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Is section 347 of the Criminal Code 1872 compatible with the Convention Rights referred to in the Human Rights Act 2001?

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.¹ Human rights are the basic rights and freedoms that an individual should be able to expect regardless of their nationality or citizenship in a free and fair society.

The Human Rights Act 2001 (“the Act”) came fully into force on 1 November 2006 in the Isle of Man with the purpose of incorporating the fundamental rights and freedoms set out in the European Convention on Human Rights and Fundamental Freedoms (“the Convention”) into Manx domestic law and to make it unlawful for a public authority on the Isle of Man to act in such a way as to clash with or violate those rights. The Manx courts are also required to read and give effect to all legislation in a way which is compatible with the main articles of the Convention and where it cannot do so, make a statement of incompatibility. The rights in the Act are designed to protect any individual against abuses by the state.

There are 16 basic rights in the Act. When considering the question this essay will refer substantially to whether Section 347 (“the Section”) is compatible with arguably the four most important rights in a free and fair society embodied in the Convention, namely Article 6, the right to a fair trial, Article 7, no punishment without law, Article 9, the right to freedom of thought, conscience and religion and Article 10, the freedom of expression (“the Rights”). In doing this, the essay will take a threefold approach. It will consider firstly if the Section restricts the human right in question, secondly, if the restriction is in pursuance of a legitimate aim and thirdly, if it is in pursuance of a legitimate aim, consideration of proportionality, i.e. if it is more than the minimum necessary restriction needed in order to achieve the legitimate aim. The essay will then comment on the Section generally.

In order to do this, it is necessary to understand what the Section was and is trying to achieve. The Section is a ‘sweep up’ section to the group of offences against the public health and the public peace or economy of the Criminal Code 1872 (“the Code”). It provides:

‘Whosoever shall do any act or thing (not hereinbefore or in any other unrepealed Act of Tynwald or bye-law made by any authority of any Act of Tynwald, specified or referred to, or otherwise provided for by law) in contempt of God or religion, or in contempt of the Queen’s Government, or against public

¹ Article 1 of the United Nations Universal Declaration of Human Rights

justice or against public trade, or against the public health, or to the disturbance of the public peace, or injurious to public morals, or outraging decency, shall be guilty of a misdemeanour.'

On reading, due to its wide drafting, it is difficult to establish what the Section aims to achieve. The Section seems to try to provide protection to the general public by making an offence any action not already provided for in legislation which may jeopardise or disrupt peace, security or the general order of day to day society.

Article 6 of the Convention provides:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - *(b) to have adequate time and the facilities for the preparation of his defence;*
 - *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

In *Perez v France*² it was held that '*the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively*'.

Section 348 of the Code provides that:

² [2004] ECHR 47287/99

'Whosoever shall be convicted of any of the misdemeanours hereinbefore in the last ten sections specified shall be liable to imprisonment for a term not exceeding two years and to a fine.'

There is no committal and no jury given the section is triable summarily which restricts the right to a fair and public hearing under Article 6. However, Article 6(1) allows for this right to be restricted in the 'interest of morals, public order or national security...where the interests of juveniles or the protection of the private life of the parties so require, or...in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. Depending on the nature and severity of the 'act or thing' done by an individual, this could be in pursuance of a legitimate aim.

The fact that a policy restricts a person's human rights does not necessarily mean that it is not compatible with the Convention. As with all countries, the Isle of Man has a responsibility to protect the safety of its people. If a restriction on a qualified right has a legitimate aim, such as public safety, and the restriction is only as much as is necessary to achieve that aim then it could be compatible with the Convention. In considering if the aim is proportionate, The European Court of Human Rights ("ECHR") gives countries a margin of appreciation. The scope of the concept of margin of appreciation was outlined in *Handyside v. United Kingdom*³ which recognised that national authorities are in principle better placed to evaluate local needs and conditions than an international court. The Convention does not need to be applied universally in all states but can vary in application according to local needs and can restrict the rights of individuals accordingly in order to balance competing interests and proportionality⁴. The Isle of Man, being a small island with an approximate population of only 80,000 has substantially different local needs and conditions to that of a larger country which is not a crown dependency or equivalent.

