[The Court] holds that these applications disclose a breach of Article 3 of Protocol No. 1 concerning the ineligibility to vote in elections," Ibid.
[136] [1882] 10 LR Ir 287.

the defendant was "justified in taking the necessary steps to stop and disperse [the meeting of the plaintiff]"[137] even affecting individuals not potentially involved in a breach of peace. Almost 30 years later, Dicey stated that 'an otherwise lawful' meeting may become the opposite if there is a suspected breach of peace.[138] In *Michaels v Block,*[139] the court cited Cicero's maxim *'salus populi suprema lex'* ('the safety of the state being the highest law')[140] as a justification for the arrest of a plaintiff done "under Regulation 55[141] which empowered the authorities to arrest any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has acted, is acting or is about to act contrary to the public safety."[142]

The interwar period also witnessed a number of interesting cases such as *Thomas v Sawkins*[143] where 30 police officers attended a meeting on private property, where the objective was the discussion of a campaign against the police. Lord Chief Justice Hewart not only based his justification of the defendant upon the necessity of preventing a breach of peace, but also on how it "[went] without saying that the powers and duties of the police are directed, not to the interests of the police, but to the protection and welfare of the public."[144] Only a year later, in *Duncan v Jones*[145] Lord Hewart CJ further acknowledged that "[the] English law does not recognize any special right of public meeting for political or other purposes."[146]

Some change took place in *Piddington v Bates*[147]; although Piddington was convicted of obstructing a police officer, Lord Parker CJ described that "it is not enough that [the constable's] contemplation is that there is a remote possibility,"[148] and that there must be an actual possibility of a breach of peace. Yet, the case still placed quite a low threshold as to what that breach entailed. In *Moss v McLachlan*[149] "the four appellants, attempted to force their way through a police cordon which had been established to stop the miners proceeding and were charged under section 51(3) [of Police Act 1964]"[150] since the court

[137] ibid.
[138] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn Macmillan 1915) 174.
[139] [1918] 34 TLR 438.
[140] Ibid 438.
[141] Defence of the Realm Acts and Regulations 1915, Regulation 55, 66. Retrieved 02 July 2015 from https://babel.hathitrust.org/cgi/pt?id=njp.32101067264596;view=1up;seq=3.
[142] Keith Ewing and Conor Anthony Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (1st edn Oxford University Press 2001) 84. The writers consider this decision as reflecting the "indulgent view of the powers of the public authorities" of British courts in the 20th century.
[143] [1935] 2 KB 249, 30 Cox CC 265 KB.
[144] ibid.
[145] [1936] 1 KB 218.
[146] ibid.
[147] [1960] 3 All ER 660, [1961] 1 WLR 162.
[148] ibid.
[149] [1985] IRLR 76.
[150] Gillian S Morris, 'Picketing and Police Forces' [1985] 14(1) *Industrial Law Journal* 109, 110.

accepted a test of 'close proximity both in place and time' and a breach of the peace was held to be 'imminent and immediate.'[151]

Before delving further into more recent cases, the *definition* of a breach of peace in English law should be clarified. The piece of legislation that empowered the creation of the offence came in the form of a statute; it was the Justices of the Peace Act of 1361.[152] This has been the cause of considerable confusion in courts; for example, in the 1947 case *The King v County of London Quarter Sessions Appeals Committee,*[153] it was recognised by Lord Humphreys that the "statute creates no such offence, but merely authorises justices of the peace to take sureties of some and to punish others."[154] In *Howell,*[155] Lord Watkins recognised that present definitions did not suffice, attempting to provide a solution by stating that "there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property."[156]

Further contributions to this issue were made in *Steel,*[157] where it was agreed that "the expression 'to be of good behaviour'[158] was particularly imprecise and offered little guidance to the person bound."[159] The Court recognised that the third, fourth and fifth applicants, who were arrested simply for distributing leaflets, faced an interference with their Article 11 right; yet, the first and second applicants, who in addition refused to be bound over, were rightly considered to lack 'good behaviour' and the interference with their rights was justified. In many subsequent cases (for example *Hashman and Harrup v The United Kingdom,*[160] and others) the Court did not consider the complaints of the applicants with regards to their Article 11 rights or deemed their request with regards to Article 11 inadmissible and only examined interferences with Article 10.

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[151] ibid.

[152] Justices of the Peace Act 1361, 1361 Chapter 1 34 Edw 3, can be accessed at http://www.legislation.gov.uk/aep/Edw3/34/1?view=extent. It was amended in 2018, due to the fact that the powers of the Justices of the Peace had now been transferred to Magistrate's Courts, and was considered to be dated by many legal scholars -as cited by Graham McBain, "Modernising the Law: Breaches of the Peace & Justices of the Peace" [2015] 8(3) *Journal of Politics and Law* 158. However, it still applies to both England and Wakes.

[153] *The King v County of London Quarter Sessions Appeals Committee, ex parte Metropolitan Police Commissioner* [1948] 1 K.B. 670. It is interesting to note that the defendant was brought to court because his eavesdropping was thought to potentially 'blemish peace'. In the end, he "was ordered to give surety for good behaviour, not because there was evidence of mere intention to offend in future, but because he had been found to have in fact been guilty of conduct which endangered the peace" [681].

[154] ibid [679]. The Act is quite specific on that matter, as it specifies that the Justices of Peace "have Power to restrain the Offenders, Rioters, and all other Barators, and to pursue, arrest, take, and chastise them according their Trespass or Offence", while "the People be not by such Rioters or Rebels troubled nor endamaged, nor the Peace blemished".

[155] *Regina v Howell (Errol)* [1981] 3 W.L.R. 501 [1982] Q.B. 416.

[156] ibid [426].

[157] Steel and Others v United Kingdom, no 24838/94, ECHR 1999.

[158] Per the explanation of the court: "A 'binding over' order requires the person bound over to enter into a 'recognizance'... to keep the peace or be of good behaviour for a specified period of time" ibid. §611.

[159] (n62) §641.

[160] no 25594/94, ECHR 2000.

In other cases, the ECtHR has agreed with the legal approach of UK courts. In *Appleby v UK*,[161] "the applicants alleged that they had been prevented from meeting in the town centre, a privately owned shopping mall, to impart information and ideas about proposed local development plans."[162] The applicants further relied upon the argument that due to its character, the shopping centre was a 'quasi-public' land. Yet, both the Government and the ECHR were convinced that their rights had not been infringed since they could employ alternative means to "communicate their views."[163] The UK Government "countered that it was not responsible for the Postel's interference with the Applicants' rights."[164] The ECHR found that in order for the existence of a positive obligation to be determined, a "fair balance [had] to be struck between the general interest of the community and the interests of the individual."[165] It was concluded by the Court that there had been no interference with the applicants' Article 11 right,[166] whilst in a partly dissenting opinion, Judge Maruste agreed that spaces resembling the shopping mall (privately owned but of public character) could be deemed as having such a 'semi-public' status, following that the UK authorities had failed to regulate how this public forum could be used by the applicants.[167] However, it is important to note that it was recognised by both UK and ECHR courts that if an infringement of the Article 11 right was found, "there was no remedy available to the applicants in domestic law."[168]

Other important developments that have taken place include *Plattform "Ärzte für das Leben" v Austria*[169], where it was decided that the rights of an anti-abortion NGO organizing a demonstration had not been infringed due to a counter-protest overseen by the police, having "[taken] reasonable and appropriate measures."[170] Similarly, other exceptions to Article 11 have been justified by the ECtHR, such as in the case of lawful interference with the plaintiffs' freedom of association under Article 11(2) in *Rekvényi v Hungary*[171]; the ban on police officers joining political parties was not unlawful in terms of arbitrariness and fell within the restrictions that states are entitled to impose,[172] since it "had been intended to contribute to the elimination of any direct party political influence on the police by severing the institutional links."[173] The main area of dispute by the Court regards whether those any interferences are 'necessary in a democratic society' (and therefore, justified). In

[161] no 44306/9, ECHR 2003.
[162] ibid §3.
[163] ibid §48.
[164] Columbia University, 'Appleby v. U.K.' (*Global Freedom of Expression*, n.d.) <https://globalfreedomofexpression.columbia.edu/cases/appleby-v-uk/> accessed 04 July 2018.
[165] (n18) §39.
[166] ibid §50-52.
[167] ibid, (n 49).
[168] (n18) §55.
[169] no. 10126/82, ECHR 1988.
[170] ibid §34.
[171] no. 25390/94, ECHR 1999.
[172] European Convention on Human Rights, Article 11, section 2.
[173] (n 76) [57].

United Communist Party of Turkey and Others v Turkey[174] "the applicants maintained that the fact that the United Communist Party of Turkey had been dissolved and its leaders... banned from holding similar office in any other political party had infringed their right to freedom of association."[175] In this case, the arbitrariness of the ban (both in terms of its judicial enforcement and its proclaimed purpose[176]) amounted to an infringement of Article 11 rights, as it was "disproportionate to the aim pursued and consequently unnecessary in a democratic society."[177]

[174] 133/1996/752/951, ECHR 1998.
[175] ibid [18].
[176] ibid [58].
[177] ibid [61].

4. How has your country applied derogations from state obligations regarding the freedom of assembly in times of public emergency threatening the life of the nation according to Article 15 of the ECHR?

4.1. Introduction

The present essay focuses on the provision of derogation from state obligations with respect to European Convention of Human Rights (ECHR) enumerated in Article 15 of the Convention. ECHR has been the torch bearer of Human Rights across Europe with its judgments affecting the legal jurisprudence all across the world. But this protection is not absolute and is previous to state control through the provision of Article 15 which would be the emphasis of this essay. The essay will trace the journey of United Kingdom with respect to Article 15 and for that; the start of the essay will cast light upon Article 15 and its diverse facets, especially clause 15(1). The next part will talk about the major decisions of Article 15 and the doctrine of the margin of appreciation. The last part will focus on the efforts of the court in upholding the human rights and the conclusion.

4.2. Article 15, Meaning and Implications

The derogation clause, or as Article 15 is known, is one of the most essential as well controversial clause of the European Court of Human Rights as it affords to Contracting States, in exceptional circumstances, the possibility of derogating, in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the Convention[178]. It occupies a central place in the discourse of human rights during 'emergency situations' and is seen as setting the parameters within which the balance is to be established for both the states as well as international organs.[179]

The text of Article 15 is based on the draft Article 4 of the United Nations draft Covenant on Human Rights, which later became Article 4 of the International Covenant on Civil and Political Rights (ICCPR)[180]. For the sake of brevity, we will briefly cover what the various clauses of Article 15 focus on.

Article 15 has three clauses. Article 15(1) defines the circumstances in which Contracting States can validly derogate from their obligations under the Convention. It also limits the measures they may take in the course of any derogation. Article 15(2) protects certain

[178] European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights - Derogation in time of emergency* (last update 30 April 2018) <https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf> accessed 27 May 2018 1,5.
[179] MM El Zeidy, 'The ECHR and States of Emergency: Article 15 -A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 *San Diego International Law Journal*, 316.
[180] (n 1).

fundamental rights in the Convention from any derogation. Article 15(3) sets out the procedural requirements that any State derogating must follow.

Article 15(1) allows for states to take measures derogating from its conventional obligations, "provided that such measures are not inconsistent with its other obligations under international law."[181]

The court has not been required to interpret the term war in any of the emergency cases yet and therefore, the same would not be an issue of contention in the present essay. Most of the cases concerned with Article 15 are concerned with the interpretation of the term "public emergency threatening the life of the nation" that has been interpreted by the court as an exceptional situation of crisis or emergency affecting the whole population and constituting a threat to the community of which the state is composed.[182]

4.2.1. Public Emergencies

Public emergencies present a problem for states, with regards to balancing the efforts to overcome the emergency and restore order while at the same time respecting the fundamental rights of individuals. In 1959, the phrase "public emergency threatening the life of the nation" was defined for the first time by the European Commission of Human Rights in its report on *Lawless,* where the Commission pointed out the French authentic text of the lawless judgment from which the court adopted its definition, the text mentioned not only the word 'exceptional' but also the word 'imminent' which created an additional criteria to be examined by both the Court and the Commission.[183] Although the phrase was defined by the Commission in the *Lawless* case, through the Greek case it became more elaborate. The Commission expressed that in order to be qualified as "public emergency," an emergency must have the following characteristics:

- It must be actual or imminent,
- its effect must involve the whole nation,
- the continuance of the organised life of the community must be threatened,
- the crisis or danger must be exceptional in the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[184]

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[181] Article 15(1) as a whole reads|: "*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*"

[182] *Lawless v Ireland,* no 332/57, EHRR 1961.

[183] MM El Zeidy, 'The ECHR and States of Emergency: Article 15 -A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 *San Diego International Law Journal* 281.

[184] European Commission of Human Rights, *The Greek Case : Report of the Commission : Application No. 3321/67-Denmark v. Greece, Application No. 3322/67-Norway v. Greece, Application No. 3323/67-Sweden v. Greece, Application No. 3344/67-Netherlands v. Greece* (1969) 72.

Despite the fixed criteria of crises affecting the whole population, in practice the standard has been relaxed. For instance, in *Ireland v United Kingdom,*[185] the court accepted the argument that the whole population may be affected by incidents or events in only a part of the state, and that the derogation may be restricted to that part.

A number of conceptual tensions or oppositions appear when the states tend to defend the human rights derogations in the name of emergency in the state. One of them is the implicit counterpoint between emergency and normality and therefore, an emergency is understood as an exceptional vesting of powers in the executive that would normally belong to the judiciary or legislature.[186] The government asserted and the Court accepted that an emergency relating to Northern Ireland had existed at least since the early 1970s and highlighted an important feature of the emergency/normality antinomy if emergency measures pretend to aim at the achievement of future normality they often, in fact, become a deferring normality.[187] This process of normalization has been noted by a number of observers of UK anti-terrorist legislation.[188]

The second precondition for a valid derogation is that the derogation must be "strictly required by the exigencies of the situation"; generally the Convention organs have been satisfied with the fulfillment of this condition if a respondent government showed some colorable basis for believing that the derogatory measures were necessary at the time, for instance in *Ireland v UK* where the Court found that the Government was 'reasonably entitled' to consider that departures from the convention were 'called for.'[189] Along with a series of decisions comprising those in *Brogan,*[190] as well as *Brannigan*, one can observe a pattern of Court providing a wide margin of appreciation to the states (discussed in detail in the next section) which is sometimes interpreted as, by some scholars,[191] endorsing the notion that derogation is a viable alternative to compliance.

4.3. ECHR and the doctrine of 'margin of appreciation'

The European Court of Human Rights constantly deals with various issues of law and policy, which have been considered as a matter of domestic jurisdiction raising problem concerning the authority of the court in scrutinizing the laws and practices of the contracting states and assessing them against the European Convention of Human

185 *Ireland v United Kingdom*, no 5310/71, ECHR 1977.
186 Moreover, emergency denotes the distinctive notion of duration, in that, it is a limited departure from an otherwise enduring sense of normality and has to be justified by the promise of restoration, or creation, of normality in the future as conveyed by one of the dissenting opinions in *Brannigan and McBride* (*Brannigan and McBride v United Kingdom,* no 14554/89, ECHR 1993) by Judge Makarczyk.
187 ibid, 86.
188 ibid.
189 *Ireland v United Kingdom*, no 5310/71, ECHR 1977 [212]-[220].
190 *Brogan v United Kingdom,* [1988] 11 EHRR 117.
191 S Marks, 'Civil liberties at the margin: the UK derogation and the European Court of Human Rights' (1995) 15 Oxford Journal of Legal Studies 79.

Rights.[192] Like most of the international institutions, the Strasbourg system as well was not set up for the destruction of national sovereignty and authority, therefore some of the matters must be left to the states to regulate while the court and other organs exercise a degree of control through their decisions to achieve the protection of human rights.[193]
To achieve this purpose, the concept of 'margin of appreciation' was developed, leaving an area of discretion to the contracting parties, which may be in a better position to decide than the European organs.[194] The court's job remains to review the lawfulness of the measures and to be sure that the state has not exceeded its margin of appreciation.[195] This concept was the main tool relied upon by the court when dealing with emergency cases under Article 15.

