EXPLORING NARRATIVES ABOUT 'CANCEL CULTURE' IN UK EDUCATIONAL/EMPLOYMENT SETTINGS UNDER THE ECHR

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ABSTRACT

Some advocates of free speech are currently arguing that universities and other organisations are far too prompt to accept curbs on expression or expressive acts in relation to issues such as transgender rights, racism, feminism, religious extremism. Such curbs tend to be aimed at offence-avoidance; as a result such advocates argue that debate on these and cognate issues is in some instances being silenced. But other commentators oppose that view, arguing that merely allowing the airing of all sorts of views offensive to some facilitates intolerance and opposes equal dignity. Against the background of such ongoing debates on the concept of so-called 'cancel culture', affecting some institutions, especially universities, this piece will interrogate various restrictions on expression that some view as linked to that concept. This article will then place such restrictions within the ECHR framework by considering the balance to be struck between freedom of expression as protected under Article 10 ECHR on the one hand, and the interest of minority and/or marginalised groups not to be confronted with opinions or view-point-based behaviour that may denigrate them on the other. The article seeks to come to some conclusions as to ways to achieve that balance, taking account of the standards set by relevant ECHR jurisprudence. It will ask fundamentally whether or how far the concept of curbing lawful but arguably harmful expression is compatible with those standards.

1. INTRODUCTION

This article sets out to scrutinise closely conflicting narratives about so-called 'cancel culture' in the UK in educational and employment settings, especially in the campus context. The contested idea that a person can be 'cancelled', their views excluded or expunged from public platforms or from an employment context, has polarised debate. Certain advocates of free speech are currently arguing that educational organisations, in particular universities, and some employers, have allowed so-called 'cancel culture' to stifle free expression.[1] It has been argued that some institutions are far too prompt to accept curbs on expression or expressive acts in relation to issues such as transgender rights, racism, feminism, religious extremism. Such curbs tend to be aimed at offence-avoidance; as a result some free speech advocates are arguing that debate on these and cognate issues is in some instances being silenced by an illiberal left that refuses to allow for space in which to hear divergent points of view, opposing its orthodoxy.[2] For example, Dominic Raab, Justice Secretary, recently wrote that the new proposed British Bill of Rights would provide far greater protection for free speech, and oppose 'cancel culture' and 'wokery'.[3] But other voices oppose that view, criticising the very use of the term 'cancel culture' as disingenuous, and arguing that merely allowing the airing of all sorts of views offensive to some, sometimes by powerful public figures with ready access to public platforms, facilitates intolerance, intimidates or silences minorities and opposes equal dignity.[4]

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[1] See the attack on 'cancel culture' from Noam Chomsky: PARADOX, 'Noam Chomsky warns against 'cancel culture' establishing itself in the United States' (04.02.2021), available at https://paradoxpolitics.com/2021/02/noam-chomsky-cancel-culture-harpers-letter/, last accessed 29.03.22. See further: I. DUNT, 'Safe space or free speech? The crisis around debate at UK universities', *the Guardian*, (06.03.2015), available at www.theguardian.com/education/2015/feb/06/safe-space-or-free-speech-crisis-debate-uk-universities, last accessed 15.03.22; B. O'NEILL, 'Students are the new masters – and the result is campus tyranny', *The Spectator*, (26.08.2017), available at https://archive.ph/kGv1d, last accessed 29.03.2022; and, in the US context, J. A. CABRANES, 'For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University', (2017) 35 *Yale L. & Pol'y Rev.*, p. 345. See also the LEGATUM INSTITUTE, 'Is Academic Freedom Under Threat?', 2022, available at https://li.com/reports/is-academic-freedom-under-threat/, last accessed 29.03.2022.

[2] See: A. DERSHOWITZ, *Cancel Culture*, Hot Books, New York 2020. A. Doyle finds: "The 'culture wars', although often dismissed by commentators as a manufactured phenomenon, [cause]...the principle of free speech [to be] casually disregarded for the sake of what is perceived to be a higher social priority... a new identity-based conceptualisation of 'social justice'" (A. DOYLE, *Free Speech and Why it Matters*, Constable, London 2021, p. 2).

[3] D. BARRETT, 'Free speech to get legal supremacy, says Dominic Raab as he unveils plan to stop democratic debate being 'whittled away by wokery' in major victory over cancel culture', *Daily Mail*, (25.03.2022), available at www.dailymail.co.uk/news/article-10653643/Free-speech-legal-supremacy-Dominic-Raab-unveils-plan-stop-democratic-debate.html, last accessed 29.03.2022.

[4] See e.g.: H. A. HELLYER, 'When it comes to cancel culture the right-wing has the advantage', *the National News*, 30.03.2022, available at www.thenationalnews.com/opinion/comment/when-it-comes-to-cancel-culture-the-right-wing-has-the-advantage-1.1194664, last accessed 29.03.2022.

This article will focus in particular on universities, but they are far from being the only bodies that have featured in writings on 'cancel culture'. Universities are required, pursuant to a range of duties, to support critical thinking and plural debate on moral, religious and political issues. Article 10 of the European Convention on Human Rights (ECHR)[5] jurisprudence, applicable to universities, state sector schools and other public authorities under sections 6 and 2 Human Rights Act (HRA), can readily be found to promote such debate, although that jurisprudence as specifically applying to such educational institutions is relatively undeveloped, in striking contrast to the emphasis placed on school-based free speech in US case-law.[6] The position of private bodies, including colleges or schools, is more problematic, since they appear in effect to be HRA-free zones, but private colleges and schools, in common with state schools, are expected to adhere to certain free speech demands in so far as they are reflected in duties imposed by Ofsted or a recognised independent inspectorate.[7] But at the same time public and private bodies also have duties, arising from legal demands, sometimes reflected in codes of practice, to promote non-discrimination, and to safeguard persons, including pupils or students, from intimidation or harassment.[8]

Against the background of such potentially conflicting duties and of ongoing debates on the concept of so-called 'cancel culture', affecting some institutions, especially universities, this piece will interrogate restrictions on expression/expressive acts that have been viewed as linked to that concept, including the creation of employment detriment, and those created by recent student- or academic-led efforts, including via 'no-platforming', or the creation of 'safe spaces' in universities. So it will begin by examining some instances in which individuals were banned from speaking at UK universities, or other institutions, or reportedly faced campaigns to silence them, or encountered employment detriment due to their views, or had to abandon talks due to heckling or other disruption. It will proceed, secondly, to consider duties of a range of bodies to foster equality and ensure non-discrimination in various contexts. It will then, thirdly, place curbs on speech, including on campus speech, in context by juxtaposing them with the various free speech duties of institutions, including UK universities – current and future. Clearly, duties to uphold free expression are constitutional ones, applicable to the state/state bodies. But they could also apply to private bodies via specific statutory duties, as will be the case in relation to the 'tech' companies under the Online Safety Bill when it becomes law. Or if cases involving such bodies come to court, the court itself as a public authority[9] could find a violation of Article 10.

Fourthly, the article will proceed to place the restrictions considered within the ECHR framework by considering the balance to be struck between freedom of expression/freedom to manifest religion or belief as protected under Articles 10 and 9 ECHR[10] on the one hand, and the interests of minority and/or marginalised groups in avoiding confrontations with opinions/expressive actions that may denigrate them, or appear to do so, on the other (relevant under Article 14).[11] In order to do so, it will then examine the relevant ECHR jurisprudence, domestically and at Strasbourg, and, fifthly (in section 6), consider the implications of such jurisprudence for instances of 'cancel culture' from section 2. Finally, it will come to some conclusions as to ways to achieve a balance between the two interests, taking account of the standards set by relevant ECHR jurisprudence. It will consider fundamentally whether or how far the concept of curbing lawful but arguably harmful expression is compatible with ECHR values.

2. REPORTED/ALLEGED INSTANCES OF 'CANCEL CULTURE'

Below, the term 'cancel culture' will be deployed for convenience, although it is accepted that the term is controversial, imprecise and often used disingenuously; it will be taken to refer to punishing people who break the rules by saying the wrong thing by ostracising them – in effect, cancelling them. So below it will be used to

[5] Article 10(1) provides: '[e]veryone has the right to freedom of expression… to receive and impart information and ideas without interference by public authority', subject to paragraph 2, discussed below. It is acknowledged, but beyond the scope of this article, that the extent of the protection for speech maintained under Article 10 ECHR at Strasbourg can clearly be criticized.

[6] See e.g.: *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Bethel School District v Fraser* 478 U.S. 675 (1986).

[7] See DEPARTMENT FOR EDUCATION, 'Promoting fundamental British values as part of SMSC in schools', available at https://www.gov.uk/government/publications/promoting-fundamental-british-values-through-smsc, last accessed 29.03.2022, and also OFSTED, 'Non-association independent school inspection handbook', 2019, available at https://www.gov.uk/government/collections/education-inspection-framework, last accessed 29.03.2022. See also the INDEPENDENT SCHOOLS INSPECTORATE, 'Inspection Framework', 2018, available at https://www.isi.net/site/downloads/1.1%20Handbook%20Inspection%20Framework%202018-09.pdf, last accessed 29.030.2022.

[8] See e.g. section 149 of the Equality Act; Education (Independent School Standards) Regulations 2014 (SI 2014/3283) Sch.1 para.5(b),(c),(d). Even where no such specific duty appears to arise, some members of educational institutions may take the view that certain viewpoints are too exclusionary or too offensive to be heard.

[9] Under section 6 HRA.

[10] Article 9 provides a right to freedom of thought, conscience, and religion. That includes the freedom to change a religion or belief, and to manifest a religion or belief in worship, teaching, practice and observance, subject under Article 9(2) to certain restrictions (legitimate aims) that are 'prescribed by law' and 'necessary in a democratic society'.

[11] For the wording of Article 14, see below at 3.2.

refer to instances in which lawful (or arguably lawful) speech, or the expression of views via action, has apparently led to employment or educational detriment, or to situations, including protests, whereby anticipated or actual speech is abandoned, curbed or in other ways limited. It will be taken to cover such detriment arising due to provisions with legal status, but also due to Codes of Practice or policy guidelines in various bodies, intended to ensure inclusivity, equality and dignity. It will be accepted as encompassing the term 'no platforming' which has been used to cover a range of actions leading to creating restraints on external speakers or barring them completely. That term has been used in the media to cover decisions to withdraw invitations from speakers due to their views, to disinvite speakers due to pressure from persons who oppose the speaker's views,[12] or to impose onerous restrictions on speakers. It has been used, for example, to cover National Union of Students' (NUS) decisions, or those of individual student societies, to ban external speakers/groups from speaking at universities,[13] or to refuse to share a platform with them. The term 'cancel culture' could also cover 'safe space' policies that typically seek to insulate students from emotional harms caused by speech which might be considered offensive, to create space where students feel comfortable in expressing certain views that relate to questions of personal identity. Persons, regardless of whichever race, gender, sexual orientation, religion, they choose to identify with are thus offered a tolerant environment in which to express/explore that identity; those whose speech indicates intolerance should therefore, on this view, be excluded from the environment in question.[14]

2.1 'NO-PLATFORMING' OR MINIMIZING/DISRUPTING SPEECH: EXAMPLES

The NUS's 'No Platform' policy, for example, is intended to secure a 'safe environment' for members by excluding the speech of supporters of certain far-right and Islamic groups from campus. This long-standing policy, operational since 1974, means that currently NUS officers will not share a platform with certain groups known to hold racist or fascist views;[15] in effect that means that they are generally excluded from NUS campus events.[16] Individual decisions to ban particular individuals or groups on a list agreed by the National Conference every year are made by each student union across the country on a majority vote.[17]

One version of enforcing 'safe spaces' arises when persons opposed to a speaker's views seek to silence him or her during or just before a talk.[18] For example, Amber Rudd, a former Home Secretary, was due to speak at the UN Women Oxford UK society at Oxford University in 2020. But half an hour before the event, her invitation

[12] Toby Young, for example, finds that 'no-platformings are quite rare, that doesn't mean they aren't a serious problem': T. YOUNG, 'Why we support university 'free speech' bill', 14.06.2021, available at https://www.politics.co.uk/comment/2021/06/14/why-we-support-university-free-speech-bill/, last accessed 29.03.2022.

