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### Death by a thousand cuts

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**Burkhard Schafer**

## **Death by a thousand Cuts: Cumulative data effects and the Corbyn affair**

In 2020, Jeremy Corbyn was temporarily suspended from the Labour Party that he had once led. This rapid fall from grace brought to an end a leadership which had been from the beginning marred by accusations of antisemitism. This paper analyses some of the legal issues behind this affair, and focusses in particular of an emerging conflict between equality legislation and data protection law, a conflict that is rooted in diverging approaches to cumulative versus atomistic online-harms and their impact on human dignity, free speech and equality.

1 United, we stand

In a recent contribution to DuD, Thomas Knieper and Marie-Theres Tinnefeld discussed emerging challenges for democratic debate in the “prosumer” culture. This paper aims to add to this discussion from a comparative perspective, discussing the debate surrounding antisemitism in the Labour party that led to the exclusion of its former leader and the withdrawal of the party whip (“Fraktionsausschluss”). Its focus however are not “high profile” events, but rather the accumulation of in themselves insignificant “speech events” over time. Focussing on high profile speech and speakers has pedagogical and analytical benefits, and serves well to illustrate the normative concerns. It can however also hide some conflicting intuitions and intractable difficulties that the law faces when trying to resolve the inherent normative conflicts and paradoxes that the free speech discourse inevitably generates.<sup>1</sup>

One of the many paradoxes in the current controversy over our political debating culture is that often, those who complain about having been censored – or “cancelled” – do so on their Twitter or Facebook accounts with thousands, if not millions of followers, in op-eds for national newspapers, or in TV interviews that help promoting their latest book about the experience.<sup>2</sup> Conversely, those voices that feel unable to participate fully in online public debate and remove themselves from it because of the level of toxicity, are often lacking these channels.<sup>3</sup>

The paper will first give an account of the timeline of the events that led to Corbyn’s suspension in 2020. It will then focus on the report by the UK Equality and Human Rights Commission (EHRC) that

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<sup>1</sup> See in particular, Fiss, O. (2009) *The irony of free speech*. Harvard University Press, 2009 and for a more recent discussion the overview in Udupa, S., & Pohjonen, M. (2019). *Extreme Speech| Extreme Speech and Global Digital Cultures*. *International Journal of Communication*, 13, 19. For a comparative analysis of Germany and the US, see Krotoszynski Jr, R. J. (2003). *A comparative perspective on the first amendment: free speech, militant democracy, and the primacy of dignity as a preferred constitutional value in Germany*. *Tul. L. Rev.*, 78, 1549.

<sup>2</sup> For two UK examples see Chandler, M (2021) *Julie Burchill's book picked up by Stirling Publishing after contract cancelled*, *The Bookseller* <https://www.thebookseller.com/news/julie-burchills-book-picked-stirling-publishing-after-contract-cancelled-1246375>; Harding, L (2021) *Piers Morgan appears to make dig at ITV after Good Morning Britain departure*, *The Evening Standard* (15.3.2021) <https://www.standard.co.uk/news/uk/piers-morgan-itv-gmb-meghan-sharon-osbourne-twitter-b924152.html>

<sup>3</sup> See e.g. for gendered exclusion Vickery, J. R. (2018). *This isn’t new: gender, publics, and the Internet*. In *Mediating Misogyny* (pp. 31-49). Palgrave Macmillan, Cham.

was central to his fall from grace. We will put the approach of the EHRC into a broader context, focusing on the difference between cumulative and atomistic interpretation of harmful speech.

## 2 Flashbacks waking me up

In 2015, Jeremy Corbyn was elected leader of the Labour Party, He had inherited from his predecessor a radical reform of the rules for leadership election. This now allowed all registered supporters to vote in a ‘one member-one vote’ system. Previously elections involved three “electoral colleges”, each controlling one third of the vote - the Parliamentary Labour Party (elected Labour members of the House of Commons and of the European Parliament), individual Labour Party members, and trade union sections. Now, candidates were elected by members and registered and affiliated supporters, whose votes were all weighted equally.<sup>4</sup> This meant a significant shift of power to ordinary members and also even more loosely associated registered supporters over the Party establishment”.

