Freedom of Speech and Association in South Africa

Constitutionality of Section 1(1) of the Intimidation Act 72 of 1982

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EXECUTIVE SUMMARY

a. Introduction

1. OPBP has been asked by the Legal Resources Centre (LRC), South Africa, to prepare a report on how Freedom of Expression and Freedom of Association protections interact with laws criminalising intimidating or threatening conduct. The LRC is acting in the case of *Moyo and Another v Minister of Justice and Constitutional Development and Others* ('Moyo'), due to be heard before the South African Constitutional Court this year, representing the Right2Know Campaign, which is seeking to intervene as an *amicus curiae*.

2. The LRC is instructed to prepare a constitutional challenge to Section 1(1)(b) of the Intimidation Act 72 of 1982. This Section criminalises "*any person who … acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication ... fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person*". This therefore criminalises conduct which creates a *subjective* fear of harm in an onlooker, even where that fear is not reasonable from an objective perspective.

3. A key contention in the constitutional challenge is likely to be that this provision is overbroad and contravenes constitutional freedom of expression and association protections. The Apartheid-era provision means that protests or demonstrations that elicit feelings of fear from any single onlooker can be declared criminal and broken up, with prosecutions potentially following, depending on the exercise of prosecutorial discretion. Such took place in the case of General Alfred Moyo, who is being prosecuted under this Act for actions taking place during a protest in South Africa.

4. Consequently, the LRC sought a comparative report that examines the manner in which other jurisdictions regulate actions creating fear of harm, and the interaction of constitutional human rights protections with those regulations.

b) The research questions

Question 1: Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

- The LRC has asked for comparative research on the manner in which different jurisdictions protect freedom of expression and freedom of assembly. This question asks for an introductory outline of these protections, so that their content can be examined in greater

depth later. For clarity and ease of exposition, the Question has been divided into four sub-questions, each question concerning a different aspect of how the constitutional protection is structured:

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?
b) If so, what are those provisions and how do they compare to article 19 of the ICCPR?[1]
c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?
d) What are the consequences of any such declaration?

Question 2: In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

- The LRC has asked for comparative research on how different jurisdictions regulate threatening or intimidating conduct. The *Moyo* case centres around fear assessed subjectively, but the research looks additionally to laws pertaining to fear assessed objectively, and other related public order offences. This question is answered slightly differently in each jurisdiction.

Question 3: Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

- The LRC has asked for comparative research on how challenges similar to that likely to take place in *Moyo* have been dealt with in other jurisdictions. This is a question concerning how the constitutional protections examined in Question 1 interact with the criminal offences canvassed in Question 2, and how the different legislative objectives are balanced against each other.

c) Jurisdictions

5. The jurisdictions examined were chosen because of their developed freedom of expression and association protections. The countries in question are located all over the world: we chose jurisdictions covering Africa, Europe and the Commonwealth. This report draws on the following jurisdictions:

1. Kenya
2. Namibia

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

3. Australia
4. Canada
5. India
6. England and Wales
7. The European Convention of Human Rights (Council of Europe)[2].

d) Summary conclusions

6. The Intimidation Act offences do not have direct parallels in most jurisdictions covered. That said, almost all jurisdictions have criminal regulation of similar activities, such that helpful comparisons can be drawn from them. For example, with the important exception of India, no jurisdictions covered criminalise speech or conduct that (only) creates fear subjectively. All the jurisdictions covered criminalise, in some way, conduct that creates a sense of fear objectively: most have multiple crimes to this effect, but none stretch to using the simple fear of an onlooker as a threshold criterion for criminality. All, including India, require a higher standard than that seen in Section 1(1)(b) of the Intimidation Act.

7. Some jurisdictions have crimes or other legal provisions that cannot be neatly described as either based on objective or subjective creations of fear. This is often because the *actus reus* of the offence is centered in the defendant rather than the complainant. For example, in Canada, certain offences, such as intimidation, extortion and public incitement of hatred, are based around the defendant's use of violence, threats, inducements or incitements, rather than the complainant's fear. In contrast, in England and Wales, the crime of assault occurs when "the defendant intentionally or recklessly causes the victim to apprehend immediate unlawful personal violence".[3] The *actus reus* involves a victim-centered criterion: the (actual) apprehension of violence. But since the crime is not concerned with an experience of fear per se, it cannot neatly be placed into "objective" or "subjective" categorisations. All jurisdictions require stronger conditions than mere subjective experiences to be met.

8. India comes closest to criminalising conduct that creates subjective experiences of fear. The Indian Penal Code criminalises Extortion, enacted in Article 383. It reads: "*Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits extortion"*. The fear of the onlooker is sufficient to fulfil the *actus reus*, irrespective of whether that fear is reasonable. This crime nonetheless contrasts with that enacted in Section 1(1)(b) of the Intimidation Act, because of the intent component of the offence. The locus of Extortion is not solely centered in the onlooker, rendering it distinct from the effects-focused

[2] The Council of Europe does not enact legislation that can criminalise conduct directly, such as that envisaged by Question 2. As such, the section on the Convention is focused on challenges to state legislation that criminalises threatening or intimidating conduct made before the Strasbourg Court. See the ECHR section for further explanation.
[3] Fagan v MPC [1969] 1Q.B. 439

crime of the Intimidation Act. Extortion therefore can be described as hybrid subjective-objective in its complexion.

9. Human rights-based challenges to the crimes discussed here are typically dismissed with seeming ease by courts across our jurisdictions. Courts in most jurisdictions are willing to accept that most of the examined crimes engage freedom of speech and association protections, but that they represent proportionate interferences with such, due to the public order justifications being successfully employed by state counsel.

Table 1: Comparative criminalisations of speech and/or conduct that creates objective and subjective experiences of fear, and analogous criminalisations

Jurisdiction	**Crime(s)/action**	**Creating fear from an objective perspective**	**Creating fear from a subjective perspective**
Kenya	Intimidation; molestation		
	Rioting		
	Breaches of the peace; incitement to violence[4]		
Namibia	Intimidation; assault		
	Public gatherings[5]		
Australia	Using postal service to menace, harass or cause offence		
	Offensive behaviour because of race, colour or national or ethnic origin		
Canada	Criminal harassment; assault		
	Intimidation; extortion; public incitement of hatred		

[4] These provisions involve the criminalisations of actual or threatened violence, not touching upon fear per se.
[5] These provisions are potentially broad enough to catch objective or subjective creations of fear, but they do not criminalise any conduct. Rather, they give the police powers to control public gatherings.

India	Extortion; promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony		
	Assault; criminal force		
England and Wales	Public Order Act: threatening or abusive words or behaviour; causing harassment, alarm or distress		
	Racial, sexual orientation and religious hatred		
	Breach of the peace		
	Assault		

Key:

	Criminalised
	Ambiguous standard/threshold somewhere between "subjective" and "objective"
	Not criminalised
	No pertinent data

Question 1: Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

10. All of the jurisdictions were chosen on the basis of their freedom of expression and association protections, so all had a protection of these freedoms in some form. Indeed, the wording of the relevant provisions is typically rather broad, with the protections in question usually being at least co-extensive with ICCPR protections.

11. In most jurisdictions, the protections are found at the constitutional level. Kenya, Namibia and India all contain explicit statements of the rights within their Constitutions. Canada has enacted the *Charter of Rights and Freedoms*, which is a constitutional document, and also explicitly protects these

rights. The ECHR protects freedom of expression and association explicitly within its founding treaty.

12. Jurisdictions like Australia and England and Wales reveal a more complex picture. The Australian Constitution does not include a Charter or Bill of Rights. Nor is there a Human Rights Act applicable to the entire Australian territory. But two of Australia's six states have Human Rights Acts, which are the focus of the research on this jurisdiction. Moreover, the Australian High Court has recognised a residual common law right of free expression, though no judicial review of legislation in light of this right has been explicitly recognised. As to England and Wales, the Human Rights Act 1998 and the UK's membership of the Council of Europe mean that, to an extent, protection of these freedoms is broadly similar to that in the ECHR. And there is also a common law right to freedom of expression that has been specifically outlined by the courts.

13. The status of these freedoms also varies between jurisdictions. In Kenya, Namibia, Canada and India, the position is relatively straightforward: if legislation or another legal norm contravenes constitutional protections of freedom of expression and assembly, that law can be declared incompatible by the courts, rendering it invalid. The European Court of Human Rights can declare municipal laws that contravene human rights to be in violation of the Convention, and this decision is binding on the Contracting Parties. The Contracting Parties are internationally responsible for these violations, and must take the measures they deem appropriate in order for the applicant's rights to be reinstated. In Australia (specifically, the Australian Capital Territory and Victoria) and England and Wales, legal norms deemed incompatible with the provisions of the Human Rights Acts continue to apply, though the issuance of a declaration of incompatibility (or, for Victoria, a declaration of inconsistent interpretation) by the courts is usually met with amendment to remedy that incompatibility.

Question 2: In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

14. As stated above, most jurisdictions do not contain a crime directly analogous to that enacted in the Intimidation Act. The closest parallel is the Namibian offence of Intimidation, which criminalises acts that "have or would probably have, the effect on a person perceiving the act or language, reasonably to fear for his own safety or the safety of his property, or for the safety of any other person or for the safety of the property of that other person". The reasonableness standard stands in marked contrast to the subjective standard employed in South Africa. This is a particularly notable difference, given that *The Intimidation Act 72 of 1982* passed by the South African Parliament was also the law in South West Africa (later Namibia), and yet that jurisdiction has chosen to diverge from South Africa on this point.

15. Several jurisdictions have offences which criminalise threatening conduct, but with an *actus reus* that focuses only on the actions of the defendant, rather than placing the locus of the offence on the

generation of fear in a (imagined or real) defendant. For example, the Kenyan offences of breach of the peace, intimidation and molestation, and the Canadian offences of intimidation, extortion and public incitement of hatred, criminalise actual or threatened physical violence, without incorporating victim-based conditions within the *actus reus*. These defendant-centered offences do not directly compare to those complainant-centered ones to be examined in *Moyo*, and provide less assistance to it.

16. But of those jurisdictions with more complainant-centered offences, all of them either criminalise conduct that creates an objective fear of harm, or impose more stringent conditions than those imposed by the Intimidation Act. In the former category, the number of examples are rife. In Africa, the Kenyan crime of rioting, and the Namibian crimes of intimidation and assault, require reasonable or objective assessments of fear of harm. In the Commonwealth, the Australian crimes of using the postal service to menace, harass or cause offence, and offensive behaviour because of race, colour, national or ethnic origin, and the Canadian offences of criminal harassment and assault, all fall within this category too. Lastly, in England and Wales, the offences enacted in the Public Order Act, and those of breach of the peace and racial, sexual or religious hatred, all have this objective requirement.

17. India stands as a potential but imperfect exception. The Indian Penal Code criminalises Extortion, which, of all the offences studied here, comes closest to criminalising conduct based on the creation of subjective fear. Article 383 reads: "*Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits extortion".* Article 385 describes the similar offence of putting a person in fear of injury in order to commit extortion. This Article reads: "*Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both*".