[13] For example, there were no visits by the Israeli ambassador or Israeli diplomats to SOAS between 2005-2017 after its students' union became the first in the country to support the Palestinian Boycott, Divestment and Sanctions (BDS) campaign. In 2017, however, the Israeli ambassador spoke at SOAS when the SOAS director Valerie Amos allowed the event to go ahead despite calls for a boycott from a number of student societies: see E. HEINZE, 'Israel, no-platforming – and why there's no such thing as "narrow exceptions" to campus free speech', *The Conversation*, 30.04.2017, available at https://theconversation.com/israel-no-platforming-and-why-theres-no-such-thing-as-narrow-exceptions-to-campus-free-speech-76907, last accessed 29.03.2022.

[14] For example, the University of East Anglia students' union cancelled an appearance by UKIP candidate Steve Emmens who was due to speak at an event organised by the university's Political, Social and International Studies (PSI) society after a petition was raised against it on the basis of ensuring that safe spaces for students were maintained, leading to fears that it might be in breach of the union's 'Equal Opportunities Policy': see BBC, 'UEA's student event cancelled over UKIP invite', 28.11.2014, available at www.bbc.co.uk/news/uk-england-norfolk-30245209, last accessed 29.03.2022. As a further example, in March 2015 Maryam Namazie, a critic of Islamism, claimed that she had to withdraw from a speaking event organised at Trinity College, Dublin after college security said that it would be 'antagonising' to Muslims and tried to place restrictions on attendees: see A. MCMAHON, 'Activist claims Trinity speech on apostasy and Islam cancelled', *The Irish Times*, 22.03.2015, available at https://www.irishtimes.com/news/politics/activist-claims-trinity-speech-on-apostasy-and-islam-cancelled-1.2149050, last accessed 29.03.2022.

[15] NUS, 'No Platform Policy', available at https://www.nusconnect.org.uk/nus-uk/how-we-work/articles-and-rules, last accessed 29.03.2022. The groups include: Al-Muhajiroun; British National Party (BNP); English Defence League (EDL); Hizb-ut-Tahir; Muslim Public Affairs Committee (MPAC) and National Action. Al-Muhajiroun was proscribed in 2010, National Action in 2016, so it would in any event be a criminal offence under section 12(2)(c) Terrorism Act 2000 to arrange or help to arrange a meeting allowing their members to speak.

[16] The NUS states: 'NUS has been effective in ensuring that racist, fascist and anti-semitic organisations have been silenced in the student movement, both nationally and within students' unions': NUS, 'No Platform Policies: A Guide for Student Unions', 2011, available at www.yourstudentsunion.com/pageassets/more/key_documents/policies_and_procedures/No_Plaform_Policy-2011.pdf, last accessed 29.03.2022.

[17] For example, Kent student union imposes a 'No Platform' policy barring 'any individual who is known to hold racist or fascist views from distributing any written or recorded material in the union which expresses those views [these include] a member of racist or fascist organisations such as the BNP, Combat 18, Hizbut-Tahrir, MPAC UK, or National Front'. For an example of the application of the policy, see KENTONLINE, 'University of Kent bans extremist Islamic preacher Haitham al-Haddad from giving talk on sharia law', 16.03.2015, www.kentonline.co.uk/canterbury/news/haitham-al-haddad-33512/, last accessed 29.03.2022.

[18] The Joint Committee on Human Rights gives the example of disruption at University College London and King's College London in 2016 where anti-Israeli protestors disrupted events organised by the Friends of Israel societies: 'Freedom of Speech in Universities', 4th Report of Session 2017-19, 27.03.2018, para. 44, available at https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589.pdf, last accessed 29.03.2022.

was rescinded after a vote of the society's committee based on her alleged involvement in the Windrush scandal.[19] Jenni Murray, a BBC broadcaster, withdrew from a speaking event at Oxford University in 2018 due to a 'No Platform' campaign against her; the protesters had accused her of transphobia because, in 2017, she had written an article in *The Sunday Times* which had argued that 'it takes more than a sex change and make-up' for someone to be able to 'lay claim to womanhood'.[20] As regards the latter situation Bristol Students Union, for example, passed a motion in 2018 to 'Prevent Future Trans-Exclusionary Radical Feminist (TERF) groups from holding events at the university'.[21] The ban was to bar from campus speakers who would argue that identifying as a woman is not the same as being born a woman.[22] Similarly, Selina Todd, a history professor at Oxford University, had her invitation to appear at the Oxford International Women's Festival withdrawn due to pressure from trans-activists since she was involved with 'Woman's Place UK', an organisation campaigning for the protection of women's 'birth-gender-based rights'.[23] Jo Phoenix, a criminology professor, was due to give a lecture at Essex University about the potential harms of putting trans women in women's prisons. Staff and students attacked her as a transphobe and the talk was cancelled, Essex University citing security reasons for the cancellation.[24] A talk about diversity Professor Kathleen Stock was to give at the University of East Anglia was cancelled in 2020 after the university feared that it would offend 'the views of members of the transgender community'; UEA cited security concerns, after activists threatened to protest at the event.[25]

A further example arose when a petition, signed by over 3,000 persons, demanded that Germaine Greer be de-invited from giving a lecture at Cardiff University on women in political and social life; in the end it did not, however, prevent her from delivering her lecture. She had previously argued that post-operative transgender males were not females. The organizer of the petition said that Greer had 'demonstrated misogynistic views towards trans-women,[26] including continually misgendering trans-women and denying the existence of transphobia altogether'.[27] Individual Student Unions reject speakers on a range of bases;[28] a wide range of examples was given in the Joint Committee on Human Rights' Report 2018 of student unions placing barriers in the way of talks organized by student societies, especially those organized by Secular, Atheist or Humanist societies, on the basis that religious groups might be offended. Talks putting forward pro-life viewpoints, or those deemed transphobic, also attracted opposition.[29]

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[19] See J. GRIERSON, 'Amber Rudd hits out at "rude" Oxford students after talk cancelled', *the Guardian*, 06.03.20, available at www.theguardian.com/politics/2020/mar/06/amber-rudd-hits-out-at-rude-oxford-students-after-talk-cancelled, last accessed 29.03.2022.

[20] See BBC, 'Jenni Murray pulls out of Oxford talk amid trans row', 08.11.2018, available at www.bbc.co.uk/news/uk-england-oxfordshire-46139085, last accessed 29.03.2022.

[21] See JCHR (2018), 'Freedom of Speech in Universities', *supra* note 18, para. 59.

[22] See C. PARKER, 'Bristol University students vote to ban "transphobic" feminists', *The Times*, 02.03.2018, available at www.thetimes.co.uk/article/bristol-university-students-ban-transphobic-feminists-73d0pmrx7, last accessed 29.03.2022.

[23] She had previously been given protection by the university after she received threats online: see BBC, 'Oxford University professor condemns exclusion from event', 04.03.2022, available at https://www.bbc.co.uk/news/uk-england-oxfordshire-51737206, last accessed 29.03.2022.

[24] See S. GRIFFITHS, 'The Culture of Fear on campus is real', *The Times*, 21.05.2021, available at https://www.thetimes.co.uk/article/there-is-a-culture-of-fear-in-universities-say-criminologist-jo-phoenix-and-lawyer-rosa-freedman-cancelled-for-transphobia-c2b6zv98j, last accessed 29.03.2022.

[25] M. ANDO, 'UEA cancels seminar by feminist speaker to 'respect transgender community', 20.01.2020, available at https://thetab.com/uk/norwich/2020/01/20/uea-cancels-seminar-by-feminist-speaker-to-respect-transgender-community-33377, last accessed 29.03.2022.

[26] S. MORRIS, 'Germaine Greer gives university lecture despite campaign to silence her', *the Guardian*, 08.11.2015, available at https://www.theguardian.com/books/2015/nov/18/transgender-activists-protest-germaine-greer-lecture-cardiff-university, last accessed 29.03.2022.

[27] A somewhat similar example arose when Goldsmiths College, University of London cancelled the booking of comedian Kate Smurthwaite after members of the feminist society organized a picket of her performance. They objected to her stance on sex workers since Smurthwaite was known for her support of the Nordic regulatory approach, finding that Smurthwaite was 'whorephobic', and the comedian was informed that sex workers, who were included in the safe spaces policy, might be hurt by what she might say: K. MCVEIGH, 'Goldsmiths cancels free speech show by comedian Kate Smurthwaite', 02.02.2015, available at https://www.theguardian.com/culture/2015/feb/02/goldsmiths-comedian-kate-smurthwaite-free-speech-show-feminist-campaigners, last accessed 29.03.2022. See also e.g. E. REDDEN, '"Nietzsche Club" Banned in British University', *InsideHighered*, 06.06.2014, available at https://www.insidehighered.com/quicktakes/2014/06/06/%E2%80%98nietzsche-club%E2%80%99-banned-british-university, last accessed 29.03.2022, referring to a ban imposed at UCL after the club posted a poster stating 'Equality is a false god'; the UCL student union claimed that the Nieztsche Society threatened the safety of the UCL student body.

[28] Spiked's rankings of universities in 2015 in terms of allowing free expression on campus found that it is not usually university managements that are behind censorship on campus: only 9.5 per cent were found to impose censorship. In contrast, it was found that 51 per cent of student unions have actively censored certain types of speech or instituted bans: J. GURNEY, 'Free speech rankings over half of universities have banned or censored ideas', available at, https://www.telegraph.co.uk/education/universityeducation/12105101/Free-speech-rankings-over-half-of-universities-have-banned-or-censored-ideas.html, last accessed 29.03.2022. See further: S. PERFECT, 'Freedom of Expression in universities', St George's House and SOAS, 2016, paras. 4.1 and 4.2, available at https://www.stgeorgeshouse.org/wp-content/uploads/2017/03/Freedom-of-Speech-in-Universities-Report.pdf, last accessed 29.03.2022.

[29] See JCHR (2018), 'Freedom of Speech in Universities', *supra* note 18, paras. 56-59.