Corbyn’s campaign succeeded in particular to create an upsurge in “registered supporters”, a status that entailed voting rights, and that could be achieved by a simple one-off payment of £3. At the time of the rule changes, the party had 300000 full members and 150000 affiliated supporters (i.e. members of affiliated trade union, where union membership automatically entailed a status equivalent to a “direct” member). By the time the vote was held, the number of registered supporters had increased from a mere 10.000 to 112.000, a sizeable block. Crucial for this success was a highly efficient online grassroots campaign, even though many of these new supporters had only marginal interest in involvement with Labour beyond the leadership election. Instead, they remained a diffuse, and difficult to control, movement outside established political structures.

It is important for our discussion later to note that the UK has no equivalent to the German Parteiengesetz that prescribes internal democratic structures. UK parties have significant discretion how they organize their membership and election of party leaders, making it notoriously difficult even to compare, or to know, membership numbers. The legal status of parties is that of unincorporated associations, the relation between the members conceived as a network of private law contracts.

Indeed, until recently it was not clear if even this contract was at all justiciable, or if it is a mere unenforceable gentleman’s agreement.<sup>5</sup> Illuminating for our purposes is a decision by the High Court of Australia from 1934 that determined that the expulsion of the then leader of the Australian Labor party by its executive was not within the remit of the courts, even though the question also decided who governed the country.<sup>6</sup> This purist position of non-interference by the courts has since shifted. It seems now clear that courts are willing to enforce the formal party rules against a party’s executive.<sup>7</sup> However, the content of the rules is still left to the voluntary agreement between the members, which can be internally undemocratic and hierarchical, and vest in the executive broad powers of expulsion.

While this approach leaves political parties largely free from interference by the courts, it also means they enjoy considerably less protection in constitutional law. In the UK, parties do not have a privileged position when it comes to “contributing to the formation of political opinions” akin to Art 21 GG in Germany. This too will be important for the analysis below.

Back however to 2015 and the Labour leadership election. Not too dissimilar from the campaign of Donald Trump a year later, the hallmarks of Corbyn’s campaign were sustained and sophisticated use

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<sup>4</sup> Garland, J (2016) “A Wider Range of Friends: Multi-Speed Organising during the 2015 Labour Leadership Contest.” *The Political Quarterly* 87 (1): 23–30

<sup>5</sup> For an excellent comparative analysis that references also Germany see Orr, G. (2014). Private association and public brand: the dualistic conception of political parties in the common law world. *Critical Review of International Social and Political Philosophy*, 17(3), 332-349.

<sup>6</sup> *Cameron v Hogan* (1934) 51 CLR 358

<sup>7</sup> So e.g. in *Johns v Rees* [1970] 1 Ch 345 and *Lewis v Heffer* [1978] 1 WLR 1061.

of social media to mobilise support, together with a substantive “anti-establishment” message that did not just target the Conservative Party, but also the Labour Party establishment and the established, traditional press that was from the beginning seen as hostile. This perception had some grounding in fact. In a comprehensive quantitative and qualitative analysis of media coverage of the Corbyn years, the authors conclude:<sup>8</sup>

“In view of this, our research contends that the British press acted more as an attackdog than a watchdog when it comes to the reporting of Corbyn. We conclude that the transgression from traditional monitorial practices to snarling attacks is unhealthy for democracy, and it furthermore raises serious ethical questions for UK journalism and its role in society.”

One element of media criticism quickly focussed on allegations of antisemitism. This issue too has been subject to quantitative analysis. The Media Reform Coalition, an initiative that grew out of a research project at Goldsmith University, analysed 250 news items covering the debate on the definition of antisemitism. It found over ninety examples of misleading or inaccurate reporting. These inaccuracies overwhelmingly benefited the Labour's critics and gave a picture of "systematic reporting failures" to the detriment of the Labour leadership. This one should note is an analysis of *reporting quality* only, not a judgement of the facticity of antisemitism in Labour. This paper too will try to take an agnostic approach on the question of antisemitism in the Labour party or Corbyn,<sup>9</sup> its interest is the general use of law as a mode of regulation of speech.

