

# FREEDOM OF EXPRESSION AND THE RIGHT TO PEACEFUL PROTEST

CLC23 GOA – CAROLINE P. HAY KC, FCIARB, NOTARY PUBLIC

MARCH 7, 2023

# FOCUS

- *All legal systems recognize that freedom of expression is not unlimited but is curtailed to varying extents by the law. Expression that incites unlawful activities, vilifies or encourages vilification, or defames will be constrained. How best to preserve freedom of expression whilst protecting the rights of others? How have Commonwealth jurisdictions curtailed **the right to peaceful protest** during and beyond the COVID pandemic and what is the role and capacity of the courts to protect that right? What lessons can be learned?*

# *“CIVIL DISOBEDIENCE” HENRY DAVID THOREAU (1849)*



- *“Thus the State never intentionally confronts a man's sense, intellectual or moral, but only his body, his senses. It is not armed with superior wit or honesty, but with superior physical strength. **I was not born to be forced.** I will breathe after my own fashion. Let us see who is the strongest.”*
- *“**The authority of government,** even such as I am willing to submit to - for I will cheerfully obey those who know and can do better than I, and in many things even those who neither know nor can do so well - is still an impure one: **to be strictly just, it must have the sanction and consent of the governed.** It can have no pure right over my person and property but what I concede to it.”*

## THOREAU (1849)

- “What force has a multitude? They only can force me who obey a higher law than I. They force me to become like themselves. I do not hear of men being forced to have this way or that by masses of men. What sort of life were that to live? When I meet a government which says to me, “Your money or your life,” why should I be in haste to give it my money? It may be in a great strait, and not know what to do: I cannot help that. It must help itself; do as I do. It is not worth the while to snivel about it. **I am not responsible for the successful working of the machinery of society.** I am not the son of the engineer. I perceive that, when an acorn and a chestnut fall side by side, the one does not remain inert to make way for the other, but both obey their own laws, and spring and grow and flourish as best they can, till one, perchance, overshadows and destroys the other. If a plant cannot live according to its nature, it dies; and so a man.”

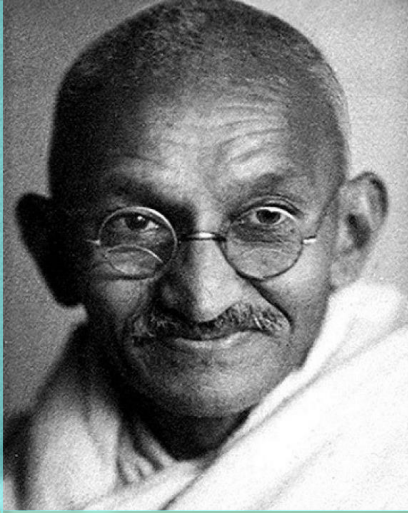
# REG V JONES [2006] UKHL 6

- “Civil disobedience
- *My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilized community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account. The conditional discharges ordered by the magistrates in the cases which came before them exemplifies their sensitivity to these conventions.”*
- Per Lord Hoffman at para. 89

# CIVIL DISOBEDIENCE IN TIMES OF PANDEMIC CLARIFYING RIGHTS AND DUTIES – CROCE & NICOLE-BERVA

- *“Civil disobedience is a type of protest that takes the form of a communicative breach of the law (Brownlee, 2012). It consists, at its most basic level, in an individual or a group of people deliberately disobeying the law in order to protest a specific law or order with the aim of bringing change to it. The distinction between civil disobedience and non-civil disobedience (such as radical violence) is its civility. Following Brownlee, the civility of an act lies in the motivations of the disobeyer, and more precisely in a ‘conscientious communicative breach of law motivated by steadfast, sincere, and serious, though possibly mistaken moral commitment.’”*





# THE RIGHT TO PEACEFUL PROTEST (CIVIL DISOBEDIENCE)

- *Engages:*
- Right to free expression and communication
- Right to peaceful assembly and association
- No right to commit crime disproportionate to the cause
- The imposition of proportionate sanction for any offending

# THE CURTAILMENT OF THE RIGHT

Many countries  
curtail the right in  
similar ways:

Offences against  
public order, public  
nuisance, racial and  
political vilification