Again, depending on the nature and severity of the 'act or thing' done by an individual if it is no more than the minimum necessary restriction needed in order to achieve the legitimate aim then it is not incompatible with the Convention. The application of Article 6(1) depends on the facts of each case as demonstrated in *R (on the application of Dudson) v Secretary of State for the Home Department*⁵ which held there was no absolute right to a public hearing at every stage in the proceedings at which the claimant or his representatives were heard orally. The application of Article 6(1) to the proceedings in this case (other than at first instance) depended on the special features of the proceedings in question. It was held that consideration had to be taken of the entirety of the proceedings, the role of the person conducting the proceedings that were in question, the nature of the system within which they were being conducted and the scope of the powers being exercised. It

³ (1979-80) 1 EHRR 737

⁴ It is arguable that the concept approved in principle does not apply to the Manx courts but for the purposes of this essay I will presume it does.

⁵ [2005] All ER (D) 415 (Jul)

also held that Article 6 does not state that there has to be an oral hearing at every stage of proceedings for a hearing to be public and fair. In this case the detainee was convicted of murder in 1993. The Chief Justice's task was to assess where, given the going rate for the setting of tariffs for adult murderers, the claimant's case should be placed on the scale given his age at the time of the murder and his progress since he was taken into custody. The Chief Justice had to have regard to the public interest as well as the interests of the detainee, and he had to have regard to the requirement that the exercise had to be carried out within a reasonable time as Article 6(1) requires. If he had to conduct oral hearings in every case it would prolong his task and therefore cause delay. It followed that taking into account the special features of the proceedings the absence of an oral hearing did not violate Article 6(1).

Section 348 of the Code does restrict the human right in question. The restriction is in this situation not in pursuance of one of the legitimate aims as no matter what the nature and severity of the 'act or thing' done is, section 348 automatically disallows committal and a jury. No consideration is needed to be given to proportionality here as there is no pursuance of a legitimate aim.

Article 7 of the Convention provides:

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
2. *This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.*

In the case of *Kafkaris v. Cyprus*⁶, it was stated that:

"The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection ... It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment..."

Litigation under this article generally covers the issue of legal certainty rather than overtly retrospective legislation. The Section, as a 'sweep up' provision, does not give an individual a fair warning of the offence being committed due to its broad wording and wide application. There is no certainty to give an accused an indication of what they are doing wrong. On reading, it may be

⁶ [2008] 49 E.H.R.R. 35 ECtHR at 137

difficult for any individual charged with an offence under this Section to prove the act or thing they had done was not covered.

In the *Kafkaris* case above, it was stated “*only the law can define a crime and prescribe a penalty*”. The European Court considers the term ‘law’ to mean statute and case-law and seems to interpret the term ‘law’ broadly. However, the law must meet requirements of accessibility and foreseeability. In *Kafkaris*, the Court stated that the definition of the offence (and the penalty) must be accessible and foreseeable. The accessibility and foreseeability requirements regularly feature in case law relating to many articles under the Convention as well as Article 7. The law must be sufficiently clear for individuals to understand and conduct themselves in accordance with its provisions making it accessible, and where there are changes to the law, the changes must be predictable and therefore foreseeable.

Kafkaris also held that it “*must have regard to the domestic law as a whole and the way it was applied at the material time*”. Article 7 aims to provide legal certainty by requiring governance in accordance with prior rules. The certainty this offers individuals is compromised if courts can deprive rules of their legal character after the offence.