Disruption of speaking events can also mean that they are minimised. For example, in 2007 the Oxford Union debating society president approached Holocaust denier David Irving, BNP chairman Nick Griffin and the President of Belarussia, Alexander Lukashenko, to speak at a forthcoming debate.[30] Fifty protesters broke into the debating chamber, delaying the event from starting; the security operation allowed the event to proceed, but with a minimised audience. In January 2012 the Atheist, Humanist, and Secularist Society organised a talk at Queen Mary College, abandoned after a man burst in and began filming attendees, threatening to kill them if they insulted Mohammed.[31]

2.2 *CREATING EMPLOYMENT/EDUCATIONAL DETRIMENT*

A number of varied examples can be given, some of which led to court action (below), in which the expression of adverse views in relation to a minority, whether via actions or words, led to employment/educational detriment. In some instances, but not all, the detriment could be justified in ECHR terms, as discussed below. For example, Ngole, a very devout Christian, was enrolled in a social work course at Sheffield University, which involved requiring him to sign a professional code of conduct. In 2015 he posted a series of comments to Facebook showing strong disapproval of homosexual acts, including a number of Biblical quotations.[32] A fellow student reported him to the university; as a result, after disciplinary proceedings, he was expelled from his social-work course on the basis that he had breached the code, which included ensuring that persons would have confidence in his profession. Once he was expelled he clearly could not qualify for social work. The Court of Appeal later overturned the decision (below),[33] but that did not oblige the university to reinstate Ngole. The case was similar to that of Israel Folau, who was dismissed as a member of Australia's rugby team after he posted a Biblical comment online condemning homosexuality.[34]

A number of further examples from the employment context can be given. For example, Ms Forstater did not have her contract renewed at the think tank Centre for Global Development in 2019, after she posted a series of tweets questioning government plans to allow people to declare their own gender (the plans were later dropped) on the basis that she considered that gender at birth was immutable. She took her case to an employment tribunal which found that her beliefs were not worthy of respect in a democratic society as transphobic, but the EAT later disagreed.[35] It found that the original tribunal had been wrong not to find that the claimant's views amounted to a genuine and important philosophical belief which was protected by the Equality Act 2010.[36] A teacher in Batley was suspended from his school for a period after showing pictures of the Charlie Hebdo cartoons to a class, although he assumed they could be shown as part of a scheme of work on blasphemy.[37] A police officer, Lee Scott, was dismissed in 2021 due to racist and homophobic comments he had posted to social media in the wake of George Floyd's death.[38] Sir Tim Hunt, a Royal Society Fellow, and Honorary Fellow at UCL, made what he described as jocular comments in 2015 at a conference: 'Let me tell you about my trouble with girls…three things happen when they are in the lab. You fall in love with them, they fall in love with you and when you criticise them, they cry.' Due to the resulting outcry he was then reportedly forced to resign from UCL and the European Research Council; he insisted that the University did not inquire into his side of the story and that the remarks had led to the end of his career.[39]

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[30] See M. TAYLOR, 'BNP leader and Holocaust denier invited to Oxford Union', *the Guardian*, 12.10.2007, available at https://www.theguardian.com/uk/2007/oct/12/race.students, last accessed 29.03.2022.
[31] The speaker was Anne-Marie Waters: see HUMANISTS UK, 'Talk at Queen Mary cancelled after threats of violence', 17.01.2012, available at https://humanists.uk/2012/01/17/news-966/, last accessed 29.03.2022.
[32] He referred to homosexuality as an 'abomination' and also said that '[h]omosexuality is a sin, no matter how you want to dress it up'; see *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127, para.10.
[33] Ibid.
[34] BBC, 'Israel Folau sacked by Rugby Australia for social media post', 19.05.2022, available at https://www.bbc.co.uk/sport/rugby-union/48306223, last accessed 29.03.2022.
[35] *Maya Forstarter v CGD and others* [2021] UKEAT/0105/20/JOJ.
[36] The case was remitted to the lower tribunal to determine whether she had been discriminated against due to her gender critical beliefs which would have the same status as, for example, a belief in veganism.
[37] See R. ADAMS and M. WOLFE-ROBINSON, 'Batley teacher suspended after showing Charlie Hebdo image can return', *the Guardian*, 26.05.2021, available at https://www.theguardian.com/education/2021/may/26/batley-teacher-suspended-after-showing-charlie-hebdo-image-can-return, last accessed 29.03.2022. In fact he has not returned to work one year later due to fears for his safety: C. TEALE, 'A year on from Prophet Muhammad Batley school row and teacher still in hiding as family "at risk"', 25.03.2023, available at https://www.examinerlive.co.uk/news/west-yorkshire-news/year-prophet-muhammad-batley-school-23493076, last accessed 29.03.2022.
[38] See: S. DOUGHTY, 'Northumbria Police officer sacked over racist and homophobic Facebook comments after George Floyd death', 29.09.2021, available at https://www.chroniclelive.co.uk/news/north-east-news/northumbria-police-officer-dismissed-iopc-21708673, last accessed 29.03.2022.
[39] See R. MCKIE, 'Shamed Nobel laureate Tim Hunt "ruined by rush to judgment after stupid remarks"', *the Guardian*, 13.06.2015, available at https://www.theguardian.com/science/2015/jun/13/tim-hunt-forced-to-resign, last accessed 29.03.2022.

In a somewhat similar situation, Rosa Freedman, a Law Professor at Reading University, who considers that men cannot transition into women, was the subject of attacks by activists after she raised concerns about proposed reforms to the Gender Recognition Act, intended to make it easier for individuals to change gender.[40] She received a range of threats; it was also alleged that she was refused a job interview at Essex University due to concerns about protests,[41] and was 'disinvited' from speaking on a panel on anti-Semitism there in 2020 to mark Holocaust Memorial Week after allegations of transphobia. A similar situation arose in relation to Professor Kathleen Stock, who has also been accused of transphobia; Stock, another gender-critical feminist, has previously argued that trans-women should not be allowed in women's prisons; she has also raised questions about gender-neutral lavatories. She resigned from her post at Sussex University after a number of protests against her; she claimed that the lack of support from her colleagues and the unions had led her to resign.[42]

3. FOSTERING EQUALITY IN EDUCATIONAL AND EMPLOYMENT CONTEXTS

3.1 THE EQUALITY ACT 2010

Discrimination against a person on a protected ground – age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex or sexual orientation – is prohibited conduct under chapter 2 of the Equality Act 2010 in the contexts covered by the Act. Student unions, for example, have duties under the Act as associations, and at times as employers and service providers; therefore they must not unlawfully discriminate against students, employees, customers, members or guests. So, for example, dismissing a person on grounds of their expression of religious belief could amount to unlawful discrimination.[43] A range of examples in which religious beliefs were manifested at work in various ways, resulting in employment detriment, are considered below. The Public Sector Equality duty under the Act further means that public sector institutions are obliged to have due regard to the need to foster good relations between persons who share a relevant protected characteristic and those who do not,[44] which would include good relations between heterosexuals and homosexuals, or between religious adherents and atheists. That latter function includes the need to eliminate discrimination, harassment, victimisation.[45]

The equality duty also requires educational and other institutions to consider whether its policies contribute to providing equality of opportunity for all and to tackling discrimination. As a result, equality concerns have been cited, for example, as a basis for banning UKIP speakers[46] or potentially homophobic ones from campus.[47] Certain Islamic preachers/speakers have reportedly aided in creating an intimidating atmosphere on some campuses,

[40] Reportedly, Freedman was concerned that this move could harm women's rights.
[41] She was accused of being a 'Nazi' who 'should be raped', and her office door was urinated on. See J. BINDEL, 'Stonewall and the silencing of feminist voices at universities', 19.05.2021, available at https://www.spectator.co.uk/article/stonewall-and-the-silencing-of-feminist-voices-at-universities, last accessed 29.03.2022.
[42] See R. ADAMS, 'Kathleen Stock says she quit university post over "medieval" ostracism"', *the Guardian*, 03.11.2021, available at https://www.theguardian.com/education/2021/nov/03/kathleen-stock-says-she-quit-university-post-over-medieval-ostracism, last accessed 29.03.2022.
[43] See *Mrs Onuoha v Croydon Health Services NHS Trust* (2022) 2300516/2019 (she was demoted due to wearing a cross at work, opposing the dress code).
[44] Section 149 of the Equality Act. See the guidance on this duty: GOVERNMENT EQUALITIES OFFICE and EQUALITIES AND HUMAN RIGHTS COMMISSION, 'Equality Act 2010: guidance', 2013, available at https://www.gov.uk/guidance/equality-act-2010-guidance#public-sector-equality-duty, last accessed 29.03.2022.
[45] Ibid.
[46] BBC, 'UEA's student event cancelled over UKIP invite', 28.11.14, available at http://www.bbc.co.uk/news/uk-england-norfolk-30245209, last accessed 29.03.2022.
[47] For example, a number of Islamic preachers have been banned by the University of East London (UEL): Murtaza Khan and Uthman Lateef were due to speak at a dinner predicted to be gender-segregated held in the University by the Islamic society, but were barred due to their views on homosexuality which had included stating that homosexuality should be punished by death (PETER TATCHELL FOUNDATION, 'Islamist extremists blocked at East London University', 29.04.2014, available at http://www.petertatchellfoundation.org/islamist-extremists-blocked-at-east-london-university/, last accessed 29.03.2022. Imran ibn Mansur had also been due to speak at a gender-segregated UEL Islamic Society event, but was barred by the University. Mansur has stated that homosexuality is 'obscene, filthy, shameless' (see D. CHURCHILL, 'London university bans preacher who calls homosexuality a "filthy" disease', *Evening Standard*, 24.11.14), available at https://www.standard.co.uk/news/london/london-university-bans-preacher-who-calls-homosexuality-a-filthy-disease-9879579.html, last accessed 29.03.2022.

affecting in particular LGBT students,[48] thus arguably infringing the equality duty.[49] A range of institutions, as considered below, also have Codes and Policy guidelines, going beyond the Equality duty, albeit linked to it, intended to ensure equality and dignity for all in educational/employment settings.

3.2 ARTICLE 14 ECHR

The duties arising under the 2010 Act overlap with the non-discrimination provisions of Article 14 ECHR under section 6 Human Rights Act 1998, which impose positive and negative obligations on public authorities, including, for example, state universities, not student unions,[50] so long as the instance falls within the ambit of another Article (in this context Articles 11, 10, 9).[51] Article 14 covers a wider range of groups than does the Duty and discrimination law generally, of relevance in this context, because it covers: 'discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. Article 14 only applies in the context of another Convention right and there is an implied exception based on the definition of 'discrimination': it occurs when a person is treated less favourably than another person in a similar situation on protected grounds, *but* this treatment can be objectively and reasonably justified.[52]

4. FREE SPEECH DUTIES AND CURBS ON SPEECH

No specific duty arises to promote freedom of expression in schools, similar to that specifically imposed on universities under the Education Act (no. 2) 1986, section 43.[53] But that freedom finds statutory protection under Article 10 ECHR due to section 6 HRA, which also applies to universities and other public authorities: Article 10 is therefore binding upon maintained and academy schools. Section 5 below accords extended consideration to the Article 10 jurisprudence, and that relating to other relevant guarantees, potentially relevant to 'cancel culture' incidents.