4.3.1. Significant Cases

Lawless was one of the most important cases that dealt with Article 15 while facing a political situation. In this case, the court set the criteria for evaluating the existence of the preconditions dictated by Article 15(1) and extended the motion of a measure of discretion, which it first adopted in the case of *Cyprus*,[196] applying it "not only to the question of whether the measures taken by the Government were 'strictly required by the exigencies of the situation' but also to determine whether a 'public emergency threatening the life of the nation' existed". The court applied the 'margin of appreciation'[197] doctrine, agreeing with the claims of the government that derogation from Article 5 (detention without trial) was required by the exigencies of the situation which was the existence of public emergency.[198] *Lawless* established and provided guidelines for states considering the measures available to them in emergency situations and was also the first case where the first definition and detailed interpretation of Article 15 was adopted.

Further, *Brannigan & McBride* where the court explicitly concurred with the doctrine of wide margin of appreciation and held that "the court explicitly stated that it fell in the first place to each Contracting State, with its responsibility for 'the life of [its]nation', to determine whether that life was threatened by a 'public emergency.'"[199] According to the court, the national authorities were better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations

[192] MM El Zeidy, 'The ECHR and States of Emergency: Article 15 -A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 *San Diego International Law Journal* 301.
[193] ibid.
[194] ibid.
[195] ibid.
[196] [2001] ECHR 331.
[197] Albeit, without using the actual term.
[198] The judgment was criticized since it was believed that the protection afforded to the individual had been undermined.
[199] *Brannigan and McBride v United Kingdom,* no 14554/89, ECHR 1993 [48].

necessary to avert it due to their direct and continuous contact with the pressing needs of the moment.[200]

In *Brannigan & McBride* the Court confirmed that a wide margin of appreciation should apply in regard to derogations. According to the Court, it was not its function to do anything more *"than review the lawfulness, under the convention, of the measures adopted."*[201] Even in one of the later cases, *A v Secretary of State for the Home Department*,[202] concerning a situation of an emergency requiring derogation, Lord Bingham expressed that "*it is the function of political and not judicial bodies to resolve political questions.*"[203]

The convention, like the other treaties that permit derogation, provides that certain freedoms and rights are not subject to derogation. If derogable rights are considered dispensable luxuries to be given up when no longer affordable, then the non-derogable rights should be absolutely indispensable.[204] However, the Court's decision in *Brannigan & McBride* illustrates a polarized way of conceiving issues, seemingly inferring from the fact that certain rights are listed as non-derogable that all other rights are fully derogable.[205]

Where the court adopts a wide margin of appreciation, it accepts the government's policy choices. With a narrower margin, arguments about those choices become possible and the court can be called upon to evaluate alternatives from perspective that seeks to maximize conformity with convention standards. Cast in this light, the wide margin of appreciation represents a lost opportunity for the court to play an engaged role in relation to the issues before it.[206]

The court's decision in *Brannigan & McBride* surely sits uneasily with the exceptionally important role of international supervision in an emergency situation.[207] Scholars like Zeidy, believe that the court in *Brannigan* emphasized the primacy of the state's assessment of what is required. Also, the decision opens an unlimited possibility of applying extended administrative detention for an uncertain period of time ignoring judicial reviews.[208]

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[200] ibid.
[201] *Ireland v United Kingdom*, no 5310/71, ECHR 1977 [241], and *Brannigan and McBride v United Kingdom,* no 14554/89, ECHR 1993.
[202] *A v Secretary of State for the Home Department* [2004] UKHL 56.
[203] S Humphreys, 'Legalizing lawlessness: On Giorgio Agamben's state of exception' (2006) 17(3) European Journal of International Law 677,687.
[204] S Marks, 'Civil liberties at the margin: the UK derogation and the European Court of Human Rights' (1995) 15 Oxford Journal of Legal Studies 90.
[205] ibid.
[206] ibid., 93.
[207] ibid., 94.
[208] DJ Harris et al., *The law of the European Convention on Human Rights* (1st edn OUP 1995) 501-2.

4.4. The other Efforts of the Court and hope for Human Rights

In the case of *Brannigan & McBride,* the court had also emphasized that the domestic margin of appreciation was not unlimited and had to be accompanied by a European Supervision in which the court must give appropriate weight to relevant factors such as the nature of rights affected by the derogation, the duration of the emergency, etc. In determining whether a State has gone beyond what is strictly required, the Court has to give appropriate weight to factors such as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.[209] It can also consider its own motion if necessary, even if only to observe that it has not found any inconsistency between the derogation and a state's other obligations under international law.[210] The making of a derogation is not a concession; in practice, when lodging a derogation, the State has to recognise that the measures 'may' involve a derogation. Therefore, where an applicant complains that his or her Convention rights were violated during a period of derogation, the Court first examines whether the measures taken could be justified under the substantive articles of the Convention; it is only if it cannot be so justified that the Court would go on to determine whether the derogation was valid.[211]

It can be inferred that the machinery of the Strasbourg organs while examining emergency cases faced fundamental dilemma but part of it can be contributed to the formulation of Article 15 itself. Firstly, it permits derogation from specific rights such as Articles 5 and 6 that are no less fundamental than the ones listed as non–derogable; secondly, there is no specific criterion defining the required time period for proper notification in accordance with Article 15(3).[212] Further, the total lack of sanction mechanism concerning the notification process gives too much manoeuvrability to states.

Time and again the court has tried to reinforce the exceptional nature of the threat under which a country can opt to derogate from its human rights obligations such that the normal measures or restrictions permitted by the convention for the maintenance of public safety are patently inadequate[213] and the same can be assessed by the court with reference to the facts known not only at the time of the derogation but also subsequently.[214]

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[209] *Brannigan and McBride v United Kingdom,* no 14554/89, ECHR 1993 [43] and *A and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009 [173].
[210] *Lawless v Ireland,* no 332/57, EHRR 1961.
[211] ibid.
[212] MM El Zeidy, 'The ECHR and States of Emergency: Article 15 -A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 San Diego International Law Journal 316.
[213] European Commission of Human Rights, *The Greek Case : Report of the Commission : Application No. 3321/67-Denmark v. Greece, Application No. 3322/67-Norway v. Greece, Application No. 3323/67-Sweden v. Greece, Application No. 3344/67-Netherlands v. Greece* (1969) 153.
[214] *A and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

In later cases (*Mehmet Hasan Altan v Turkey,*[215] *A v Secretary of State for the Home Department*[216]*),* the court clarified that States do not enjoy unlimited power in cases of decisions concerning derogations and the court was empowered to rule on whether the state has gone beyond the "extent strictly required by the exigencies" of the crisis on the basis of each complaint. One can most certainly hope that the court is conscious of the immense responsibility that it holds in regard to derogation and that the states such as the United Kingdom do not rely on the concession provided under Article 15 merely to restrict opposition.

4.5. Conclusion

One can clearly ascertain that there has been a continuous and consistent change in the perception of states as well as the Court in the case of derogation with the preference towards the human rights of the individuals. The Court has to remember that it is a defender of rights and not the governments. Even though the role and the approach of the Court may be perceived as unsatisfactory, one also has to bear in mind that the politically sensitive nature inherent in emergency situations affects the lens through which the court looks at the issues presented to it.[217] To take up the point made by Judge Makarczyk in *Brannigan & McBride,*[218] the issue of UK derogation is an issue of the "integrity of the Convention system of protection as a whole."[219]

[215] *Mehmet Hasan Altan v Turkey*, no. 13237/17, ECHR 2018.
[216] *A v Secretary of State for the Home Department* [2004] UKHL 56. Although it regards a domestic jurisdiction case before House of Lords, the ratio of the case is important.
[217](n 32).
[218] *Brannigan and McBride v United Kingdom,* no 14554/89, ECHR 1993.
[219] ibid, 45.

5. How can restrictions on the right to protest be justified with reference to the protection of public order and prevention of crime in your country?

5.1. Introduction

The right to peaceful protest and assembly, as protected by Article 11(1) of the European Convention of Human Rights (ECHR), is a fundamental feature of democracy and pluralism.[220] At a societal level, the right complements and adds to the political debate, constantly triggering a process of reflection and deliberation, generating transparency and accountability.[221] At an individual level, it is a way of assertion of one's dignity. It is also important by virtue of its close nexus with Article 10, the right to the freedom of expression, by protecting one's ability to voice and communicate their ideas to the wider society.[222] The multi-layered importance of the right, therefore, necessitates strong protection and close scrutiny of any restrictions.

Nevertheless, as important as the right is, it may compete against another public policy – the need to prevent crimes and disorder in the society, which the unrestrained permissiveness on the exercise of the right to protest may give rise to.[223] Accordingly, it has been argued that the two concepts need to be balanced against each other.[224] This has been recognized by Article 11. The limited circumstances in which the restrictions on Art 11(1) may be justified are expressly set out in Article 11(2). These are "the interests of national security or public safety…the prevention of disorder or crime…the protection of health and morals, or…the protection of the rights and freedoms of others."[225]

The following sections evaluate how restrictions on the right to protest are justified with reference to the prevention of disorder or crime in the UK. Some restrictions have developed through common law; others have been solidified with legislation. In the UK,

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[220] Law, Liberty and Australian Democracy, Beth Gaze, (1990), 115.

[221][221] Martin O'Flatherty, "Right to Peaceful Protest is Pillar of Open Democracy" [2014] Irish Times 15.

[222] Commonwealth Secretariat, *Freedom of Expression, Association, and Assembly,* (2003), 15.

[223] With regards to some protests, some level of police intervention may be necessary in order to prevent escalation into violence and disruption of the public order. One example of this is the events of 1 May 2000, where the protest against capitalism "turned ugly with looted shops and battles with police." The events included some demonstrators throwing bottles at the police, two protestors smashing the McDonald's windows and McDonald's sign, and smoke bombs let off inside the place. May 2K: special report, Will Woodward, Paul Kelso, and John Vidal, available at: https://www.theguardian.com/uk/2000/may/02/mayday.world.

[224] In many jurisdictions, the right to peacefully assemble and protest is protected so long as the public order is not disrupted. For example, while the right to peacefully protest is not expressly guaranteed in the French Constitution, it may be implied from the 1789 Declaration of Rights of Man and of the Citizen, incorporated into the French Constitution, which declares that "no one should be bothered for his opinions, even religious ones, so long as their manifestation does not disturb the public order established by Law." In Italy, the Italian Constitution guarantees the right to peaceful assembly, where "peaceful" is described as one that does "*disturb the public order*."

[225] European Convention on Human Rights, s 11(2).

the right of freedom of protest is generally restricted on the grounds of protecting public order and preventing crimes which can threaten the maintenance of public order, such as terrorism.[226]

Because there is no determinative objective standard to determine when a protest can threaten public order and peace,[227] broad discretion has been granted to the police and the local authorities.[228] Many human rights organisations, such as Liberty, have criticized this broad discretion as over-inclusive and disproportionate, applying even to peaceful demonstrators exercising their freedom of expression.[229]

5.2. How is right to peaceful protest protected and restricted at a domestic level?

The effect of the ECHR on the protection of the right to protest within the UK has already been elaborated previously in this journal. Nonetheless, a brief reiteration of the basic points is necessary before we proceed with our analysis. As previously discussed, the ECHR has been significantly influential on how the right to freedom of protest is regulated at a domestic level. While it is an international document, as opposed to a British Bill of Rights, it has been made part of the domestic law through the HRA 1998. This means that the way in which the right to freedom of protest is governed at a domestic level has to be ECHR-compliant, including the restrictions imposed on the right. Consequently, any restriction on the right has to surpass a three-fold test to be justified: (1) the restriction should be prescribed by law; (2) it should be necessary in a democratic society; (3) and it should be proportionate. The proportionality test is again three-fold: (a) the limitation should pursue a legitimate goal; (b) it must address a pressing social need; (c) the balance between the aim pursued and the means employed to achieve it must be proportionately struck.

5.2.1. The Public Order Act 1986

In addition to the HRA, the right to protest is regulated through legislation and the common law. The main piece of legislation is the Public Order Act 1986, outlining the steps necessary for a lawful protest. Under the Act, it is essential to give the police advance notification of the planned protest, except where the assembly is a funeral procession, or

[226] Public Order and the Right of Assembly in England and the United States: A Comparative Study, (1938), 47 Yale L. J. 404.
[227] *R v Howell* [1981] 3 All ER 383 explained that the breach of peace is the "harm … actually done or likely to be done to a person or, in his presence, his property or is put in fear of being harmed through an assault, affray, riot, unlawful assembly or other disturbance."
[228] (n6).
[229] Liberty's response to the Joint Committee on Human Rights: "Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest," (2009).

where it is unreasonable to require notification.[230] Otherwise, the failure to provide a notification is an offence. The Act also gives powers to the police to impose conditions on the undertaking of the protest as they consider necessary, for example on its time and place.[231] These involve restrictions on the exercise of right to freedom of protest, and under the legislation, these restrictions are justified only if they are imposed with the intention of preventing "serious public disorder" or where the purpose of the protest is the "intimidation of others with a view to compelling them to do something they have no right to do or not to do something they are entitled to."[232] Failure to comply with the conditions imposed is an offence.[233]

Under Section 4 of the Public Order Act 1986, it is an offence for a person to use threatening, abusive or insulting words or behaviour that cause, or can possibly cause, harassment, alarm or distress to other people. It is evident that peaceful pluralistic co-existence necessitates some degree of respect and care when one is exercising their right to freedom of speech. Nevertheless, this provision, without an accompanying definition of harassment, alarm or distress, or any other guidance, can be an intrusive device for the peaceful protestors exercising their freedom of expression[234]. There is a tense interplay between fundamental rights of speech and protest, and the need to prevent crime that the (unregulated) exercise of these rights can give rise to. One plausible way of striking the delicate balance is proposed by Dworkin, who distinguishes between merely offending people (which should *not* be prohibited), and attacking the dignity of a group of people (which *should* be prohibited).[235] This is a fine but sensible line: protection of dignity is vital for the key values of pluralism, tolerance and broadmindedness, while being offended is merely an emotional and subjective response.[236] However, this distinction is not clarified under the current law, and a step in this direction may be desirable.

The way in which the right to freedom of protest may be restricted with the aim of maintaining public order has recently been demonstrated with the legal case surrounding the Ealing Council's unanimous vote to create the first ever 'safe zone' around an abortion clinic in the UK which would shield protect women from anti-abortion protestors.[237] The ban has been upheld by the high court, meaning that there is now a protest-free "buffer zone" around the clinic. Justice Turner conceded that the ban interfered with the demonstrator's right to freedom of protest, he held that the ban was necessary in a democratic society. The ban was justified in order to protect women from considerable

[230] Section 11, the Public Disorder Act 1986.
[231] ibid, Section 14.
[232] ibid, Section 14(1)(a) and (b).
[233] ibid, Section 14(4).
[234] (n 6).
[235] Kai Moller, "The Global Model of Constitutional Rights", (2013), 183.
[236] Jeremy Waldron, "The Harm in Hate Speech" (2012), 139.
[237] Sarah Marsh, 'Decision to ban protests at London abortion clinic upheld' *The Guardian,* (London, 2 July 2018).

distress and intimidation by the protests.[238] This demonstrates how the need to maintain public order and protect others from alarm and distress may be used to restrict the exercise of the right to freedom of protest.[239]

5.2.2. Kettling

One common method by which the right to protest is restricted is kettling, which involves the police containing the people in a cordon in a specified area with the intention of preventing the risk of public disorder. One example of how kettling restricts the right to freedom of protest is demonstrated in *Austin v Commissioner of Police of Metropolis.*[240] The facts of the case have already been elaborated elsewhere in the journal.[241] Importantly, the approach taken by the House of Lords –and approved by the ECtHR later in *Austin and Others v UK*[242] -was to examine the *motive* behind the restriction in order to decide whether it is justifiable. Thus, the House of Lords (and agreed later by the ECtHR) argued that the restriction on the applicant's Article 5 –right to liberty and security –was justified because of the *motive* of the police who reasonably perceived a "real risk, not just to property, but also of serious personal injury and even death."[243]

Such an approach can be dangerous for the protection of the right to freedom of protest in the UK.[244] Determining whether there has been a restriction of liberty is less about what the police intended, and more about the actual impact the police's action had on the protestors. This has not been emphasized by the ECtHR[245] who confirmed the House of Lord's decision, referring to the uncooperative behaviour of the crowd and the duty of the police to contain it when there is an anticipated real risk. It has been suggested that the authorization of kettling should be allowed at a narrower scope. Liberty suggests that not only can kettling dangerously over-restrict fundamental freedoms, but it can also prove counter-productive in achieving its aims. Furthermore, while kettling is done with the intention of preventing risks of violence and crime, it can exacerbate the risk of confrontation and provoke the crowd. Accordingly, it may not only fail to realise its objective of maintaining public order, but also actually increase the risk of disorder and other crimes.[246]

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[238] ibid.
[239] ibid.
[240] *Austin and another v Commissioner of the Police for the Metropolis* [2009] UKHL 5.
[241] Austin was present in Oxford Circus during May Day protests in 2001, but himself was not one of the organisers. Despite this, he was prevented from leaving the area for about 7 hours. He alleged a violation of his Article 5 of the ECHR; the right to liberty.
[242] (n 17).
[243] *Austin v Metropolitan Police Commissioner* [2005] EWHC 480 at [532].
[244] (n 6).
[245] *Austin and Others v UK* App nos 39692/09, 40713/09 and 41008/09.
[246] (n 6).