18. Both of these Articles contain subjective fear elements, with additional criteria including the intent to induce that fear, and a purposive element regarding the receipt of some monetary or other benefit. Thus the *actus reus*, uniquely in this research, involves subjective fear of the victim. But, unlike in S1(1) of the Intimidation Act, there is an additional element of *intent* to induce that fear. This renders the two crimes imperfectly aligned. The commission of an act that would not induce fear in the reasonable person would render the courts less likely to infer intention of fear inducement. That said, this offence plainly relies heavily on the subjective fear of the victim. A defendant, knowing that the would-be victim is predisposed to be more fearful than a reasonable person, could intend to induce fear with some act that would not frighten the reasonable person, and still fulfil the requirements of the *actus reus*. This renders this offence the closest analogue to that enacted in S1(1) of the Intimidation Act that this research covers.

19. There are also those crimes upon which more stringent conditions than those of the Intimidation Act are placed. For example, in the Canadian section, Table 3 highlights how several

offences in the Criminal Code could plausibly have subjective fear as one component of the crime, but also illustrates the additional conditions placed on these crimes. These additional conditions usually touch upon more objective factors, such as defendant-centric conditions like violence or threats, or breaches of the peace.

20. The only other potential exception is the Namibian Public Gatherings Proclamation, AG 23 of 1989, which allows the police to impose conditions on public gatherings at which "feelings of hostility between different sections of the population of the Territory would be caused, encouraged or fomented". This is a broad provision that potentially covers subjective senses of fear. However, it does not criminalise anything: this provision is designed to give police certain powers once these conditions have been met. As such, its utility is rather limited.

Question 3: Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

21. Most jurisdictions do not have offences that line up closely with crimes based on subjective fear. Consequently, research unearthed few cases challenging these provisions. However, some of the crimes that have similar content to that contained in the Intimidation Act have been challenged, as illustrated by Table 2, below.

Jurisdiction	**Crime**	**Overview of litigation**
Kenya	Rioting and breaches of the peace	*Khalid v A-G.*[6] The Court held, without much elaboration, that promoting and maintaining peace and order are legitimate limitations on the freedoms.
Namibia		No pertinent litigation.
Australia	Offensive uses of the postal service	*Monis v the Queen.*[7] The High Court found that found that the law burdened the right to political communication. However, the members of the High Court split by 3-3 on whether this was a proportionate restriction and therefore the lower court's decision upholding the provision was confirmed.
Canada	Criminal harassment	*R v Krushel.*[8] Whatever infringement s 264 presented to the *Charter* right to freedom of expression, such was at the "low end of the scale" of the types of speech that were thereby

[6] Petition 324 of 2013.

[7] *Monis v The Queen* [2013] HCA 4.

[8] *R v Krushel*, (2000) 142 Canadian Criminal Coded (Third Series) 1, 2000 CanLII 3780 (ON CA) available under<http://canlii.ca/t/1fb11> accessed 17 July 2018.

		protected. Thus s 264 would be saved by the savings clause enacted in s 1 of the *Charter*. No further reasoning was deemed to be necessary by Catzman JA.
India		No pertinent litigation.
England and Wales	Causing harassment, alarm or distress	*Hammond v DPP*.[9] Challenge to the application of s 5 Public Order Act dismissed. The interference imposed on the defendant's article 10 ECHR right was held to be a proportionate response. His conduct went beyond any legitimate protest, and he intended to provoke violence and disorder.
	Threatening or abusive words or behaviour	*Dehal v Crown Prosecution Service*.[10] Challenge to the application of s 4A Public Order Act upheld. Interference with right to freedom of expression was disproportionate. The defendant's statements were insulting, but it had not been shown that the provision was *necessary* to fulfil the legitimate aim of preventing public disorder.
ECHR		No pertinent *challenges* to criminal provisions, though useful illustrative litigation is discussed below.

22. Across jurisdictions, most courts have dismissed challenges made to laws proscribing the causation of fear from an objective standpoint. As the answers to Question 1 illustrate, all provisions protecting freedom of expression and association in the relevant jurisdictions either explicitly or implicitly recognise public order justifications for limitation. In almost all cases, crimes that concern objective causations of fear have been upheld as proportionate interferences with human rights on this basis.

23. One exception to this pattern is found in the England and Wales case of *Dehal*.[11] Here, the defendant, who was a practising Sikh, was charged with POA s 4A by placing a notice that criticised the President of the Temple which he attended as a hypocrite, a liar, and a maker of false statements to the police. The prosecution, on the basis that the speech only had to be insulting to cause distress, was held to be disproportionate. The President being shown to be distressed and worried was insufficient as a justification for limiting the defendant's right to free expression. The measure had to be shown to be necessary to prevent public disorder, and this was not made out in this case.

24. Another noteworthy point is thrown up by the Kenyan case of *Okuta v A-G*.[12] This Nairobi High Court judgment specifically concerned whether *criminalisation* of certain speech acts (defamation in

[9] [2004] EWHC 69.
[10] [2005] EWHC 2154.
[11] Ibid.
[12] Petition 397 of 2016. The report has no paragraph or page numbers.

this case) was the appropriate legal mechanism to be used. While tortious liability for acts doing harm to reputation might be appropriate, criminalising such conduct was a disproportionate interference with the individual's human rights. The Court spoke of the "chilling possibilities of arrest, detention and imprisonment" that should factor in within proportionality assessments of criminalising speech or conduct that amounts to free expression.

25. Lastly, it is relevant that in ECHR jurisprudence, speech in a political context is given stronger protection. The Court applied different standards of proportionality review in the *Sunday Times*[13] and the *Mueller*[14]. The first concerned an injunction imposed on the prospective publication of an article by the Sunday Times revealing evidence around the publication of evidence regarding the public interest issue of the Thalidomide children, whereas the second concerned confiscation of paintings depicting sexual acts. A violation was found in *Sunday Times*, but not *Mueller*, in large part due to the stricter application of review for issues concerning the public interest as opposed to artistic expression. The Court also applies stricter standards of review depending on the intention of the speaker (e.g. to cause fear or violence)[15], or the imminent danger of violent conduct arising as a consequence of the expression.[16]

[13] *Sunday Times v. the UK* App no 6538/74 (ECtHR, 26 April 1979).
[14] *Mueller and Others v. Switzerland* App no 10737/84 (ECtHR, 24 May 1988).
[15] E.g. *Halis Dogan v. Turkey* App no 4119/02 (ECtHR, 10 October 2006).
[16] E.g. *Leroy v. France* App no 36109/03 (ECtHR, 2 October 2008).

AFRICA

KENYA

I. Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?

26. The Constitution of Kenya, 2010, has a bill of rights[17] which protects the right to freedom of expression in Article 33 and the right to freedom of association in Article 36.

b) If so, what are those provisions and how do they compare to Article 19 [and Article 22] of the ICCPR [and the relevant provisions of the South African Constitution]?

27. Article 33 reads:

Freedom of expression

(1) Every person has the right to freedom of expression, which includes—
  (a) freedom to seek, receive or impart information or ideas;
  (b) freedom of artistic creativity; and
  (c) academic freedom and freedom of scientific research.
(2) The right to freedom of expression does not extend to—
  (a) propaganda for war;
  (b) incitement to violence;
  (c) hate speech; or
  (d) advocacy of hatred that—
    (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
    (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).
(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

28. This provision is very similar to Article 19 of the International Covenant on Civil and Political Rights (read together with Article 20, which is mirrored in internal limitations in Kenya's Article 36(2)(a), (2)(d)(i) and (2)(d)(ii)). In addition, it is almost identical to s 16 of the Constitution of the Republic of South Africa, 1996, on which it is based. There are two notable differences. First, South Africa's Section 16(1)(a) has in Kenya's case been hived off into a freestanding Section on media

[17] Constitution of Kenya, 2010, ch 4.

freedom (s 34). Second, s 33(2)(d) is somewhat broader. Thus, the Section as a whole is more restrictive of expression than the equivalents in both the ICCPR and the South African Constitution.

29. Article 36 reads:

Freedom of association

(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
(2) A person shall not be compelled to join an association of any kind.
(3) Any legislation that requires registration of an association of any kind shall provide that—
  (a) registration may not be withheld or withdrawn unreasonably; and
  (b) there shall be a right to have a fair hearing before a registration is cancelled.

30. Article 36 as a whole has a broader scope than Article 22 of the ICCPR. Article 36(1), which is very similar to article 22(1) of the ICCPR, protects the formation of all kinds of associations and not only trade unions; Article 36 contains no equivalent of article 22(2)'s internal limitation (allowing prescriptions 'in the interests of national security or public safety, public order, [etc]'); and Article 36(3) finds no equivalent in the ICCPR. Article 36 is more detailed in its protections than s 18 of the South African Constitution, which says only that 'Everyone has the right to freedom of association.'

c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?

31. Courts are permitted to declare legislation to be inconsistent with the Constitution of Kenya.[18]

d) What are the consequences of any such declaration?

32. The consequence is that the legislation is void.[19]

II. In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

33. No provisions criminalise speech or conduct merely because they create a subjective fear for anyone's person, property, or livelihood. However, for the sake of completeness, Kenya's penal provisions that raise similar issues of potential overbreadth are discussed in the following paragraphs.

34. Kenya's Penal Code[20] criminalises 'intimidation' and 'molestation' in s 238. Both are punishable by a term of imprisonment not exceeding three years. The definitions of the two offences are set out

[18] Constitution of Kenya, 2010, article 23(3)(d) and 165(3)(d). See further the discussion in, for eg, *Suleiman Shahbal v Independent Electoral and Boundaries Commission*, Petition 3 of 2014, [2014] eKLR.
[19] Constitution of Kenya, 2010, art 2(4).

in subsections (2) and (3). The relevant points here are that a *mens rea* requirement (of intent) is express, and that the *actus reus* in no way depends on the subjective fears of another person—it depends (in the case of intimidation) on actual or threatened 'injury to the person, reputation or property' of another or (in the case of molestation) the accused's own act of 'dissuasion', 'watch[ing]', interfer[ing]', etc.

35. Sections 78 to 87 criminalise behaviour involving rioting. These are fairly broad and have attracted some judicial attention.[21] Section 78(1) defines an 'unlawful assembly' to include an instance when three or more persons, 'being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace'. This seems to bear some similarity to the provision at issue in *Moyo*, but, crucially, the other persons' fear must be *reasonable*. It is also limited to reasonable fears of breaches of the peace, i.e. physical violence.[22]

36. The Penal Code also criminalises 'offensive conduct conducive to breaches of the peace' (s 94) and 'threatening [a] breach of the peace or violence' (s 95), but these have an express intent requirement (the exception is the misdemeanours in s 95(1)) and the result—an actual or threatened breach of the peace—has been held to mean actual or threatened physical violence.