4.1 SPECIFIC STATUTORY DUTIES OF UNIVERSITIES AND STUDENT UNIONS RELATING TO FREE EXPRESSION

The Education Act (no 2) 1986 section 43(1) emphasises the significance of free speech in universities by imposing a legal obligation on those governing them to 'take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured' to staff, students and visiting speakers; the governing body must also promulgate a Code of Practice setting out procedures relating to speaking events.[54] But the high profile of universities as creating forums for the airing of controversial views also raises the likelihood that protests will occur in respect of visiting speakers,[55] with which the institutions are ill-equipped to deal, meaning that free expression may give way,[56] taking account in particular of the public order offences discussed below. The Codes

[48] For example, a Report published by the University of Westminster Student Union LGBT Society (UWSU LGBT) in 2014 investigated how safe LGBT students feel on campus after a number of concerns were reported. It noted that students stated that the situation had been exacerbated by the invitation of homophobic speakers to the university, such as Haitham Al-Haddad. The student union president admitted that the gay and transgender student communities on campus 'feel unsafe' due to the activities of some in the Islamic society: L. SHERRIFF, 'Extremist Students Consistently Given A Platform At Westminster while "Useless" SU Does Nothing', *Huffington Post*, 27.02.2015, available at http://www.huffingtonpost.co.uk/2015/02/27/extremist-students-consis_n_6767440.html, last accessed 29.03.2022. See also P. WALKER, 'Emwazi's University more scared of being Islamophobic than homophobic', *the Guardian*, 02.03.2015, available at https://www.theguardian.com/education/2015/mar/02/mohammed-emwazi-university-of-westminster-islamophobia-homophobia, last accessed 29.03.2022.

[49] The same can be said of allowing or imposing gender-segregated seating at some speaking events hosted by certain University Islamic societies, See R. SANDHANGI, 'Gender segregation: The truth about Muslim women "forced" to sit away from men', *The Telegraph*, 19.01.2016, available at https://www.telegraph.co.uk/women/life/gender-segregation-the-truth-about-muslim-women-forced-to-sit-aw/, last accessed 29.03.2022, a matter cited as a concern in 2016 by the JCHR: 'Counter Extremism - Second Report of Session 2016-17', HL Paper 39, HC 105, 2016, para. 61, available at https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/105/105.pdf, last accessed 29.03.2022.

[50] Given that universities are bound by the ECHR as public authorities under section 6 HRA.

[51] Article 10 could be engaged on the basis that the creation of an intimidatory atmosphere by some societies might tend to stifle the expression of certain groups on campus; see comment by the JCHR, 'Counter Extremism', *supra* note 49, para. 60.

[52] See e.g. for discussion of such justification *Steinfeld v Secretary of State for International Development* [2020] AC 1 (Supreme Court); *Steinfeld v Secretary of State for Education* [2017] 3 WLR 1237 (Court of Appeal).

[53] It creates a duty to take such 'steps as are reasonably practicable to ensure that freedom of speech within the law is secured for…visiting speakers'.

[54] Under section 43(3).

[55] It was confirmed that visiting speakers were covered under section 43 in *R v University of Liverpool, ex p Caesar-Gordon* [1990] 3 WLR 667. Various examples of protests having an adverse impact on speaking events are given by the JCHR (2018), 'Freedom of Speech in Universities', *supra* note 18, paras. 43-54.

[56] See, for example, L. TICKLE, 'Free speech? Not at four in five UK universities', *the Guardian*, 02.02.2015, available at https://www.theguardian.com/education/2015/feb/02/free-speech-universities-spiked-ban-sombreros, last accessed 29.03.2022; she cites the visit to speak at Essex University by Israel's deputy ambassador on 20.2.13; it was met by noisy protests meaning that it had to be abandoned.

of Practice promulgated under section 43 by universities answer to various legal demands, including public order ones; they typically provide that notice must be given to designated authorities in the university by the organisers of expression-based events on campus, and permission sought. The university will then decide whether to impose conditions on the gathering.[57] But, reflecting the Equality duty, discussed above, the Codes tend also to allow bans on speaking if the event is likely to create an 'environment in which people will experience, or could reasonably fear, harassment, intimidation, verbal abuse or violence, particularly on protected grounds,[58] including gender.[59]

Under section 43(4) only such steps should be taken as are 'reasonably practicable', including where appropriate 'the initiation of disciplinary measures', to secure compliance with the section 43 duty. The courts have shown some disinclination to interfere with universities' decisions on the meaning of 'reasonably practicable' where speech is curbed as a result. In *R v University of Liverpool, ex p Caesar-Gordon*[60] the term was considered in finding that Universities could ban meetings by political groups or inflammatory speakers if there were good reasons to fear disruption on an institution's premises. The High Court also more recently declined to interfere with the University of Southampton's decision to withdraw permission for a planned conference on 'International Law and the State of Israel' due to the risk of disorder.[61] These examples support the contention that the free speech duties of universities may readily be found to give way to other considerations which bear relation, not to the value of the speech in question, but to the propensity of certain forms of controversial content to attract protests. As mentioned, section 43 does not directly cover student unions, but student organisers of speaking events must comply with the requirements of the section 43 Codes, and under section 43(8) premises they occupy are covered. However, when the Higher Education (Freedom of Speech) Bill becomes law (see below), Student Unions will be expressly covered.

The perception that universities are stifling free speech by allowing the no-platforming of speakers has given rise to the expression of concerns, especially in the right-wing press, for some time and led to the inception of the Education Act (no 2) 1986 section 43(1), considered above. More recently, such concerns have been expressed as to the impact on campus free speech of student 'no-platforming' policies; they influenced the proposal recently to fine universities that fail to uphold free speech[62] and to a significant Report on campus speech from the Joint Committee on Human Rights (JCHR) in 2018.[63] The Office for Students (OfS) has been operative since April 2018,[64] and was established partly in order to address the perception of censorship on campus.[65] Currently, this concern[66] influenced the government, leading to the introduction of the Higher Education (Freedom of Speech) Bill 2021-22, at present before Parliament, which will amend section 43, creating a somewhat stronger duty. It imposes a duty to take steps to secure freedom of speech (clauses 1 and 3), and provides for civil proceedings to enforce the duty, which can be brought against the governing body and, importantly, student unions (clause 4).

4.2 THE PREVENT DUTY

[57] For example, such curbs are present under the Code of Practice (in paras 3-5) promulgated under section 43 by Cambridge University: 'Code of Practice on Meetings and Public Gatherings on University Premises', 2020, available at https://www.governanceandcompliance.admin.cam.ac.uk/files/code_of_practice_on_meetings_and_public_gatherings_on_university_premises.pdf, last accessed 29.03.2022.

[58] That would include their ethnicity, race, nationality, religion or belief, sexual orientation, gender identity, disability or age.

[59] See e.g. UNIVERSITY OF HULL, 'University Regulation on Freedom of Speech', 27.11.2014, available at https://www.hull.ac.uk/editor-assets/docs/code-of-practice-on-freedom-of-speech.pdf, last accessed 29.03.2022. See further: EQUALITY AND HUMAN RIGHTS COMMISSION, 'Freedom of expression: a guide for higher education providers and students' unions in England and Wales', 2019, p. 18, available at https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf, last accessed 29.03.2020.

[60] [1990] 3 WLR 667.

[61] *R (on the application of Ben-Dor and others) v University of Southampton* [2016] EWHC 953 (Admin). Permission was withdrawn when the university conducted a risk assessment (based partly on police evidence) and concluded that the event carried a significant threat of disorder. It had received considerable correspondence from a range of pro-Israel and pro-Palestinian groups who intended to protest at or near the conference, some of which conveyed threats of violence against the university, and media interest had made it more likely that further external groups would attend. Significantly, the university did not rule out the possibility of a similar conference occurring in the future. The Court deferred to the judgment of the university after being unable to find fault with the risk assessment. It was also found that it could take account of the terrorist attacks in Paris in 2015 and the general state of national alert as external factors because they could have led to disorder or violence on campus: *ibid*, at [76].

[62] Sam Gyimah MP HC Debs (2017-18) Vol.363, col.695: 'The Office for Students can investigate, promote culture and, in extremis, fine universities that are not taking seriously their responsibilities on free speech. That is a huge development.' The power to fine universities is accorded to OfS by the Higher Education and Research Act 2017.

[63] JCHR (2018), 'Freedom of Speech in Universities', *supra* note 18.

[64] It took over a number of HEFCE's regulatory functions for the University sector functions after HEFCE was abolished on 01.04.2018.

[65] Freedom of speech was included in a standard list of 'public interest principles' which would form part of the 'public interest governance condition' applying to the 'Approved' categories of universities, so it has a remit to protect free speech on campus.

[66] See e.g. K. FARROW, 'Liberals are no-platforming each other! Boulton rages at left-wingers in free speech row', *The Express*, 16.02.2021, available at https://www.express.co.uk/news/politics/1398525/Sky-News-Adam-Boulton-liberal-transgender-no-platforming-left-wing-row-latest-vn, last accessed 29.03.2022.

Part 5 of the Counter-Terrorism and Security Act 2015 (CTSA) in effect placed expression-related aspects of the government's existing Prevent strategy[67] on a statutory basis for the first time.[68] The Part 5 provisions are intended to address the risk of persons being drawn into terrorism (section 26) by placing duties on certain authorities, including schools and universities, to prevent the risk arising by, *inter alia*, placing curbs on 'extremist expression'.[69] In Universities the duty includes disallowing or monitoring the expression of visiting speakers on the basis that it could aid in the radicalisation of students.[70] If the Secretary of State was satisfied that a university had not discharged the section 26 duty she could give it directions to enforce the performance of the duty under section 30. In publicly-funded FEIs governance could be reviewed, and ultimately dissolution of the institution could occur.[71]

4.3 CRIMINALISING SPEECH

A range of provisions potentially criminalise forms of 'extreme' speech in the UK, including provisions as to inciting terrorism[72] or as to hate speech,[73] but only the stirring up of hatred in respect of race, religion and sexual orientation is criminalised; there are at present no equivalent offences related to disability or transgender identity.[74] However, the provisions under Part I Public Order Act 1985 (POA), sections 4A and 5, as amended, which can arise in racially or religiously aggravated forms,[75] are or could be of most relevance to certain of the speech situations discussed here, often in relation to *anticipated* public order problems. Section 5 criminalises use of threatening or abusive words[76] and the display of threatening or abusive visible representations,[77] within the hearing or sight of a person 'likely to be caused harassment, alarm or distress thereby'. The offence under section 4A is similar, as are the defences,[78] except that it could cover some merely offensive expression in or adjacent to, for example, educational institutions due to its inclusion of the term 'insulting',[79] but in that case the harassment, alarm or distress must actually have been caused to a person,[80] and intentionally so.[81] The offences could in particular potentially cover visiting speakers, or anticipated protests concerning them, arising on-campus, including inside educational meeting places.[82] The provisions specifically allowing regulation or banning of

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[67] See HOME OFFICE, 'Countering International Terrorism', Cm 6888, 2006, available at https://www.gov.uk/government/publications/countering-international-terrorism-the-united-kingdoms-strategy, last accessed 29.03.2022; HOME OFFICE, 'Pursue, Prevent, Protect, Prepare: the UK's Strategy for Countering International Terrorism', Cm 7547, 2009, available at https://www.gov.uk/government/publications/the-united-kingdoms-strategy-for-countering-international-terrorism, last accessed 29.03.2022. The strategy is outlined in a policy paper CABINET OFFICE, '2010-2015 Government policy: counter-terrorism', 08.05.2015, available at https://www.gov.uk/government/publications/2010-to-2015-government-policy-counter-terrorism/2010-to-2015-government-policy-counter-terrorism, last accessed 29.03.2022.