Nonetheless, the decision in *Austin* has set the momentum in the opposite direction, expanding and easing the justifications of kettling on the right to freedom of protest.[247] A year after the ruling, on 9 December 2010, there was another instance of what Mansfield calls "a dangerous use of police force to quell the protest."[248] The march containing around 15,000 people, most of whom were students and staff, was aimed to protest against cuts in education and the changes in the tuition fees. There was a kettling of the crowd at 3:23 p.m. for nearly 6 hours.[249] Moreover, there was another incidence of kettling at Westminster Bridge which involved 3,000-4,000 people being tightly packed in very cold weather conditions. The police also exercised force on the protestors, causing Meadows grave head injury.[250] The police response has been condemned by the UN Special rapporteur[251]. Mansfield argues that these responses by the police are part of a general trend of an increasing use of kettling and police force.[252] This confirms Mead's observation of how the decision in *Austin,* after which the prevention of disorder became more readily available as a justification for the restriction of the right to freedom of protest, can dangerously threaten such a fundamental human right.[253]

5.2.3. Stop and Search Powers

Additionally, the police are also granted stop and search powers, exercised in order to pre-empt and prevent crimes, particularly in relation to terrorism. Previously, this area was governed by Section 44 of the Terrorism Act 2000, under which the chief constable is authorized to stop and search pedestrians and vehicles if they consider it "expedient" in order to prevent terrorism.[254] The open-ended and vague legislative lexis "expedient" potentially has far-reaching consequences on the right to freedom to protest. This is demonstrated in *Gillan and Quinton v UK.*[255] To briefly reiterate the facts, the applicants were Mr Gillan who was on a bicycle and carrying a rucksack, and Ms Quinton, a journalist, who was ordered to stop filming despite showing her press cards. The House of Lords ruled that the right to protest is not an absolute rule. The word "expedient" was interpreted loosely; Lord Bingham suggested that it need not be "necessary,"[256] and confirmed the Court of Appeal interpretation of the word which ruled that police can exercise stop and search powers where they consider such an action "advantageous."[257]

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[247] David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Bloomsbury UK 2010) 9-11.
[248] Michael Mansfield, 'A dangerous use of police force to quell protest', *The Guardian,* (London, 3 March 2013).
[249] ibid.
[250] ibid.
[251] ibid.
[252] (n 29).
[253] Mead (n 28) 355.
[254] Terrorism Act 2000, Section 44(3).
[255] *R (on the application of Gillan (FC) and another (FC) (Appellants) v Commissioner of Police of Metropolis and another (Respondents)* [2006] UKHL 12.
[256] ibid, [15].
[257] ibid, [25].

It has been argued that the word "advantageous" is a very vague interpretation of the legislation which can justify and even encourage significant restrictions to the right to protest.[258] This was recognized by the ECtHR, who ruled that section 44 powers unjustifiably interfered with Article 8.[259] It held that the first and second stage of the test was fulfilled: s44 powers did have a legal basis, and they did address a legitimate aim: prevention of crime.[260] Nevertheless, the third stage of proportionality could not be surpassed. It objected to the interpretation of "expedient" as "advantageous," the result of which was that there was "no requirement of any assessment of the proportionality of the measure,"[261] leading to "a clear risk of arbitrariness in the grant of such a broad discretion to the police officer."[262] These risks were actualised when the 82-year-old Walter Wolfgang was dismissed from the 2005 Labour Party conference for criticizing Jack Straw on Iraq.[263] His return was prevented under Section 44. This case shows that the broad way in which Section 44 powers had been defined can infringe on the people's ability to exercise their right to freedom of protest and the right to freedom of expression.

Largely due to the decision in *Gillian v UK,* the Section 44 powers were repealed and replaced by Protection of Freedoms Act 2012, Section 59. This demonstrates the influence of the ECtHR on the UK. Now, the senior police officer can stop and search only if they reasonably suspect that an act of terrorism will take place and reasonably consider that the authorization is necessary to prevent such an act.[264] Furthermore, any such power can now exist very restrictively, in terms of space and duration. Spatially, the authorization will apply only to a *specified* area which the officer reasonably considers no greater than necessary.[265] In terms of time, the authorization should be for a specified duration to a maximum of 14 days[266] (as opposed to the 28-day period authorized previously)[267], and should be confirmed by the Secretary of Space within 48 hours of the issue. The reformed law is relatively much more in favour of the right to peaceful protest. As Cape observes, "the new regime […] is significantly more stringent than that under the TA 2000 s.44 and is more likely to satisfy the ECHR concerns."[268] This is an example of the ECHR contributing positively to the protection of the right to peaceful protest in the UK. Nevertheless, the criterion of "reasonable suspicion" may still be ambiguous and can permit potentially dangerous unnecessary restrictions.

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[258] ibid.
[259] *Gillan and Quinton v UK* App no 4158/05 (ECtHR, 12 January 2010).
[260] ibid, [65].
[261] ibid, [80].
[262] ibid, [85].
[263] Andrew Sparrow, 'Heckler, 82, who dared called Straw a liar is held under terrorist law'*, the Telegraph,* (London, 29 September 2005).
[264] Protection of Freedoms Act 2012, Section 59.
[265] Protection of Freedoms Act 2012, Section 59.
[266] Protection of Freedoms Act 2012, Section 59.
[267] Protection of Freedoms Act 2012, Section 44.
[268] Ed Cape, *The Counter-Terrorism Provision of the Protection of Freedom Act 2012: Preventing Misuse or a Case of Smoke and Mirrors,* (2013) 4 Criminal Law Review.

5.2.4. Terrorism

Terrorism is a particularly serious category of crime which the government should protect the public against. It can pose an existential threat to societies and can injure/kill a considerable number of people, although its emotive rhetoric can often exaggerate and multiply the real level of harm it causes.[269] Particularly in the post-9/11 world, the very topic of terrorism generates the public perception that *anything* can – and should – be done in order to fight terrorism.[270] Nevertheless, at the heart of terrorist legislation lies a very delicate balance between liberty, to which freedom of protest is an essential component, and security.

The broad definition of "terrorism" arguably shifts the balance towards security[271]. This is demonstrated in *R v Gul,*[272] which concerned the conviction of a law student under Section 2 of the Terrorism Act[273] for "terrorist publications," including publications which are likely to be understood as 'a direct or indirect encouragement…to the commission, preparation, or instigation of acts of terrorism.' The applicant was charged with Section 2[274] after the police found videos on his computer, including those depicting terrorist attacks on the civilians. The case is crucial for the opinions of Lord Neuberger and Lord Judge who reluctantly accepted the "concerningly wide"[275] definition of terrorism in Section 1 of the Terrorism Act 2000, which includes military attacks by a non-state armed group against any state or inter-governmental organization forces in the context of a non-international armed conflict. Such a wide interpretation can easily justify restrictions on protests through an appeal to terrorism, even where the nexus between the alleged offence and terrorism is not self-evident. For example, the trial of James Matthews, a former British soldier volunteer joining Kurdish forces to fight Islamic State group extremists, depicts that even military acts at the time approved by the government can later be condemned as terrorist acts.[276] While not a straightforward act of protest, his military activity may also be considered a form of protest against terrorism. Perhaps paradoxically, however, his 'protest' against terrorism was restricted in order to fight terrorism. In any case, his inclusion in the Terrorism Act 2000 demonstrates that justificatory grounds of fighting terrorism can cover protest, which one may not perceive as promoting terrorism.

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[269] David Anderson, "Shielding the compass: How to fight terrorism without defeating the law", (2013), Journal of Politicial Philosophy.
[270] Waldron, however, cautions his readers that we should be aware of the difference between the emotive appeal of the anti-terrorist legislation and the real impact of such legislation in the fight against terrorism. Jeremy Waldron, "Security and Liberty: The Image of Balance", (2003), 195.
[271] Ibid.
[272] *R v Gul (Appellant)* [2013] UKSC 64.
[273] Terrorism Act 2006, Section 2(3).
[274] ibid.
[275] ibid, [38].
[276] Lizzie Dearden, "James Matthews: Former British Army soldier who fought Isis in Syria now faces terror charge", *the Independent,* (London, 7 February 2018)

5.2.5. Surveillance

Recently, the right to freedom of protest has been restricted with increasing surveillance. This can be seen in a case recently brought by *Liberty R (On the application of Wood) v Commissioner of Police of the Metropolis*.[277] In order to be able to attend the AGMs, Wood bought a share in a company with links to arms trade. While there was no problem during the meeting, the police claimed that they saw him talking to a known arms industry protestor after the conference. The police surveilled Wood; upon his refusal to reveal his identity, he was tracked by the police to the underground station where they sought to discover his identity from his travel documents. Wood's claim of a violation of Article 8 ECHR – the right to respect for private and family life – was rejected by the House of Lords. The case is currently on appeal to the ECtHR where the human rights organization, Liberty, has argued that "taking, storing and dissemination of photos of peaceful protesters is an unjustified interference with the right to private life."[278] The retention of such data also discourages potential future protestors, thereby harming the very exercise of the right.

5.3. Conclusion

The most common justification for the restriction on the right to freedom of protest, as it has been shown, is the need to prevent/reduce the risk of crimes, and maintain public order in society. At the UK level, the police have various means at their disposal to realise these objectives, such as through kettling or stop-and-search powers.[279] Overall, there is now a trend towards the specification and limitation of such powers, thereby also limiting the authorised justifications for the restriction on the right to liberty. Even then, many of the police powers and justifications for the restriction on the right to freedom of protest have been questioned by many human rights organisations. Essentially, this is a very controversial area, and justifying the restrictions on the right to protest involve striking a delicate balance between the need to maintain order and prevent crimes, and protecting one's ability to voice their opinion and contribute to public debates via demonstration and protest.

[277] *Liberty R (On the application of Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414.
[278] (n 9).
[279] While section 44 stop-and-search powers are now repealed, the police authorities retain the liberty to question suspects, although now on more restricted grounds allowed by the Protection of Freedoms Act 2012.

6. What positive obligations does your state assume to guarantee the enjoyment of the right to protest and protection from the interference of private parties?

6.1. Introduction

The right to protest is considered a fundamental part of a healthy democracy as it supports an "informed, participatory and active electorate"[280] and acts as an "important safety valve"[281] for dissenting views. As such, the UK is required to fulfil certain positive obligations in order to guarantee the enjoyment of the right. These obligations require the state to take protective measures to prevent interference by private parties, such as counter-demonstrators or businesses targeted by protestors, and facilitate demonstrations. Part one outlines the legal framework of the right to protest, namely the relevant Articles 10 and 11 of the European Convention of Human Rights (ECHR) and the operation of Section 6 of the Human Rights Act 1998 which requires all public authorities to act in a Convention compliant manner. Part two focusses on the Police as one of the major public bodies involved in protest activity and how they seek to fulfil their duties to both the public and the protestors. Part three discusses the role of the courts in balancing between the private interests of businesses and the right to protest in deciding orders for injunctions.

6.2. The Legal Framework

6.2.1. The Distinction Between Positive and Negative Obligations

Upholding the right to protest entails the state fulfilling both positive and negative obligations. Positive obligations require the state to undertake specific preventative actions to safeguard a particular right whereas a negative obligation is a duty to refrain from impinging on the right itself.[282] A breach of a positive obligation occurs when the state fails to act and a breach of a negative obligation would occur via the imposition of a limitation upon the right being exercised – for example if protestors are subject to violence from police authorities there is a breach of a negative obligation as they did not refrain from violence, in contrast, if counter-protestors are violent towards protestors and the police do not act, there is a breach of a positive obligation by failing to act.

[280] David Mead, *The New Law of Peaceful Protest* (2010, Hart Publishing) 9.
[281] Her Majesty's Chief Inspector of Constabulary (HMCIC), *'Adapting to Protest'* (2009) 40.
[282] Jean-Francois Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks, Directorate General of Human Rights, no.7, 2007).

6.2.2. The Relevant Provisions

Albeit the right to protest is no stand-alone right, it falls under the scope of Article 11, and a bit less so under Article 11; imposing both positive and negative obligations upon contracting parties such as the UK.

Article 11 establishes that all individuals have the "right to freedom of peaceful assembly and to freedom of association with others,"[283] such that those who participate or organise such assemblies are protected from state interference. Peaceful assembly includes meetings, mass actions, marches, sit down protests but not violent protest or direct action taken to prevent an activity at all.[284] The European Court of Human Rights (ECtHR) has interpreted the right as encompassing both the right not to be hindered by the state from assembling in order to pursue particular aims and a duty upon the state to ensure that such rights are secured even between individuals. For example, as stated in *Ärzte fur das Leben*, "genuine effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere."[285] Article 11 sometimes requires "positive measures to be taken even in the sphere of relations between individuals."[286] Lord Bingham echoed the decision in *Ärzte* in the domestic *Laporte* case where he held that a duty upon the state to "take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully"[287] existed. Positive obligations to protect freedom of assembly and association are necessary for the full realisation of the right. For example, fear of violence from opponents resulting from a lack of protective state action is likely to deter demonstrations. Thus, fulfilment of Article 11 may require police action to mitigate risks of violence or facilitating protest via providing access to space.

Also relevant is the freedom of expression guaranteed by Article 10. In *Appleby*, the ECtHR held that where a bar on accessing property prevented the exercise of Article 10, e.g. there were no alternative means available, the court would not exclude the possibility of a positive obligation to protect Article 10 via regulating property rights.[288]

The UK, as a signatory of the ECHR, is bound by its articles and incorporates the Convention via the HRA 1998. Section 6 HRA makes it unlawful for any public authority to act in a manner incompliant with the ECHR.[289] Public authorities include courts, tribunals, and "any person certain of whose functions are functions of a public nature."[290]

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283 Article 11 of the European Convention on Human Rights (ECHR).
284 HMCIC (n 2) 72.
285 *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204 [32].
286 ibid.
287 *R(Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 (Bingham LJ).
288 Mead, '*The New Law of Peaceful Protest'* (n 1) 129, see *Appleby and Others v. The United Kingdom* - 44306/98 [2003] ECHR 222.
289 Human Rights Act 1998 s6.
290 ibid.

Therefore, bodies such as the police, the courts, and local government are all required to fulfil the positive and negative obligations that Articles 10 and 11 entail. The ECHR only requires 'reasonable and appropriate measures' to safeguard the right,[291] and derogations are permitted as neither right is absolute, thus the state can be seen to be under a general obligation of neutrality and to advocate a conciliatory stance.[292]

6.3. Policing and Positive Obligations Relating to Protest

As a public authority, the police are required to act compatibly with the Convention and therefore are under a duty in certain circumstances to safeguard rights of assembly and expression. The police "must demonstrate a certain degree of tolerance towards the protest and anticipate a level of public disruption" in relation to non-violent demonstrations.[293] Recent reports[294] also indicate the adoption of a presumption in favour of facilitating peaceful protest as the standing point for policing protest. However, the police are also tasked with maintaining public order and safety and so must balance the safety and rights of the general public and the rights of the protestors.[295] The police mainly seek to fulfil their facilitative role in three ways– police presence at demonstrations, co-operation prior to and during the assembly, and by using legislation to charge violent acts and to prohibit demonstrations that may lead to violence.