37. Section 96 criminalises 'Incitement to violence and disobedience of the law'. It is a fairly broad provision. It criminalises inter alia the 'do[ing of] any act or thing, indicating or implying that it is or might be desirable to do … any act the doing … of which is calculated' to lead to death, physical injury, or property damage. The absence of the usual intention requirement is notable. The use in its stead of the word 'calculated' is not unlike the reference, in the provision at issue in *Moyo*, to acts that 'have the effect' of inducing fear. However, the former adopts a higher threshold than the latter. Furthermore, the 'calculated' occurence, in terms of s 96, is actual death, physical injury, or property damage—not the mere fear of it.

38. Finally, defamation (more accurately, 'libel') was criminalised in s 194 of the Penal Code. This provision is now invalid, having been the subject of a successful constitutional challenge.[23]

III. Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

39. A constitutional challenge to ss 78 and 80 (which together criminalise 'rioting') and s 94 (which, as above, criminalises 'offensive conduct conducive to breaches of the peace') was given short shrift

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[20] The Penal Code, 1970 (Cap 63).

[21] See below.

[22] See eg *Mule v Republic* (1983) KLR 246.

[23] See para 17 below.

by the Nairobi High Court in *Khalid v A-G*.[24] The Court held, without much elaboration, that 'the object of the said provisions … is to promote and maintain peace and order and the provisions do not in any way prohibit the right [to freedom of expression and assembly] but they only place limitations thereto'.[25] Both constitutional rights contain internal limitations: Article 33 provides that freedom of expression shall be exercised respectfully of the rights of others, and Article 37 confers the right to assemble 'peaceably and unarmed'.[26] Hence 'there is *per se* no conflict' between the Code's provisions and the Constitution.[27] And, '[i]n any event', the provisions of the Code would be saved by article 24, the general limitations clause.[28]

40. Much the same occurred in *Olal v A-G*,[29] where the constitutional challenge was to ss 78 and 83 (which together criminalise 'rioting after proclamation', i.e. after the rioters have officially been asked to disperse). The Nairobi High Court dismissed the challenge on the basis that the provisions were saved by Article 24, since they 'are aimed at preventing public disorder and to protect public safety'.[30] The Court held, however, that the police's purported exercise of the powers under those ss, in deciding to break up a peaceful demonstration without notice, had been unlawful, and granted relief on that basis.

41. Given that neither constitutional challenge was upheld, or even discussed at much length, these cases are of limited assistance.

42. With regard to the issue of whether *criminalisation* is an appropriate tool, the criminal offence of defamation, embodied in s 194 of the Penal Code, was struck down by the Nairobi High Court in *Okuta v A-G*.[31] The judgement is lengthy, but the decisive argument is that criminalisation is disproportionate—proportionality was, it said, a crucial moderating concept in human rights law, and emphasised it at length—given that civil remedies for defamation exist. In the Court's own words:

> I am persuaded beyond doubt that … the harmful and undesirable consequences of criminalizing defamation, viz. the chilling possibilities of arrest, detention and two years' imprisonment, are manifestly excessive in their effect and unjustifiable in a modern democratic society like ours.
>
> Above all, I am clear in my mind that there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. Thus, it is absolutely unnecessary to criminalize defamatory statements. Consequently, I am satisfied that

[24] Petition 324 of 2013.

[25] ibid [70].

[26] ibid [70]–[71].

[27] ibid [72].

[28] ibid [73].

[29] Petition 323 of 2014.

[30] See text starting at fn 52.

[31] Petition 397 of 2016. The report has no paragraph or page numbers.

> criminal defamation is not reasonably justifiable in a democratic society within the contemplation of article 24 of the Constitution. I my view, it is inconsistent with the freedom of expression guaranteed by 33 of that Constitution.

43. The Court issued a declaration that 'Section 194 of the Penal Code, cap 63, Laws of Kenya is unconstitutional and invalid to the extent that it covers offences other than those contemplated under article 33(2)(a)–(d) of the Constitution of Kenya 2010'.

NAMIBIA

I. Briefly outline your jurisdiction's protection of (a) freedom of expression, (b) freedom of assembly.

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?

44. Yes. Article 21 of Namibia's Constitution sets out a list of fundamental freedoms. This list of fundamental freedoms includes freedom of expression and freedom of association.

b) b) If so, what are those provisions and how do they compare to article 19 of the ICCPR?

45. Article 21(1)(a) states, 'All persons shall have the right to: (a) freedom of speech and expression, which shall include freedom of the press and other media.'

46. Article 21(1)(d) states, 'All persons shall have the right to: (d) assemble peaceably and without arms.'

47. Article 21(1)(e) states, 'All persons shall have the right to: (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties.'

48. Article 21(2) states that the rights outlined in 21(1) can be restricted, 'subject to the law of Namibia, so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.'

49. The right to freedom of expression in article 21(1)(a) of the Namibian Constitution has similarities to Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Both provisions protect expression. Both provisions allow for permissible limitations of the right to expression so long as the restrictions pass the limitation analysis in 21(2) of the Namibian Constitution and article 19(3) of the ICCPR respectively. There are some minor differences between the two provisions. Article 21(1)(a) of the Namibian Constitution refers to speech and expression whereas article 19(2) of the ICCPR refers only to expression. Article 19(2) of the ICCPR also goes into more detail setting out what the right to freedom of expression includes.

c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?

50. The High Court and the Supreme Court of Namibia can declare legislation to be incompatible with the Constitution. Articles 79(2) and 80(2) of the Namibian Constitution give the Supreme Court and the High Court, respectively, the power to hear and adjudicate upon cases which involve the interpretation, implementation, and upholding of the Constitution.

51. Article 25(3) of the Namibian Constitution states, 'Subject to the provisions of this Constitution, the Court referred to in Sub-article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.'

d) What are the consequences of any such declaration?

52. Article 25(1) of the Constitution states that any law that is in contravention of the Constitution shall be invalid.

II. In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

Intimidation

53. Prior to Namibia gaining independence in 1990, the South African Parliament exercised legislative powers over the territory of South West Africa (the name of the territory prior to the attainment of nationhood).[32] The Namibian legal system was an extension of the South African legal system.[33]

54. The *Intimidation Act 72 of 1982* passed by the South African Parliament was also the law in South West Africa. *The Intimidation Act 72 of 1982*, however, did not criminalise speech and conduct that created subjective fear of safety until the amendments introduced to the act by the South African Parliament through s32(b) of *The Internal Security and Intimidation Amendment Act 138 of 1991*. *The Intimidation Act 72 of 1982* had already been repealed by this time by s 3 of the *Intimidation Proclamation, AG 24 of 1989*. Section 140 of the Namibian Constitution states that, 'all laws which were in force immediately before the date of Independence shall remain in force until repealed or

[32] Sam K Amoo, 'The constitutional jurisprudential development in Namibia since 1985' in Nico Horn and Anton Bösl (eds), *Human Rights and the Rule of Law in Namibia* (Macmillian 2008) 39.
[33] ibid.

amended by Act of Parliament or until they are declared unconstitutional by a competent Court.' *The Intimidation Proclamation, AG 24 of 1989* has not been repealed or held to be unconstitutional and is, therefore, still the law.

55. The *Intimidation Proclamation, AG 24 of 1989* introduced a legal rule criminalising speech and conduct that creates objective fear of safety. Section 1(1)(b) states a person will be guilty of an offence if they act, 'in such a manner or uses or publishes any language in such a manner that it has, or would probably have, the effect on a person perceiving the act or language, reasonably to fear for his own safety or the safety of his property, or for the safety of any other person or for the safety of the property of that other person, and to be induced by his fear to do, or to abstain from doing, something or to assume or to abandon a particular standpoint'. This is an objective test that requires the fear to be reasonable. There has been very little case law on the interpretation of the *Intimidation Proclamation, AG 24 of 1989*. Section 1(1)(b) of the *Intimidation Proclamation* is mentioned as a possible alternative basis for criminal conviction in *S v Malumo*.[34] The application of the test, however, is not discussed. Research found no other cases discussing the application of the test.

Assault

56. Assault is a common law offence. In *S v Afrikaner* Heatcote AJ outlined assault as understood in Namibian law. He stated, 'The definition of assault, as laid down by Gardiner (as author and judge) as well as in the Transkeian Code, consists of two portions, unifying the English concepts (as they were then understood) of battery and assault. Thus, assault as known in our law, came to include both battery and attempted battery and it must be recognised today that the definition of assault, as applicable in Namibia, is the same as defined in the Penal Code of Transkei.'[35] The *Penal Code of Transkei* defines assault as the, 'act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by act or gesture, to apply such force to a person of another, if that person making the threat has or causes the other to believe on reasonable grounds, that he has the present ability to effect his purpose.'[36] This is an objective test that requires the fear of harm to be reasonable. This is supported by the comments made by Usiku AJ in relation specifically to assault by threat in *S v Vries*. She stated, 'for assault by threat to take place, there must be a threat of immediate personal violence, in circumstances that lead the person threatened reasonably to believe that the other intends and has the power immediately to carry out the threat.'[37] Two elements are needed for an assault by threat offence to be made out. The first is that the threat must be of immediate personal violence. The second is that it must be reasonable to believe the threat will be carried out.

Public Gatherings

[34] *S v Malumo* (CC 32-2001) [2015] NAHCMD 213 [7].
[35] *S v Afrikaner* 2007 (2) NR 584 (HC) [16].
[36] ibid [7].
[37] *S v Vries (*CC 11/2015) [2017] NAHCMD [63].

57. The *Public Gatherings Proclamation, AG 23 of 1989* gives the police the power to impose conditions on public gatherings. According to s 3 of the proclamation the police can impose restrictions of public gatherings,

> "If the Commissioner has reason to think that –
> (a) the public peace would be seriously endangered;
> (b) the public order would be threatened;
> (c) any person would be killed or seriously injured or valuable property would be destroyed or seriously damaged;
> (d) feelings of hostility between different sections of the population of the Territory would be caused, encouraged or fomented; or
> (e) any person would be compelled to abstain from doing or to do an act which that person is legally entitled to do or to abstain from doing".

58. This is a broad provision that could be used to restrict protests that created subjective fear in sections of the population. It provides grounds for restricting public protests and does not criminalise speech or conduct. Research found no examples of the *Public Gatherings Proclamation, AG 23 of 1989* being used to restrict protests because they created subjective fear in sections of the population.

III. Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

59. Research found no pertinent legal challenges to these legal provisions in Namibian law.

THE COMMONWEALTH

AUSTRALIA

I. Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?

60. The Australian Constitution does not include a Charter or Bill of Rights. Nor is there a Human Rights Act applicable to the entire Australian territory.[38] This does not preclude human rights protection at the level of the states. Out of its six states and three mainland territories currently only two have a Human Rights Act. Both predominantly contain civil and political rights and were modelled on the UK Human Rights Act 1998.[39] They both expressly protect freedom of expression and association.

b) If so, what are those provisions and how do they compare to article 19 of the ICCPR?