Throughout the debate, the media focussed on two types of issues to construct/evidence the narrative of rising antisemitism in the Labour party under Corbyn. One type were past statements and actions by Corbyn himself, sometimes going back to the 1970s. The other was the way in which the party under Corbyn sanctioned other members for ant-Semitic utterances. This we will discuss in section 3.<sup>10</sup>

Attributed to Corbyn were events that he (merely) attended but which were shared or otherwise associated with speakers who expressed views deemed to be antisemitic. Examples include co-chairing a meeting with a talk by Hajo Meyer, attending events organised by "Deir Yassin Remembered", an organisation founded by Holocaust denier Paul Eisen, but mainly commemorating the massacre of Palestinian villagers in 1948, and maybe most controversially attending a pro-Palestinian conference in Tunisia that also included the laying of wreaths at a cemetery for the victims of the 1985 Israeli air strikes on the PLO headquarters in Tunis. The cemetery also has graves of Palestinians who have been implicated in terrorist crimes, which led to competing narratives about the wreath ceremony.

In addition there are statements by Corbyn directly. These included being signatory of a motion, in 2011, to rename Holocaust Memorial Day as "Genocide Memorial Day", writing in praise of the influential 1902 book by the noted economist and anti-imperialist John Atkinson Hobson, *Imperialism*, despite its blatantly antisemitic content, or defending in 2013 comments by the Palestinian representative Manuel Hassassian in a way that *could* be understood as saying that Jews in support of Zionism were not properly “British”.<sup>11</sup>

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<sup>8</sup> Cammaerts, B., DeCillia, B., & Magalhães, J. C. (2020). Journalistic transgressions in the representation of Jeremy Corbyn: From watchdog to attackdog. *Journalism*, 21(2), 191-208.

<sup>9</sup> Affirmative Rich, D. (2018) *The Left's Jewish Problem: Jeremy Corbyn, Israel and Antisemitism*. Biteback Publishing, or Gaber, I. (2020). *Anti-Semitism: the Touchstone Issue for the Next Labour Leader*. *The Political Quarterly*, 91(1), 70-73.

<sup>10</sup> For space reason this is a selective list of the type of evidence that was used. More examples can be found in Rich, op cit

<sup>11</sup> We should note that the accounts of all of these events are heavily contested - there is e.g. disagreement about what exactly happened in Tunis, claims of selective and out-of-context quotations, and

Together, these two types of evidence highlight what distinguishes our discussion from the one by Knieper and Tinnefeld. There is “no smoking gun” here, not a single, unambiguous statement where we can ask if its contribution to public discourse (or the arts) merits protection, or if it crosses the threshold into prohibited speech and merits sanctions by state, employer or civil society. Rather, the issue is for better or worse the cumulative effect of speech that in isolation looks innocuous or trivial, but when are accumulated across time and contexts create a profile that gives rise to concerns.

### 3 ‘Cause I can’t pretend it's okay when it's not

In 2016, shortly after Corbyn had taken office, Labour MP Naz Shah was accused of antisemitism for having shared on Facebook a picture of an outline of Israel superimposed on a map of the U.S. with the caption "Solution for Israel-Palestine conflict – relocate Israel into United States". When she agreed to apologise, ending a temporary suspension, the former London Mayor Ken Livingstone spoke out in her defence, saying in particular "When Hitler won his election in 1932 his policy then was that Jews should be moved to Israel. He was supporting Zionism before he went mad and ended up killing six million Jews."

Over 20 Labour MPs asked for Livingstone's suspension over the comments. Corbyn announced an internal inquiry by the National Executive Committee (NEC). It ruled in April 2017 that Livingstone had brought the party into disrepute, and extended his suspension for a year – too long for those within the party who had supported Livingstone’s defence that „truth should be an absolute defence against any sanctions“, and by far too lenient for those who like the Deputy Labour leader Tom Watson or London Mayor Sadiq Khan had asked for expulsion. Corbyn announced a new NEC investigation over Livingstone’s failure to apologise, and in 2018 his suspension was extended indefinitely. Soon after Livingstone resigned from the party. Controversially, he later admitted that during the ongoing investigation, he had approached members of Corbyn's staff for advice - serious procedural irregularity that we will return to below.

