

## **Freedom of expression in the UK**

### **Policy briefing, March 2020**

In recent months, there have been a number of incidents that undermine freedom of expression in the UK. These threats include: attacks on the freedom of the media; attacks on the right to protest; the use of vague and excessive counterterrorism laws to clamp down on protected speech; and proposals that could see the regulation of speech online that is legal but perceived to be harmful. If unchecked, the combination of these factors could create a corrosive environment for freedom of expression, which will deteriorate unless decisive action is taken by the UK Government and public authorities to protect our fundamental rights.

This reality is in striking contrast to the proclaimed commitments to freedom of expression and media freedom by the UK Government and its leadership in the Media Freedom Coalition (see Media Freedom below) which aims to champion media freedom around the world.

The threats to freedom of expression in the UK should be seen against a global decline in freedom of expression, as reported in ARTICLE 19's annual *Global Expression Report*. The latest version of this report, which analyses freedom of expression in 161 countries, showed that global freedom of expression is at a ten year low.<sup>1</sup> It also highlighted a trend where democratic countries are adopting laws, practices and policies that are more typically associated with authoritarian regimes, such as the dismissal of criticism as fake news, Internet shutdowns or the use of counterterrorism laws to restrict speech. As the UK prepares for a future outside of the European Union, it should reverse this trend, by upholding its commitments to human rights and ensuring that practices are in place to protect freedom of expression.

### **Significant threats to freedom of expression in the UK in 2020**

#### **1. Media freedom**

The UK has long upheld the importance of a free press domestically and globally. In 2019, the Foreign and Commonwealth Office co-launched the Media Freedom Coalition, a media protection campaign to “move beyond rhetoric” and “demonstrate impact in defending media freedom” around the world.<sup>2</sup>

Despite these public statements of support for media freedom, journalists in the UK face a number of threats, including legislation that restricts investigative journalism, a lack of protection and political tactics that undermine their work.

#### **1.1 Legislation that threatens media freedom**

<sup>1</sup> <https://www.article19.org/xpa-2019/>

<sup>2</sup> <https://www.article19.org/resources/uk-government-must-take-more-action-on-media-freedom/>

Proposals to reform the 1989 Official Secrets Act, the use of bulk surveillance powers under the Investigatory Powers Act 2016 and a number of 'SLAPP' cases (strategic litigation against public participation) pose a threat to investigative journalism in the UK.

**Proposals for an Espionage Act:** In the Queen's Speech, the Government announced that it would be reforming the Official Secrets Act 1989. In 2017, the Law Commission published proposals for a new Espionage Act that were widely criticised by the media, the National Union of Journalists (NUJ) and human rights NGOs. The proposals would threaten investigative journalists and whistleblowers who leak information that is in the public interest, for example about government misconduct or abuse of power. In particular, there were plans to: punish those making disclosures that are unlikely to cause harm; make it a criminal offence to leak information to which there is a public right of access; increase the maximum prison sentences to 14 years in some cases; and not permit a public interest defence. If the proposals are revived, they would pose a serious threat to investigative journalism in the UK.<sup>3</sup>

**Investigatory Powers Act 2016 (IPA):** The IPA has been criticised for its potential abuse against journalists. The NUJ stated that it puts "journalists and their sources at risk because it ... allows the state to legally access journalistic communications and material in secret (including information capable of identifying journalistic sources), and there are no judicial hearings at which the interests of the journalist are represented."<sup>4</sup> The NUJ intervened in a judicial review challenge to the IPA in June 2019. The Investigatory Powers Tribunal noted the legitimate concerns of the NUJ but found that the bulk surveillance powers under the IPA were compatible with Convention rights.<sup>5</sup>

**SLAPPs:** SLAPPs are often used by private entities to try and silence public interest journalism. Cases that lack any merit are filed purely to cause financial harm to journalists who have to hire lawyers and engage in costly legal battles to continue their work. These cases include, for example, the libel case brought by businessman Arron Banks against investigative journalist Carole Cadwalladr. ARTICLE 19 and other freedom of expression organisations have called for action to be taken against SLAPPs, calling them an: "example of a wealthy individual appearing to abuse the law in an attempt to silence a journalist and distract from these issues being discussed by politicians, the media and the public at a critical time in the life of our democracy".<sup>6</sup>