61. Firstly, Victoria has a Charter of Human Rights and Responsibilities Act including the freedom of expression and the freedom of assembly.[40] Thus, s 15 of the Act states:

Freedom of expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—

(a) orally; or
(b) in writing; or
(c) in print; or
(d) by way of art; or
(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or
(b) for the protection of national security, public order, public health or public morality.

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[38] State Library New South Wales, 'Formal human rights protections in Australia', <http://legalanswers.sl.nsw.gov.au/hot-topics-85-human-rights/formal-human-rights-protections-australia> accessed 22 July 18.

[39] State Library New South Wales, 'Human rights in state and territory law', <http://legalanswers.sl.nsw.gov.au/human-rights-australia/human-rights-state-and-territory-law> accessed 22 July 2018.

[40] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

62. Section 16 states the following:

Peaceful assembly and freedom of association

(1) Every person has the right of peaceful assembly.

(2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

63. Secondly, the Australian Capital Territory (ACT) has a Human Rights Act (2004) including the freedom of expression and the freedom of assembly in its ss 15 and 16.

15. Peaceful assembly and freedom of association

(1) Everyone has the right of peaceful assembly.

(2) Everyone has the right to freedom of association.

16. Freedom of expression

(1) Everyone has the right to hold opinions without interference.

(2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

64. Following the introduction of these acts, other states and territories have shown an interest in adopting a similar act.[41] The Queensland government, for example, has promised to introduce one.[42]

65. However, while recognized by the Court as one of the 'fundamental values traditionally protected by the common law[43], it is widely recognised that freedom of speech is not absolute.[44] The protection of common law rights is not particularly strong as they are considered 'residual', protecting what is not prohibited by law.[45] Although the power of judicial review based on common law rights has not been recognized by the High Court, such an approach has not been ruled out either.[46] Per the principle of legality, an interpretive assumption applies that the legislator has to

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[41] State Library New South Wales, 'Human rights in state and territory law', <http://legalanswers.sl.nsw.gov.au/human-rights-australia/human-rights-state-and-territory-law> accessed 22 July 2018.
See also for example: Human Rights Bill 2004 (SA); Human Rights and Equal Opportunity Commission, *Human Rights for WA Discussion Paper and Draft Human Rights Bill 2007*<https://www.humanrights.gov.au/proposed-wa-human-rights-act> accessed 22 July 2018.

[42] Felicity Caldwell, 'Human Rights Set to be Enshrined in a Queensland Act' (2018) *Brisbane Times*<https://www.brisbanetimes.com.au/politics/queensland/human-rights-set-to-be-enshrined-in-a-queensland-act-20180205-p4yzgc.html> accessed 10 July 2018.

[43] Nationwide News v Wills (1992) 177 CLR 1, 19.

[44] Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 78.

[45] ibid, 40-41.

[46] Adrienne Stone, 'Constitutional Interpretation' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007); George Williams, 'Judicial Review' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007); Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 40-41.

make explicit an intention to interfere with such rights.[47] There is thus an interpretive assumption against statutory encroachment of common law rights.[48]

66. The Court has held freedom of political communication to be implied in the Constitution.[49] This is not considered to be a personal right but rather a check on the exercise of legislative power.[50] This is not absolute either as the freedom is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.[51]

67. In *McCloy v New South Wales*, the High Court adopted a proportionality test where the freedom of political communication is impaired.[52]

68. Freedom of assembly, however, is not recognized in the same manner as freedom of speech. As a common law right it only protects what is not prohibited by law.[53] The common law freedom of assembly is only for peaceful purposes.[54] It can be recognized as a component of the implied constitutional freedom of political communication since the freedom of assembly could be the effective means required for the exercise of this communication.[55] Where that is the case, the same justification test applies to infringements on the freedom of assembly.[56]

69. Australia is party to the ICCPR.[57]Article 19 and 21 ICCPR thus also expressly protect freedom of speech and freedom of association.

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[47] George Williams, 'Judicial Review' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007); Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 36-38.

[48] ibid.

[49] For example *Brown v. Tasmania* (2017) HCA 43; E.g. Adrienne Stone, 'Constitutional Interpretation' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007); Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 80-83; Anna Walsh 'Freedom of Expression, Belief and Assembly: The Banning of Protests Outside of Abortion Clinics in Australia'[2018] Journal of law and medicine 1126-1127.

[50] Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 80.

[51] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 as cited in Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 81.

[52] *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell and Keane JJ) as cited in Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 82.

[53] Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 163.

[54] ibid.

[55] Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 163, 165.

[56] ibid.

[57] E.g. Justin Healey, *Human Rights and Civil Liberties* (The Spinney Press 2014) 1,13.

70. As can be seen above, s 15 of the Charter of Human Rights and Responsibilities Act and s 16 of the ACT Human Rights Act use very similar wording as the ICCPR for the description of the freedom of expression. The limitation clause in s 15(3) is also similar. Section 7(2) of the Charter of Human Rights and Responsibilities Act also contains a general limitation test:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

71. While its s 16 does not contain a specific limitation clause, the ACT Human Rights Act sets out a general limitation test for human rights in its s 28:

> **Human rights may be limited**
>
> (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
>
> (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
>
> (a) the nature of the right affected;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose;
>
> (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

72. Concerning the freedom of assembly, like the ICCPR, both Acts only recognize peaceful assembly. Unlike the ICCPR, neither s 16 of the Charter of Human Rights and Responsibilities Act nor s 15 of the ACT Human Rights Act explicitly qualify this right. However, the general limitation test set in its s 28 would apply equally to this right, and a similar test can be found in s 7(2) of the Charter of Human Rights and Responsibilities Act.

c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?

73. The High Court can perform judicial review of the legislation's compliance with the Constitution,[58] including the implied freedom of political communication. Laws interfering

[58] E.g. George Williams, 'Judicial Review' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007).

disproportionately with this freedom can be considered invalid.[59] As explained above, the common law freedom of speech does not currently give rise to an equally strong protection although a similar approach has not been definitively ruled out by the High Court.[60]

74. The ICCPR, like all international law in the Australian legal system, 'does not create binding domestic law…nor does it abrogate the power of the Commonwealth Parliament to make laws that limit rights'.[61] However, where a statute is ambiguous or unclear, courts favour an interpretation compatible with the ICCPR.[62]

75. Section 32 of the ACT Human Rights Act allows the Supreme Court of the ACT to make a declaration of incompatibility. Section 36 of the Victoria Charter of Human Rights and Responsibilities Act 2006 allows the Victoria Supreme Court to make a declaration of inconsistent interpretation.

d) What are the consequences of any such declaration?

76. Where the High Court has found that a law violates the (implied) Constitutional norm, the law will then be of no effect.[63]

77. However, a declaration under s 32 of the ACT Human Rights Act 'does not affect—(a) the validity, operation or enforcement of the law; or (b) the rights or obligations of anyone.'[64] The same is true under s 36 of the Victoria Charter of Human Rights and Responsibilities Act 2006.[65]

78. A copy of this declaration is given to the Attorney-General[66] representing the Executive who must present this as well as a written response to the declaration to the Legislative Assembly.[67] This can result in an amendment of the contested law.[68] The Victoria Charter of Human Rights and

[59] Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 80-83.

[60] Adrienne Stone, 'Constitutional Interpretation' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007); George Williams, 'Judicial Review' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007); Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 40-41.

[61] Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 40, 84-85, 166-167.

[62] ibid.

[63] George Williams, 'Judicial Review' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2007).

[64] Section 32(3) Human Rights Act (ACT).

[65] Section 36(5) Charter of Human Rights and Responsibilities Act 2006

[66] Section 32(4) Human Rights Act (ACT).

[67] Section 33 Human Rights Act (ACT).

[68] State Library New South Wales, 'Human rights in state and territory law', <http://legalanswers.sl.nsw.gov.au/human-rights-australia/human-rights-state-and-territory-law> accessed 22 July 2018.

Responsibilities Act provides the possibility for the Victoria Supreme Court to issue a 'declaration of inconsistent interpretation' with similar consequences.[69]

II. In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

79. While a significant number of laws interfere with the freedom of speech[70], there do not seem to be legal rules criminalising speech or conduct on the basis of the creation of a subjective fear of a person's safety. However, there are several laws proscribing the incitement of violence or offending people that have raised concerns of overreach and of chilling speech.

80. Firstly, s 471.12 of the Criminal Code Act 1995 concerns the use of a postal service to menace, harass or cause offence; and a person commits an offence if:

(a) the person uses a postal or similar service; and
(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 2 years.

81. This provision has been criticized for the fact that it can apply to core political speech and that it applies to 'offensive' speech (leaving it to the courts to decide without statutory criteria on what is offensive).[71] The provision was also challenged before the High Court (see below).

82. Secondly, the Racial Discrimination Act intersects with freedom of speech and is relevant here.[72] Its s 18C states the following: Offensive behaviour because of race, colour or national or ethnic origin:

(1) It is unlawful for a person to do an act, otherwise than in private, if:
    (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
    (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this

[69] Sections 36-37 Charter of Human Rights and Responsibilities Act (Vic); State Library New South Wales, 'Human rights in state and territory law', <http://legalanswers.sl.nsw.gov.au/human-rights-australia/human-rights-state-and-territory-law> accessed 22 July 2018.

[70] Eg Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 90-127.

[71] ibid 97.

[72] Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (2015) ALRC Report 129, 112-114.

Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section: "public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

83. Section 18D provides an exemption for 'anything said or done reasonably and in good faith':

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

84. The inclusion of speech that is 'reasonably likely to offend' in s 18C is criticised by the Australian Law Reform Commission as being too broad.[73] The fact that it includes speech that is likely to offend prohibits speech, they argue, depending on a subjective value judgment.[74] Those criticising the provision also claim it violates Australia's obligations under international law, including under art. 20 of the ICCPR.[75] However, the courts in practice have rejected broad meanings of 'offend' and Federal Court cases have found no inconsistency between this section and Australia's international law obligations.[76] There is no High Court decision on this provision as yet. However, the Australian Law Reform Commission thinks it likely that the High Court might read down the provision or invalid it in light of the implied freedom of political communication.[77]

III. Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

85. Yes, in *Monis v the Queen*, the High Court considered whether the inclusion of offensive uses of a postal service in s 471.12 of the Criminal Code Act infringed the implied freedom of political communication.[78] The Court applied the 3-stage *Lange* proportionality test.[79] All members of the Court construed the standard of offensiveness as requiring a degree of seriousness and significance.[80] Nevertheless, they found the law to burden political communication.[81] However, the members of the High Court split by 3-3 on whether this was a proportionate restriction and therefore the lower court's decision upholding the section was confirmed.[82] Three of the judges considered that the law

[73] ibid 113-115.

[74] ibid.

[75] ibid 116-117.

[76] ibid 115-117.

[77] ibid 118.

was reasonably and appropriately adapted to the legitimate purpose of protecting people from intrusive, seriously offensive communications.[83] As the section is not directly targeted at political communication, it is unlikely to constitute a significant burden on the freedom.[84] According to the three other judges the law's purpose was to prevent the use of postal services in an offensive way and this could considerably burden political communication without an adequate justification.[85]

[78] *Monis v The Queen* [2013] HCA 4.