In response to these events, Corbyn commissioned an inquiry into racism in the Labour Party. It was chaired by Shami Chakrabarti, a barrister and former head of Liberty, the oldest civil rights NGO in the UK. In June 2017, her report stated that there was "no evidence" of systemic antisemitism. However, the report noted an "occasionally toxic atmosphere", and made 20 recommendations to address the issue, including a speech code and improved disciplinary procedures. The response to the report was initially largely positive. This would change when Chakrabarti was nominated by the Labour Party for the House of Lords shortly after the submission of the report, triggering accusations of a "whitewash for peerage" scandal.

In response to the report, the 2017 Labour Party Conference adopted new rules on hate speech. Up until then, it had been impossible to discipline party members for "the mere holding or expression of beliefs and opinions". Now, those found guilty of expressing any form of hate speech could be disciplined.

While the definition of hate speech was wide and flexible, it was felt desirable to have an official definition of antisemitism specifically. For this purpose, Labour adopted in 2017 the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism. The IHRA definition, a short principle of 38 words together with eleven explanatory examples, had been contentious, its critics claiming that it conflates antisemitism with legitimate criticism of certain policies by the state of Israel.

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what was known or knowable at the time, for instance whether Eisen’s Holocaust denial was public knowledge when Corbyn attended the event by his organisation.

When the NEC developed in 2018 its new code of conduct, it amended or omitted four of the eleven examples and added three others, partly for that reason.

Jewish organisations were not consulted over the changes, and prominent organisations quickly condemned them. According to the Board of Deputies of British Jews and the Jewish Leadership Council, the changes "dilute the definition and further erode the existing lack of confidence that British Jews have in their sincerity to tackle antisemitism within the Labour movement". Over 60 British rabbis complained in an open letter that Labour had "chosen to ignore the Jewish community", and it was "not the Labour party's place to rewrite a definition of antisemitism".

Most of the discussion centred on the question whether the IHRA definition prevents legitimate political debate and disagreement, especially with regards to criticism of Israel. Again, this paper will not discuss the respective merits or demerits of this claim. Important for the argument in this paper though is one of its examples of antisemitism:

“Apply [to Israel] double standards by requiring of it a behavior not expected or demanded of any other democratic nation.”

This provision means that it will often not be possible to determine if an utterance on its own is anti-semitic, unless one also considers all the opinions that the speaker expressed about other nations (or their lack of them). We will come back to it when we discuss the data protection implications of the debate.

Eventually, Labour would drop the changes and adopt the original version of the IHRA in September 2018. By then however, the damage had been done. For some, it was conclusive evidence that Corbyn had embarked on a policy to protect antisemitism in the party. For others, he had compromised on free speech and his past commitment for the Palestinian cause.

#### 4 Our country, guess it was a lawless land

In May 2019, the Equality and Human Rights Commission (EHRC) began a formal investigation of the Labour party to ascertain whether it had “unlawfully discriminated against, harassed or victimised people because they are Jewish”: specifically, whether "unlawful acts have been committed by the party and/or its employees and/or its agents, and; whether the party has responded to complaints of unlawful acts in a lawful, efficient and effective manner.” This investigation was triggered by formal complaints inter alia from the Jewish Labour Movement (JLM), a society affiliated to the UK Labour Party.

A few notes on the EHRC are needed here. The EHRC was established through the Equality Act 2006 by the then Labour government, taking over the roles of the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission.<sup>12</sup> Its task is the promotion and sometimes enforcement of equality and non-discrimination laws. Its status is that of a statutory, non-departmental public body (NDPB). NDPBs are largely independent from ministers and only accountable to Parliament, though ministers remain responsible for the effectiveness and efficiency of NDPSs in their portfolio.

Section 3 of the Equality Act sets as its aim a society where:

- (a) people's ability to achieve their potential is not limited by prejudice or discrimination,
- (b) there is respect for and protection of each individual's human rights (including respect for the dignity and worth of each individual),

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<sup>12</sup> For a historical background and basic principles see Choudhury, T. (2006). The commission for equality and human rights: Designing the big tent. *Maastricht Journal of European and Comparative Law*, 13(3), 311-322. For the legal framework see Barrett, D. (2019). The regulatory space of equality and human rights in Britain: The role of the Equality and Human Rights Commission. *Legal Studies*, 39(2), 247-265.