## 1.2 Protection of journalists

**Julian Assange:** Wikileaks publisher Julian Assange is currently being held in Belmarsh Prison. A hearing into whether he should be extradited to the United States, to face charges under the US Espionage Act, started on Feb 21 and will finish in May 2020. If convicted, it would be the first time that the Espionage Act has been used to prosecute a publisher for sharing information

<sup>3</sup> <https://www.article19.org/resources/uk-whistleblowers-and-journalists-could-face-prison-for-revealing-information-available-under-foi/>

<sup>4</sup> <https://www.nuj.org.uk/documents/nuj-submission-to-the-law-commission/>

<sup>5</sup> <https://www.nuj.org.uk/news/legal-judgement-blow-ipa/>

<sup>6</sup> <https://www.theguardian.com/world/2019/jul/20/letter-press-freedom-campaigners-call-for-action-on-vexatious-lawsuits>

that is in the public interest. If the UK facilitates Assange's extradition, they will be complicit in this attack on press freedom, which would set a dangerous precedent for journalists around the world.

**Safety of journalists in Northern Ireland:** In April 2019, the journalist Lyra McKee became the first UK journalist to be killed in 18 years. McKee is believed to have been shot by dissident republicans while reporting on riots in the Creggan area of Londonderry.<sup>7</sup> On 12 February, 2020, a man was charged with her murder. In February 2020, threatening graffiti appeared in Creggan about journalist Leona O'Neill, who had been reporting with McKee on the night of her murder. The graffiti accused O'Neill of being a "M15 tout" and a "shit stirrer".<sup>8</sup> Journalists in the UK should not face the threat of violence for doing their jobs and it is essential that any attacks are fully investigated and the perpetrators brought to justice.

### 1.3 Restricting access of journalists and undermining of the BBC

**Restricting access to journalists:** In February 2020, one of the Prime Minister's senior communications advisers excluded a number of journalists from the *Independent*, *HuffPost*, *PoliticsHome* and other outlets from a government briefing. Journalists from other outlets that were allowed to attend walked out in solidarity.

During the 2019 General Election, the Conservative Party refused to allow a *Daily Mirror* journalist on their campaign bus. After the election, it was reported that government ministers were no longer appearing on *Newsnight* and Radio 4's *Today* show. It undermines our right to access information and the functioning of democracy itself when politicians picking and choose the outlets they will speak to.

**Undermining the BBC:** On Feb 5 2020, the Government announced a consultation into the decriminalisation of the non-payment of the BBC license fee. Less than two weeks later, the *Sunday Times* reported that Number 10 had told the BBC that the licence fee would be scrapped and that it would be forced to sell off the majority of its radio stations.<sup>9</sup>

The independence of the public broadcaster is a key element for diversity, media pluralism and freedom of the media in a democracy. It increases government transparency and improves participatory democracy by providing public interest programming and enhancing the professionalism of the media. Removing the funding of the BBC without providing a viable alternative would threaten the independence of the UK's public broadcaster and amounts to an attack on press freedom in the UK.

### 1.4 Media freedom recommendations

<sup>7</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-foyle-west-51457008>

<sup>8</sup> [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_count=1&sojdashboard\\_WAR\\_coesojportlet\\_alertId=58793918](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-4&p_p_col_count=1&sojdashboard_WAR_coesojportlet_alertId=58793918)

<sup>9</sup> <https://www.thetimes.co.uk/article/no-10-tells-bbc-licence-fee-will-be-scrapped-hzwb9bzsx>

- Proposals for a new Espionage Act must not threaten investigative journalism that is in the public interest. It should not be an offence to leak information where there is a public right of access. Journalists should not be punished for disclosures that are unlikely to cause harm and should be allowed a public interest defence. Prison sentences must be proportionate.<sup>10</sup>
- Parliament should repeal Part 6 of the IPA that provides for bulk surveillance powers. At the very least, sufficient safeguards should be put in place to protect journalistic materials and communications in relation to these capabilities.
- The UK should not be complicit in the extradition of Julian Assange.
- In Northern Ireland, everyone involved in the killing of journalist Lyra McKee must be brought to justice. Threats against journalists including Leona O'Neill must be thoroughly investigated and the perpetrators brought to justice.
- Politicians must be open to scrutiny by all media outlets and not cherry pick which outlets it speaks to.
- The Government should ensure that the BBC's independence is not undermined by changes to the TV licence without viable alternatives in place.