[68] The duty is applicable to England, Wales and Scotland, and took effect in HEIs on 21 September 2015. For discussion, see: J. BLACKBOURN and C. WALKER who provided an early commentary on CTSA which covered Part 5, in 2016: 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015', (2016) 79(5) *MLR*, p. 840. See also: S. GREER and L. BELL, 'Counter-terrorist law in British universities: a review of the "*Prevent"* debate' [2018] *Public Law* pp. 84-105; I. CRAM and H. FENWICK, 'Protecting Free Speech and Academic Freedom in Universities' (2018) 81(5) *MLR*, p. 825.

[69] See CTSA sections 26-33. See the accompanying Guidance for Higher Education Institutions: HOME OFFICE, 'The Revised Prevent Duty Guidance', 16.07.2015, available at https://www.gov.uk/government/publications/prevent-duty-guidance, last accessed 29.03.2022.

[70] *Ibid*.

[71] HOME OFFICE, 'Prevent Guidance for Further Education Institutions in England and Wales', 2015, para 30, available at https://www.gov.uk/government/publications/prevent-duty-guidance/prevent-duty-guidance-for-further-education-institutions-in-england-and-wales , last accessed 29.03.2022. In respect of non-publicly-funded institutions their contract could be terminated by the Skills Funding Agency.

[72] The Terrorism Act 2006, Part 1, as amended.

[73] Part 3 Public Order Act 1985, as amended.

[74] The Law Commission proposed in December 2021 that those two protected grounds should also be covered: LAW COMMISSION, 'Hate crime laws: final report', LC 402, 2021, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/12/Hate-crime-report-accessible.pdf, last accessed 29.03.2022. Note, in *R (on the application of Miller) v College of Policing* [2020] HRLR 10 the Court of Appeal found that College of Policing's guidance requiring forces to record incidents perceived to be 'motivated by a hostility or prejudice against a person' as 'non-crime hate incidents' – irrespective of any evidence of 'hate' – encourages conduct which violates Article 10 ECHR (the incident involved allegedly transphobic tweets).

[75] The Crime and Disorder Act 1998, section 31(1)(c). Under section 28 of the 1998 Act an offence will be racially or religiously aggravated if: (a) at the time of the offence (or shortly before or after), the offender demonstrates to the victim hostility based on the victim's membership (or presumed membership) of a racial or religious group, or (b) the offence is motivated wholly or partly by hostility towards members of a racial or religious group based on their membership (or presumed membership) of that group.

[76] A person is guilty of the offence only if he intends his words or behaviour to be (or is aware that they may be) threatening or abusive (section 6(4)).

[77] The word 'insulting' was removed from section 5 in 2014 by the Crime and Courts Act 2013, section 57, but not from section 4A.

[78] Under section 5 and section 4A the accused has a defence if it is proved that his conduct was reasonable.

[79] But CPS Guidance indicates that the terms 'insulting' and 'abusive' overlap: CPS, 'Public Order Offences incorporating the Charging Standard', 2019, available at http://www.cps.gov.uk/legal/p_to_r/public_order_offences/, last accessed 29.03.2022.

[80] The words etc can be targeted at one person but take effect on another.

[81] Under section 4A there must be intent to cause a person harassment, alarm or distress, and the verbal or written threats, abuse, or insults must cause that or 'another person harassment, alarm or distress'.

[82] The offences expressly do not apply to 'dwelling' places, which would cover e.g. student accommodation, but not seminar rooms etc.

processions and assemblies in POA sections 11-13,[83] are also viewed by universities as relevant to gatherings on campus.[84]

5. COMPETING DEMANDS UNDER THE ECHR GUARANTEES AND JURISPRUDENCE

5.1 INTRODUCTION

The relevant law and practice echoes the tension between those advocating the value of safe spaces and respect for minorities, compared to those advocating virtually untrammelled free expression. In order to provide a perspective as to the place of 'cancel culture' in relation in particular to Article 10 ECHR this article will proceed to consider the relevant ECHR guarantees and conflicts between them that could be in play if in any particular instance a conflict was thought to arise between free expression and protection of minority groups from offence and denigration. The other relevant guarantees, are, as indicated above, freedom to manifest religion and belief (Article 9) and of avoidance of discrimination on a range of grounds, including those of sexual orientation or gender reassignment (Article 14) in the context of another Convention right.

None of these guarantees is absolute; Articles 9 and 10 can be departed from inter alia on grounds of preserving public order or preventing crime, and to protect the rights of others if necessary to do so in a democratic society – so Article 10 can be departed from to protect the freedom to manifest religion under Article 9. Where freedom of *religious* expression is in question, as in the Ngole and Folau instances mentioned above, and in a number of instances at Strasbourg under both Articles 10 and 9 considered below, other exceptions, such as to further the protection of others from discrimination, could arise in relation to both guarantees. The values underlying free speech – supporting plurality, democratic participation, the search for truth, self-development[85] – are not only reflected in Article 10 ECHR jurisprudence, and common law free speech principle, but also in Protocol 1 Article 2 ECHR and in Article 22 of the UN Convention on the Rights of the Child. Discrimination on a number of grounds within the scope of the ECHR Articles would also be covered by the guarantee against discrimination under Article 14.

The so-called 'anti-abuse clause' under Article 17 disallows Convention protection to certain groups or individuals; it provides that there is no 'right to engage in any activity....aimed at the destruction or limitation of any of the [ECHR] rights and freedoms'.[86] Thus the Article could apply to the expression, based either on religious or secular beliefs, of intolerance against a minority group. In this context it could prevent reliance on the Article 9 or 10 guarantees in order to, for example, promulgate hate speech, furthering discrimination against such a group. Article 17 reflects an acceptance of limitations on speech where its impact undermines the consequentialist justifications for its own protection. The discussion below proceeds to consider the way that the Strasbourg Court balances the value it places on free speech and religious freedom with the demands of protecting minority groups denigrated by expression, including via expressive acts in the employment/contractual context.

5.2 STANCE OF THE STRASBOURG COURT UNDER ARTICLES 10 AND 17 – PROTECTING FREE EXPRESSION BUT AVOIDING DENIGRATION OF MINORITY GROUPS

The Strasbourg Court has fairly consistently refused to offer protection to speech attacking various minority

[83] The very broad common law doctrine of breach of the peace could also apply - which overlaps with these statutory provisions. If the assembly went ahead, the police officers on the ground would only be able to invoke the doctrine in relation to an apprehended breach of the peace if it was imminent: *Laporte v Commissioner of Police of the Metropolis* [2007] 2 WLR 46.

[84] See e.g. UNIVERSITY OF CAMBRIDGE, 'Code of practice issued under section 43 of the Education (No 2) Act 1986', p. 4, available at http://www.cam.ac.uk/system/files/code_of_practice_on_meetings_and_public_gatherings_on_university_premises.pdf, last accessed 29.03.2022.

[85] See further: F. SCHAUER, 'Free Speech in a World of Private Power', T. CAMPBELL, 'Rationales for Freedom of Communication', and E. BARENDT, 'Importing United States Free Speech Jurisprudence?', in T. CAMPBELL and W. SADURSKI (eds.), *Freedom of Communication*, Dartmouth Publishing, Aldershot 1994; I. LOVELAND, 'A Free Trade in Ideas—and Outcomes', and J. LAWS, 'Meiklejohn, the First Amendment and Free Speech in English Law', in I. LOVELAND (ed.), *Importing the First Amendment, Freedom of Expression in Britain, Europe and the USA*, Hart, Oxford 1998. See more generally H. FENWICK and G. PHILLIPSON, *Media Freedom under the Human Rights Act*, OUP, Oxford 2006, chapter 1 for an account of how free speech rationales and countervailing values play out under the ECHR.

[86] Article 17 provides: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

groups,[87] relying on Article 17[88] *or* on Article 10(2). It has found: '[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society…so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance…provided that any [restrictions]…imposed are proportionate to the legitimate aim pursued.'[89] As a result, in the ECHR jurisprudence, targeted or harmful expression, including hate speech – speech inciting hatred and/or expressing contempt for certain groups - can fairly readily be distinguished from merely offensive expression. That jurisprudence is based mainly on instances of offline expression, and the Strasbourg Court has yet to come fully to terms with the argument that *online* expression may create greater harm due to its propensity to reach a wide audience rapidly and to be shared many times between users. Where 'extremist' expression is at issue, it would potentially fall within the scope of Article 10(1) unless Article 17 applies since, as is well established, the term 'expression' covers all sorts of expression, including disturbing, or even discriminatory material.[90]

The argument is about to turn to instances that illustrate the general principles underpinning the operation of these Articles in relation to instances of 'cancel culture', relating them to a range of curbs on expression, including in relation to religiously-based attacks on homosexuals, or to arguments from some feminists offensive to trans-women. The Court has addressed legal responses to instances of homophobic expression under Article 10. For example, in *Molnar v Romania*[91] the Court considered a challenge to the applicant's conviction arising from the distribution of posters containing messages attacking various groups, including the homosexual minority (stating, for instance, 'Romania needs children, not homosexuals'). By reason of Article 17, the Court found that the applicant could not rely on Article 10 since his conduct was found to be incompatible with the aims underlying the ECHR of protection of human rights of minority groups.

Even if Article 17 is not deemed applicable, sanctions imposed in respect of speech attacking minorities may be found to be justified under Article 10(2). That occurred in *Vejdeland v Sweden*:[92] the applicants had distributed homophobic leaflets in a secondary school (ages 16-19), resulting in their convictions for 'agitation against a national or ethnic group'. According to the leaflets, homosexuality is 'a deviant sexual proclivity' that has 'a morally destructive effect on the substance of society'.[93] The applicants distributed the leaflets – they claimed - with the aim of starting a debate about the lack of objectivity of education in Swedish schools – to the effect that the schools were furthering a pro-gay agenda. Under the Swedish Penal code it is an offence to disseminate a statement or communication, threatening or expressing contempt for a group of persons on various grounds, including sexual orientation. The applicants were convicted on that basis and claimed a breach of Article 10 at the Strasbourg Court.

The Court agreed with the Swedish Supreme Court that even if the applicants' purpose could be seen as an acceptable one, regard had to be paid to the wording of the leaflets. The Court found that although the statements did not directly recommend individuals to commit hateful acts, they made serious and prejudicial allegations – which were somewhat similar to Scott's, Ngole's or Folau's posts about homosexuals on social media (above), although in those instances they were religiously motivated. The Court reiterated that incitement to hatred does not necessarily have to entail a call for an act of violence, or other criminal acts. It found that attacks on persons committed by insulting, holding up to ridicule, or slandering specific groups of the population, can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner.[94] The Court further stressed that discrimination based on sexual orientation was as serious as discrimination based on 'race, origin or colour'.[95] It found that the wording militated in favour of finding that the interference with the applicants' activities was justified, given the unacceptability of homophobic expression

[87] See: ECommHR, *Otto E.F.A. Remer v Germany*, no 25096/94, 06.09.1995; ECtHR, *Witzsch v Germany*, no 41448/98, 20.04.1999; ECtHR, *Garaudy v France*, no 65831/01, 24.06.2003. In ECtHR, *Pavel Ivanov v Russia*, no 35222/04, 20.02.2007 a speaker who had attacked Jews was found to be unable to rely on Article 10 since he fell within Article 17 – at para. 1. See also *M'Bala M'Bala v France*, no 25239/13, 10.11.2015, at para. 39 (discussed below).