- (c) each person has an equal opportunity to participate in society, and
- (d) there is mutual respect between communities based on understanding and valuing of diversity and on shared respect for equality and human rights.

The EHRC has the power to apply for judicial review against public authority decision making and can assess the compliance of public bodies with their equality duties. Section 24 of the EA empowers the EHRC to form binding agreements with employers. An employer might e.g. agree to set up an internal complaints procedure to deal with claims of discrimination, or new staff training. This agreement is then enforceable through court injunctions. We noted above that political parties are allowed to determine their internal rules. However, once these are in place their consistent enforcement can become a legal issue for the EHRC beyond contractual disputes between members. Furthermore, Section 20 gives the EHRC the power to carry out investigations when it has the "suspicion" of unlawful discrimination taking place. This was also the legal basis for investigating the Labour party that in particular had as its remit to investigate:

- Whether unlawful acts have been committed by the party and/or its employees and/or its agents
- Whether the party has responded to complaints of unlawful acts in a lawful, efficient and effective manner

The Labour Party, by then under a new leader, Keith Starmer, an experienced human rights lawyer, pledged to fully support the investigation.<sup>13</sup> Far from clearing the waters, things got quickly muddled even more. A lengthy party-internal report on the handling of antisemitism was compiled for submission to the ECHR, but then withheld on legal advice. Despite this, it was leaked on social media.<sup>14</sup> The overall tenor of this report was to acknowledge a significant problem in the party, but also largely exonerated Corbyn who had "inherited a lack of robust processes, systems, training, education and effective line management".

The report also documented active hostility against Corbyn and his allies. His unexpected election had caused a push-back by the party establishment that created a highly toxic atmosphere. The report documented this by including hundreds of private WhatsApp messages and similar communication between Labour party officials and employees. Worryingly from a data protection perspective, it identified a number of party officials by name, and documented their use of highly derogatory and sometimes violent language against Corbyn and his team. Of even greater concern is that the report identified the names of those who had raised complaints about antisemitism, and also if these complainants were Jewish themselves, even though they had chosen not to disclose this.<sup>15</sup> The report then urges the EHRC to "question the validity of the personal testimonies" of labour members interviewed by the ECHR.

The EHRC's own report into the way in which Labour had handled antisemitism complaints was scathing.<sup>16</sup> It identified "serious failings in leadership and an inadequate process for handling antisemitism complaints across the Labour Party",<sup>17</sup> together with 23 cases of political interference into complaints of antisemitism – most notably the Livingston case referenced above - insufficient training in

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<sup>13</sup> <https://www.bbc.co.uk/news/uk-48433964>

<sup>14</sup> <https://news.sky.com/story/labour-antisemitism-investigation-will-not-be-sent-to-equality-commission-11972071>

<sup>15</sup> <https://www.hopenothate.org.uk/2020/04/14/labours-continuing-antisemitism-crisis/>

<sup>16</sup> ECHR Report Investigation into antisemitism in the Labour Party (2020)  
<https://www.equalityhumanrights.com/sites/default/files/investigation-into-antisemitism-in-the-labour-party.pdf>

<sup>17</sup> Ibid p.6

how to handle complaints of antisemitism, and harassment of employees, all in breach of the Equality Act 2010. While Corbyn agreed with the general findings, he emphasised that his actions had tried to address them, and also accused his political enemies of exaggerating the problem. It was this refusal to accept the findings of the ECHR in full that led to his suspension from the party.

## 5 Death by a thousand cuts

Of particular importance for this paper is Chapter 8 of the report that discusses the role of social media. The ECHR points out that in the sample of complaints that they studied, the vast majority involved social media. The ECHR is particularly critical of a policy from 2015 (preceding Corbyn), according to which complaints about Party members' social media activity were not investigated if the member had merely "liked" or shared content without commenting on it. According to the EHRC, this led to inappropriate dismissal of complaints:

"Sharing social media content, such as an image, meme, article or video, may or may not reflect a person's own views. The circumstances surrounding the share will be relevant, for example, whether the individual has shared similar content before and who the content is shared with. The policy adopted by the Labour Party meant that even repeated sharing of antisemitic material could have escaped investigation, where it could have amounted to a breach of the Party's conduct rule and unlawful harassment or discrimination."