## 2. The right to protest

The right to protest in the UK is being threatened by unlawful restrictions on demonstrations, disproportionate sentencing of activists and intrusive surveillance at protests and other events.

### 2.1 Restricting protests

ARTICLE 19 has consistently called on the UK Government to adopt a positive legal framework on the right to protest and freedom of expression, to enable a crucial shift from a focus on public order to a human rights approach. We have emphasised that exercising the right to protest should be considered an essential characteristic of public order and not a de facto threat to it, even when protests cause inconvenience or disruption.<sup>11</sup>

There have been numerous incidents that have threatened and undermined the right to protest in the UK:

**Banning protests:** In October 2019, the Metropolitan police used section 14 of the Public Order Act to ban all Extinction Rebellion protests in the capital – the first time that such a ban has been applied across the whole of London. In November, the High Court ruled that this use of section 14 to close down protests was unlawful.<sup>12</sup>

<sup>10</sup> <https://www.article19.org/resources/uk-whistleblowers-and-journalists-could-face-prison-for-revealing-information-available-under-foi/>

<sup>11</sup> <https://www.article19.org/resources/uk-calls-for-protection-of-right-to-protest/>

<sup>12</sup> <https://www.article19.org/resources/uk-high-court-decision-finds-met-ban-on-extinction-rebellion-was-unlawful/>

**Public nuisance laws:** Met Police Chief Cressida Dick has called for ‘public nuisance’ to be made a statutory offence so that the police have greater powers to tackle disruptive protests and prosecute protestors.<sup>13</sup>

**Domestic extremist database:** The National Domestic Extremism Database is a police database of people who are defined as ‘domestic extremists’. In June 2019, over 150 lawyers, campaigners, lawyers, academics, journalists and politicians called for the police to stop categorising non-violent protestors, such as those from environmental organisations, anti-racists groups and anti-nuclear campaigns as domestic extremists.<sup>14</sup> For example, John Catt, an 87 year-old protester with no criminal record, has found that there were 66 entries in respect of his political activities on the National Domestic Extremism Database. In 2019, the European Court of Human Rights found that Catt’s right to privacy had been violated by the police.<sup>15</sup>

**Infiltration of political groups:** The police have been criticised for their use of undercover policing to infiltrate political groups in the UK, including the Animal Liberation Front, the Socialist Workers Party and the Independent Labour Party. The Undercover Policing Inquiry will look at allegations of corruption and practices such as deceiving women into relationships. Campaigners have complained that many of the police officers who will give evidence to the inquiry will be allowed to remain anonymous.

Kate Wilson, who was deceived into a long term relationship with undercover police officer Mark Kennedy is taking a case to the Investigatory Powers Tribunal (IPT) on February 27, 2020. Wilson will argue that the police violated her human rights under Articles 3, 8, 10, 11 and 14 of the European Convention of Human Rights.

**Counterterrorism legislation:** The use of counterterrorism legislation against protestors and activists has been of concern for a number of years. In December 2018, counterterror legislation was used to convict the ‘Stansted 15’, who tried to prevent the deportation of asylum seekers whose claims were denied. The 15 were convicted of terrorism offences under the 1990 Aviation and Maritime Security Act, which had been passed in following the 1988 Lockerbie bombing.<sup>16</sup>

## 2.2 Facial recognition

The police are increasingly using facial recognition at public events, such as football matches or the Notting Hill carnival as well as during protests, despite high incidences of incorrectly identifying people.<sup>17</sup> In January, the Met police announced they would be rolling out its use in