[88] See EUROPEAN COURT OF HUMAN RIGHTS, 'Hate Speech', 2022, available at https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf, last accessed 29.03.2022. The role of Article 17 in a 'militant' defence of democracy is discussed by P. HARVEY, 'Militant Democracy and the European Court of Human Rights', [2004] *Eur L Rev*, p. 407.

[89] ECtHR, *Erbakan v Turkey*, no 59405/00, 06.07.2006, para. 56 (see also below).

[90] See ECtHR, *Ibragim Iragimov and others v Russia*, nos. 1413/08 and 28621/11, 28.08.2018; that material was contextualised by the theme of tolerance in the text in question – as discussed below. See further e.g.: ECtHR, *Handyside v UK*, no 5493/72, 07.12.1976; ECtHR, *VBK v Austria*, no 68354/01, 25.01.2007; ECtHR, *IA v Turkey*, no 42571/98, 13.09.2005, para. 28; *Gough v DPP* [2013] EWHC 3267; ECtHR, *Giniewski v France*, no 64016/00, 31.01.2006; ECtHR, *E.S. v Austria*, no 38450/12, 25.10.2018.

[91] No 16637/06, 23.10.2012.

[92] ECtHR, *Vejdeland v Sweden*, no 1813/07, 09.05.2012.

[93] Paragraph 54. The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" had tried to play down paedophilia.

[94] See *Féret v Belgium*, no. 15615/07, para. 73, 16 July 2009.

[95] ECtHR, *Vejdeland v Sweden*, *supra* note 92, para. 55.

in a democratic society.[96] That point did not appear to be confined to the school setting, although that setting may have had some influence.[97] The expression in question was not aimed at arousing hatred against homosexuals or advocating violence, but at expressing disrespect for the idea of equality between homosexuals and heterosexuals. So the Court found that it was acceptable to place sanctions on it, because it promoted discrimination on grounds of sexual orientation, and could have paved the way to hate speech and hate crimes on that basis. Those findings could also apply to transphobic expression; some recent findings of the Court in the transgender context indicate that it would be likely to take that stance, depending on the manner of the expression.[98]

A similar stance was taken in *Lilliendahl v Iceland*[99] in the context of seeking to improve education in relation to sexual orientation and gender identity matters in schools in a particular town. In response, the applicant left comments below an online article describing homosexuality as 'disgusting' and using very strong language to refer to sexual deviancy and to indicate that links exist between homosexuals and animal sexuality. As a result, the Supreme Court of Iceland convicted the applicant under Article 233(a) of the Penal Code on the basis that his comments had intentionally publicly mocked, defamed, denigrated or otherwise threatened a group of persons based on their sexual orientation. The Court made it clear that the applicant's right to freedom of expression under the Constitution of Iceland and the ECHR could be constrained by the need to protect the rights of others, which would include a homosexual person's right to respect for private life and to the equal enjoyment of rights, irrespective of sexual orientation. The applicant alleged a breach of Article 10 at Strasbourg. The Court reiterated that any exceptions to freedom of expression must be construed strictly,[100] but it also noted Iceland's obligations under international law to take appropriate measures to counter discrimination on the basis of gender identity or sexual orientation, including prohibiting hate speech. It found that the restriction was prescribed by law since Article 233(a) was sufficiently clear, and the interference was in pursuance of the legitimate aim of protecting the rights of others. The Court did not find that the homophobic hate speech in question arose in its 'gravest form', which would fall within the scope of Article 17, because it was 'not immediately clear that [the posted comments] aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention'.[101] Relying partly on *Vejedeland*, it delineated a second, 'less grave' category of hate speech which could be restricted by state parties in accordance with Article 10(2) within which the comments in question could fall.[102]

In considering the necessity of the interference with the applicant's right to freedom of expression the Court took account of the Icelandic courts' consideration of the competing interests and competing constitutional rights at issue, accepting the Supreme Court's findings, based, it determined, upon relevant and sufficient reasoning, that the applicant's comments were 'serious, severely hurtful and prejudicial'.[103] The interference was needed in order to protect the rights of those traditionally discriminated against, taking account of the nature and severity of the comments, and the wider context of the case. Further, the applicant's comments had not criticized the council's decision itself as to changes in schools, so the derogatory language was not part of the ongoing public discussion. The Court also found that the sanction of a fine of 800 EUR, rather than a possible two years' sentence of imprisonment, was proportionate to the aim pursued. The Court therefore upheld the Supreme Court's assessment, concluding that it had acted appropriately within its margin of appreciation, and unanimously declared the applicant's complaint under Article 10 to be manifestly ill-founded;[104] it also found no violation of Article 10.

The *Vejdeland* and *Lilliendahl* instances can be compared with the following ones which related to *religiously*-based expression attacking other groups. In *Belkacem v Belgium*[105] the applicant's claim at Strasbourg under Article 10 related to his criminal conviction arising from videos he had posted on YouTube in which he called on Muslims to overpower non-Muslims, and fight them. The Court found that such a general and vehement attack,

[96] *Ibid*., paras. 54-56.
[97] The point about attacking minority groups was made more explicit in the Concurring Opinion of Judges Judkivska and Villiger, who found: 'Hate speech is destructive for democratic society…since prejudicial messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups, and therefore it should not be protected,' *ibid*, para. 9.
[98] See ECtHR, *X and Y v Romania*, nos 2145/16 and 20607/16, 19.01.2021. The Court found that the Romanian national courts had 'presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma: either they had to undergo the surgery against their better judgement…or they had to forego recognition of their gender identity.' The Court said that Romania's stance had placed the pair in a situation of 'vulnerability, humiliation, and anxiety.'
[99] No. 29297/18. Judgment of 11 June 2020.
[100] It cited *Von Hannover v Germany* (no.2) [GC] ECHR [2012], no. 40660/08 and 60641/08 and *Bédat v Switzerland* [GC] ECHR [2016] no. 5692/08.
[101] Para. 26.
[102] The Court referred to a range of past decisions in which expression had been deemed to be hate speech although it did not call for violence or other criminal acts, including *Féret v. Belgium* ECHR [2009] no. 15615/07, in which it had found no violation of Article 10 when an applicant was convicted of publicly inciting discrimination or hatred by making racist comments, because they were made by a politician during a political campaign and had wide impact on the public.
[103] Para. 45.
[104] Para. 48.
[105] ECtHR, no 34367/14, 27.06.2017.

stirring up hatred and violence towards all non-Muslims was incompatible with the values of tolerance, social peace and non-discrimination promoted by the Convention – so Article 17 applied and therefore the applicant's Article 10 complaint was rejected as incompatible with the provisions of the Convention – in other words, it was found to be inadmissible.

That decision can be contrasted with the one in *Ibragim Ibragimov and Others v Russia*;[106] the applicants had published books concerning the Koran which were declared to be extremist literature, resulting in a ban under the Suppression of Extremism Act on their publication and distribution. The domestic court had noted that one of the books treated non-Muslims as inferior to Muslims.[107] The applicants claimed breaches of Articles 10 and 9 at Strasbourg due to the ban on the book. The Court found that Article 17 did not apply but noted that under Article 9 religious groups, which included those of faiths other than Islam, must tolerate denial of their religious beliefs or expression of doctrines hostile to their faith – to further harmony in pluralistic societies. It also emphasised that democratic societies might need to sanction expression which promoted or justified hatred based on religious intolerance. But in that instance it found that the impugned statements had not been shown to be capable of inciting violence, hatred or intolerance due to contextualisation. The author, it was found, belonged to moderate, mainstream Islam, the texts advocated tolerant relationships and cooperation between religions, and opposed any use of violence. They did not, it was found, insult, hold up to ridicule or slander non-Muslims.[108] So the Court proceeded to find a violation of Article 10 interpreted in the light of Article 9.

Similarly, in *Erkaban v Turkey*[109] during a local election campaign, the applicant gave a public speech. More than four years later criminal proceedings were brought against him for having incited the people to hatred or hostility through comments made in his 1994 speech about distinctions between religions, races and regions.[110] The Court re-emphasised the importance of fostering the equal dignity of all which might justify placing proportionate sanctions on expression.[111] In this instance, however, due to the importance of protecting political expression, especially that of a politician, and due to the harshness of the penalty, the demands of proportionality were not found to be satisfied. A breach of Article 10 was therefore found. A similar conclusion was reached in *Gunduz v Turkey*.[112]

In contrast, in *M'Bala M'Bala v France*,[113] the Court found that a French comedian's show was a demonstration of hatred, anti-Semitism and support for Holocaust denial. The Court considered that even if it was meant to be satirical it did not fall within the protection of Article 10, under Article 17.[114] The Article was also relied on to effect such an exclusionary approach in *Norwood v UK*[115] in relation to an expression of anti-Muslim sentiment.[116] The applicant, supporter of a far-right party, had displayed a poster 'Islam out of Britain' and a picture of the twin towers in flames. Inadmissibility was found to arise, although the expression was unlikely to inspire violence,[117] because it linked Muslims as a group with 'a grave act of terrorism….' and was incompatible with Convention values, 'notably, tolerance, social peace and non-discrimination'.[118] In contrast, in *Perinçek v Switzerland*,[119] the Strasbourg Court did not give the same protection to denial of the Armenian genocide as it had previously afforded to Holocaust denial. The Grand Chamber took a range of factors into account in finding a breach of Article 10 due to the conviction of the applicant for denial of Armenian genocide. The Court also analyzed whether other States parties criminalize the denial of historical events and found that eighteen did so – that was not a majority.[120] Despite a degree of consensus, the Court found that Switzerland 'stands at one end of the comparative spectrum'

[106] ECtHR, nos 1413/08 and 28621/11, 04.02.2019.
[107] The Risale-I Nur Collection, an exegesis on the Qur'an written by the well-known Turkish Muslim scholar Said Nursi in the first half of the 20th century. It described Muslims as 'the faithful' and 'the just', and everyone else as 'the dissolute'. The book also proclaimed that not to be a Muslim was an 'infinitely large crime': (ibid., para. 35).
[108] Nor did they amount to improper proselytism or seek to impose on everyone their religious symbols or conception of a society founded on religious precepts (*ibid*., paras. 116-123). There was no evidence that the books had caused inter-religious tensions or led to any harmful consequences, let alone violence, in Russia or elsewhere.
[109] ECtHR, no 59405/00, 06.07.2006. The speech was given in Bingöl in south-east Turkey.
[110] For example, he described all parties, except his own, as parties of the unjust, lovers of the infidel. No official recording of the speech was made.
[111] ECtHR, *Erbakan v Turkey*, *supra* note 103, para. 56.
[112] (2005) 41 EHRR 5.
[113] ECtHR, no 25239/13, 10.11.2015.
[114] *Ibid*., at para. 39.
[115] ECtHR, no 23131/03, 16.11.2004.
[116] *Ibid*., para. 111.
[117] *Ibid*., paras. 113-14.
[118] *Ibid*., para. 114.
[119] ECtHR, no 27510/08, 15.10.2015.
[120] Austria, Belgium, France, Germany, the Netherlands and Romania criminalise only the denial of the Holocaust and Nazi crimes, while Andorra, Cyprus, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Slovakia, Slovenia, and Switzerland criminally sanction the denial of any genocide.