The ECRC commented approvingly on rule changes introduced in 2018 that tightened Labour policy, encouraged reporting of 'abuse behaviour' and admonishes party members "not to give a voice to those who persistently engage in abuse and to avoid sharing their content".

The EHRC furthermore approved attempts by Labour to engage with the social media activities of supporting groups, that is groups that operate outside official party structures. Corbyn's success had been largely due to a successful online campaign that coordinated loosely defined groups and coalitions. A newspaper investigation had shown that in the 20 largest pro-Corbyn Facebook groups, numbering over 400,000 members, antisemitic tropes and posts were widely shared, documenting 2000 instances.<sup>18</sup> Some high-profile office holders were parts of these groups, though they did not personally post or repost antisemitic material, and Corbyn subsequently deleted his own personal Facebook account.

According to the EHRC analysis, policing these informal groups too is at least to a degree responsibility of the Labour Party leadership under the Equality Act. Because "Managing social media use by employees, agents and members is an important issue for *all* organisations", the Labour Party is asked to "*monitor* trends in social media use and remain flexible to address new issues"<sup>19</sup>.

We can now begin our final analysis of the Corbyn affair, and in particular the impact it could have on data protection and the emerging surveillance landscape. According to the EHRC, because the cumulative effect of posts, comments, or even just "likes" and retweets on social media can create a hostile atmosphere against groups based on their protected characteristics, all organisations are under a duty under Equality law to monitor social media activity that can be attributed to them, including but not limited to employees and office holders. This can also include diffuse networks, where it is unclear how closely connected to the party these groups are. The very loose definition of party membership and official party supporter makes it even more difficult to decide where this duty stops.

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<sup>18</sup> For this and similar findings for Twitter see J. Mulhall and P. Hermansson, 'A smear campaign? Left-wing antisemitism on social media', in N. Lowles, ed., *State of Hate 2019: People vs The Elite?*, pp. 92–94;

<sup>19</sup> My emphasis added



Furthermore, as we saw in the discussion of the definition of antisemitism, it is often not sufficient to evaluate individual posts. To know if a given post or its retweeting raises issues under equality legislation, it may be necessary to get a complete picture of the activities of the poster. Criticism of Israel *can* be antisemitic *if* the criticism singles out Israel and applies double standards, but this we know only if we also know what opinions the poster expressed about other countries. The EHRC’s approach to “mere liking and retweeting” generalises this further – to determine if a tweet is racist or otherwise discriminatory *might* require to have a full profile of the person retweeting it. It is therefore not enough for an employer to simply look for “red flags” that could be identified by keywords, they may have to monitor and curate potentially all online activity of their staff, including perfectly harmless and legitimate activity.

The ECHR does not discuss the data protection implications of its suggestions. The question then arises if the requests by the ECHR give employers a lawful basis for data processing under Art 6.1(c) GDPR. The Equality Act on which the ECHR’s powers are based does not create an explicit duty for such monitoring. Rather, this is its interpretation and implementation by the ECHR, which as we saw above operates independently from government and Parliament. The recommendations and findings of the ECHR can carry sanctions – but then again these are typically the result of a violation of an agreed-upon course of action between the ECHR and an employer or organisation, so that the data controller is here often co-creator of the legal norms they then would rely on for processing.

The values that the ECHR and the Equality Act protect are also values enshrined in the Charter of Fundamental Rights of the European Union, in particular Articles 1, human dignity, and the prohibition of discrimination in Art 21. Relevant is also Art 31, and the prohibition of discrimination at the workplace. We remember that the ECHR investigation was triggered by Labour members and employees. The issue was *not* what policies Labour espouses externally, the political opinions of its leaders or what positions it campaigns for. Rather, the question for the ECHR was if the way in which Labour applied its own internal policies created a hostile and discriminatory working environment for its Jewish members. The values the ECHR aims to protect are of equal rank to the privacy rights in Art 7 and 8, which means a careful balancing between these competing values would be needed. There is however no indication that such an analysis has taken place, let alone by a democratically legitimated body and the ECHR clearly considers data protection concerns outwith its remit.