In *Erdogdu and Ince v Turkey*⁷ the applicants were prosecuted under section 8 of the Prevention of Terrorism Act 1991. The applicants claimed a breach of their rights under Articles 7(1), 9 and 10 of the Convention. Under Article 7(1), they claimed that the national legislation was “*so vague that it had not enabled them to distinguish between permissible and prohibited behaviour*”. Despite this argument, they made no claim that their Article 10 rights were not ‘prescribed by law’, even though the same measure alleged offended both articles. The European Court of Human Rights noted that as it had found the interference prescribed by law for the purposes of Article 10, it would find no violation under Article 7(1) either. The reason for this is because the court found that even though section 8 had prima facie breached their human rights, it was in pursuance of a legitimate aim, that being the prevention of terrorism and therefore the protection of society.

In *Cantoni*⁸, the Court declared that there are always “*grey areas at the fringes of the definition of the law*” and Article 7(1) simply requires that the law is “*sufficiently clear in the large majority of cases... and the applicants must have known on the basis of their behaviour that they ran a real risk of prosecution*”.

The purpose of the Section is well intentioned, protecting public safety and morals, but this does inevitably restrict the human right in question even though it is in pursuance of the legitimate aims. When considering proportionality here, without the benefit of accessibility, individuals may find it

⁷ *Erdogdu v Turkey* (app nos 25067/94 and 25068/94) (8 July 1999, unreported), ECt HR

⁸ *V. France* (1) [1996] ECHR 17862/91

difficult to ascertain where the boundaries of legal and illegal behaviour lie. However, accessibility and foreseeability do not prevent laws from being broadly drafted where this is necessary for the law to fulfil its role. For example, laws relating to terrorism may be vague, but still compliant with Article 7. When looking at if the Section is proportionate, it would depend on the nature and severity of the 'act or thing' done by an individual.

Article 9 of the Convention provides:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.*

*Leyla Şahin v. Turkey*⁹ challenged a Turkish law which banned wearing the Islamic headscarf at educational and state institutions. The verdict upheld the Turkish law. In the case the ECHR endorsed the national authorities' view of the headscarf as 'antagonistic to both secularism and gender equality'. At the material time the applicant was a university student. In 1998 the Vice-Chancellor of the university issued a circular directing that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. The applicant was denied access to enrollment on a course, admittance to lectures and a written examination. The faculty also issued her with a warning for contravening the university's rules on dress and suspended her from the university for taking part in an unauthorised assembly that had gathered to protest against them. The applicant claimed a violation of Article 14 and Article 9, stating that the prohibition on wearing the headscarf forced students to choose between education and religion and discriminated between believers and non-believers. As it is stated in the case of *Kokkinakis v Greece*¹⁰ "*freedom to manifest one's religion or belief recognizes that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.*" The problem arose from whether it was necessary to restrict the right to wear a headscarf at the university to protect the rights of others.

⁹ [2005] ECHR 44774/98

¹⁰ [1993] ECHR 14307/88

The strict separation of the state and religion is a fundamental value of the Turkish system. The ECHR puts Turkey in a special place by the ban of Islamic headscarves in public stating that the restrictions are necessary in a democratic society. The margin of appreciation was recognised by the court in respect of the political principles that determine the relationships between state and religion. Article 9 is aimed at providing an adequate guarantee of the right to freedom of religion and belief. In this case, the court applied the convention regarding the secularism-oriented tolerance wherein the state decides to be positively secular and draws a line of separation between state and religion. This choice is normally justified by historical reasons, to preserve the autonomy of the state or by claiming it is indispensable to keep the state free from the religious intolerance of a significant section of a population.

In *Connolly v. DPP*¹¹ Veronica Connolly sent graphic images of aborted fetuses to pharmacies. She was a Roman Catholic who objected to the morning after pill. She was prosecuted under the Malicious Communications Act 1988. She held that the prosecution violated her right to freedom of expression under Article 10 of the Convention. Her appeal against prosecution was dismissed. Under the Human Rights Act 1998, the restriction on her freedom of expression was justified because the images were grossly indecent and offensive. The restriction was for the protection of the rights of others, in accordance with the exception of Article 9.