6.3.1. Police Presence at Demonstrations

In *Ärzte,* the European Court recognised a facilitative duty by requiring that there is an adequate police presence in response to violent and disruptive opposition.[296] Police presence, whilst sometimes leading to conflict with protestors, can be facilitative of protest as it deters violence and enables the demonstration to take place without interference from private individuals e.g. prevents violent counter-demonstrations. An example of this was the Bristol 'Gays Against Sharia' march which involved around 40 protestors but had a police presence involving more than 100 officers, 10 police riot vans, mounted officers and a law enforcement drone.[297]

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[291] *'Ärzte für das Leben*' (n 6).
[292] Akandji-Kombe (n 3) 51.
[293] HMCIC *'Adapting to Protest'* (n 2) 4.
[294] Committee on Human Rights, *Facilitating Peaceful protest*, 10th report of session 2010-11, Joint committee on Human Rights, HL paper 123, 25th March 2011, and also Her Majesty's Chief Inspector of Constabulary, *Adapting to Protest: Nurturing the British Model of Policing* (2009).
[295] HMCIC *Adapting to Protest'* (n 2) 5.
[296] Her Majesty's Chief Inspector of Constabulary, *Adapting to Protest: Nurturing the British Model of Policing* (2009) 61.
[297]Alex Ballinger, 'Massive Police Presence Keeps 'Gays Against Sharia' March and Counter-Protests Under Wraps' *Bristol Post* (2018) <https://www.bristolpost.co.uk/news/bristol-news/massive-police-presence-keeps-gays-1511608> accessed 12 July 2018.The march was organised by activists with links to the far right and faced counter protests from anti-fascist and LGBT+ groups. The two groups were kept at a distance by the police to prevent clashes.

6.3.2. Co-Operation Between the Police and the Protestors

In order to ensure that police involvement is proportionate to the size of the event, procedures have been implemented to increase co-operation between themselves and the organisers such that demonstrations can occur peacefully and that threats are mitigated. The organiser is required to notify the police of the date, time, route of the demonstration, along with the details of the organisers, six days in advance.[298] This allows the police to determine the appropriate level of police presence and to manage any risks – for example the Public Order Act allows the police to impose conditions as to the route, location, duration and the number of people present if there is a reasonable belief that serious public disorder, damage to property or disruption to community life or the intimidation of others may occur.[299] These conditions have the potential to prevent, instead of facilitating, the exercise of Article 10 and 11, and so require the Police to ensure that such conditions are proportionate to the risk that requires mitigating.

The police have undertaken a 'no surprises' approach[300] to policing protests with communication between organisers and the police before and during demonstrations, for example communicating via social media or tailored leaflets and ensuring that stewards are also used to ensure the protest remains peaceful.[301] This ensures that police presence is both facilitative, as threats are managed, and appropriate to the demonstration.

6.3.3. Statutory powers

One fundamental aspect of the positive obligations of Articles 10 and 11 is to protect those exercising such rights from violence from private individuals. Thus, the police have multiple statutory and common law powers to address such situations. If a chief officer reasonably believes that imposing conditions are not sufficient to prevent serious public disorder, they can apply to the local council or Secretary of State for an an order prohibiting the holding of public processions or a particular class of public procession in the area or part of the area for a period of up to 3 months.[302] Alongside the more traditional and well-known criminal law offences e.g. assault and battery, the Public Order Act 1986 defines a number of statutory offences, including riot, violent disorder, affray, causing fear or provocation of violence and causing harassment, alarm and distress which can be utilised against those being violent and threatening other's exercise of expression and assembly. Common law powers regarding breaches of the peace also exist; there is a duty to seek to prevent by arrest or any action short of, any breach of the peace occurring, about to occur

[298] ibid.
[299] ibid ss.12 and 14.
[300] HMCIC '*Nurturing the British Model*' (n 17) 36.
[301] Joint Committee on Human Rights, *Facilitating Peaceful protest*, 10th report of session 2010-11, Joint committee on Human Rights, HL paper 123, 25th March 2011.
[302] n 21 s 13(1).

or likely to be renewed in ones' presence.[303] These powers are mainly concerned with ensuring wider public safety and maintaining public order but are also conducive to a protestor's ability to partake in peaceful demonstrations without fear of violent repercussions.

6.4. Injunctions and the Courts

Although private individuals and bodies are not directly required to comply with the rights contained in the ECHR, there is, occasionally, an indirect duty imposed upon them when they interact with the courts. This is because the courts, as public authorities, are subject to section 6 HRA and so must decide cases and exercise discretion in a manner which aligns with Convention rights.[304] This is especially relevant, as Mead argues, due to the shift away from traditional public law routes and towards private, civil remedies in relation to protest actions as protestors now actively attempt to disrupt commercial business, e.g. by persuading suppliers to cease their supply to certain businesses.[305]

The most common civil remedy utilised by private parties, such as businesses, are injunctions. Injunctions are an order from the court and prohibit specific individuals from undertaking specified activity in certain locations.[306] As injunctions impose conditions on expression and assembly, the court, in deciding the order, is required to balance between the property rights of businesses or privacy rights of company directors and people's right to protest.[307] Two types of injunction are relevant in this case: ordinary civil injunctions and injunctions under the Protection from Harassment Act 1997.

6.4.1. Civil Injunctions

Civil injunctions can be granted as equitable relief in relation to protest activity when claims in trespass or nuisance occur. An example of this is the 2017 INEOS injunction in response to anti-fracking protests. INEOS submitted evidence demonstrating that the company faced hostility from protestors and of actions taken against other similar firms that it could expect to face in the future e.g. repeated trespass.[308] In the *INEOS* case, the possible effects on the freedom of expression if an injunction was ordered was considered,

[303] A breach of the peace as whenever 'harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance' (*R v Howell (Errol)* [1982] QB 416).
[304] Mead, *'The New Law of Peaceful Protest'* (n 1) 47.
[305] David Mead, 'A Chill Through the Back Door? The Privatised Regulation of Peaceful Protest' [2013] PL 100.
[306] ibid 103.
[307] Mead, *'The New Law of Peaceful Protest'* (n 1) 382-384.
[308] Rob Evans, 'Fracking Firm Wins Extension To 'Draconian' Protest Injunction' *The Guardian* (2017) <https://www.theguardian.com/environment/2017/nov/23/fracking-firm-wins-extension-to-draconian-protest-injunction> accessed 12 July 2018.

as section 12(3) HRA was held to apply.[309] The injunction, whilst having an effect on the right, was regarded as justified as the laws of trespass and highway obstruction were lawful and predictable. This case can be seen as an example of balancing between the private rights of the company and the rights of the protestors to demonstrate. The injunction is aimed at curbing unlawful behaviour, e.g. courses of conduct that amount to criminal damage or obstructing highways via slow-walking,[310] as opposed to policing the actual expression – e.g. only allowing certain signs.

6.4.2. Use of the Protection from Harassment Act 1997

The use of injunctions to prevent protest has increased since the Protection from Harassment Act 1997 (PFHA) as its broad powers and vague definitions lend itself to wide applicability.[311] Under the Act, "if someone pursues a course of conduct which amounts to harassment of another person and which he or she knows or ought to know amounts to harassment,"[312] they may be guilty of an offence,"[313] and the victim may seek an interim injunction.[314] This was widened by s125 of the Serious and Organised Crime and Police Act 2005, which included within the definition of harassment, the harassment of "two or more people with the intention to convince them to do or refrain from doing an act there are entitled to do,"[315] thus allowing both victims of the harassment and those intended to be persuaded e.g. higher up company officials, to seek injunctions. There is no clear statutory definition of harassment beyond 'alarming' or 'distressing' an individual, and so it is open to broad interpretation.[316] Injunctions under the PFHA 1997 allow the company to protect itself from demonstrations in areas beyond company property, e.g. to nearby roads, to establish wider exclusion areas.[317] For example, the Badger Cull injunctions prohibited any protest-related activities within 100m of homes/25m of businesses, the use of artificial lights to harass protected persons and the use of flying remote controlled objects by anyone protesting against the cull.[318]

6.4.3. A Balancing Act

It is evident that such injunctions can have a deterrent and impinging effect upon freedoms to protest, as a result, the courts have had to balance between the rights of those being targeted and those of the protestors. As recognised by Walker J:

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[309] *Ineos Upstream Ltd & Ors v Persons Unknown & Ors* [2017] EWHC 2945 [86].
[310] INEOS, Injunction https://www.ineos.com/businesses/ineos-shale/injunction/.
[311] (n 29) 105.
[312] Protection from Harassment Act 1997 s 1.1.
[313] ibid s2.1.
[314] ibid s3.1.
[315] Serious and Organised Crime and Police Act 2005 s 125.
[316] Mills (n 43) 128.
[317] Mead, '*The New Law of Peaceful Protest*' (n 1) 264.
[318] Mills (n 43) 130-132 see https://www.nfuonline.com/cross-sector/farm-business/legal/legal-news/high-court-injunction-in-full/.

> *'[The] role of the court is 'to ensure that legitimate protest is not stigmatised as unlawful' such that it will be 'impossible for the claimants to succeed if their claim would amount to a disproportionate interference with freedom of expression including the expression of protest.'*[319]

This is seen in the *Edo* case wherein a temporary injunction was granted, given that the protestors would have a quick trial.[320] However, action by the firm in ignoring court orders prolonged the trial and ultimately led to the rejection of attempts to render the injunction permanent as they were held to have impeded a quick trial.[321] Similarly, attempts by Novartis Pharmaceuticals to prohibit all masks, animal costumes, and banners containing words such as 'abuses,' or 'torture,' among other actions on its premises as they were "inciting criminal activity by subtle means" were rejected as they were a disproportionate interference with freedom of expression.[322]

However, as Mead states, there is a tendency for case law to treat protests with disruptive aspects as non-peaceful, hence subject to PFHA injunctions.[323] This equivocates peaceful protest involving minor obstructive elements with more disruptive direct action which arguably goes against the facilitative duty of public authorities and the approach of some degree of tolerance towards public disruption. The gradual limitation of defences exacerbates this, as the s1(3)(c) 'reasonableness' defence once considered to apply when vindicating Convention rights[324] is now limited to only exceptional circumstances, e.g. rescuing someone from danger.[325] Thus, it can be gathered that whilst the court does recognise its obligation to facilitate and give effect to Articles 10 and 11 as per its positive obligations under s6 HRA, in practice its rulings do appear to shift in favour of the private parties seeking injunctions.

6.5. Conclusion

The UK, as an ECHR signatory, is bound by the positive obligations to facilitate and protect the rights of assembly and expression in order to ensure its citizens are able to voice their discontent through peaceful methods. The HRA bestows upon public authorities an obligation to act in a Convention compliant way, and as such the courts and the police have had to undertake various measures and balancing in order to give effect to the positive obligations required. Both bodies are empowered to make decisions regarding the extent to which private parties may impinge upon freedoms – either by maintaining the peace and ensuring the safety of protestors or by ensuring that protestors are able to

[319] Mead, '*The New Law of Peaceful Protest'* (n 1) 272 citing *EDO Technology* (Preliminary Issues) [2005] EWHC 2490 [25] (Walker J).
[320] Mills (n 43) 131.
[321] ibid.
[322] ibid 132.
[323] Mead 'A Chill' (n 29) 106.
[324] Mead, 'The New Law of Peaceful Protest' (n 1) 272.
[325] ibid, *DPP v Moseley, Selvanayagam and Woodling*, unreported High Court decision, 9 June 1999.

protest in the locations and methods they prefer. However, the likelihood that in attempting to reach the balance between protestors and private rights and maintaining peaceful protest that the rights of protest may be impinged is ever present.

7. How equipped is your country's legal system to face the challenges presented by digital social movements such as #metoo, and how might the right to protest be exercised in this context?

7.1. Introduction

In our current digital age, the internet is perhaps one of, if not the most powerful and effective tool of expression. Information and communication technologies (ICTs) have enabled mass and instantaneous exchanges, as well as disintermediation, all of which have successfully combated previous obstacles posed by time and geography. More crucially, the ability to send messages via digital means allow injustices and controversies, which may have gone unnoticed, to be conveyed to the rest of the world, without the burden of physicality. Blogging and other virtual tools of our generation, like weaving, are also art forms that deserve our respect. In many ways, social media can even be said to be a global tapestry of our times, worthy of legal protection because it is the unique junction where different threads come together: stories, opinions and protests.

This essay believes that the complexity of cyberspace requires a more refined legal regime for the United Kingdom (UK) to effectively respond to the challenges, which stem from online expression and protest. The points which will be raised build upon the idea that a sound legal footing for the right to offline and online expression, is a necessary building block to support the right to protest in cyberspace. The first thread will explain how ambiguous parameters of acceptable speech, is inadequate to protect expression, particularly digital social movements and protests. Furthermore, despite established laws in regards to realspace speech, the regime governing online speech lacks transparency and consistency. A second thread will examine the existing regulation on physical protests and show that it is inapplicable in the context of cyberspace because of its unique architecture. Therefore, the final thread will tie together the first two, to show that a new legal regime that is specific to cyberspace is urgently needed in order to put an end to the enigmatic status quo, as well as to fairly govern the ever-evolving sphere of online expression and protest. Ultimately, these three threads, seek to persuade readers that the social media tapestry is a vital part of our lives and the right to add to it should be universal and upheld, particularly for those physically-disabled from voicing their suffering.

7.2 The First Thread: examining the right to expression in realspace and cyberspace

Free speech did not truly gain momentum in English law until the Human Rights Act of 1998 (HRA), which protects Article 10, the right to freedom of expression guaranteed

under the ECHR.[326] Nowadays, the right to freedom of expression is firmly rooted in both the common law and at statutory level. In *Reynolds v. Times Newspapers Ltd*, Lord Steyn remarked that the right to freedom of expression is 'constitutional' thereby, bestowing a 'higher normative force' on this fundamental right.[327] However, despite a strong legal foundation for realspace speech and the potential to develop a robust cyberspace regime, the current status quo is ambiguous, which has also left the right to online assembly and association in a limbo.

Determining the exact degree to which our rights to expression and protest online can be exercised is especially tricky due to the difficulties associated with identifying acceptable speech, as well as the fact that cyberspace is constantly evolving.[328] Notably, even in the physical world, both common law and the Convention accept that freedom of expression is not limitless. Furthermore, on an international level, its parameters are drawn by Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which stresses that restraints must have a 'legitimate aim' as well as be 'necessary and proportionate'.[329] In regards to implementation, the United Nations' Human Rights Committee established a *lex specialis* to Article 19: a state obligation is contained in Article 20 to ban propaganda that incites war and any 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[330] Such standards have consequently introduced an array of ambiguities into the qualification process of what constitutes "hate speech". The challenge is heightened in the online environment due to its unique structure. Sunstein explains that 'the nature of the internet is to isolate individuals behind screens', on top of this there is no 'homogeneity of information… [because] users can choose to only receive certain information'.[331] Thus, the layout of the internet can cause, for instance, sarcastic remarks to be misinterpreted because the author's tone and facial expression are unknown. Thoughts and opinions can also be easily taken out of context because of filters which individuals may have applied. This matter is even more troubling if the speech in question pertains to protest. Fear of triggering the "hate speech" standard can chill digital social movements and curb the expression of online protesters for three key reasons. The first, being the architecture of the internet, which makes it easier to misunderstand communications. The second is because the essence of protest speech is often highly opinionated and may be extreme. While the third cause is that attitudes towards what is an acceptable expression and what is not, are largely subjective and legal boundaries of speech

326 Human Rights Act of 1998.
327 *Reynolds v. Times Newspapers Ltd and Others* [1991] UKHL 45, [1999] 4 All ER, [156] (Lord Steyn).
328 Nani Jansen Reventlow, 'The Right To 'Offend, Shock Or Disturb,' Or The Importance Of Protecting Unpleasant Speech' [2017] Perspectives on Harmful Speech Online <https://cyber.harvard.edu/sites/cyber.harvard.edu/files/2017-08_harmfulspeech.pdf> accessed 25 June 2018.
329 United Nations Human Rights Committee, General comment No. 34: Article 19: Freedoms of opinion and expression, *International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/34, http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.
330 Reventlow (n 4), 8.
331 Cass R Sunstein, *Republic.Com 2.0* (Princeton University Press 2009) 46-96.

vary across jurisdictions. In the US for example, in the landmark case *Reno*, Judge Stevens' majority opinion confirmed that the First Amendment's protection of speech extends into cyberspace.[332] While, in the UK, there is no written constitution, no free speech law such as the First Amendment, nor a case like *Reno*, instead, freedom of expression and assembly are qualified rights. Restraints on these freedoms are accepted if they are necessary and proportionate. Moreover, in light of the fact that states are obliged to ban propaganda that contains "hate speech", a reasonable threshold and a transparent test to evaluate speech are needed. As it stands, it is unclear what kind of protest speech is truly protected by law, which leaves many individuals in a vulnerable position and may deter the exchange and defence of controversial ideas regarding sensitive topics such as religion online. Thus, the chilling of expression may also have far-reaching consequences on our exercise of democracy.