The situation becomes even more complex when we consider the impact on Freedom of Speech. Again, there is no attempt by the ECHR in its report to discuss whether the suggested policy changes and recommended disciplinary sanctions raise free speech issues. Nonetheless, it would be a mistake to frame their ruling as a simple conflict between free speech and dignity in equality. Rather, we see here also a different conception of free speech emerging, and it is here where despite all the misgivings regarding the privacy implication of the ECHR policy, it makes an important contribution to the legal debate.

If we reduce freedom of speech to the right to shout at the top of one’s voices, only the loudest will ever be heard. This brings us back to the paradoxes of free speech from the beginning of this paper. If we want a diversity of voices on the market place of ideas, sometimes it can become necessary to tell some people to be quiet for a while. There is strong empirical evidence and legitimate political concern that the aggressive environment of social media can lead to disengagement of those who already suffer

systemic disadvantages.<sup>20</sup> The ECHR approach *can* from this perspective, also be seen as free speech-enhancing.<sup>21</sup>

What makes the ECHR approach conceptually interesting though is the “unit of analysis” that it uses. Instead of an “atomistic” approach that tries to classify individual speech events (a cartoon say) by individual speakers, it looks holistically at the cumulative effect of speech on the recipients.

Knieper and Tinnefield too warn e.g. against the “Erregungs wellen der Shitstorms”. For these waves, like every tsunami, it is characteristic that the single droplet so to speak is quite harmless or even benign, it is only their cumulative effect that can be dangerous. This is not a new regulatory problem for the Internet. Legal responses to Denial of Service attacks initially faced the same issue. Every individual “request” was harmless or even invited by the target, which made it difficult to capture what the criminal act was, something that in the UK was only remedied in Police and Criminal Justice Act 2006.<sup>22</sup>

In a similar vein, we can think of this type of Internet mobbing as the speech-based equivalent of a DoS – it overloads the cognitive capacity of the recipient and silences them. The strength of the Internet always was that it can combine myriads of minor contributions that cost the individual little, to achieve cumulatively significant outcomes (e.g. Wikipedia). This also allowed new forms of political action. As we saw, Corbyn was able to create a movement of people who had individually only very limited stakes in the Labour party, but who nonetheless together enabled its takeover. But this approach carried in it the seed of its own destruction, as the amorphous ad-hoc coalition proved difficult to control also for Corbyn.

The political and legal discourse surrounding workplace equality has created a conceptual toolbox that is better suited to capture the harm that can emerge from the interaction of multiple, potentially harmless or less harmful, events. Concepts such as “hostile work environment” from US law<sup>23</sup> are examples that also inform the ECHR approach, and with that also sociological concepts as “microaggression”, the cumulative “death by a thousand cuts” where the individual cut needs not even be hostile in intent.<sup>24</sup> While these concepts predate the online world, it is the ability of the Internet to aggregate contributions that gives it added urgency – the law, after all, will have to care about trifles.

While the underlying regulatory concern has therefore merit, we have seen in the application to a political party also significant dangers, through the surveillance structures that its enforcement could necessitate. The narrow statutory remit that the EHRC has been given and the way its members are appointed creates inevitably blind spots in their analysis, and prevents a comprehensive balancing of competing rights and interests.

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<sup>20</sup> See e.g. Helsper, EJ, Reisdorf, BC (2017) The emergence of a ‘digital underclass’ in Great Britain and Sweden: changing reasons for digital exclusion. *New Media and Society* 19(8): 1253–1270 or Jane, E (2018) Gendered cyberhate: a new digital divide? In: Ragnedda, M, Muschert, GW (eds) *Theorizing Digital Divides*. Oxon: Routledge, pp. 158–198.

<sup>21</sup> So also recently Citron, D. K. (2019). *Restricting Speech to Protect It*. In Brison S.J. and Gelber, K *Free Speech in the Digital Age*. Oxford OUP

<sup>22</sup> Worthy, J., & Fanning, M. (2007). Denial-of-Service: Plugging the legal loopholes?. *Computer Law & Security Review*, 23(2), 194-198.