Again, dependant on the nature and severity of the act or thing committed, the Section could restrict the right to freedom of thought, conscience and religion. The restriction could be in pursuance of one of the legitimate aims. When considering if it is proportionate, it would again depend on the facts of the individual case. The Section speaks only of contempt of god or religion. It could be interpreted (and most likely) would have been at the time to be a Christian religion with a Christian god. With this interpretation, the Section would easily be interpreted as being incompatible with Article 9. However, in the absence of definitions, it could be all inclusive and thus compatible with the article.

Article 10 of the Convention provides:

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

¹¹ [2008] WLR 276

for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In *Castells v Spain*¹² The applicant was a senator of an opposition political party. He published an article in a magazine criticising the government. He was convicted of insulting the government and disqualified from holding public office. During the trial he attempted to adduce evidence as to the truth of the article but it was declared inadmissible by the court. He claimed that his conviction constituted an unjustified interference with his right to freedom of expression. It was held that the contents of the published article had to be considered as a whole. Many of the assertions were susceptible to an attempt to establish their truth. Declaring evidence inadmissible on the ground that the defence of truth could not be pleaded in respect of insults directed at the institutions of the nation, effectively denied the applicant a defence. Such interference in the exercise of his freedom of expression was not necessary in a democratic society and violated Article 10.

*Prager and another v Austria*¹³ The applicants were journalists and the second applicant was also the proprietor of a magazine in which they published an article found to be defamatory of a judge, contrary to Article 111 Austrian Criminal Code. The truth or a justified belief in the truth of the statement, were defences. Under section 6 of the Media Act, the publisher was strictly liable in the case of defamation and could be jointly and severally liable for fines and costs. There was power to order the seizure of offending material. They complained that their conviction violated their right to freedom of expression. Their application was held admissible. By five votes to four the application was dismissed. The state had the first duty to protect confidence in the judiciary against destructive attack, which was necessary if the judicial function was to be carried out in a law governed state. As the nature of the attack upon the judge had been severe and as the first applicant was unable to demonstrate the truth of his allegations or that his research was sufficient to demonstrate good faith and as he had not given the judge an opportunity to comment upon the accusations, the admitted interference was not disproportionate to the legitimate aim pursued. Article 10 had not been violated.

The Section again restricts the right in the article, however this restriction is in pursuance of some of the legitimate aims, namely the interests of national security and territorial integrity by protecting public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others and for maintaining the authority and impartiality of the judiciary. Again, depending on the nature and severity of the 'act or thing' done by an individual if

¹² [1992] ECHR 11798/85

¹³ [1995] ECHR 15974/90

it is no more than the minimum necessary restriction needed in order to achieve the legitimate aims then it is not incompatible with the Convention.

It is also worth remembering that the Section was drafted over 70 years before the Convention was even considered as a thought and some 60 years before the Act was introduced into Manx Law. The drafters would have been ignorant to the concept and theory of Human Rights.

In reality, it is rare that an offence would be brought under this section but if so it may require the court to make a declaration of incompatibility if the Section is deemed incompatible or contravenes the convention rights by notifying the Attorney General. This will then pressurise Tynwald to implement changes. The penalties for a conviction under this Section could also be relatively minor or overly harsh depending on the 'act or thing' done. Serious offences would generally be covered by other legislation where the punishment is proportionate to the crime committed, for example acts of terrorism.

In conclusion, while the Section is for the most part prima facie incompatible with the Convention, to accurately determine if the Section is compatible with the Convention rights referred to in the Act the facts of each individual case have to be considered, as demonstrated by the addressed case law in this essay. It is also dependant on the article and right in question. The legitimate aims which are allowed under the above Rights can arguably be interpreted as being equally as broad and vague as the Section itself. Determining proportionality depends on nature and severity of the act or thing done and again, the facts of each individual case.