[79] [1997] HCA 25

[80] Australian Human Rights Commission, 'Casenote: Monis v The Queen [2013] HCA 4' (2013) <https://www.humanrights.gov.au/our-work/legal/publications/casenote-monis-v-queen-2013-hca-4-0> accessed 24 July 2018; *Monis v The Queen* [2013] HCA 4, nos 63-66, 87, 333-337.

[81] ibid, nos 68-71, 88, 93, 343.

[82] ibid.

[83] ibid, nos 340-353.

[84] ibid, nos 340-353.

[85] ibid, nos 72-74, 95-232.

CANADA

I. Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

86. The strongest form of protection for the freedoms of expression and assembly in Canada are the constitutional protections found in the *Canadian Charter of Rights and Freedoms* ("the *Charter*").[86] While Canadian provinces also offer protection for these freedoms through provincial law, the *Charter*, as a constitutional document, is supreme and has the broadest scope of application. This report is limited to the protections set out by the *Charter*.

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?

87. The *Constitution Act, 1982* Part I *Canadian Charter of Rights and Freedoms* ("the *Charter*") sets out the constitutional protection of human rights and freedoms in Canada.[87] The *Charter* explicitly protects freedom of expression, assembly and association. Section 32 of the *Charter* outlines its application, which is broad in scope:

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[86] *Canadian Charter of Rights and Freedoms*, *Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, available under <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> accessed 17 July 2018.
[87] ibid.

88. The *Charter* applies to both federal and provincial levels of government. It provides a stronger protection of rights than other human rights legislation (instruments or statutes), such as provincial bills of rights that are only binding in their province.[88] This is of relevance. Section 32 sets out that the *Charter* applies to both the "Parliament and government of Canada" and the "legislature and government of each province" the federal parliament and provincial legislatures cannot enact laws that are inconsistent with the *Charter*. The *Charter* binds any government body exercising statutory authority. Thus, statutory authority is valid when actions taken under such authority are within its scope. The corollary of this is:

> Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.[89]

89. Who benefits from the protections of the rights and freedoms enumerated in the *Charter* varies slightly depending on the provision applied.[90] Generally, the *Charter* protects the rights of any persons in Canada rights, including Canadian citizens, permanent residents, newcomers and (at times) corporations.

b) If so, what are those provisions and how do they compare to article 19 of the ICCPR?

90. Freedom of expression and freedom of peaceful assembly are fundamental freedoms under the *Charter*, protected by s 2:

Fundamental freedoms

2. Everyone has the following fundamental freedoms:
   (*a*) freedom of conscience and religion;
   (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   (*c*) freedom of peaceful assembly; and
   (*d*) freedom of association.

[88] See for example: *Human Rights Code*, RSO 1990 c H 19, <http://www.ohrc.on.ca/en/ontario-human-rights-code> accessed 17 July 2018; *Human Rights Code*, RSBC 1996 C 210, <http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96210_01> accessed 17 July 2018.

[89] Peter Hogg, *Constitutional Law of Canada*, vol 2 (5th edn, Thomson Reuters Canada Limited 2016) 37-13.

[90] The language of each individual section determines who may benefit from each rights or freedom.

91. There is a significant body of case law interpreting and applying subsections 2(b), (c) and (d). Notably, protection under 2(b) is 'content neutral,' meaning that even offensive statements receive protection, the courts have recognised that some laws prohibiting hate propaganda or defamation are justifiable limitations of the freedoms under s 2.[91]

92. These freedoms are subject to the limitations set out in s 1 of the *Charter*:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

93. The application of this provision is known as the '*Oakes* test,' named for the seminal case that first interpreted this provision.[92] There is also a significant body of case law interpreting and applying this section of the *Charter*.

94. Compared to Article 19 of the ICCPR, the wording of s 2 of the *Charter* is more general and abstract, granting very broad protection to the freedoms of expression and peaceful assembly. The precise parameters and contours of these freedoms have been further defined by the jurisprudence treating these *Charter* provisions.

95. The broad and general wording of s 2 stands in stark contrast to Article 19 of the ICCPR, which provides a far more detailed account of similar rights. The limitation to the rights set out in provisions (1) and (2) of Article 19, namely that these rights will only be restricted as provided by law and as necessary are similar to the Canadian source of limitations which requires any such limitation be "prescribed by law" and "demonstrably justified in a free and democratic society". However, unlike Article 19 the limitations of s 2 of the *Charter* are not specific to this provision. The same limitation clause applies to all *Charter* rights and freedoms.

c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?

96. Yes, a court that has the authority to apply and enforce the *Charter*, can declare legislation incompatible or inconsistent with the *Charter*, as per s 52.

97. All Canadian laws, including federal and provincial legislation and regulations, must be consistent with the *Charter*. The only exception is where a law is enacted under S. 33 of the *Charter*, which is known as the 'notwithstanding clause'. While S. 33 can only be used to negate certain provisions of the *Charter*, s 2 is among them:

Exception where express declaration

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[91] Peter Hogg, *Constitutional Law of Canada*, vol 2 (5th edn, Thomson Reuters Canada Limited 2016) ch 43.

[92] *R v Oakes*, [1986] 1 Canada Supreme Court Reports 103, available under;<http://canlii.ca/t/1ftv6> accessed 17 July 2018.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

d) What are the consequences of any such declaration?

98. The Constitution is the supreme law of Canada. Where a court finds that legislation is incompatible or inconsistent with the *Charter*, s 52 of the *Constitution Act, 1982* applies. It is known as the 'supremacy clause':

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

99. Thus, a court can hold that legislation, or a part thereof, that is inconsistent with *Charter* rights and freedoms to be of no force and effect. This can effectively nullify the law.[93] Because this provision specifies that any inconsistent law is of no force of effect "to the extent of the inconsistency," rather than declare the entire legislation invalid, courts may adopt different strategies when applying s 52. For example, it is possible that rather than declare an entire law or provision of no force or effect, the law is "read down" to sever the unconstitutional parts of legislation from the constitutional ones to save the latter.[94] The language of s 52 has also been flexible enough to permit courts to read in words or extend statutes to 'cure' any constitutional inconsistencies.[95] It is also possible to suspend a grant of invalidity.[96]

[93] Peter Hogg, *Constitutional Law of Canada*, vol 2 (5th edn, Thomson Reuters Canada Limited 2016) 58-2.

[94] Kent Roach, *Constitutional Remedies in Canada* (2nd edn, Thomson Reuters Canada Limited 2017) 14-47.

[95] *Schachter v Canada*, [1992] 2 Canada Supreme Court Reports 679.

[96] Kent Roach, *Constitutional Remedies in Canada* (2nd edn, Thomson Reuters Canada Limited 2017) 3-9.

100. A party may also seek a personal remedy if it is found their *Charter* right or freedom has been violated under s 24 of the *Charter*:

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

101. Such specific remedies have included injunctions, *Charter* damages, declarations, and the exclusion of evidence.[97]

II. In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

102. In Canada, criminalised acts are set out in the *Criminal Code*.[98] There are provisions under the *Criminal Code* that criminalise certain forms of speech and conduct. None of these provisions, however, criminalise these acts on the basis that they create a reasonable subjective fear of a person's (or another's) life, property, or livelihood. While subjective fear may arguably be *one of* the elements of some offences or an aspect of an element of the offence, the requirement of other elements for the offences to be made out critically differentiate these criminal provisions from s 1(1)(b) of the Intimidation Act.

103. Also, the criminal offence of uttering threats, which is one of the more similar provisions to s 1(1)(b) of the Intimidation Act, does not include subjective fear as an element:

Uttering threats

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or bodily harm to any person;

(b) to burn, destroy or damage real or personal property; or

(c) to kill, poison or injure an animal or bird that is the property of any person.

104. Included is a table below listing offences under the *Criminal Code* that criminalises certain forms of speech and conduct and may be argued to contain subjective fear as an element. However, all these offences also have other elements that must be met on an objective standard. This makes the following offences distinct from s 1(1)(b).

Table 3: Criminalisations of speech and conduct that could (potentially) give rise to fear

[97] ibid.

[98] *Criminal Code*, RSC 1985, c C-46, available under<http://laws-lois.justice.gc.ca/eng/acts/C-46/> accessed 17 July 2018.

Provision	Offence	Elements
S 423(1)	Intimidation	Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing, (a) uses violence or threats of violence to that person or his or her spouse or common-law partner or children, or injures his or her property; (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged; (c) persistently follows that person; (d) hides any tools, clothes or other property owned or used by that person, or deprives him or her of them or hinders him or her in the use of them; (e) with one or more other persons, follows that person, in a disorderly manner, on a highway; (f) besets or watches the place where that person resides, works, carries on business or happens to be; or (g) blocks or obstructs a highway.
S 346(1)	Extortion	Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done. .... (2) A threat to institute civil proceedings is not a threat for the purposes of this section.
S 319	Public Incitement of Hatred	*Public incitement of hatred* (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction. *Wilful promotion of hatred*

		(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction. *Defences* (3) No person shall be convicted of an offence under subsection (2) (a) if he establishes that the statements communicated were true; (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
s. 264(1)	Criminal Harassment	(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them. *Prohibited conduct* (2) The conduct mentioned in subsection (1) consists of (a) repeatedly following from place to place the other person or anyone known to them; (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or (d) engaging in threatening conduct directed at the other person or any member of their family.
S. 265(1)	Assault	A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

		(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

III. Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

105. As set out above, none of these criminal provisions sufficiently parallels s 1(1)(b) of the Intimidation Act. The closest provision is s 264, which criminalises criminal harassment (including harassment by repeated communication). Courts have held that s 264 is constitutional and does not violate the freedoms protected by s 2(b) of the *Charter*.[99] Without going into significant detail, Catzman JA reasoned that whatever infringement s 264 presented to the *Charter* right to freedom of expression, such was at the "low end of the scale" of the types of speech that were thereby protected. Thus s 264 would be saved by the savings clause enacted in s 1 of the *Charter*. No further reasoning was deemed to be necessary by Catzman JA.

[99] See, for example: *R v Krushel*, (2000) 142 Canadian Criminal Coded (Third Series) 1, 2000 CanLII 3780 (ON CA) available under<http://canlii.ca/t/1fb11> accessed 17 July 2018; *R v Sillipp*, (1995) 99 Canadian Criminal Coded (Third Series) 394, 1995 CanLII 5591 (AB QB) available under <http://canlii.ca/t/1nnxd> accessed 17 July 2018.

INDIA

I. Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?

106. The Indian Constitution includes a Part, named Fundamental Rights, which codifies 6 human rights that are recognized by India.[100] Article 19 of Indian Constitution expressly protects both (a) freedom of speech and (b) the right to assemble.

b) If so, what are those provisions and how do they compare to article 19 of the ICCPR?