7.2.1 The Current Legislative Framework on Digital Speech

The UK has tried to respond to the challenges of digital speech by including targeted provisions within the greater legal regime, which governs communications, namely s. 1(1) of the Malicious Communications Act 1988 (MCA) and s. 127 of the Communications Act 2003 (CA). However, Geach and Haramlambous posit that the current law is 'inaccessible, uncertain and thus inadequate' to meet the obstacles posed by today's evolutionary online environment.[333] Currently s. 1(1) of the MCA 1988 states that:

> A person who sends to another person
> (a) a letter, electronic communication or article of any description which conveys
> (i) a message which is indecent or grossly offensive;
> (ii) a threat; or
> (iii) information which is false and known or believed to be false by the
> sender; or
> (b) any article or electronic communication which is, in whole or in part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should . . . cause distress or anxiety to the recipient or to any other person to whom he intends that it or its content or nature should be communicated.[334]

[332] *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).
[333] Neal Geach and Nicola Haralambous, 'Regulating Harassment: Is The Law Fit For The Social Networking Age?' (2009) 73 The Journal of Criminal Law.
<http://journals.sagepub.com/doi/abs/10.1350/jcla.2009.73.3.571> accessed 25 June 2018.
[334] Malicious Communications Act 1988, s 1 (1).

This addition was a breakthrough because it helped prevent the law from being rendered irrelevant in the Internet era. It 'puts together a low-level harm, merely causing distress and anxiety, with an intention to cause such harm, and thus it does not provide a criminal sanction for inadvertent innocuous behaviour'.[335] Furthermore, aside from providing the sole route to charge an accused of one-off online acts, unlike the PHA, it does not require a cause of action, which allows it to avoid the technical difficulties that may stem from attempts to prosecute offences that fall in between an online and offline state. However, it fails to capture the intricacy of online social interactions because the nature of the stipulated act does not capture the harassment methods that can be used on social networking sites. Examples of such include repeated friend requests, "gift" requests and so forth. A more serious consequence of the narrow mens rea and actus rea of the MCA is that the law becomes even more foreseeable and out of reach as the PHA confusingly suffers from the opposite problem: its mens rea and actus rea are too wide.[336] It has been suggested by Geach and Haramlambous that the wide s.2 actus reus of the PHA should be integrated with the narrow mens rea of the MCA, in order to enable 'for a low-level form of harm to be caused such as distress or irritation, as this outcome would need to be intentionally caused, which would then justify imposing a criminal sanction for such conduct.[337]

Compared to real life, it is more legally obscure where the boundaries of expression lie in the virtual world. This is largely due to the novel ways of communication available in the virtual world. For example, the ability to post videos on a platform such as YouTube. The CA 2003 has attempted to cover these developments by adding two offences under s. 127 to specifically tackle harassment conducted using electronic communication tools. Both offences emphasize a public electronic communications network, making them narrow in nature. According to Lord Bingham, s. 127 does not seek 'to protect people against receipt of unsolicited messages which they may find seriously objectionable', rather it serves to 'prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society'.[338] Indeed, these offences have great potential to protect the individuals from online harassment but the application is ultimately confined to public networks. This excludes harassment which occurs using a private network such as workplace bullying in the form of instant messaging. Overall the legal regime has failed to establish clear confines and transparency in their regulation of cyberspace communications. Not only is the degree to which individuals are protected from harassment and 'offensive' communications dubious, but also the requisite standards used to judge such speech are also too broad. As a result, the law hinders cyberspace from fostering meaningful exchanges and from acting as a platform for individuals to peacefully protest. Digital social movements cannot be

[335] Geach and Haralambous (n 9), 243.
[336] ibid.
[337] Geach and Haralambous (n 9), 252.
[338] Geach and Haralambous (n 9), 252.

accommodated because of these uncertainties and the awkward silence regarding the precise point at which expression can trigger the law may deter unpopular or minority opinions.

7.3. The Second Thread: contrasting physical and online protests

Despite laws that now target digital communications, there are no specifics regarding online protest. However, in practice, the public vs private space debate has manifested into a frequent obstacle for many protests. Recent developments have blurred the distinction further. Enright and Bhandar have observed that private law mechanisms are being increasingly used to counter student protests at universities.[339] Yet, universities have traditionally been considered as quasi-public because despite being 'intrinsically private corporations', they 'serve at universal public function', which in the past had a 'priority' over their 'corporate make-up'.[340] Similarly, in *Appleby v UK* (2003), a protest at a privately-owned shopping mall was refused by the owners. The organizers applied to the European Court of Human Rights claiming (ECtHR), arguing that the UK failed to uphold their obligations to ensure Articles 10 and 11 of the ECHR. In the end, the Court found that the owners' private property rights trumped the state's obligations.[341] Unfortunately, it seems that a balance has yet to be struck in regards to protest – private law mechanisms provides a simple but undeniable counter-position. Notably, this issue also extends into cyberspace, however, because of the structure of online communities, it may be harder to uphold the right to peaceful assembly and free association.

The internet is, in essence, an open network and it is being increasingly seen as a public good. Audibert and Murray explain that this is because of the indispensable role that it now plays in our daily lives and its democratic function in upholding Article 10.[342] Yet, not every user subscribes to this principled approach and the architecture of the Web is far more complicated nowadays. It has evolved into 'a patchwork of multi-sided platforms operating with different models and with different levels of openness'.[343] As a result, private law mechanisms can potentially be invoked in regards to certain domains or servers. However, the nature of occupying a space online is radically different from realspace, methods may range from boycotting the use of an application to spam posting to distributed denial of service attacks (DDoS) and denial of service attacks (DoS). Although the law has firmly established that techniques such as DDoS are criminal under the

[339] Lucy Finchett-Maddock, 'The Right To Protest Is Under Threat From Several Different Directions' <http://www.democraticaudit.com/2014/04/23/eternal-vigilance-is-required-to-protect-the-right-to-protest/> accessed 25 June 2018.
[340] ibid.
[341] *Appleby v UK* [2003] ECHR 222, [2003] All ER (D) 39.
[342] Audibert, Lucie C. and Murray, Andrew D. (2016) A principled approach to network neutrality. SCRIPTED, 13 (2). pp. 118-143.
[343] Andrea Renda, 'Antitrust, Regulation And The Neutrality Trap: A Plea For A Smart, Evidence-Based Internet Policy' (Centre for European Policy Studies 2017), 7.

Computer Misuse Act 1990 (CMA), it must also clarify the line between public and private cyberspaces.[344] This will not be uncontroversial, but it is urgently needed – whether petitions or opinions can be removed by website operators will depend on this distinction. On the flip side, there are many technical legal nuances attached to assemblies in the physical world that may no longer be applicable in cyberspace. The facts of *Olympic Delivery Authority v Persons Unknown*, provides a good opportunity for us to examine these differences. Protesters attempted to obstruct the construction of a site allocated for the 2012 Olympics by blocking lories and establishing a camp. The Olympic Delivery Authority had an exclusive license hence, there was sufficient interest to pursue a private nuisance claim.[345] Yet, their counsel also raised a public nuisance point, which Arnold J further discussed. If there is 'a public right of way' over a route or a piece of land more generally, any obstruction would constitute a public nuisance.[346] Regardless, a short-term injunction was ordered. In the virtual world, it would be much harder to claim a public right over a website or platform because the majority are owned by corporate entities. For public nuisance claims to be available, online public functions would have to be defined and whether the freedom of assembly is exercisable because a website performs certain activities. Although private nuisance claims may appear to be more straightforward, the open nature of the internet blurs the private/public space distinction and the lack of physicality may make injunctions harder or even impossible to enforce – fences cannot be put up and the police cannot be called to the rescue. Out of respect for privacy and to avoid discrimination, there is no screening of users based on one's identity or intent prior to entering a website. Lessig points out that code seems to be able to express law better than the law itself' because it defines the terms which cyberspace is offered – similar to 'bars on a prison'.[347] Hence, in practice, a website can require an access code, but this is not a viable option for businesses or operators that profit from advertisements. Moreover, the rise of hacking and specialist software such as Circumventor has shown that code is not impenetrable. Although the CMA may be triggered, if protesters engage in the creation and sending of viruses. However, technology has evolved to a point where Internet Protocol addresses (IPs) may be untraceable if virtual private networks (VPNs) are used, which makes it difficult to ensure accountability. Therefore, there are many elements of online protest that the law must consider before it can be said to fully possess the capacity to facilitate digital social movements and protests.

7.4. Conclusion: a targeted legal regime for online expression?

By extending realspace, laws into the virtual world and adding targeted provisions regarding digital communications into the existing legal structure, it seems that we are

[344] Computer Misuse Act 1990.
[345] ibid, [17] (Arnold J).
[346] ibid, [19] (Arnold J).
[347] Lawrence Lessig, *Code* (2nd edn, Basic Books 2006), 83.

trying to make online expression and protest wear a hat that does not fit. A new legal regime built upon a clearer understanding of online expression may be more effective. It may even be time to accept that ICTs have revolutionized human expression and our social interactions. This legal framework should, like social media, be a tapestry that ties together the diverse elements that are unique to the architecture of cyberspace. However, before any radical course of action is embarked upon, the law which governs online expression on a whole should be clarified, in particular, the precise point at which restraints are legitimate. A secure legal foundation for free speech online is an important stepping stone towards regulating the disputed right to digitally protest. Notably, there will be practical issues that must be considered, such as whether website operators can seek injunctions if they discover or are notified of a plan to protest and the availability of damages and how they should be measured. As a result, there are many aspects of online protest that the current UK law must consider, before it can be said to fully possess the capacity of facilitating digital expression, social movements and protests. Finally, this exploration was of a limited scope hence, it is a tapestry that will require further weaving in order to reflect the expansive and ever-changing face of cyberspace.

8. What Role and Responsibilities Do Academic Institutions in Your Country Have Regarding Promoting Freedom of Speech and the Right to Protest Within and Outside Their Campuses?

8.1. Introduction

The rights to freedom of speech and freedom of assembly and association provide a 'foundation for democracy.'[348] Together, freedom of speech and the right to assembly and association 'cover the right to peaceful protest.'[349] Although important in all settings, these rights are especially significant within the context of universities, 'where education and learning are advanced through dialogue and debate.'[350] Both rights underpin 'academic freedom,'[351] reinforcing the notion that 'universities must continue to be places where difficult topics are discussed and where people, however controversial their views, should be allowed to speak within the law, and their views challenged openly.'[352]

However, there have been repeated and high-profile claims that freedom of speech in universities is under attack,[353] with warnings of 'a "creeping culture of censorship" on university campuses.'[354] Moreover, the media have reported controversies over speakers at universities, or about academics, with concerns that legal speech is being intentionally impeded by 'masked protest, intimidatory filming [and] physical disruption.'[355] Parliamentarians and the Government have raised concerns, with a recent report into freedom of speech in universities by Parliament's Joint Committee on Human Rights ('JCHR') illustrating 'serious concerns over barriers to free speech.'[356]

Against this backdrop, these sections examine the role and responsibilities that universities and student unions in England have regarding promoting freedom of speech and the right to protest within and outside their campuses. It will first assess the legal framework governing freedom of speech and the right to protest in universities. Following this examination, it will evaluate the extent to which these rights are being complied with at

[348] 'Free Speech and Protest' (*Liberty Human Rights*, 2018) <https://www.libertyhumanrights.org.uk/human-rights/free-speech-and-protest> accessed 1 June 2018.
[349] 'Free Speech: Guidance for Universities and Students Organising Events' (*Publications.parliament.uk*, 2018) <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589-annex.pdf> accessed 1 June 2018.
[350] 'Freedom of Speech in Universities' (*Publications.parliament.uk*, 2018) <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/58902.htm> accessed 1 June 2018.
[351] Ibid.
[352] 'Free Speech in Universities' (*Universitiesuk.ac.uk*, 2018) <https://www.universitiesuk.ac.uk/news/Pages/Free-speech-in-universities.aspx> accessed 1 June 2018.
[353] (n 3.)
[354] 'Intolerance' Risk to Campus Free Speech' (*BBC News*, 2018) <http://www.bbc.co.uk/news/education-43544546> accessed 1 June 2018.
[355] ibid.
[356] 'Serious Barriers Limit Free Speech in Universities - News From Parliament' (*UK Parliament*, 2018) <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/freedom-of-speech-universities-report-17-19/> accessed 1 June 2018.

universities, concluding that a number of factors are limiting freedom of speech and the right to protest on university campuses. These inhibiting factors will be analysed in greater depth to demonstrate how institutions are failing to fulfil their role and responsibilities in promoting freedom of speech and the right to protest. Finally, these sections conclude that the 'complex web'[357] of regulations and guidance currently governing free speech and the right to protest on university campuses be 'replaced by one clear set of guidelines for both students and institutions.' [358] Above all, such guidance should outline 'core principles'[359] for securing and upholding free speech and the right to protest, provide clarity and prevent '"bureaucrats or wreckers on campus"'[360] from blocking 'discussion of unfashionable views.'[361] Only then can 'universities, student unions and students can move forward'[362] in a manner which gives due importance to the promotion of freedom of speech and the right to protest.

As a starting point, it is important to note that these sections have been deliberately selective in focusing on concerns over barriers to free speech and the right to protest in universities in England. This is because evidence 'suggested that there were more acute concerns'[363] relating to free speech and the right to protest in universities in England than Wales, Scotland and Northern Ireland. Moreover, the regulatory system 'operates differently in each jurisdiction, with different regulators for universities and student unions.'[364] Universities in Scotland and Northern Ireland have 'different obligations'[365] to uphold principles of free speech than do universities in England and Wales.