as it criminalizes the denial of any genocide without 'the requirement that it be carried out in a manner likely to incite to violence or hatred.'[121] Further, a lesser sanction could have been imposed – a breach of Article 10 due to disproportionality was therefore found.[122]

5.3 INSTANCES OF 'CANCEL CULTURE' LEADING TO EMPLOYMENT/EDUCATIONAL DETRIMENT - UNDER THE ECHR

This article is about to turn to direct clashes between protecting homosexuals or other minority groups from targeted insult, and the freedom to manifest religious belief under Article 9, via expression or expressive actions arising from certain religious views. This issue has arisen, not in the context of denying speakers a platform, but in relation to educational/employment detriment arising due to such expression or action. Strasbourg and domestic jurisprudence in the employment law context covers in particular the situation in which a clash has arisen between guaranteeing freedom to manifest religious belief under Article 9 ECHR, and the protection of individuals from homophobic insult. Two key cases are *London Borough of Islington v Ladele*[123] and *McFarlane v Relate Avon Ltd*[124] which were later joined with two others and heard by the Strasbourg Court in *Eweida v United Kingdom.*[125] They have some parallels with the *Ngole* and Scott examples mentioned above, and with the issues raised in relation to Folau, but also, importantly, the latter group in question concerned instances of expression, rather than discriminatory *behaviour*.

Ladele concerned a marriage Registrar who held strong religious convictions that marriage is the union of one man and one woman.[126] Owing to the legal similarities between civil partnerships and marriage, Ladele felt unable to facilitate their formation directly, maintaining that same-sex civil partnerships are 'contrary to God's instructions'.[127] Her line-manager considered that she was in breach of Islington's 'Dignity for all' equality and diversity policy and the Council issued disciplinary proceedings against her.[128] The Court of Appeal agreed with the Employment Appeal Tribunal's finding that Ladele had not been either directly or indirectly discriminated against.[129] The facts of *McFarlane* were similar*;* he worked for Relate as a counsellor, advising couples whose relationship had deteriorated. McFarlane believed on religious grounds that homosexual activity is morally wrong, and he was later found by Relate to be unwilling to work with same-sex couples,[130] especially in relation to counselling on sexual matters. Relate dismissed McFarlane for failing to give an unequivocal commitment that he was prepared to give psycho-sexual therapeutic counselling to same-sex couples. The Employment Tribunal and Employment Appeal Tribunal both found that such dismissal did not constitute direct or indirect discrimination or unfair dismissal for the purposes of employment law.[131] In the conjoined challenge at the Strasbourg Court in *Eweida v UK*[132] both Ladele and McFarlane claimed *inter alia* a breach of Article 9 ECHR, whether read alone, as advanced by McFarlane, or in conjunction with Article 14, as advanced by both Ladele and McFarlane.

The Court began by asserting that freedom of thought, conscience and religion guaranteed by Article 9 is one of the 'foundations of a democratic society', which can be exercised in private or practised in community with others. Eweida had not been allowed to wear a cross at work by British Airways, but had not sought to evince discrimination against any minority group; a breach of the Article was therefore found.[133] In relation to *Ladele's*

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[121] ECtHR, *Perinçek v Switzerland*, *supra* note 119, para. 257.
[122] See also ECtHR, *Ibragim Iragimov and others v Russia*, nos 1413/08 and 28621/11, 28.08.2018, paras. 61-63: as discussed above, application of Article 17 was not accepted and a breach of Article 10 found since statements condemnatory of non-Muslims were put forward, but in a context of tolerance; see also *Perinçek v Switzerland*, *supra* note 119, para. 115.
[123] [2010] 1 WLR 955.
[124] [2010] EWCA Civ 880.
[125] ECtHR, nos 48420/10, 59842/10, 51671/10 and 36516/10, 27.05.2013.
[126] Prior to the introduction of same-sex marriage in England and Wales, a registration regime creating civil partnerships was introduced for same-sex couples in December 2005.
[127] Upon the commencement of the Civil Partnership Act, Islington Borough Council designated all existing Registrars as also Civil Partnership Registrars. Initially, Ladele made arrangements with colleagues so as to avoid conducting civil partnership ceremonies, but in March 2006 two homosexual Registrars complained.
[128] Ladele subsequently refused to accept a variation of her contract whereby she would conduct civil partnerships where no ceremony was involved. The case arose prior to the introduction of the Equality Act 2010. The Employment Tribunal found that Islington had both directly and indirectly discriminated against her and that she had been subject to harassment, but the Employment Appeal Tribunal subsequently set aside all of those findings: *London Borough of Islington v Ladele* [2010] 1 WLR 955.
[129] Similarly, it was found that the later Equality Act (Sexual Orientation) Regulations introduced in 2007 took precedence over any right a person might have by virtue of his or her religious beliefs to practise discrimination on the ground of sexual orientation. Furthermore, the Employment Equality (Religion or Belief) Regulations introduced in 2003 did not confer on her a right on religious grounds to refuse to have civil partnership duties assigned to her.
[130] Although he had apparently believed for a period that provision of counselling was not an endorsement of same-sex relationships.
[131] *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.
[132] ECtHR, *supra* note 125.
[133] The Court found that 'where there is no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to protect the first applicant's right to manifest her religion, in breach of the positive obligation under Article 9' (*ibid*., para. 93).

claim, the Strasbourg Court accepted that her religiously motivated refusal to officiate civil partnership ceremonies fell within the ambit of Article 9, and this finding paved the way for the applicability of Article 14. Once Article 14 was found to be engaged, the Court found that the relevant comparator in this case was a registrar with no religious objection to same-sex unions. It then had to determine whether Islington LBC's refusal to make an exception for her in light of her strongly held religious beliefs amounted to discrimination, so the Court proceeded to consider whether the policy pursued a legitimate aim and was proportionate to that aim. The Court found that the measure was motivated by the intention of Islington LBC to promote equal opportunities and to ensure that employees acted in a manner that did not discriminate against others: the aim pursued was legitimate and the policy was aimed at protecting the rights of others that are *also* guaranteed by the Convention. As for the question whether the means used to pursue this aim were proportionate, the Court acknowledged that the consequences for Ladele were serious as she ultimately lost her job.[134] Although discriminatory treatment can be justified under Article 14, it was found that where the difference was based on sexual orientation weighty reasons would be required to justify it. Even after conferring upon the UK a wide margin of appreciation owing to the evolving practice of states when protecting same-sex relationships, and bearing in mind that the national authorities were striking the balance between competing Convention rights, it was nevertheless determined that no breach of Article 14 read with 9 arose.

McFarlane primarily argued his case relying on Article 9 read alone. His refusal to counsel homosexual couples was found to fall within Article 9 as it was a manifestation of religious belief and thus it triggered the State's positive obligation to secure his rights. The Court had to determine whether the State had complied with its positive obligations and whether a fair balance had been struck between the competing interests at stake. In that balancing process, it was accepted, on the one hand, that loss of employment was a severe sanction, but on the other that McFarlane knew that Relate operated an Equal Opportunities Policy and had voluntarily enrolled on a postgraduate training programme in psychosexual counselling. Ultimately, the most important factor was that Relate had sought to implement a policy of providing a service without discrimination which was subject to a wide margin of appreciation. Consequently, the Court determined that there was no violation of Article 9 read alone or in conjunction with 14.

The contrasting facts in the Ngole instance led to the conclusion that a violation of Article 10 had arisen in *R (Ngole) v University of Sheffield*,[135] mentioned above; the Court of Appeal applied a number of Strasbourg decisions in considering the determination that Ngole's actions in posting Biblical comments on social media attacking homosexuals, had breached two requirements of the code of conduct, leading to his expulsion from the social work course. The Court found a breach of Article 10 on grounds of disproportionality: it found that the university had adopted a stance which amounted to imposing a blanket prohibition against Ngole, meaning that he could not voice his religious views on homosexuality in any public forum, on or offline.[136] The University should have made it clear that it was the manner and language in which he had expressed his views that had created the problem, and it could have given him advice as to a more appropriate means of expressing himself. For example, such a forum could have included a Facebook group with a privacy setting limiting the audience.[137] The Court noted that in *Vogt v Germany*[138] and *Wille v Liechtenstein*,[139] it had found that the interference with the Article 10 rights of the applicants was not justified, where there was no evidence that it had affected the work of the professional; those findings could be applied to the instant case.

6. IMPLICATIONS OF THESE CASES FOR INSTANCES OF 'CANCEL CULTURE'?

The jurisprudence in all these instances was attempting to distinguish between expression or expressive action that is offensive, controversial or shocking on the one hand, and expression targeting a particular minority or group, taking the form of strong denigration, on the other. It is demonstrating an acceptance that expression in the former category should be protected, but not necessarily expression in the latter, as falling outside the boundaries of acceptable criticism and failing to promote the equal dignity of all. Thus, sanctions applied to the applicant in *Belkacem* did not lead to a finding of a breach of Article 10: the expression was particularly robust since it incited

[134] It also noted that when she entered into her contract of employment she did not or was not required to waive her right to manifest her beliefs since the requirement to officiate on same-sex civil partnerships was introduced at a later date.
[135] [2019] EWCA Civ 1127.
[136] The Court said that the University's position was untenable since it meant that 'any expression of disapproval of same-sex relations (however mildly expressed) on a public social media or other platform which could be traced back to the person making it, was a breach of the professional guidelines': para. 5.
[137] The Court also found that if the university's position was accepted, that position would extend to all professionals covered by the relevant regulations, such as psychologists, affecting 'many Muslims, Hindus, Buddhists and members of other faiths with similar teachings. It considered that that stance would not cohere fully with the relevant code of conduct and guidelines': para. 127.
[138] ECtHR, no. 17851/91, 13.02.1991.
[139] ECtHR, no. 28396/95, 25.08.1995.

violence, so Article 17 applied; in *Vejdeland* in comparison Article 17 did not apply but nevertheless the sanctions were found to be justified since the expression was so denigratory as regards a minority.

6.1 EMPLOYMENT/EDUCATIONAL DETRIMENT UNDER ARTICLES 9 AND 10

If the Scott instance had arisen at Strasbourg the Court might not have been prepared to find that the sanction to which he was subjected had led to a breach of Article 10; the fact that he based the posts on the Bible would not have had some influence, despite the provisions of Article 9, under Article 17. The right to manifest religious belief via speech under Articles 9 and 10 is not likely to be taken to include relying on tolerance for religious freedom in order to deny tolerance entirely to another minority – as in *Belkacem.* Nor is the Court prepared to accept expression strongly denigratory of a minority, as in *Vejdeland*. The expression used by Ngole or Folau was in one respect more harmful since it was promulgated via social media, so it reached a far larger audience than did the speech at issue in *Vejdeland.* The Folau situation was, further, not fully analogous in terms of the value of the speech with that in *Ibragim Ibragimov* because Folau did *not* contextualise his attack on homosexuals by reference to the general promotion of harmony and tolerance between groups with differing views in society. But the sanction imposed on Ngole meant that he had no outlet for his speech at all; it therefore failed the Article 10(2) proportionality test. That might be less likely in the case of Hunt, who had other outlets for speech, although the sanction imposed was apparently of an equally severe nature.