107. Article 19 reads:

The Right to Freedom

19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(…g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause…

108. Unlike art 19 ICCPR, the Indian Constitution does not list example forms of speech, such as artistic or media expression. It merely states that 'speech and expression' are protected. Restrictions on the right in both instruments must be imposed by law, though the contours of these restrictions differ in content. Reasonable restrictions are permissible in India, whereas only necessary ones are in the ICCPR. The potential justificatory factors in the Indian Constitution are also broader, listing

[100] *The Constitution of India* Part III <http://www.legislative.gov.in/sites/default/files/coi-4March2016.pdf> accessed 5 August 2018.

friendly relations with foreign states, decency or morality, contempt of court and incitements, though not expressly listing rights of others or public health like the ICCPR does.

109. As to art 21 ICCPR, again a necessity standard contrasts with the reasonableness standard required by the Indian Constitution. The potential justifications are similar, though the ICCPR additionally includes the protection of public health or morals and the protection of rights and freedoms of others.

c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?

110. The Supreme Court and High Courts can perform judicial review of legislation. This power is rooted, for the Supreme Court, in arts 32 (Right to Constitutional Remedy) and 136 (Special leave to appeal by the Supreme Court) and, for the High Court, arts 226 (Power of High Courts to issue certain writs) and 227. Apart from these, according to art 13(2) of the Constitution, 'the state shall not make any law inconsistent with the fundamental rights and any law made in contravention of fundamental rights shall be void to the extent of the contravention'[101].

111. In its decisions, the Supreme Court may decide that:

(i) The law is constitutionally binding. In this case, the law continues to operate as before, or
(ii) The law is constitutionally invalid. In this case, the law ceases to operate with effect from the date of the judgment.
(iii) Only certain parts or portions of the law are invalid. In this case, only invalid part or parts become non-operative and other parts continue to work. However, if the part/section being invalidated is vital for the law that other sections cannot function without it, the whole law is rejected[102].

d) What are the consequences of any such declaration?

112. When a law is rejected for not being compatible with the Constitution, it ceases to operate from the decision date. However, all activities, performed before the court decision in compliance with that law, continue to be valid.

II. In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

[101] Ibid.

[102] Bidyut Chakrabarty, *Indian Politics and Society Since Independence: Events, Processes and Ideology* (1st ed, Routledge 2008), p 103.

113. The Indian Penal Code includes several provisions that make certain forms of speech and behaviour a crime[103]. Several of these offences contain subjective fear as a key component. The crucial subjective-based crime is that of extortion. But, as explained below, other elements of the offence mean that extortion has hybrid subjective-objective tests. Other offences are based on objective fear, or the defendant's intent to cause fear, with no requirement of subjective fear being present.

114. Article 383 discusses "extortion", and this crime involves a subjective fear element. It reads: "*Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits extortion".*

115. Article 385 describes the similar offence of putting a person in fear of injury in order to commit extortion. This Article reads: "*Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both*".

116. Both of these Articles contain subjective fear elements, with additional criteria including the intent to induce that fear, and a purposive element regarding the receipt of some monetary or other benefit. This moves the offences further towards an objective standard: the intention of the defendant must be to *induce* that fear. The commission of an act that would not induce fear in the reasonable person would therefore render the courts less likely to infer intention of fear inducement. That said, this offence plainly relies heavily on the subjective fear of the victim.

117. Article 351, which codifies "assault", contrasts with this formulation, since it uses an objective "likely" standard. It reads: "*Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.*" Thus the defendant either has to intend to cause, or the victim has to be likely to experience, apprehension of physical force. Intention to cause is located in the defendant, and likelihood of apprehension is located in the objective victim, thus subjective fear does not form part of this offence.

118. The offence of criminal force is structured similarly, with intent and the likelihood of fear being key elements. Article 350 reads: "*Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.*" Likewise with statements conducing to public mischief, encapsulated in Article 505. Either intent to cause fear, or likelihood of fear being caused, is required: "*Whoever makes, publishes or circulates any statement, rumour or report …with intent to*

[103] The Indian Penal Code 1860, http://ncw.nic.in/acts/theindianpenalcode1860.pdf Accessed on 17 September 2018

cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity".

119. The only other offence relying on subjective fear is that of "Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony". Article 153A holds that *"whoever … organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community* and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity *amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both*" (emphasis added). Subjective fear is one potential route for the offence to be made out, but coupled with many additional conditions on top.

120. Finally, Article 503 explains "Intimidation", which is centered in the intention of the defendant rather than the fear of the victim. It reads: "*Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation*".

III. Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

121. Research found no pertinent legal challenges to these legal provisions in Indian law.

EUROPE

ENGLAND AND WALES

I. Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?

122. The right to freedom of expression and freedom of assembly are explicitly recognised in the Human Rights Act 1998 (HRA). Under the HRA's Schedule 1, the right to freedom of expression guaranteed by art 10 of the European Convention on Human Rights (ECHR), and the freedom of assembly and association guaranteed by art 11 of the ECHR are protected by law in the UK.[104]

123. Further, Lord Goff has expressed the view that there was no difference in principle between the English common law right to freedom of expression and article 10 in respect of freedom of speech in *Attorney General v Guardian Newspapers Ltd (No 2)*.[105] Freedom of expression was further described by Lord Mance in *Kennedy v Charity Commission*[106] as a common law constitutional right, meaning that the courts should look to the common law as their starting point. So freedom of speech is thereby protected under the principle of legality (which is also mentioned in relation to the system in Australia above).

b) If so, what are those provisions and how do they compare to article 19 of the ICCPR?

124. Article 10 states that:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[104] Human Rights Act, 1998, s 3(1); Schedule 1.
[105] [1990] 1 AC 109.
[106] *Kennedy v Charity Commission* [2014] UKSC 20.

125. Article 11 states that:

(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.

126. While art 19 of the ICCPR maintains that the right to hold opinions is absolute, to the extent that the ECHR protects both the right to freedom of expression and the right to hold opinions, neither of the rights is absolute. Like with the ICCPR, as recognised by Lord Bingham, the exercise of UK/ECHR rights 'may be restricted if the restriction is prescribed by law, necessary in a democratic society and directed to any one of a number of specified ends'.[107]

127. Article 10(2) of the ECHR lists out restrictions for the 'exercise of these freedoms', which include all of the freedoms protected in art 10(1). Such differentiation is apparent on art 10(2), which provides that the freedom of expression may be subject to the necessity to prevent 'the disclosure of information received in confidence'. In this respect, the ICCPR has no similar express reference to confidentiality.

c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?

128. The HRA gives courts the power to declare acts of Parliament incompatible with Convention rights.[108]

d) What are the consequences of any such declaration?

129. The judicial power to issue a 'declaration of incompatibility' against legislation conferred in s 4 of the HRA does not legally invalidate an offending statute. Incompatible legislations would still remain in force unless and until Parliament amends the law. The only hard legal consequence of the issuance of a declaration lies in s 10, which enables a Minister to take remedial action to rectify the incompatibility.

II. In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

[107] *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, para 35.
[108] Human Rights Act, 1998, s 4.

130. Section 4 of the Public Order Act, 1986 (POA) criminalises acts of using 'threatening or abusive words or behaviour' which is likely to cause another person to believe that unlawful violence will be used against him. As the Law Commission explained, the offence requires a defendant '(a) to cause another person to fear immediate unlawful violence, or (b) to provoke the immediate use of unlawful violence by another person'.[109] A hybrid subjective-objective standard will be employed in determining liability, where a subjective test is used for observing a defendant's intention and an objective test is used to determine whether the speech or conduct could cause fear of unlawful violence.

131. Section 5 of the POA also criminalises similar acts that are likely to cause an individual 'harassment, alarm or distress'. The courts adopt an objective test for determining whether an individual would feel offended. Lord Phillips acknowledged that allowing claims for harassment based on a subjective test would be a serious interference with the freedom of expression.[110] This may occur if an individual wishing to express their own views may be silenced by claims that the target feels insulted.

132. In *Harvey v Director of Public Prosecutions*, the appellant was stopped by police on suspicion of possessing dangerous drugs.[111] A police officer tried to search the appellant and he refused by saying, 'Fuck this man, I ain't been smoking nothing'. He was told that he would be charged with a s 5 offence if he continued to swear. When nothing was found after the search, he said, 'Told you, you won't find fuck all'. The police warned about his swearing again and when he was asked if he had a middle name, he replied, 'No, I've already fucking told you so'. The appellant appealed against the conviction of the s 5 offence. The issues are whether the words spoken were 'threatening, abusive or insulting', and whether those words would cause 'harassment, alarm or distress'. By approving *Southard v DPP* in relation to the word 'fuck', the court held that,

> '…whether or not the person addressed is a police officer or a member of the public, the words "fuck you" or "fuck off" are potentially abusive. Frequently though they may be used these days, we have not yet reached the stage where a court is required to conclude that those words are of such little significance that they no longer constitute abuse. Questions of context and circumstance may affect the court's ultimate conclusion as to whether, in an individual case, they are abusive.'[112]

133. After establishing that the word 'fuck' was potentially abusive, the court, however, held that there was no proof that the words were spoken would likely cause one harassment, alarm, or distress and the conviction was quashed. Words are to be given their ordinary meaning and whether the words used are 'threatening, abusive or insulting' is a question of fact.[113] While it cannot be said that 'wherever there is disrespect or contempt for people's rights there must always be insulting

[109] Law Commission, *Criminal Law Report on Offences Relating to Public Order* (Law Com No 123, 1983) para 5.43.
[110] *Thomas v News Group Newspaper Ltd* [2001] EWCA Civ 1233, para 35.
[111] [2011] EWHC 3992.
[112] [2006] EWHC 3449.
[113] *Brutus v Cozens* [1973] AC 854.

behaviour',[114] and that 'words which are rude or offensive are not necessarily insulting',[115] 'an ordinary sensible man knows an insult when he sees or hears it'.[116] Here, then, it seems that the court is using an objective standard to assess whether the term meets the statutory threshold.

134. Mr Justice Bean further explained that there should be evidence that shows an individual is likely to have been caused 'harassment, alarm or distress' and such evidence cannot be inferred. He held that 'where witnesses have given oral evidence of an incident which forms the basis of a charge under s 5 of the Public Order Act 1986, but have said nothing and been asked nothing about experiencing harassment, alarm or distress, there is no sound basis for the court to reach that conclusion for itself'.[117]

135. Section 5 of the POA, unlike s 4, provides a defence of reasonable conduct. The question of whether an accused's conduct is reasonable so as to entitle him to invoke the defence given by s 5(3)(c) of the POA was held to be only answered by reference to objective standards of reasonableness.[118] On the other hand, the burden of proof rested on the accused and the standard of proof was on the balance of probabilities.