8.2. The Legal and Regulatory Framework

8.2.1. Competing Duties

Universities and student unions are 'subject to a number of sometimes conflicting duties under the law'[366] which have the 'potential to interfere'[367] with freedom of speech and the right to protest. Under section 43 of the Education (No.2) Act 1986, universities have a legal obligation 'to secure free speech within the law.'[368] Moreover, this provision 'does not

[357] 'Letter From Minister Of State For Universities To The Chair Regarding Free Speech Summit' (*Parliament.uk*, 2018) <https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2017-19/SG-Letter-free-speech-summit.pdf> accessed 1 June 2018.
[358] Richard Adams, 'Universities Minister: One Set Of Guidelines On Free Speech Needed' (*the Guardian*, 2018) <https://www.theguardian.com/education/2018/may/03/universities-minister-one-set-of-guidelines-free-speech-campus> accessed 1 June 2018.
[359] ibid.
[360] ibid.
[361] ibid.
[362] (n 3).
[363] ibid.
[364] ibid.
[365] ibid.
[366] ibid.
[367] ibid.
[368] Education (No.2) Act 1986, s 43.

require universities to allow or facilitate speakers to break the law through inciting violence, inciting racial hatred, or glorifying acts of terrorism.'[369] Additionally, the duty 'requires institutions to issue and update a code of practice setting out the procedures to be followed by members, students and employees for the upholding of freedom of speech and take reasonably practicable steps (including the "initiation of disciplinary measures") to ensure compliance with the code.'[370]

In addition to these duties, there are applicable human rights relevant to promoting freedom of speech and the right to protest within and outside university campuses. Article 10 and Article 11 of the European Convention on Human Rights ('ECHR') sets out the right to freedom of expression and the right to freedom of assembly and association. The ECHR is incorporated into domestic law via the Human Rights Act 1998 ('HRA 1998') and section 6 of the HRA 1998 prohibits public authorities from acting in a way 'which is incompatible with a Convention right.'[371] It can therefore be argued that, where a university 'is performing functions of a public nature,'[372] then it must adhere to the rights and freedoms contained within the ECHR. Furthermore, it is important to stress that the right to free speech 'is not absolute and can be limited by law'[373] although 'any such limitations must be proportionate.'[374]

Alongside the obligation 'to secure free speech within the law,'[375] institutions are 'subject to a range of other sometimes competing duties.'[376] Evidence supports this notion as the Equality Act 2010 ('EA 2010') 'prohibits unlawful discrimination'[377] in relation to specific 'protected characteristics.'[378] The protected characteristics are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.[379] Moreover, section 149 of the EA 2010 establishes a public-sector equality duty ('PSED') on institutions 'undertaking public functions, which harmonises the equality duties across the protected characteristics.'[380] Further, the PSED obligates universities to 'have due regard to the need to - (a) "eliminate discrimination, harassment, victimisation;" (b) "advance equality of opportunity;" and (c) "foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'"[381] Consequently, it can be argued that equality law can impede freedom of speech 'by making

[369] (n 3).
[370] ibid.
[371] Human Rights Act 1998, s 6.
[372] (n 3).
[373] (n 2).
[374] ibid.
[375] (n 21).
[376] (n 3).
[377] Equality Act 2010, pt 2, ch 1.
[378] ibid.
[379] ibid.
[380] (n 2).
[381] (n 32) s 149.

certain speech and conduct unlawful.'[382] Therefore, institutions must 'balance their obligation to secure free speech with the duty to promote good relations between different groups with protected characteristics.'[383]

Moreover, under section 26(1) of the Counter-Terrorism and Security Act 2015, higher education bodies are obliged to 'have due regard to the need to prevent people from being drawn into terrorism'[384] when exercising their functions - otherwise known as the Prevent duty. However, the provision also requires those bodies to have 'particular regard'[385] to the obligation to secure free speech. Consequently, institutions must ensure they 'balance their legal duties to ensure free speech with their duty to protect students from being drawn into terrorism.'[386]

8.3. Scale of the Problem

It is significant to note that the Government 'has repeatedly expressed concerns about the impact of student led activities such as "no platforming" and "safe space" policies'[387] on freedom of speech and the right to protest in universities. For instance, the Minister of State for Universities, Science, Research and Innovation, Sam Gyimah MP, has recently called on higher education institutions to 'join forces with the government to eradicate the "institutional hostility" to unfashionable views that have emerged in some student societies.'[388]

Moreover, recent press accounts have 'given prominence to claims that "no platforming" and "safe space" policies'[389] are limiting freedom of speech and the right to protest at universities. Evidence supports this as outlets have reported concerns that 'more than nine in 10 UK universities are restrictive of free speech,'[390] reinforcing the perception that the 'current generation of students are unwilling to hear views which are different to their own.'[391]

[382] (n 3).
[383] ibid.
[384] Counter-Terrorism and Security Act 2015, s 26(1).
[385] ibid.
[386] (n 3).
[387] ibid.
[388] Sam Gyimah Hosts Free Speech Summit' (*GOV.UK*, 2018) <https://www.gov.uk/government/news/sam-gyimah-hosts-free-speech-summit> accessed 1 June 2018.
[389] (n 3).
[390] Rachael Pells, 'These Are The Least Free Universities In Britain, Apparently' (*The Independent*, 2018) <https://www.independent.co.uk/student/news/nine-10-uk-universities-free-speech-restrict-rankings-joseph-rowntree-cardiff-ediburgh-newcastle-a7577381.html> accessed 1 June 2018.
[391] (n 3).

However, complaints that 'students have created a free speech crisis'[392] on university campuses have been 'exaggerated'[393] according to a report by the JCHR. The report concluded that despite 'real free speech issues,'[394] media accounts of 'wholesale censorship of debate in universities'[395] are evidently 'out of kilter with reality.'[396] Despite this, the report also highlighted the existence of 'real problems which act as disincentives for students to put on challenging events.'[397] Although the majority of student unions surveyed within the inquiry confirmed they are confident that they and their companions can speak freely,'[398] such prevalent 'disincentives could be having a wider "chilling effect"'[399] on freedom of speech and the right to protest within and outside university campuses.

8.4. Factors Limiting Freedom of Speech and the Right to Peaceful Protest

Although the JCHR found 'no wholesale censorship of debate at universities,'[400] the report highlighted numerous incidents 'where student led activities or student attitudes towards certain groups have impinged on others' rights to freedom of expression or association.'[401]

8.4.1. Student Activity

8.4.1.1. No Platforming Policies

The National Union of Students ('NUS') and many student unions have no platforming policies. According to the NUS, the objective of a no platform policy 'is to prevent individuals or groups known to hold racist or fascist views from speaking at student union events and to ensure that student union officers do not share a public platform with such individuals or groups.'[402] Moreover, evidence demonstrates significant support for such policies, with a survey undertaken by ComRes highlighting that 63% of UK university students surveyed 'support the NUS having a "No Platforming" policy'[403] and 54% share the view that 'the NUS is right to enforce the policy against individuals they believe threaten a safe space.'[404]

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[392] ibid.
[393] (n 3).
[394] ibid.
[395] ibid.
[396] ibid.
[397] ibid.
[398] ibid.
[399] ibid.
[400] ibid.
[401] ibid.
[402] 'NUS' No Platform Policy @ NUS Connect' (*Nusconnect.org.uk*, 2018) <https://www.nusconnect.org.uk/resources/nus-no-platform-policy-f22f> accessed 1 June 2018.
[403] 'BBC Victoria Derbyshire "No Platform" Poll - Comres' (*Comresglobal.com*, 2016) <http://www.comresglobal.com/polls/bbc-victoria-derbyshire-no-platform-poll/> accessed 1 June 2018.
[404] ibid.

However, such policies have often 'been a source of tension,'[405] with critics condemning 'the "disinvitation" of various high-profile speakers as an attack on free speech.'[406] No platforming policies generate 'regular headlines revealing the latest jilted and aggrieved activist, academic or politician.'[407] Moreover, recent ministerial announcements share this theme as Sam Gyimah MP has stated that higher education bodies 'must stamp out their "institutional hostility" to unfashionable views,'[408] with warnings that 'universities which "no-platform" controversial speakers will face Government intervention for the first time in 30 years.'[409]

The term no platforming has been utilised to describe an array of student actions ranging from 'internal decisions within student bodies to ban external speakers/groups from speaking at universities'[410] to 'disinviting speakers due to pressure from other students who oppose the speaker's presence in the university.'[411] Although it is accepted that not all student actions within the scope of this policy limit freedom of speech and the right to protest, it is evident that such rights are 'unduly interfered'[412] with: i) 'when protests become so disruptive that they prevent the speakers from speaking or intimidate those attending;'[413] ii) 'if student groups are unable to invite speakers purely because other groups protest and oppose their appearance;'[414] and iii) 'if students are deterred from inviting speakers by complicated processes and bureaucratic procedures.'[415] Moreover, although 'not widespread,'[416] it is apparent that 'all these problems do occur,'[417] reinforcing the notion that institutions are essentially failing to fulfil their role and responsibilities in promoting freedom of speech and the right to protest within and outside their campuses.

8.4.1.2. Intolerance Towards Some Groups and Issues and Disruptive Protests

As identified by the JCHR, evidence suggests that instances where freedom of speech has been limited 'usually involve groups who are perceived as minorities, or as having views which some could consider to be offensive, but which are not necessarily unlawful.'[418]

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405 Alfie Packham, 'Boris, Tatchell, Greer: Were They Actually No-Platformed?' (*the Guardian*, 2016) <https://www.theguardian.com/education/2016/may/05/boris-tatchell-greer-were-they-actually-no-platformed> accessed 1 June 2018.
406 ibid.
407 ibid.
408 Camilla Turner, 'Universities Which 'No-Platform' Controversial Speakers Will Face Government Intervention' (*The Telegraph*, 2018) <https://www.telegraph.co.uk/education/2018/05/03/universities-no-platform-controversial-speakers-will-face-government/> accessed 1 June 2018.
409 ibid.
410 (n 3).
411 ibid.
412 ibid.
413 ibid.
414 ibid.
415 ibid.
416 ibid.
417 ibid.
418 ibid.

In some circumstances, there have been 'unacceptable incidents'[419] where freedom of speech has been impeded by student activities, namely disruptive protests. Instances such as this include disruption at University of West England in February 2018 where Conservative MP Jacob Rees-Mogg was 'at the centre of a highly physical fracas'[420] as 'masked protesters tried to disrupt an event he was speaking at.'[421] Similarly, disruption erupted at King's College London in March 2018 where 'masked activists'[422] violently disrupted an 'event featuring a controversial anti-feminist YouTube star,'[423] reportedly assaulting security guards, smashing windows, hurling smoke bombs and setting off a fire alarm.[424]

Although 'some level of peaceful protest'[425] should be permitted, it is submitted that 'the levels of disruption in the above incidents are unacceptable and contrary to the university's obligation to secure freedom of speech.'[426] Indeed, it is evidently 'unacceptable for protestors to deliberately conceal their identities, break in with clear intention to intimidate those exercising their rights to attend meetings or to seek to stop events.'[427] Further, higher education bodies have a legal obligation to 'initiate disciplinary measures if individual students or student groups seek to stop legal speech, or breach the institution's code of conduct on freedom of speech.'[428] As evidenced, higher education providers are not only failing to combat intolerant views towards some groups on issues and disruptive protests; they are failing to effectively promote freedom of speech and the right to peaceful protest.

8.4.1.3. Safe Spaces

Safe space policies can be broadly defined as guidelines 'for creating environments on campus where all students feel safe and able to engage in discussions and activities free from intimidation and judgement.'[429] Such policies aim to 'restrict the expression of certain views or words that can make some groups feel unsafe.'[430] Moreover, debates occur 'within specific guidelines to ensure that people do not feel threatened because of their gender,

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419 ibid.
420 'Jacob Rees-Mogg Caught Up In Fracas As Masked Protesters Disrupt University Event' (*Sky News*, 2018) <https://news.sky.com/story/jacob-rees-mogg-caught-up-in-fracas-as-masked-protesters-disrupt-university-event-11234071> accessed 1 June 2018.
421 ibid.
422 Camilla Turner and Helena Horton, 'Violence Breaks Out As Protesters Storm King's College London Event Featuring Controversial Youtuber' (*The Telegraph*, 2018) <https://www.telegraph.co.uk/news/2018/03/06/violence-breaks-self-proclaimed-antifascists-shut-alt-right/> accessed 1 June 2018.
423 ibid.
424 ibid.
425 (n 3).
426 ibid.
427 ibid.
428 ibid.
429 'Freedom Of Speech In Universities' (*Stgeorgeshouse.org*, 2016) <https://www.stgeorgeshouse.org/wp-content/uploads/2017/03/Freedom-of-Speech-in-Universities-Report.pdf> accessed 1 June 2018.
430 (n 3).

ethnicity or sexual orientation'[431] and 'may require individuals who breach the guidelines to leave the discussion space.'[432] It must be emphasised that 'not all student unions have safe space policies.'[433] Although 'the intention behind safe spaces is understandable,'[434] evidence supports the more appropriate notion that, when extended too far, such policies 'can restrict the expression of groups with unpopular but legal views, or can restrict their related rights to freedom of association.'[435]

8.4.2. Regulatory Barriers

Apart from student led activities, there are also significant regulatory barriers in the current regime which have impeded on others' rights to freedom of speech and association, namely 'fear and confusion over what the Prevent Duty entails'[436] and 'unnecessary bureaucracy imposed on those organising events.'[437]

8.4.2.1. Prevent Duty

Although the Government has expressed concerns that freedom of speech is being 'undermined by a reluctance of institutions to embrace healthy vigorous debate,'[438] the introduction and enforcement of the Prevent duty within the higher education context 'is responsible for a perceived "chilling" of free speech'[439] on university campuses.

Moreover, the Prevent duty 'appears to counter'[440] the institution's obligation to uphold freedom of speech as it requires higher education bodies 'not to proceed if there is any doubt about the ability to fully mitigate any risk associated with hosting "extremist" speakers.'[441] Despite suggestions that 'anti-extremism policy is not limiting academic freedom,'[442] the prevailing view is that the Prevent duty 'encourages universities to have an "overanxious approach to stopping speech for fear that it might be an indicator of a view" even where such speech is not unlawful.'[443]

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431 ibid.
432 (n 89).
433 (n 3).
434 ibid.
435 ibid.
436 (n 9).
437 ibid.
438 Nicola Slawson, 'Ministers Plan Fines For Universities Which Fail To Uphold Free Speech' (*the Guardian*, 2018) <https://www.theguardian.com/education/2017/oct/19/ministers-plan-fines-for-universities-which-fail-to-uphold-free-speech> accessed 1 June 2018.
439 (n 89).
440 (n 3).
441 ibid.
442 'Prevent Is No Threat To Free Speech On Campus' (*Times Higher Education (THE)*, 2018) <https://www.timeshighereducation.com/blog/prevent-no-threat-free-speech-campus> accessed 1 June 2018.
443 (n 3).

Although proponents of the Prevent duty argue that it is 'helping families, saving children's lives and stopping radicalisation,'[444] the more appropriate view constructed by Universities UK is that anti-extremism policy 'has created "a grey area in relation to free speech which did not previously exist."'[445] Furthermore, student unions have criticised the Prevent duty for causing 'self-censoring'[446] amongst students and staff as guidance fails to clarify 'which views might be considered extremist'[447] and 'lengthy bureaucracy'[448] is required in the recording and investigation of events, particularly those involving external speakers.

Furthermore, critics argue that the Government's Prevent policy 'may have a wider effect than simply deterring student unions from inviting individual speakers,'[449] with suggestions that 'students, particularly Muslim students'[450] have been consistently 'dissuaded from becoming involved in student activism out of fear of being reported under the Prevent duty for expressing opinions on certain issues.'[451] Moreover, a report undertaken by Just Yorkshire - 'based on interviews with 36 Muslim students, academics and professionals'[452] - concluded that 'a wide spectrum'[453] of those surveyed 'articulated concerns in relation to surveillance, censorship and the resultant isolation felt by many.'[454] Given repeated concerns that the prevent duty is instigating 'fear, suspicion and censorship'[455] on university campuses, it can therefore be argued that institutions are not only struggling to tackle inhibiting issues such as this; they are failing to fulfil their role and responsibilities in promoting rights to freedom of expression and association within and outside their campuses.

8.4.2.2. Bureaucracy

It is evident that some institutions' codes of practice regarding freedom of speech 'appear to inhibit free speech within the law rather than enhance it.'[456] Numerous codes of practice are 'unclear, difficult to navigate, or impose bureaucratic hurdles which could deter students from holding events and inviting external speakers.'[457] Evidence reinforces this notion as research undertaken by the Higher Education Policy Institute ('HEPI') evaluated

444 Chris Graham, 'What Is The Anti-Terror Prevent Programme And Why Is It Controversial?' (*The Telegraph*, 2018) <https://www.telegraph.co.uk/news/0/anti-terror-prevent-programme-controversial/> accessed 1 June 2018.
445 (n 3).
446 ibid.
447 ibid.
448 ibid.
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450 ibid.
451 ibid.
452 Josh Halliday, 'Prevent Scheme 'Fosters Fear And Censorship At Universities' (*the Guardian*, 2018) <https://www.theguardian.com/uk-news/2017/aug/29/prevent-scheme-fosters-fear-and-censorship-at-universities-just-yorkshire> accessed 1 June 2018.
453 'Rethinking Prevent: The Case For An Alternative Approach' (*rethinkingprevent.org.uk*, 2017) <http://rethinkingprevent.org.uk/> accessed 1 June 2018.
454 ibid.
455 ibid.
456 (n 3).
457 ibid.