The ECHR jurisprudence (*Ngole*) has also been found to distinguish between instances of manifestations of belief linked to education or employment and such manifestations leading to a direct adverse impact on members of the minority group. The *Ladele* and *McFarlane* situations therefore differ from those that arose in the Ngole, Scott or Folau instances. Ngole was expelled from his course, while Scott and Folau were dismissed, due in each case to manifesting their beliefs. Ladele and McFarlane were also dismissed for manifesting their own beliefs, *but* through refusals to perform a particular service rather than manifesting those beliefs via speech – therefore the possibility of finding a breach of Article 10 did *not* arise in those instances. So in relation to employment sanctions imposed due to the expression of religious beliefs (and, probably, other deeply held beliefs under Article 9) that do *not* have a direct impact on the provision of services, a breach of Article 10 would be found, unless Article 17 applied. In *McFarlane* and *Ladele* the most important factor to be taken into account was that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination.[140] An analogy with instances arising similar to those in the Ngole or Folau situations would arise if the employers' actions in dismissing the persons in question were intended to accord with an express policy of disallowing contempt to be expressed publicly (for example, on social media) for a minority group, including homosexuals. That was the case in those situations, according to the Codes of conduct already mentioned, of which Folau and Ngole were aware. Nevertheless, as indicated above, those considerations would not appear to be likely to be found to justify the interference with Article 10 rights in each instance, as found by the Court of Appeal in *Ngole*. Given those findings, it would also appear that employment/educational detriment, such as may also have arisen in relation to Stock and Freedman, would be found to have led to a breach of Article 10 if the instances had come to court. The fact that in relation to allegations of transphobia the expression had arisen due to deeply held *non*-religious beliefs would *not* appear necessarily to be pivotal, taking the wording of Article 9 into account.

As regards Article 9, if homophobic or transphobic expression arising from religious or other belief that could be causally linked to employment/educational detriment came to the attention of the Strasbourg Court, it would consider that a positive obligation could arise, placed on the state, to secure the Article 9 rights at issue – the question therefore would be whether it had breached that obligation. It is apparent from the Strasbourg rulings in *Ladele* and *McFarlane* that the Court provided acknowledgement of the fact that the body in question was strongly committed to promoting equal opportunities, as required by the domestic legislation. Ladele's or McFarlane's rights to manifest religious belief were overridden by a need to avoid discrimination. The discrimination on grounds of sexual orientation at issue in relation to Ngole, Scott or Folau was of a different nature since obviously they had not refused a service on that ground. However, the bodies in question had policies in place regarding the promotion of equality,[141] of especial significance in relation to Scott, since he would have had opportunities, as a police officer, to evince racism or homophobia. Therefore it is arguable that if the situations arising in the Folau or Scott instances (and, probably in relation to Freedman and Stock if employment was been linked to deeply held

[140] Also McFarlane had known that it would not be possible to enrol on the postgraduate training programme if he intended to discriminate against homosexual couples.

[141] In Folau's case, the employer in question, Rugby Australia, appeared to have evinced a determination not to bring the sport into disrepute by homophobic speech expressed by players, given that its Code of Practice promoted equality. The Code applied to Folau under clause 1.3, required that everyone is to be treated equally regardless of inter alia sexual orientation; on the facts that clause would appear to cover promulgating speech expressing hostility to a group on grounds of sexual orientation.

critical feminist beliefs) were considered under the ECHR jurisprudence, the employment detriment would not have been found to lead to a breach of Article 9, either read alone or with 14.[142]

6.2 CURBING SPEAKING EVENTS UNDER ARTICLE 10

A small number of the instances of 'cancel culture' mentioned in section 2 in relation to speaking events would potentially fall within Article 17, if amounting to hate speech, depending on the content of the speech (*Norwood, M'bala*); that might have been the case in respect of David Irving and Lee Scott. Other instances mentioned in Section 2 above, including expression of far-right or Islamic speakers attacking minorities in denigrating terms, without providing context, contrasting with *Ibragim Iragimov and others v Russia*, could fall within Article 10, but sanctions, including bans on speaking, could be justified under Article 10(2). In terms of comparisons between the cases related to either *secular* or religiously-based anti-minority beliefs, it is arguable that the Court is somewhat more sympathetic to expression that has a religious basis. For example, despite attacks on non-Muslims as a group in the impugned book in *Ibragim Ibragimov and Others v Russia*, a breach of Article 10 *was* found due to the conviction of the applicants for publishing it, on the ground that the book did not advocate violence against the group in question, but – significantly – neither did the speech at issue in *Vejdeland* based on secular homophobic ideas. So religiously-based freedom of expression, or freedom to manifest homophobic religious beliefs via expressive action, may have a more privileged place under the ECHR than expression promoting homophobia (and probably transphobia), but based on secular beliefs. Even if that is the case, it does not necessarily follow that the Strasbourg Court would consider that no-platforming a person due to manifestations of religious belief discriminating against minorities would be found to be in breach of the relevant ECHR Articles – either Articles 10 or 9, read alone or with 14 since denying a platform on one occasion might be found to accord with the demands of proportionality. Further, the aims underlying Article 14 would tend to lead to the conclusion that even if a person could claim an engagement of Article 14 (in other words, a non-religious person in the same situation would not have been subject to the same sanction because they would not have manifested their beliefs in the impugned fashion), that would not necessarily persuade the Court that a breach of the relevant Articles had occurred, especially as other outlets for the expression/manifestation would arise – in contrast to the facts of *Ngole*).

6.3 STRASBOURG'S GENERAL STANCE

In light of *Vejdeland, Molnar, Ladele* and *McFarlane*, it must be asked, where the expression in question is not aimed at arousing hatred against persons on grounds of race, gender, gender identification or sexual orientation, or advocating violence, but at expressing disrespect (either via speech or via refusal of services) for the idea of equality between majority and minority groups, is it acceptable under Articles 9 or 10 to place sanctions on it, because it promotes discrimination on grounds protected under Article 14, and could eventually pave the way to hate speech and hate crimes on that basis? The answer appears to be in the affirmative as far as the UK domestic courts, and to an extent the Strasbourg Court, are concerned, *if* the anti-minority ideas in question either have an impact on the practice of the individual in question or they spread, incite, promote or justify intolerance of a minority group.

But a number of the instances mentioned above, including those in relation to Rudd, Phoenix, Stock, the Batley teacher, would fall within Article 10(1), but sanctions imposed on them, and condoned by the institution in question, might, as in *Ibragim Ibragimov*, be unlikely to be found to be justified under Article 10(2), if the speech in question provided context and had some public interest value. But the outcome would depend on the severity and extent of the sanctions in terms of preventing expression, on grounds of proportionality. In such instances, clearly, no court action might arise, but nevertheless, those protesting against the expression in question on grounds of furthering equality and curbing intolerance in accordance with the values underlying Article 14 would view themselves as justified in seeking to curb or bar it, while other voices would call for the expression to proceed untrammelled, in accordance with Article 10 values. The ideological divide between the two factions increasingly appears to be impassable, especially in the digital era.

7. CONCLUSIONS

This article has explored the contradictions between furthering the values of equality and dignity as opposed to those underlying free speech. The stance that an institution could take in the situation where a person is accused of transphobia, homophobia, sexism, racism, in terms of seeking some reconciliation between the two sides, can,

[142] In Folau's case the comparator would presumably have been a rugby player who did not hold the view that he should proselytise against acceptance of homosexuality in society.

it is argued, be summed up as seeking more speech, not no speech. Such a stance would be in accordance with the values underlying Article 10, which the Court of Appeal sought to rely on in *Ngole*. In other words, the Court considered that the university should have sought to indicate to Ngole that there were some forums he could utilise to promulgate his speech, but that he should have been guided to understand that its promulgation was hurtful to minority groups, and needed further contextualisation. The university, the Court found, had *assumed* his intransigence, rather than seeking forms of compromise and mediation.

A somewhat similar model is provided – perhaps surprisingly – by the Prevent Guidance to universities, fleshing out the duty under section 26 CTSA, that the Secretary of State has issued under section 29(1),[143] covering the possibility of restricting a range of forms of expression, including that of visiting speakers.[144] Under the Guidance universities need to ensure, in relation to 'at risk' speakers that a speaker *opposed* to their views also speaks at the same event, if so doing could fully mitigate the risk created.[145] But the Court of Appeal in the case of *Butt*,[146] modified that Guidance, placing greater emphasis on free speech. The Guidance, paragraph 11 states that a university must be 'entirely convinced' that the risk of an external speaker drawing individuals into terrorism must be 'fully mitigated', or the event should not proceed. That requirement was found by the Court to be too unbalanced; so it was likely to mislead a university as to its duty to balance the Guidance based on the Prevent duty with its section 31(2)(a) CTSA duty (to uphold free speech): a decision-maker who had 'regard' to it (in a literal sense) in selecting external speakers would be likely, it was considered, to disregard the free speech duty.[147]

Relying on *Ngole* and the Guidance, combined with the findings in *Butt* as a model, then, by analogy, institutions faced with intimations of 'cancel culture', such as those instanced above in relation to cancelling talks (where seeking to stir up hatred or advocating violence is not in question), could make determinations as to mitigating actions which included 'more speech' solutions, such as ensuring that the chair of a speaking event can provide balance and facilitate debate, and/or ensuring that a balanced platform is put in place by ensuring that a speaker opposed to the views of the original speaker speaks at the same event. In the cases mentioned above of allegations of transphobia, if a speaker was determined merely to deny that a trans-woman was a woman at all, who sought uncompromisingly, and without context, to deny the female identity of a trans-woman, it is arguable that in terms of proportionality there would be grounds for denying a specific platform to him or her, given that other platforms would still be available. But in the case of a speaker who did not seek to deny that identity but sought to consider instead, for example, the place of trans-women in sport, compromise might be possible, such as ensuring that a speaker putting an opposing point of view spoke at the same event. Or, in the employment and educational contexts, this suggested model would indicate that discussions should be held as to mitigation and compromise with the speaker (as should have occurred, according to the Court of Appeal, in *Ngole*) before resorting to the more drastic solutions of dismissal or exclusion.

[143] HOME OFFICE, 'The Revised Prevent Duty Guidance for further education institutions', *supra* note 69.
[144] *Ibid*., para. 5.
[145] *Ibid*., para. 8.
[146] *Butt v Secretary of State for the Home Dept* [2017] EWHC 1930 (HC); *R (Butt) v SSHD* [2019] EWCA Civ 256 (CA). The case concerned an Islamic scholar who did not receive invitations to speak at Islamic Society events in Universities due to his listing as an extremist.
[147] *Ibid*., para. 176.