<sup>23</sup> See e.g. Epstein, D. (1995). Can a dumb ass woman achieve equality in the workplace-Running the gauntlet of hostile environment harassing speech. *Geo. LJ*, 84, 399. Very critical esp. on the “cumulative” effect Volokh, E. (1996). What Speech Does Hostile Work Environment Harassment Law Restrict. *Geo. LJ*, 85, 627 For a UK-US comparison see Gilani, S.R.S., Cavico, F.J. & Mujtaba, B.G. (2014) *Harassment at the Workplace: A Practical Review of the Laws in the United Kingdom and the United States of America*. *Public Organiz Rev* 14, 1–18

<sup>24</sup> Torino, G. C., et al. (2018). *Microaggression theory: Influence and implications*. Hoboken, NJ: Wiley.

We encountered in this paper in various ways the problem of cumulative data analysis. From the way in which the media was able to combine, rightly or wrongly, individually innocuous utterances and actions by Corbyn over the years into a “antisemitism narrative”, to the cumulative attacks on politicians online that individually are legitimate criticism, yet cumulatively can “shout down” or intimidate MPs,<sup>25</sup> to the cumulative effect of antisemitic tropes being sent and resented between Labour activists and supporting networks.

How can society and the law respond to this? An interesting analysis comes from a paper by Gidley and collaborators.<sup>26</sup> They argue that the debate was misframed in a crucial way by asking if individual party members *are* racists. While there are undoubtedly antisemites in the Labour party, as in all other UK parties, this ontologizing profiling of people creates more noise than light. Rather, the problem was the ready availability of old, poisonous antisemitic tropes that were all too easily leveraged on individual political issues, shared and distributed.

This was empirically validated by a study by Daniel Staetsky. It showed not only that the UK remains a country with low level of antisemitism, which furthermore is more or less equally distributed across political parties, religion, age and gender. Indeed, Labour has a lower rate of overtly antisemitic members than the Conservative party. However, some groups, including the political left, have a high number of members who believe in, endorse and amplify at least one antisemitic trope or stereotype. This, in turn means for the individual Jewish member of the party that there is a high probability that they will be persistently encountering antisemitic attitudes: “In day-to-day life, the frequency of Jewish people’s encounters with antisemitism is determined not necessarily by the small minority of hard-core racists but rather by much more widely diffused elements of attitudes that Jews commonly consider or suspect to be antisemitic”. It is again this cumulative effect that is resulting in real and reasonable fear of communities.

We discussed briefly above the hostility between traditional media and the online groups supporting Corbyn. We saw how this hostility was partly grounded in fact, including biased reporting about antisemitism allegations. This in turn however led to the (re)emergence of a particularly toxic and nasty antisemitic trope within the Corbyn support, the old conspiracy theory of Jewish domination of the press. This then got widely shared as commentary on the UK press through tweets and retweets, re-enforcing in turn the media narrative of antisemitism in the party and ultimately the finding against Corbyn from the ECHR for insufficiently policing this activity.

But if the problem is therefore antisemitic tropes, rather than necessarily antisemitic party members, then maybe the right response is not one of monitoring individuals and their speech with a view to punish them, as the EHRC ultimately requires, but to monitor for these tropes to develop appropriate counter-speech, which can be done to a significant extent without profiling individuals or accumulating their personally identifiable data.<sup>27</sup> This however would also require a much more systematic and productive interaction between EHRC and the Information Commissioners Office, and also a more explicit legal environment, which also may have to accept that political parties in the modern world are different from mere clubs, their contribution to democracy both more substantial and more precarious than that.

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<sup>25</sup> Ward, S., & McLoughlin, L. (2020). Turds, traitors and tossers: the abuse of UK MPs via Twitter. *The Journal of Legislative Studies*, 26(1), 47-73

<sup>26</sup> Gidley, B., McGeever, B., & Feldman, D. (2020). Labour and Antisemitism: a crisis misunderstood. *The Political Quarterly*, 91(2), 413-421.

<sup>27</sup> The EPSRC funded project „Cumulative revelation of personal data, EP/R033889/1 that supported work on this paper also aims to develop suitable tools