136. Similarly, racial hatred is dealt with by Part III of the POA. Section 18(1) states that,

> 'A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence
> if—
> (a) he intends thereby to stir up racial hatred, or
> (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.[119]

137. Section 18(5) provides a defence where an accused 'did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting'.[120]

138. This offence has been extended to cover religious hatred by part 3A of the Racial and Religious Hatred Act, 2006, which criminalises acts of using threatening words or behaviour that are intended to stir up religious hatred. Section 29B(1) states that 'a person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred'.[121]

139. Section 29B(4) provides a defence where a defendant could 'prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed,

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[114] ibid 864 (per Lord Morris).
[115] *R v Ambrose* (1973) 57 Cr App R 538, 540.
[116] *Brutus* (n 35) 862.
[117] *Harvey* (n 33) para 13.
[118] *DPP v Clarke* (1992) 94 Cr App R 359.
[119] Public Order Act, 1986, s 18(1).
[120] ibid s 18(4).
[121] Racial and Religious Hatred Act, 2006, s 29B(1).

would be heard or seen by a person outside that or any other dwelling'.[122] Despite the criminalisation of those acts, the Part in general emphasises the freedom of expression in s 29J:

> 'Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system. Subjective descriptions of a person's actions or behaviour, however abhorrent, crass or objectionable, may not be considered an attempt to spread hate unless the motive is clearly defined as such.'

140. The Criminal Justice and Immigration Act, 2008 also criminalises similar acts that are intended to stir up hatred based on sexual orientation. Section 74 and Schedule 16 criminalises threatening acts by amending part 3A of the POA and extending the offences to include conducts which are intended to stir up hatred on the ground of sexual orientation. The offences include:

(a) the use of words or behaviour or the display of written material (s 29B(1));
(b) publishing or distributing written material (s 29C(1));
(c) the public performance of a play (s 29D(1));
(d) distributing, showing or playing a recording (s 29E(1));
(e) broadcasting or including a programme in a programme service (s 29F(1);
(f) possession of inflammatory material (s 29G(1)).[123]

141. The Terrorism Act, 2006 criminalises 'encouragement of terrorism' which includes making statements that glorify terrorist acts. Section 1(2) states,

> A person commits an offence if
> (a) he publishes a statement to which this section applies or causes another to publish such a statement; and
> (b) at the time he publishes it or causes it to be published, he—
> (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or
> (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.[124]

142. Apart from statutory offences, there are crimes arisen in the common law which involve the criminalising of speech and conduct. The crime of assault occurs when "the defendant intentionally or recklessly causes the victim to apprehend immediate unlawful personal violence".[125] The *actus reus* incorporates the apprehension of violence, rather than an experience of fear. A breach of the peace arises when there is an actual assault, or when a person's act causes public alarm and excitement. In *HM Advocate v Harris*,[126] the Court of Appeal emphasised that the crime of breach of the peace has two elements: conduct that (1) is severe enough to cause alarm to ordinary people, and (2) threatens serious disturbance to the public. As the authors of Halsbury's Laws have noted, 'mere annoyance

[122] ibid s 29B(4).
[123] Criminal Justice and Immigration Act, 2008, s 74 and schedule 16.
[124] Terrorism Act, 2006, s 1(2).

and disturbance or insult to a person or abusive language, or great heat and fury without personal violence, are not generally sufficient'.[127] Watkins LJ further explained,

> 'We are emboldened to say 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 or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an officer without warrant'.[128]

III. Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

143. At the point of writing, cases are principally concerned with whether convictions under the above laws interfere with the freedom of speech and assembly under the ECHR and the HRA.

144. In *Hammond v DPP*, the defendant, who was of sincere religious principles, sought to showcase his disapproval of same-sex relationships publicly by holding a sign with the words 'Stop Immorality', 'Stop Homosexuality' and 'Stop Lesbianism' and 'Jesus is Lord'.[129] Some people were distressed by the sign, and the tension escalated to the extent which it caused an assault to the defendant. Two police officers intervened and asked him to stop preaching and remove the sign in the public. He refused to comply with their request, and he was charged with a breach of POA s 5. The Magistrates' Court convicted him as it was held that the sign was insulting in nature, and that it was likely to distress the audience. He appealed against the conviction by arguing that the restriction on his freedom of expression was unnecessary and disproportionate to the prevention of crimes.

145. To the extent that ECHR art 10 applied to the charge, the court held that POA s 5 had the legitimate aim of preventing crimes. Furthermore, there was a pressing social need for the restriction which could only be fulfilled by such restriction. While the sign specifically attacks homosexual and lesbian communities with an implication that they were immoral, there is a social need to embrace all societies without provoking hostility from the public. In addition, the interference imposed by POA s 5 on the defendant's right conferred upon him by ECHR art 10 was held to be a proportionate response. It is because his conduct already went beyond any legitimate protest, and he intended to provoke violence and disorder. In light of the above, the appeal was dismissed.

146. Similarly, the case *Dehal v Crown Prosecution Service* concerns POA s 4A, which requires a defendant to have an intention to cause harm. There was an issue as to whether the threshold of merely requiring the speech to be insulting and cause distress is too low.[130] This case concerned a defendant, who was a practising Sikh, being charged with POA s 4A by placing a notice that

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[125] Fagan v MPC [1969] 1Q.B. 439
[126] [2010] HCJAC 102.
[127] Cited in *R v Howell* (1982) 1 QB 416, 427A.
[128] ibid 427E.
[129] [2004] EWHC 69.
[130] [2005] EWHC 2154.

criticised the President of the Temple which he attended as a hypocrite, a liar, and a maker of false statements to the police. The President found the note to be distressing and was worried that other worshippers would see him as what the notice described. The defendant appealed against the conviction by contending that a prosecution under POA s 4A for purposes other than the necessity to protect public order will be inconsistent with the ECHR article 10.

147. When deciding the question of whether the prosecution would be a proportionate response to his acts, the court allowed his appeal. The court reasoned that prosecutions could only be made in pursuit of a legitimate aim, namely the protection of society against any violence and that a criminal prosecution is the only way necessary to achieve that purpose. However insulting the defendant's statements may have been, while the prosecution failed to explain such action was necessary to prevent public disorder, the ECHR art 10 rendered his prosecution unlawful.

148. A final point is that any interference the POA offences might have with freedom of speech and association would mean that the scope of those offences should be construed narrowly, by operation of s 3 HRA. This may avoid the need for a challenge to be made to the legislation directly. For example, the POA offences should be interpreted to require a significant level of harm and construed in a way that keeps interference with political speech to an absolute minimum.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

I. Briefly outline your jurisdiction's protections of (a) freedom of expression, (b) freedom of assembly

a) Does your system have a bill of rights or other human rights legislation that expressly protects freedom of speech and association?

149. In the ECHR (henceforth: the Convention), art 10 protects freedom of expression and art 11 safeguards freedom of assembly and association. Given the interrelation between the two rights, the European Court of Human Rights (henceforth: the Court), while examining a case mainly on the basis of one freedom, has stressed that much of its reasoning could equally apply to the other freedom.[131]

b) If so, what are those provisions and how do they compare to article 19 of the ICCPR?

150. Article 10 of the Convention states that:

> (1) Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

151. It is noteworthy that the list of restrictions in art 10 is broader than in any other Convention provision protecting a qualified right.[132] Article 11 is framed in roughly the same terms as art 10, though art 11(2) does not mention the interest of territorial integrity and the causes of the protection of the reputation of others, the prevention of the disclosure of information received in confidence and the maintenance of the authority and impartiality of the judiciary as potentially restrictive grounds as does art 10.

Article 11: Freedom of assembly and association

[131] In the seminal case of *Vona v. Hungary* (App no 35943/10 (ECtHR, 9 July 2013)), the Court predicated its considerations on article 11. It emphasised (paras 53,63 and 66) that a lot of its considerations could be applied mutatis mutandis to the freedom of expression.

[132] Prominent examples include article 8 on the right to respect for private and family life, article 9 on the freedom of thought, conscience and religion and on the freedom of assembly and association of the Convention.

(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.

152. The ICCPR is subsequent to the Convention and has been influenced by it. This is evident, among other provisions, in the formulation of art 19 of the ICCPR which protects freedom of expression, art 20 which prohibits propaganda for war and national, racial or religious hate speech which leads to discrimination and/or violence and arts 21 and 22 which safeguard freedom of assembly and association.

153. In general terms, the art 10 and 11 provisions of the Convention are reflected in the corresponding ones of the ICCPR. More specifically, article 19 paras 1 and 2 of the ICCPR repeat at most the content of art 10 para 1 of the Convention. They elaborate, though, on the ways in which the freedom of the dissemination of information is to be realised by mentioning the '[oral], in writing[,] in print [or] in the form of art' ways as possible methods of such dissemination. Despite the fact that art 19 para 3 of the ICCPR follows the language of art 10 para 2 about the 'duties and responsibilities' inherent in freedom of expression, the potential heads of limitation stipulated within the ICCPR are fewer than the Convention's, comprising the rights or reputations of others, the protection of national security or public order, and public health or morals. Such difference with respect to the content of the protected right between the provisions of the two instruments is absent when it comes to the freedoms of assembly and association.

154. There is explicit prohibition in the ICCPR of hate speech, propaganda for war, and violence-related expression in art 20, as opposed to the implicit prohibition of undefined forms of appalling speech incorporated in art 17 of the Convention.

c) Does any bill of rights/human rights legislation permit courts to declare legislation to be incompatible/inconsistent with the bill of rights/human rights legislation?

155. The Convention, as is hinted by arts 32 and 34, delegates jurisdiction to the Court to examine applications from individuals claiming to be victims of a violation of the Convention rights by a Contracting Party. If such an infringement is found, the Court has the competence to rule that the domestic legislation is incompatible with the Convention.

d) What are the consequences of any such declaration?

156. The State which has enacted the incompatible legislation should take the measures that it deems appropriate to cease the violation of rights. The decision of the Court is binding on Contracting Parties, according to art 46 para 1 of the Convention. All Contracting Parties are obliged to abide by the content of the Court's judgement declaring national legislation to be inconsistent with the Convention. Even though they are allowed discretion with respect to the means of remedying the violation, they are internationally responsible to achieve that end. The Court's decision might, according to art 41 of the Convention, afford just satisfaction to the injured party, if necessary.

II. In your jurisdiction, are there or have there been legal rules criminalising speech and conduct because they create subjective fear of safety of a person's (or another's) life, property or livelihood?

157. The function of the Convention lies in securing at a European international level a minimum threshold of protection for the enshrined human rights in the domestic legal order of each Contracting Party. Thus, if there were any legislation criminalising speech which caused subjective fear of safety of a person's or another's life, property or livelihood, such legal norms would exist at the level of the national jurisdiction of the Contracting Parties. In order to ascertain the existence of such laws, a pertinent complaint that an individual's Convention rights had been violated would have to be filed with the Court. To date, no application with such content, i.e. alleging a violation of a Contracting Party's citizen's rights conferred by arts 10 or 11 of the Convention, due to the implementation of a legislation with the aforementioned content, has been submitted before the Court. The below sections outline relevant or analogous challenges brought before the Court. Most relevant applications were concerned with infringements of arts 10 or 11 and referred to instances of ad hoc administrative measures undertaken, or state sanctions imposed as a response to the occurrence of harmful forms of individual or collective expression. Particular references are made in the below sections about the heightened protection afforded to political speech not realised in the context of public protest and/or assembly and the Court's general indecisiveness regarding the threshold of protection in cases of hate speech not directly calling and leading to violence.