<sup>13</sup> <https://www.theguardian.com/uk-news/2020/feb/05/met-chief-update-public-nuisance-law-tackle-extinction-rebellion>

<sup>14</sup> <https://www.theguardian.com/world/2019/jun/17/domestic-extremism-is-no-way-to-describe-peaceful-protest>

<sup>15</sup> <https://privacyinternational.org/news-analysis/2665/catt-v-united-kingdom-police-powers-retain-personal-data-extremism-database>

<sup>16</sup> <https://www.article19.org/resources/uk-terror-related-legislation-should-not-be-used-to-sanction-protests/>

<sup>17</sup> <https://bigbrotherwatch.org.uk/all-campaigns/face-off-campaign/#list-met>

London and its first operational use took place in Stratford, east London, on February 11, 2020. The Met Police falsely claimed that the Biometrics Commissioner supported the use of live facial recognition. He refuted this: "I have continually said that we need proper governance of new biometric technologies such as LFR through legislation. In my view it is for Parliament to decide whether LFR ought to be used by the police and if so for what purposes."<sup>18</sup> The legality of police use of facial recognition is currently being challenged before the courts.<sup>19</sup>

Facial recognition is a particularly intrusive form of surveillance, which can monitor, track and identify people in real-time without consent. Its use in public spaces means that the public often has no idea when or where their images may be collected, by whom, and how they will be used. ARTICLE 19 believes that we have a right to be anonymous in public spaces and that knowing that we are being constantly tracked will have an impact on how we behave and express ourselves; there are particular concerns for our right to protest.

### **2.3 Protest recommendations**

- Public authorities must protect the right to protest and ensure that internationally guaranteed human rights are applied.<sup>20</sup>
- Counterterrorism legislation should not be used to criminalise protests and non-violent direct action.
- The police must stop classifying peaceful protestors and members of non-violent groups such as Extinction Rebellion and Greenpeace as domestic extremists.
- The Government should refrain from adopting legislation which could be used to limit the right to protest upon vague and disproportionate grounds at the discretion of courts. This should include legislation that would lower the threshold for policing protests from 'serious disorder' or 'serious disruption to the life of the community' to mere 'public nuisance'.
- Facial recognition technology should only be used when it passes a narrow necessity and proportionality test. It should not be rolled out by police forces or any other public authority before there is an adequate legislative framework that covers full public mechanisms and oversight. This framework should include the adoption of legal safeguards that assure redress against abuse or misuse, and transparency measures that provide information about how this technology is used.

### **3. Counterterrorism and surveillance**

<sup>18</sup> <https://www.gov.uk/government/news/biometrics-commissioner-on-the-police-use-of-live-facial-recognition>

<sup>19</sup> <https://www.lawgazette.co.uk/news/court-of-appeal-to-hear-facial-recognition-technology-challenge/5102241.article>

<sup>20</sup> <https://www.article19.org/resources/the-right-to-protest-principles-on-the-protection-of-human-rights-in-protests/>

Extreme surveillance laws and counterterrorism strategies are undermining freedom of expression and encouraging the stigmatisation of and discrimination against vulnerable groups, particularly Muslims.

### 3.1 Mass surveillance

A case is pending before the Grand Chamber of the European Court of Human Rights that concerns the compatibility of the UK government's mass interception and surveillance programme under the Regulation of Investigatory Powers Act 2000 with the rights to privacy and freedom of expression.<sup>21</sup> The case was brought by a number of NGOs, including Privacy International, who were themselves the subjects of unlawful surveillance by GCHQ, MI5 and MI6.<sup>22</sup>

### 3.2 Counterterrorism legislation

The UK is a leader in the Europe-wide trend of adopting overbroad counterterror legislation that is restricting freedom of expression.

**Investigatory Powers Act 2016:** The IPA is one of the most extreme surveillance laws ever passed in a democracy. The Act included many of the powers and practices revealed by Edward Snowden, as well as other measures such as compelling internet service providers to collect and store data about their customers' Internet use. In December 2016, the CJEU ruled that the UK's data retention regime was incompatible with European law and highlighted its impact on freedom of expression.<sup>23</sup> The IPA also has consequences for media freedom. (See Media Freedom, above).