'a sample of policies'[458] from universities, concluding that many codes of practice 'left it up to the reader to find the related polices, codes, templates or forms required to arrange an event.'[459] Additionally, HEPI found that 'not all universities have updated their codes of practice on freedom of speech following the implementation of the Prevent Duty in August 2015, with some policies dating back to 2010.'[460] It can therefore be argued that institutions are not only failing to combat limiting issues but more importantly, are struggling to fulfil their role and responsibilities in promoting freedom of speech and the right to protest within and outside their campuses.

8.5. Conclusions and Recommendations

These sections have sought to examine the role and responsibilities that universities and student unions in England have regarding promoting freedom of speech and the right to protest within and outside their campuses. By providing an analysis of the legal framework governing freedom of speech and the right to protest in universities, it has attempted to evaluate the extent to which these rights are being protected at universities, conclusively finding that a number of factors are impeding freedom of speech and the right to protest on university campuses. Following a closer analysis of such limiting factors, it is evident that some institutions are arguably failing to fulfil their role and responsibilities in promoting freedom of speech and the right to protest within and outside their campuses. Finally, in light of such failings, this section concludes that the 'complex tangle of regulations'[461] currently governing free speech and the right to protest on university campuses should be 'replaced by one clear set of guidelines for both students and institutions.'[462] Above all, such guidance should outline 'core principles'[463] for securing and upholding free speech and the right to protest, provide 'much-needed clarity'[464] and prohibits '"bureaucrats or wreckers on campus"'[465] from blocking 'discussion of unfashionable views.'[466] Only then can 'universities, student unions and students can move forward'[467] in a manner which gives due importance to the promotion of freedom of speech and the right to protest within and outside university campuses.

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458 'An Analysis of UK University Free Speech Policies Prepared for The Joint Committee for Human Rights' (*Parliament.uk*, 2018) <https://www.parliament.uk/documents/joint-committees/human-rights/2015-20-parliament/HEPIreport090218.pdf> accessed 1 June 2018.
459 ibid.
460 'Joint Committee for Human Rights Publishes HEPI Analysis of University Free Speech Policies - HEPI' (*HEPI*, 2018) <http://www.hepi.ac.uk/2018/03/15/joint-committee-human-rights-publishes-hepi-analysis-university-free-speech-policies/> accessed 1 June 2018.
461 (n 11).
462 ibid.
463 ibid.
464 'UK Universities And Students Back Clearer Guidance On Free Speech' (*Times Higher Education (THE)*, 2018) <https://www.timeshighereducation.com/news/uk-universities-and-students-back-clearer-guidance-free-speech> accessed 1 June 2018.
465 (n 11).
466 ibid.
467 (n 3).

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1. How is the right to protest guaranteed in the constitutional framework of your country and has been adapted in response to national social movements?

1.1. The right to protest in the constitutional framework of France

The French Constitution of 4th of October 1958 does not mention the right to protest. However the constitution through the Preamble of the Constitution of the 27th of October 1946 protects a right related to the right to protest. Paragraph 7 of the Preamble protects the right to strike. Articles 10 and 11 of the Declaration of Human and Civil Rights of 1789 recognises the freedom of opinion and speech from which the right to protest derives (article 10). Theses norms are integral in the French "Block of Constitutionality" with the Constitution of 1958, the Declaration of Human and Civil Rights of 1789, the Environmental Charter of 2004 and the Fundamental Principles recognised by the Laws of the Republic. The concept of "The Block of Constitutionality" refers to supreme and basic rules that prevail over regular laws and have constitutional value. The Constitutional Council applies these rules to control French norms, laws and international treaties. If a norm does not abide by the constitutional order, the Constitutional Council can, according to Articles 54[1], 61[2] and 61-1[3] of the Constitution, exercise judicial review in order to decide if the law or international treaty violates the Constitution and related texts with constitutional value. The Constitutional Council recognised the collective right of opinions in a decision in 18 January 1995[4]. Despite the reference to the freedom of assembly, association and expression, the Constitutional Council never enshrined the right to protest. Nevertheless, the legislature regulates this right and its limits.

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[1] *" If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution. "*

[2] *« Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the House**s** of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.*
To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.
In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days.
In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation."

[3] *"If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period.*
An Institutional Act shall determine the conditions for the application of the present article. "

[4] *N°94-352 DC* [1995] Constitutional Council http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1995/94-352-dc/decision-n-94-352-dc-du-18-janvier-1995.10612.html [1995] [French]

1.2. The right to protest in the French domestic law and practice

In the national legislative framework, the decree-law of the October 23rd 1935 about the regulation of measures related to the reinforcement of maintaining public order first admits the right to protest. This norm was repealed in May 2012 but this right remains highly regulated. The articles L211-1 and following of the French Internal Security Code incorporate some of the previous provisions from the decree-law of 1935. Article 211-1 authorizes processions, parades, gatherings and any types of protest if a previous declaration has been submitted. The article also refers to–Article 6 of the Law of the June 30 1881 about freedom of speech which limits the duration of the protest. Article L211-2 of the same code establishes where the declaration of protest must be done and what the declaration has to mention. Article L211-3 specifies that a representative of the State can forbid any protest to preserve public peace and order but the administrative courts can decide if the prohibition[5] is valid. The right to protest is enshrined as a fundamental right according to article L521-2 of the Administrative Justice Code and the higher French administrative jurisdiction, the Conseil d'Etat[6] allowing the administrative judge to check the proportionality between absolute or general prohibition during the référé liberté procedure[7]. If those rules are violated (protest without a previous declaration, unclear or false declaration, protest despite the prohibition), Article 431-9 of the French Penal Code declares it is a punishable act by up to 6 month prison sentence and a fine of 7500 Euros.

1.3. The application of Article 11 of the European Convention on Human Rights in the French constitutional framework

Article 11 of the European Convention on Human Rights (ECHR) enshrines freedom of peaceful assembly and freedom of association[8]. Article 55 of the French Constitution provides that once France has ratified or approved a treaty, from the moment of its publication, its authority becomes superior to laws. The ECHR was signed by France on 4 November 1950 and ratified on 4May 1974. Since then, the Convention is directly applicable within the French legal system and enforceable by the courts. Up until now, the *Conseil d'Etat* and the higher judicial jurisdiction, the *Cour de Cassation* applied Article 55

[5] *Benjamin* [1933] Conseil d'Etat Report Lebon [1933] 541 [French] : The prohibition have to be justified by a risk of disturbing public order.

[6] *Ministre de l'intérieur contre Association « Solidarité des Français »* [2007] Conseil d'Etat

[7] Article L.521-2 of Administrative Justice Code. The *référé liberté* is an administrative procedure of emergency that allow the judge to decide if a legal person violated a fundamental right. The judge has to make the decision within 48 hours.

[8] Article 11, ECHR, Freedom of assembly and association. *1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

of the Constitution to control the conventionality of a law[9]. For its part, the Constitutional Court remains reluctant to examine the conventionality of the law since 1975[10]. The European Court of Human Rights specifies that States have an obligation to preserve the freedom of peaceful assembly, and thus the right to protest.

1.4. The adaptation of the right to protest in reaction to social movements

Article 16 of the Constitution provides that if the Republic's institutions, the independence of the nation, the integrity of its territory or its international commitments are threatened, the President can, in collaboration with the Prime Minister, the assemblies' presidents, the Constitutional Court, take measures to protect it. In fact, this article protects the public order against the exercise of certain fundamental freedoms. In 2016, facing the migrant crisis, the Police commissionner of Pas-de-Calais decided to adopt a decree forbidding every protest linked with the "migratory situation in Calais". The administrative judge rejected it through the emergency interim proceeding considering that the context of tension justified the prohibition[11]. In another situation, the debate about the Labour Law caused tensions between trade unions and the government that led to many protests in Paris during the spring of 2016. In June, many people got injured and public buildings were damaged during protests such as the Hospital Necker for sick children[12]. To control these issues, the Paris Police headquarter prohibited the protest. The situation was resolved through an agreement between the government and the trade unions that authorised the protest under some conditions.[13] Another example is the state of emergency which was declared in France from November 13 2015 to November 1st 2017 following terrorist attacks in Paris. During this period, the right to protest was very restricted many limitations to preserve and protect public order against the terrorist threat. The state of emergency allowed Police Commissioner to forbid protests more easily[14].

In France, in the past few years, the right to protest has not been changed by social movement but by a conjunction for different factors . In fact, through the state of emergency, political debate, internal crisis or even international events (COP 21, Euro

[9] Since *Jacques Vabre*, [May 24 1975] Constitutional Council [French] and since *Nicolo* [20 October 1989] Conseil d'Etat [French]
[10] *Decision n°74-54 DC* [1975] Constitutional Council, Law Loi relative à l'interruption de grossesse
[11] *n° 1601013* [February 5 2016] Administrative Tribunal of Lille
[12] Sénécat Adrien, « Dégradations à l'hôpital Necker : ce qu'il s'est passé » (15 June 2016) <www.lemonde.fr/les-decodeurs/article/2016/06/15/degradations-a-l-hopital-necker-ce-qu-il-s-est-passe_4951016_4355770.html> accesses 2 June 2018 [French]
[13] Le Monde, « Bras de fer et coup de théâtre : récit de la manifestation interdite finalement autorisée » (22 June 2016) <www.lemonde.fr/societe/article/2016/06/22/loi-travail-la-prefecture-de-police-interdit-la-manifestation-de-jeudi-a-paris_4955521_3224.html> accessed 2 June 2018 [French]
[14] The Act of 21 July 2016 introduceaArticle 8 paragraph 3 to the Law about the state of emergency of the 3 April 1955 : Any public reunion or assembly can be forbidden. The administrative authorities have to justify that they cannot ensure the security according to their means.

2016), the French government and the administrative authorities have managed to adapt this right, prohibiting its use in some occasions, to ensure that the public safety remains peaceful.

2. Does the national legal system provide an effective remedy to individuals who claim that their right to protest has been violated ?

In French legislation, the right to an effective remedy is not codified in the Constitution, although it is present in the Declaration of the Rights of Man and the Citizen and Article 13 of the European Convention on Human Rights. In addition, the right to protest is governed by decrees and case law, which provide several rights and respective limitations such as the right to come and go and the right to express one's opinions. This right must be compatible with the need for public authorities to ensure order and security of persons and property. Under Articles L211-1 to L211-4 of the Internal Security Code, when an association wishes to organise an event (other than a temporary sporting competition) on a public road, it must first declare the planned event to the mayor or High Commissionner. [15] The administration may request changes and provide technical support. If the mayor or the considers that the planned event is likely to disturb the public order, it is prohibited by decree and the organisers are notified immediately. The right to protest is a fundamental freedom for the public at large that must be respected. In case of violation of this right, there are possible remedies. The organisers of the event may file an appeal with the administrative court in the event of a ban, within forty-eight hours. The court deals with the matter urgently, before the date of the planned event. An appeal can be filed in *Conseil d'Etat*. During these protests the police can break up the demonstration by using force. Nevertheless, this use must be made according to two criteria: the necessity of its use and its proportionality. Otherwise, the protesters can appeal. It is in this context France has been convicted by the European Court of Human Rights (ECHR) for a disproportionate use of force following the use of violence against protesters. One such case is when a protester was battered because of their refusal to comply with police orders. In case of arrest all rights afforded to protesters are the same as criminal suspects. Indeed, the protester even has the same rights as anyone arrested by the police, among these rights are knowledge of the reason for their detention and the right to speak with an attorney. They also have the right to remain silent in the face of questions from the police. After an arrest, a protester under arrest will be presented to a judicial police officer, who only has the power to place them in temporary detention. The duration of the detention shall in principle not exceed forty-eight hours At the end of the detention the prosecutor considers that there is sufficient evidence of an offense, it is likely that they decide to refer the protestor to court.

[15] Internal Security Code, Articles L211-1 to L211-4.

3. What is the impact of the European Convention on Human Rights and the case law of the European Court of Human Rights on the right to protest in your country ?

3.1 Freedom of assembly never explicitly written

3.1.1 Absent from the Constitution and the European Convention on Human Rights

The 1958 Constitution does not make explicit mention of the right to protest. Only the Declaration of the Rights of Man and of the Citizen of 1789, which has been part of the Constitutional Bloc since a decision of the Constitutional Council, evokes a semblance of this freedom in these Articles 10 and 11.

It is not written in the European Convention on Human Rights. However, Article 11 of the Convention states that "everyone has the right to freedom of peaceful assembly and to freedom of association ...[16]".

The limits of that right are, moreover, laid down in the second paragraph: Exercising these rights may not be subject to any other restrictions than those which, provided for by law, constitute necessary measures in a society. democracy, national security, public safety, the defense of order and the prevention of crime, the protection of health or morality, or the protection of the rights and freedoms of others.[17] This article does not prohibit the imposition of legitimate restrictions on the exercise of these rights by members of the armed forces, the police or the state administration. By extension, these restrictions and their regime will affect the freedom of demonstration.

3.1.2 Freedom also absent from French legislation

It is a decree-law of October 23, 1935 "Establishing Regulations on Measures Related to the Reinforcement of Public Order" which legislates seriously for the first time on the right to protest. Article 1, paragraph 2 states that: "All the processions, parades and gatherings of persons, and, in general, all street demonstrations, shall be subject to a prior declaration.[18]" A prior declaration system with the competent authorities is in place. In addition, the competent authority may prohibit the event if it is likely to cause public disorder. The wish is rather to maintain public order than to authorize demonstrations.

[16] European Convention on Human Rights, Article 11(1)
[17] European Convention on Human Rights, Article 11(2)
[18] Decree of October 23, 1935, Establishing Regulations on Measures Related to the Reinforcement of Public Order, Article 1 para 2.

In 1954, the Council of State validates the ban on a demonstration of the CGT of 1952 by merely verifying the reality of the threat to public order without questioning the proportion between the measure taken and the threat.

Thus until 1988, freedom to demonstrate was not a freedom explicitly protected in France, neither by law nor by jurisprudence.

3.2 The evolution of the right to protest in France in relation to the jurisprudence of the ECHR

In a 1988 judgment, the Strasbourg Court stated that:

> "(...) a real and effective freedom of peaceful assembly does not accommodate a mere duty of non-interference by the State; a purely negative conception would not fit with the object and purpose of Article 11. (...) this sometimes calls for positive measures (...). While it is the responsibility of the Contracting States to adopt reasonable and appropriate measures to ensure the peaceful conduct of lawful demonstrations, they can not guarantee it in an absolute manner and they enjoy a wide discretion in the choice the method to use (...). In this respect, they assume under Article 11 of the Convention an obligation of means and not of result .[19]"

States are free to appreciate the manner in which freedom of expression must be protected but must also act positively so that it can be exercised. Under European law, measures restricting the exercise of this freedom must therefore be proportionate.

This implies that the competent authorities should exercise caution when analyzing to analyze in detail the extent of threats to public order that the holding of the event would weigh. And therefore to choose the appropriate means to prevent these threats. For an important illustration of the extent of these positive obligations, see ECHR 2015 Identoba v. Georgia.

Because no text exists, the European Court of Human Rights gradually developed in its case-law the right to protest . This has been done on the basis of Article 11 of the Convention, read in the light of Article 10.

Today it holds that the event is a form of expression of ideas, opinions and positions. The aim of the protesters is to exercise their right to freedom of expression, to attract public

19 « Ärzte für das leben » c/ Autriche, 21 juin 1988, CEDH, n° 10126/82, § 32-34

opinion to think about them, and to inform them about societal issues and to publicize their ideas, while pressing on the notion of peaceful assembly.

3.2.1 The change in French jurisprudence

In 1995, the Constitutional Council defined a new constitutional value, a "collective right of expression of ideas and opinions" of which the right of assembly is a part.

During the visit of the President of the People's Republic of China in 1994, an association wanted to demonstrate. A decree of the Paris Police Commissioner of Police prohibits all the events planned during this visit. The Council of State admitted the illegality of the decree by showing the disproportion between the threat and the decision taken by the decree. Indeed, to ban all demonstrations in Paris exceeded the circumstances of the event. The Council of State restricted itself to admitting that measures could be taken around the embassy but not throughout Paris. The control exercised here by the Council of State differs markedly from the one operated in 1952 since the judge here decides on the adequacy of the measure with regard to threats to public order, and only on it. Rejecting in passing the motive of the decree showing the risk that these demonstrations undermine "the international relations of the Republic".