III. Have there been any (constitutional or human rights-based) challenges made to these laws? If so, on what grounds, and what was the outcome and reasoning?

Article 10 of the Convention, Political Speech and Public Protest and Assembly

158. The Court has stressed time and again the seminal importance of freedom of expression for the viability of a democratic society. The rationale of promoting democratic values and goals underpins the high level of protection afforded to political speech, as it facilitates socio-political dialogue and transparency regarding the proper management of public affairs. The Court has emphasised less the significance of freedom of artistic, commercial, or other non-political expression.

159. The Court's differentiated approach with respect to the value it attaches to different types of speech becomes evident in the breadth of the margin of appreciation it allows States to enjoy when they restrict freedom of expression and, concomitantly, the strictness of the proportionality test it applies to such restrictions. An illustration of such contrast can be provided by the standard of proportionality review the Court adopted in the *Sunday Times*[133] and the *Mueller*[134] cases. The first concerned an injunction imposed on the prospective publication of an article by the Sunday Times revealing evidence around the public interest issue of the Thalidomide children, whereas the second was about the confiscation of exhibited paintings depicting a variety of sexual acts between men, women and animals. The Court found a violation of art 10 in *Sunday Times* but no violation in *Mueller*. This was mostly because it applied a stricter review in the former given that it concerned public interest speech whereas the latter concerned artistic expression.

160. The Court's jurisprudence on political and 'public concern' expression when exercised in a public protest/assembly context indicates the Court's tendency to equalise the level of protection of such speech with the one it accords to cases of artistic expression. Despite the fact that public protest entails exercise of political expression on part of the protestors and is, therefore, fundamental to the function of the democratic institutions of a Contracting Party, the Court affords a wide margin of appreciation to the state's decisions as to what 'the prevention of disorder' requires as a restrictive ground of forms of public expression. Most importantly, the Court in such instances does not examine whether there is a less intrusive means than the one employed through which the purported state aim, usually being the prevention of disorder, could be equally served.

161. A prominent case exemplifying the above tendency of the Court is *Janowski v. Poland*[135]. In it, a journalist verbally assaulted two municipal guards by calling them 'oafs' and 'dumb', after his effort to dissuade them from trying to remove a stallholder from the latter's temporary working place, developed into a quarrel. Mr. Janowski was convicted of the crime of impeding civil servants from fulfilling their duties unhindered. The Court refused to acknowledge Mr. Janowski's conduct as contributing to public concern dialogue and, instead, characterised it as constituting abusive verbal attack on civil servants. The acceptance of the argument that the journalist's conviction served the legitimate aim of the prevention of disorder followed naturally in the Court's reasoning. Such prevention lay under the circumstances of the case in constraining and reprimanding the journalist's offensive behaviour whose impunity could have led to the diminution of the public confidence that civil servants should enjoy when on duty.[136]

162. The Court seems to reserve, when applying arts 10 and 11 of the Convention, the most powerful judicial shield against potential threats to individual or collective forms of expression for political or 'public concern' expression. As is evident by the Court's case-law on public protest and assembly, the above thesis is qualified when it comes to instances of personal or group protest and

[133] *Sunday Times v. the UK* App no 6538/74 (ECtHR, 26 April 1979).
[134] *Mueller and Others v. Switzerland* App no 10737/84 (ECtHR, 24 May 1988).
[135] *Janowski v. Poland* App no 25716/94 (ECtHR, 21 January 1999).
[136] Ibid., para 33.

self-expression of one's political or social ideas. The protection provided in such cases is significantly attenuated and reaches a level comparable to that enjoyed in cases of artistic expression.[137]

Issues regarding the Protection of Hate and Violence-prone Speech

163. In general, the Court tends to be reluctant to shield to afford protection under arts 10 and 11 of the Convention to forms of expression linked to the propagation of hatred and spiteful stereotyping and all the more so, the incitement towards violent conduct. Under the influence of such thinking, it has expressed its general willingness to afford a broader margin of appreciation in cases when speech 'incite(s) to violence against an individual, a public official or a sector of the population'[138]. However, the Court's approach on the field of malignant expression is fragmented, since its judges adopt a very context-specific reasoning in the pertinent cases. Despite some inconclusive indications about the emphasis given to the intention of the speaker, the imminence of the danger of a violent outburst following the exercise of malicious expression and other content- and context-specific factors, no generalisable method of adjudication can be extrapolated from the Court's case law on this sub-area of freedom of expression.

a) The role of the intention of the speaker

164. The Court utilises criteria related to the content and the context of the impugned expression, in order to establish whether it has led or it could have led to violence, and, therefore, cannot be considered as unduly limited by the restrictive measure taken lawfully within the remit of the second paragraphs of arts 10 and 11 of the Convention. One such important content-related criterion is the intention of the speaker. More specifically, the crucial point is whether the applicant had the intention through the exercise of their expression to provoke hatred, stigmatise, and, ultimately, incite violent conduct. In contemporary cases, the Court has demonstrated a steady inclination towards affording considerable weight to this factor which seems to be important, though not indefeasible, in the outcome of the judgement. In this respect, in the *Halis Dogan v. Turkey* case[139], whose facts revolved around the publisher of a weekly magazine having been sentenced for promoting separatist propaganda, the Court placed decisive significance on the fact that the texts' provocative words towards revolutionary action were accompanied by the malignant intention of the applicant to stigmatise the addresses of his propaganda campaign.[140]

165. However significant the factor of the speaker's intention might have been in the Court's recent jurisprudence, it has been shown that it can be overridden by context-related factors when the

[137] For further analysis and an in-depth evaluation of the Court's approach on this issue and the putative reasons therefor, see Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 37-72 and esp. 61-72.
[138] *Ceylan v. Turkey* App no 23556/94 (ECtHR, 08.07.1999) para 34.
[139] *Halis Dogan v. Turkey* App no 4119/02 (ECtHR, 10 October 2006).
[140] Ibid., para 34.

circumstances of the case warrant so. This was the case in *Leroy v. France*[141] which centred on a cartoon glorifying terrorist acts and violence, published in a nationalist review in the French Basque country a few days after 11th September 2001. The Court made short shrift of the applicant's explanation that he merely wanted to convey a critical message about American imperialism. It deemed the fact that the expression took place a little after the twin towers tragedy and in a politically tumultuous region as crucial in rendering the curtailed form of expression particularly apt to instigate violence. Despite that reality did not affirm this potential, since no violent incidents occurred on the publication's aftermath, the Court refused to afford the protection of art 10, due to the high risk of violence occurrence owning to the combination of the message which the comic expression emitted and the temporal and regional background of its publication.

b) Real and imminent, or remote and speculative danger of violent conduct arising as a consequence of spiteful expression

166. As demonstrated in the *Leroy v. France* case, the proximity between vitriolic expressions and the likelihood of violent outbreaks arising therefrom plays a noteworthy role in the Court's balancing process between the protection of freedom expression and the aversion of violence as an instrumental concept to the safekeeping of 'the rights of others'. The Court has vacillated between a pragmatic/consequentialist approach, according to which if the spiteful speech did not actually lead to any violent incidents, the offensive expression is protected under art 10 and a principled approach which results in the Court's assessment of the degree of risk of violence to which a certain exercise of freedom of expression under particular circumstances is linked. The consequentialist approach has been adopted in a number of recent cases, such as *Erbakan v Turkey*[142], *Vajnai v Hungary*[143], *Guel and others v Turkey*[144] and *Fratanolo v Hungary*[145], in all of which the Court, after assessing that the particularly offensive expression did not practically lead to the incitement of violent phenomena, found a violation of art 10. More particularly, in *Guel and others v Turkey*, in which the applicants took part in a peaceful demonstration in favour of the illegal armed organisation TKP/ML, the Court acknowledged that the slogans they shouted scarcely compromised national security or public order. Indeed, even though those slogans emitted a tone of aggression, what ultimately shaped the Court's opinion were the actual social reception of the slogans as typical leftist slogans and the lawful and completely peaceful way of the conduct of demonstrations[146].

167. Contrary to the pattern followed in the previous cases, in the *Feret v Belgium*[147] and the *Vona v Hungary*[148] cases, the Court did not confine its examination to whether the impugned individual and collective expression contained violence-prone elements in the former case or led in practice to the

[141] *Leroy v. France* App no 36109/03 (ECtHR, 2 October 2008).
[142] *Erbakan v. Turkey* App no 59405/00 (ECtHR, 6 July 2006).
[143] *Vajnai v. Hungary* App no 33629/06 (ECtHR, 8 July 2008).
[144] *Guel and others v. Turkey* App no 4870/02 (ECtHR, 8 June 2010).
[145] *Fratanolo v. Hungary* App no 29459/10 (ECtHR, 3 November 2011).
[146] Supra *Guel* para 41.
[147] Feret v. Belgium App no 15615/07 (ECtHR, 16 July 2009).
[148] Vona v. Hungary App no 35943/10 (ECtHR, 9 July 2013).

manifestation of violence in the latter case. Despite the absence of any explicit reference to violence in the *Feret* case or any actual pertinent behaviour arising as a result of the spiteful collective expression in the *Vona* case, the Court found no violation of art 10 in either.

168. In the *Vona* case, given that an affiliated to the Hungarian Guard Association movement orchestrated the realisation of paramilitary marches in Roma populated areas propagating ethnic prejudice against the alleged Gypsy criminality, both the movement and the Association were disbanded by Hungary. Although there was not a single instance of violent conduct, the Court concluded that the dissolution was the least intrusive and 'most reasonable' measure which could have been taken against the Association's and the movement's freedom of association. The reason was that the Court deemed the physically intimidating conduct consisting in the paramilitary actions accompanied by ethnic propaganda messages spreading racial hatred as highly likely to have incited towards violent action[149], had it not been for the presence of the police when the marches took place. Veering away from a consequentialist approach focusing on the factual absence of violence stemming from hateful expression, the Court acknowledged that the combination of threatening action liable to instigate violence and the exercise of coordinated hate speech reinforcing socially ill discriminatory attitudes warranted Hungary's action.

169. In conclusion, it is quite hard to discern a consistent approach regarding the protection of spiteful and violence-prone expression under arts 10 and 11 of the Convention, due to the heavy dependence of the Court reasoning on the content and context of the exercise of such expression in each case. It is clear that hateful expression directly and openly calling for violence cannot avail itself of the Convention's safeguards. However, when the causal connection between the expression and the manifestation of violence is not obvious, the Court's jurisprudence interchangeably gives decisive emphasis on either the pragmatic violence-related impact of the expression or the speculative violence-generating potential of the expression in the context of circumstances under which it has been exercised.

[149] Supra *Vona* para 66.