**Counter-Terrorism and Border Security Act 2019 (CTBSA):** the Act makes viewing online content that is likely to be useful for terrorism without terrorist intent punishable with up to 15 years in prison. Despite defences for journalists and academic research, this Act is likely to have a significant chilling effect on the right to seek information online since individuals will be required to justify what they are viewing online or face criminal sanctions. The CTBSA also contains very broad offences that criminalise the expression of support for a proscribed organisation and the publication of certain images of clothing or other items. ARTICLE 19 believes that this could criminalise the expression of opinions or beliefs, the documentation of human rights abuses or the making of misguided jokes.<sup>24</sup>

### 3.3 Prevent strategy

<sup>21</sup> <https://privacyinternational.org/feature/2267/uk-mass-interception-law-violates-human-rights-fight-against-mass-surveillance>

<sup>22</sup> <https://privacyinternational.org/press-release/2283/press-release-uk-intelligence-agency-admits-unlawfully-spying-privacy>

<sup>23</sup> <https://www.openrightsgroup.org/blog/2016/eu-court-slams-uk-data-retention-surveillance-regime>

<sup>24</sup> <https://www.article19.org/wp-content/uploads/2018/07/UK-CT-and-Border-Security-Bill-FINAL-Public-Bill-Committee-26062018.pdf>

The Government's anti-terrorism strategy Prevent has been widely criticised by human rights campaigners, lawyers, academics and activists. Prevent poses a number of threats to freedom of expression by:

- placing a responsibility on schools, universities and other public authorities to identify extreme beliefs, encouraging monitoring and surveillance
- categorising peaceful protestors and activists as domestic terrorists; and
- stigmatising, alienating and discriminating against certain ethnic groups, particularly Muslims.

There have been numerous reports of errors, including the reporting of a four year old boy whose drawing of his father cutting cucumber was interpreted as a 'cooker bomb'.<sup>25</sup>

More recently, it was reported that a counter-terrorism police document listed Greenpeace and Extinction Rebellion in guidance on extremist ideologies that should be reported to public authorities. The non-violent groups appeared alongside neo-Nazi and Islamist terrorist groups in a guide produced by Counter Terrorism Policing.<sup>26</sup>

Under the CTBSA, Prevent is due to be reviewed by August 2020. However, the Government is being taken to court by Rights Watch (UK) for failing to appoint an independent reviewer of the programme.<sup>27</sup>

### **3.4 Counterterrorism and surveillance recommendations**

- The Government must appoint an independent reviewer and ensure that a thorough review of Prevent is carried out.
- Prevent must stop listing non-violent groups alongside terrorist organisations.
- The CTBSA should be amended to narrow the scope of the offences in sections 1, 2 and 3 of the Act to prevent any interference with legitimate expression.

## **4. Digital freedom**

In a global context where tech companies have tremendous power over the content we see and our ability to communicate privately and securely, government policies and legislation struggle to balance corporate and sector regulations with explicit threats to freedom of expression.

### **4.1 Online harms**

There has been increasing pressure on social media companies to remove content that is considered harmful that is not necessarily illegal. In 2019, the Online Harms White Paper was published. The Government published their initial response to the consultation feedback on

<sup>25</sup> <https://www.independent.co.uk/news/uk/home-news/four-year-old-raises-concerns-of-radicalisation-after-pronouncing-cucumber-as-cooker-bomb-a6927341.html>

<sup>26</sup> <https://www.theguardian.com/uk-news/2020/jan/17/greenpeace-included-with-neo-nazis-on-uk-counter-terror-list>

<sup>27</sup> <https://www.theguardian.com/uk-news/2020/feb/06/government-to-be-challenged-in-court-over-prevent-reviewer>



February 12, 2020<sup>28</sup> and a draft bill is expected to be published later in the year. Under the proposals, social media companies would have a 'duty of care' to their users. While the Government has said that regulation will focus on the wider 'systems and processes' that platforms have in place to deal with online harms, ARTICLE 19 believes that this will delegate censorship powers to private companies, and could require the bulk surveillance of what we post online. It will also almost inevitably lead to the removal of legitimate content as companies are likely to err on the side of caution and remove content at scale.