These judgments take note of the requirements of European law, the control of measures prohibiting this freedom is increased.

Case law of the European Court of Human Rights has thus allowed the freedom to demonstrate to take a more important place in France despite the absence of texts of the latter.

4. How has your country applied derogations from state obligations regarding the freedom of assembly in times of public emergency threatening the life of the nation according to Article 15 of the ECHR?

Article 15 of the ECHR allows States parties to apply derogations from certain rights mentioned in the ECHR. Paragraph 1 of this article authorizes States to delegate the obligations provided for in the Convention "in time of war or other public emergency threatening the life of the nation". A State cannot take measures contradicting obligations from international law. The paragraph 2 specifies that no derogation from article 2, 3, 4 or 7 will be admitted[20]. Also, any derogation from Protocol n°6, article 1st, Protocol n°13, article 1st and Protocol n°7, article 4[21]is prohibited. The State availing itself of this right of derogation must keep the Secretary General of the Council of Europe fully informed[22].

4.1. The reservation regarding interpretation of Article 15 of the ECHR

In 1974, in relation to the ratification of the ECHR, France chose to submit a reservation of interpretation under Article 15§1. The Convention leaves France with a discretionary power to lay down the qualification of the public emergency provided in the ECHR article. The triggering of the exemption takes place under the conditions dictated in the article 16 of the French Constitution[23] and the laws related to state of emergency and state of siege. The Convention described two types of situations: "war" or "other public emergency threatening the life of the nation". Furthermore, Article 16 of the Constitution refers to a threat to "the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments". The law related to the state of emergency includes in its first article an imminent risk resulting from a serious disruption of public order or events which amount to a public disaster[24]. The Constitution extends the situations of derogation

[20] Right to life except for licit war death (article 2), Prohibition of torture (article 3), prohibition of slavery and forced labour (article 4) and no punishment without law (article 7).
[21] Abolition of the death penalty in peacetime (article 1st, Protocol n°6), abolition of the death penalty in all circumstances (article 1st, Protocol n°13) and right not to be tried or punished twice (Article 4, Protocol n°7).
[22] Factsheet, *Derogation in time of emergency*, April 2018, Press Unit, European Court of Human Rights [English]
[23] *" Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.*
He shall address the Nation and inform it of such measures.
The measures shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures.
Parliament shall sit as of right.
The National Assembly shall not be dissolved during the exercise of such emergency powers.
After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. It shall make its decision by public announcement as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter."
[24] Act n°55-385, article 1st, April 3 1955 (related to the State of emergency),. [Loi relative à l'état d'urgence] [French].

in comparison to Article 15 ECHR that insist on the exceptionality of the measure. The conditions of war or threat of the nation are not necessary in France to apply Article 15. The conditions of Article 16, the state of emergency or the state of siege may justify its application. Moreover, the proportionality control between the derogative measure and the threat of the nation is applicable in the cases prescribed by Article 16. French administrative judges check proportionality, note European judges. Some French jurists criticize this leeway in interpreting the law because it might give administrative authorities extended power[25]. Consequently, despite the existence of non-derogable rights contained in the article 15§2, they emphasize on the risk of violating a fundamental right including the right to protest.

4.2. The application of the derogation clause inin Article 15 of the ECHR

Following the November 13 2015 terrorists attacks in Paris, French authorities informed the Secretary General of the Council of Europe about the state of emergency measures involving derogations from rights guaranteed by the ECHR. [26]. The state of emergency give authorities the power to derogate from certain rights including the freedom of association and assembly (Article 11). France informed the Council of Europe that the state of emergency would remain for three more months. From November 13 2015 to the November 1st 2017, the state of emergency was extended six times[27]. During almost two years, whenever following a decree on the continuation of the state of emergency, France informed the Secretary General of the Council of Europe about the intention of derogate certain rights of the Convention. To justify the use of Article 15 of the ECHR, the European Court of Human Rights characterized "public emergency" as an "exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed[28]. In another decision, the European Court on Human Rights held that "it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency"[29]. Moreover, with its reservation regarding interpretation, France has even more possibility to establish the "public emergency". Under these provisions, France used Article 15 to execute measures from the state of emergency. The debate surrounding the state of emergency primarily highlights on the persistence of the

[25]Lambert Anaïs, Braconnier Moreno Laetitia, *La marge de manœuvre de la France dans le déclenchement d'un régime dérogatoire aux libertés fondamentales, une dénature de l'article 15 de la CEDH ?,* Revue des Droits de l'Homme, January 2016 [French].

[26] Secretary General of the Council of Europe, *France informs Secretary General of Article 15 Derogation of the European Convention on Human Rights*, Council of Europe Portal, 25 November 2015 [English].

[27] Law n° 2015-1501, November 20 2015, Law n°2016-162, February 19 2016 , Law n°2016-629, May 20 2016, Law n°2016-987, July 21 2016, Law n°2016-1767, December 19 2016 and Law n°2017-1154, July 11 2007 (extending the application of Act n°55-385, April 3 1955, State of emergency)[Lois de prolongations de l'état d'urgence prévu par la Loi du 3 avril 1955 relative à l'état d'urgence] [French]

[28] *Lawless v. Ireland (No 3)* [1961], §28 ECHR [English].

[29] *Askoy v. Turkey*, [1996] §68 ECHR [English].

state of emergency through the years[30]. On this issue, the European Court on Human Rights established that a "public emergency" can last many years[31].

4.3. The consequences of the derogation provided in the article 15 of the ECHR on the right to protest

During the state of emergency, the right to protest was one of the rights most affected. Article 8§1 and §2 of the Act of April 3 1955 related to the state of emergency provided that the Minister of the Interior and the Police Commissioner can ban any protest, general or particular, threatening public order. Article 8§3[32] specifies that if administrative police cannot ensure the security of the public protests, it can withdraw permission for that rally to be held it. The right to protest was restrained as a collective freedom and many oppositional protests that might cause public disorder were banned[33]. According to the Ministry of the Interior, between November 14 2015 and May 5 2017, prefects issued 155 decrees prohibiting public assemblies[34]. For example, in December 2015, the authorities banned public reunions during the 21st Conference of Parties (COP 21) to preserve public order. In others areas of France, public assemblies were prohibited. During the Labour Law debates, protests were prohibited in many areas of France such as Nantes. In 2016, the public assemblies related to the migrant crisis, both pro and cons migrants, in Calais suffer bans from Pas-De-Calais prefect[35]. The use of Article 15 with the state of emergency gives administrative authorities more power to ban public pacific assemblies. This extended power allowed prefects to use decrees in order to forbid protests. Theses decrees are not used to avoid terrorist attacks but more generally to maintain public order. Beside general prohibitions, Police Commissioner issued 683 individual measure of refusal of the right to stay or entry in France. 639 of this individual measures were taken to prevent people from participating to public protests during the Labour Law reforms[36]. In a communication, the Rapporteurs of the National Assembly explained that the state of emergency allowed prefects to ban protests as a precautionary measure justified by the

[30] Hervieu Nicolas, *Etat d'urgence et CEDH : de la résilience des droits de l'homme*, Dalloz Actualités, December 1st 2015.
[31] *A and others v. United Kingdom* [2009] §178. ECHR [English]
[32] Note 15 : The law of the July 21 2016 introduce the article 8 paragraph 3 to the Law about the state of emergency of the April 3 1955 [French].
[33] Hennette-Vauchez, Stéphanie, « La liberté de manifestation » (12 October 2017)<https://actu.dalloz-etudiant.fr/focus-sur/article/la-liberte-de-manifestation/h/23fe7b601eafb0c8c892f86635348257.html> accessed 10 June 2018 [French].
[34] Amnesty International Ltd, A right not a Threat, Report, March 2017.
[35] RFI, "La prefecture interdit à Calais toute manifestation pour ou contre les migrants » (1st October 2016) <http://www.rfi.fr/france/20161001-prefecture-interdit-calais-toute-manifestation-contre-migrants> accessed 10 June 2018 [French].
[36] Pascual Julia, « Quand l'état d'urgence rogne le droit de manifester » (31 May 2017) <https://www.lemonde.fr/societe/article/2017/05/31/en-france-les-interdictions-de-manifester-se-multiplient_5136295_3224.html> accessed 12 June 2018 [French].

preservation of public order[37]. However, the Constitutional Council censored the part of the article 5 of the Act of 3 April 1955 considering theses provisions contrary to the Constitution. Article 8§2 provided prefects to issued protection or security areas where the residence of foreign nationals was regulated. The prefects could restrain person from protest during the labour Law. The Constitution Council decided that the measure was not proportionate and violates constitutional rights. Article 8§3, which forbade the residence of any person seeking to obstruct the public authorities actions, was also censored but the legislator manages to make it more flexible it including the condition of a "serious reason to think that the person can represent a threat to the security and the public order".

In conclusion, France applied Article 15 of the ECHR in the context of the state of emergency between November 13 2015 and November 1st 2017. During that period, administrative police used its extended power to ban protests in order to preserve peace and public order. The use of theses powers raised questions surrounding the legitimacy of the protests' prohibitions. In fact, the authorities used the derogation of Article 15 not only to prevent France from a "public emergency" but also to avoid any public disturbance.

[37] Raimbourg Dominique, Poisson, Jean-Frédéric, *Communication d'étape sur le contrôle de l'état d'urgence, Réunion de la commission des Lois du mardi 17 mai 2016*, http://www2.assemblee-nationale.fr/static/14/lois/communication_2016_05_17.pdf [French]

6. What positive obligations does your State assume to guarantee the enjoyment of the right to protest and to protect against the interference of private parties?

Article 431-1 paragraph 1 of the Penal Code provides that "the act of hindering, in a concerted manner and with the help of threats, the exercise of freedom of expression, of work, of association rally participants in a territorial assembly or territorial event is punished by imprisonment and a fine of € 15,000.[38]". Thus, the right to demonstrate is a right recognized and regulated by the penal code. The article L211-4 of the code of the internal security[39] decree-law of 1935 states that "the authority invested with police powers considers that the planned demonstration is likely to disturb public order, it is prohibited by a duly motivated decision to avoid an cancellation by an adminstrative jurisdiction." To make a prohibition order, two conditions must therefore be met: A real danger of serious disturbances and the absence of another effective means of maintaining public order Any prohibition order must be immediately notified by a judicial police officer to the signatories of the declaration. The latter must, unless refused, signed a Notification Process. If this notification is impossible, advertising must be done by any means. If this prohibition is pronounced by the mayor, the prohibition order is transmitted within 24 hours to the Police Commissioner. If the considers that this prohibition is not justified, he may appeal to the Administrative Tribunal to have the order-annulled. Conversely, a Police Commissioner can replace the mayor who has not issued a prohibition order if he considers that the event is likely to disturb public order. Because the freedom to demonstrate responds to a system of prior declaration, the judge exercises maximum control of administrative decisions in this area, that is to say, a control that meets the standards of the case law Benjamin (EC May 19, 1933). For example, the ban on the Tibetan community in France on the occasion of a visit by the President of the People's Republic of China was cancelled on the double ground that the possible violation of "international relations of the Republic "is foreign to considerations of public order on the one hand, and that a general prohibition order exceeded, on the other hand, what was required by the maintenance of order (EC Nov. 12). 1997, No. 169295). The fact remains that the cancellation in 1997 of a protest order issued in 1994 has little effect on the effectiveness of the rights of those concerned. From this point of view, the introduction of the interim release by the Act of June 30, 2000, here as elsewhere, changed the situation: freedom of demonstration, fundamental freedom within the meaning of Article L. 521-2 CJA (CE, ord., Jan. 5, 2007, Min of the interior c / Assoc "Solidarity of the French", n ° 300311), can from now on be usefully protected, whenever the administrative judge is demanding with regard to the administrative authority, and exercises a genuine control of the proportionality between general and absolute measure (the prohibition) and the reality

[38] Penal Code, Article 431-1 para 1.
[39] Internal Security Code, Article L211-4

of the disturbances which it is a question of avoiding and containing. In another case, a Police Commissioner had banned a demonstration of police officers by an order under the pretext that it constituted by "its very existence" a disturbance of public order. This was an error of law. Indeed, such a conception would have led to the deprivation of the right to peaceful demonstration of entire sections of the public service: police, but also magistrates, high officials, etc. It was based on a misinterpretation of Article 29 of the Decree of 9 May 1995 which only prohibits acts or remarks of "nature to bring disrepute to the body to which it belongs or to disturb public order". A peaceful protest, by itself, does not disturb public order. If police officers are deprived of the right to strike and are subject to a duty of discretion and discretion, they enjoy the freedom of demonstration on the public road guaranteed by the decree of October 23, 1935 (under the condition of having done the subject of a prior declaration to the competent authority, which can only prohibit it on the grounds of a threat to public order). In the end, the Toulouse Administrative Court stated, explicitly, that there is no incompatibility in principle between the special reserve obligation imposed on certain officials and the exercise of the freedom to demonstrate. In the private sector, an employer cannot prevent his employee from going to a protest. This is an individual freedom guaranteed by law. The employer can neither sanction nor discriminate, in terms of advancement for example, an employee on strike. However, the latter will not be paid during his absence, unless the strike results from a serious and deliberate breach by the employer of his obligations, or if an agreement to terminate the strike has provided for it.

7. How equipped is your country's legal system to face the challenges presented by digital social movements such as #metoo and how might the right to protest be exercised in this context?

7.1. The right to demonstrate on the Internet through freedom of expression

In France, there is no specific legislation on the freedom to demonstrate on the Internet. The only case law related to this, deal with freedom of expression and more specifically its application on the internet.

The right to demonstrate on the internet is therefore exercised through freedom of expression.

7.2. Respect for freedom of expression and its limits on the Internet

Freedom of expression is written in Article 10 of the European Convention on Human Rights, it also states that the exercise of freedom of expression may be restricted by law in to the extent that they are necessary and proportionate to the aim pursued in a democratic society.

Similar limits in which freedom of expression may be exercised are set out in Article 11 of the French Declaration of the Rights of Man and the Citizen: "The free communication of thoughts and opinions is one of the rights more precious of the man: any citizen can thus speak, write, print freely, except to answer to the abuse of this freedom in the cases determined by the Law.[40]"

On the internet, everyone has the right to express themselves freely within traditional limits. The main prohibitions include insults, privacy, defamation, apology for terrorism or incitement.

[40] Declaration of the Rights of Man and of the Citizen, Article 11.

8. What role and responsibilities do academic institutions in your country have regarding promoting freedom of speech and the right to protest within and outside their campuses?

8.1. The unalienable freedom of expression of the university

Article 3 of Act No. 84-52 of 26 January 1984 on higher education states that "the public service of higher education is secular and independent of any political, economic, religious or ideological influence; to the objectivity of knowledge, it respects the diversity of opinions and must guarantee to teaching and research their possibilities of free scientific development.[41]"

This article therefore requires that freedom of expression be present in universities. It is necessary for the smooth running of their mission.

French law goes so far as to devote greater freedom of expression to academics, (Code of Education, art L. 952-2), which extends beyond that of civil servants.[42]

Finally, independence is granted to them through, most notably, the statute of professors: irremovability for the professors holding a chair.

The Constitutional Council binds these two particularities to the nature of their teaching and research functions.

8.2. This privileged status makes the university ambassador of freedom of expression

The freedom of expression granted to French universities gives them a special aura. Thus they serve as a pillar of this freedom, although it is not one of their defined roles, This is done by academic researchers and teachers who use this freedom to protect themselves. However, French universities do not have the obligation or even the objective. Since French law only requires higher education to strive towards "the objectivity of knowledge, it respects the diversity of opinions and must guarantee to teaching and research their possibilities of free scientific development.[43]"

Moreover, the July 1968 law incorporates political and trade union freedoms at the University.

[41] Act No. 84-52 of 26 January 1984, Article 3.
[42] Code of Education, Article L952-2.
[43] L141-6 Code of Education

Without being the watchdog of democracy, French universities play a significant role in promoting freedom of expression and by extension in demonstrating.

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