The proposals could also make social media bosses personally liable if they fail to remove content within a particular timescale.

The restrictions would not only apply to large social media companies, but could also apply to private messaging services, public discussion forums, and the comment sections on websites of media outlets or individuals.

## 4.2 Encryption

The Government has made repeated calls for companies to undermine encryption so that they can access the private messages of people they suspect of crimes. Sir Andrew Parker, Director General of MI5, recently called for tech companies to provide access to encrypted communications.<sup>29</sup> Children's rights charities have also asked Facebook to end their plans to roll out the end-to-end encryption of its services.<sup>30</sup>

Encryption keeps all of our information secure and confidential. Attempts to undermine it put everyone's privacy and freedom of expression at risk.

## 4.3 Anonymity online

MPs, including Jess Phillips,<sup>31</sup> Dawn Butler<sup>32</sup> and Carla Lockhart<sup>33</sup> have called for social media platforms not to allow anonymous accounts or to collect data about their users in order to reduce online abuse. While the abuse of women, BAME and LGBTQ people online is an issue that needs to be addressed, removing the right to anonymity is not the solution. Human rights activists, environmental campaigners and domestic abuse survivors are just some of the groups who may need to stay anonymous online. Requiring social media companies to hold information

<sup>28</sup> <https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response>

<sup>29</sup> <https://www.itv.com/news/2020-02-25/mi5-boss-asks-tech-firms-can-you-find-a-way-to-let-security-services-access-encrypted-messages-to-help-stop-attacks/>

<sup>30</sup> <https://news.sky.com/story/experts-facebook-must-stop-encryption-roll-out-to-keep-children-safe-11927312>

<sup>31</sup> <https://www.theguardian.com/society/2018/jun/11/labour-mp-jess-phillips-calls-for-end-to-online-anonymity-after-600-threats>

<sup>32</sup> <https://twitter.com/DawnButlerBrent/status/1228820155624497152?s=20>

<sup>33</sup> <https://twitter.com/carlalockhart/status/1206208033241600001?s=20>

about their users could be abused by the authorities, particularly given the issue of labelling non-violent activists as extremists, described earlier in this briefing.

### **Digital freedom recommendations**

- The Government should refrain from putting forward legislation that would impose a vague 'duty of care' on social media companies to prevent undefined 'harms' to their users. A regulator should not be involved in the regulation of 'harmful' content. If the Government believes that particular 'harms' are so serious that companies should be required to take that type of content down, then Parliament should legislate to prohibit it.
- Private communications channels and forums should be out of scope of the online harms bill.
- The Government should not attempt to undermine encryption. It should use its existing powers under the law to access the communications of those suspected of criminal activity without undermining everyone's security.
- The Government should protect our ability to remain anonymous online.

### **5 Next steps**

ARTICLE 19's work monitoring and campaigning for freedom of expression around the world has shown us how vulnerable this important right can be. Despite the positive effect that digital technology has had on our ability to express ourselves freely, global freedom of expression is currently at a ten year low and we are seeing declines in countries where historically there have been strong protections in place.

Within this context, the threats identified in this briefing are of significant concern. We urge the UK Government to address these individual issues and, more broadly, to commit to protecting and advocating for freedom of expression in the UK.

The country faces many challenges from terrorist threats and political disaffection to a rise in hate speech and concerns about the impact of social media on young people. When trying to find solutions to these problems, we ask the Government to avoid policies and legislation that unnecessarily restrict freedom of expression. While some initiatives, for example placing restrictions on powerful social media companies may appear popular, the consequences for free speech in the UK could be significant.

Freedom of expression is essential to the functioning of our democracy and needs our constant attention. As the UK prepares to leave the EU, the country is at an important transition in its history. Strong protections for freedom of expression and human rights must be part of the UK's future.