**Conspiracy** to  
breach public order  
offences (considered  
unusual)

Offences against  
property, trade,  
public access rights

Offences against  
(declared) public  
emergency measures



# COVID - GLOBAL PUBLIC HEALTH EMERGENCY

- Most Commonwealth countries are signatories/ratifiers of **UN International Covenant on Civil and Political Rights** (entry into force 1976)
- Article 4: *“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”*

# FREE SPEECH VS COVID LOCKDOWNS?

- In Jamaica there were Disaster Risk Management Act (Enforcement Orders) which inter alia, prohibited public gatherings or more than 10 persons (unless exempted)
- This was a general anti-vaccination protest and against the idea of mandatory vaccination

## Bail extended for UIC President Joseph Patterson, co-accused

6:08 pm, Thu July 14, 2022



UIC President Joseph Patterson was arrested after staging a protest against the COVID-19 vaccination programme, without getting a permit for the gathering.

President of the United Independents' Congress, Joseph Patterson, had his bail extended when he appeared in the Kingston and St. Andrew Parish Court on Thursday.

Mr. Patterson and his co-accused - Kevaghna Harris, Abigayle Thompson and David Thompson - are scheduled to return to court on November 3 when the case file is expected to be completed and disclosure made to the defence.

The four individuals were arrested on September 22, 2021 in downtown Kingston for acting in contravention of the Public Order Act.

Mr. Patterson spearheaded a protest against the government's COVID-19 vaccination programme, despite a warning from the police that no permit would be granted for the gathering.

At the time, Jamaica had a gathering limit of ten people due to the COVID-19 pandemic.

# PATTERSON'S PROTEST

- "I don't not intend to take this biological substance and I would not recommend it to any of my family or friends... We're not talking about our childhood vaccines, we're not talking about a vaccine I take to go to Ghana. We're talking about a very, very different kind of technology with no long term data study to support what may happen to you in two, three or four or five years. I don't even know the quality of what they're sending to Jamaica. I have no idea...because I can't trust my government. I can't even trust the scientific community because they have been censored," he argued.*





# COVID – FREE SPEECH – ANTI-VACCINATION

- Charged with offences under the Public Order Act [J] (prohibition against daytime marches and meetings without licence obtained 3 days prior)
- Has announced/commenced constitutional challenge in the Supreme Court

# AMNESTY INTERNATIONAL

- **Covid-19: Global attack on freedom of expression is having a dangerous impact on public health crisis – October 2021**
- *Attacks on freedom of expression by governments, combined with a flood of misinformation across the world during the Covid-19 pandemic, have had a devastating impact on peoples' ability to access accurate and timely information to help them cope with the burgeoning global health crisis, said Amnesty International today in a new report.*



# AMNESTY INTERNATIONAL

- *Silenced and Misinformed: Freedom of Expression in Danger During Covid-19* reveals how governments' and authorities' reliance on censorship and punishment throughout the crisis has reduced the quality of information reaching people. The pandemic has provided a dangerous situation where governments are using new legislation to shut down independent reporting, as well as attack people who have been directly critical or even attempted to look into their government's response to Covid-19.

# AMNESTY INTERNATIONAL - RAJAT KHOSLA.

- *“Throughout the pandemic, governments have launched an unprecedented attack on freedom of expression, severely curtailing peoples’ rights. **Communication channels have been targeted, social media has been censored, and media outlets have been closed down – having a dire impact on the public’s ability to access vital information about how to deal with Covid-19,**” said Amnesty International’s senior director for research advocacy and policy, Rajat Khosla.*

# AMNESTY INTERNATIONAL

- *“Amnesty International is calling on states to stop using the pandemic as an excuse to silence independent reporting, lift all undue restrictions on the right to freedom of expression and provide credible, reliable, accessible information so the public can be fully informed about the pandemic. Censorship does not help in dealing with misinformation: free and independent media and strong civil society do...”*
- *Social media companies must also stop hiding their heads in the sand and take measures to address the viral spread of misinformation, including by ensuring their business models do not endanger human rights.”*

# TRADITIONAL APPROACHES FROM COURTS

- Reg v Richard Roberts et al (Liberty and another intervening) [2019] 1 WLR 2577, CA ; [2018] EWCA Crim 2739
- *The Frack 3*



Left to right: Rich Loizou, Simon Blevins and Richard Roberts. Photograph: Lancashire Constabulary/PA

# R V ROBERTS [2019] 1 WLR 2577

- *“There is a wide range of offences that may be committed in the course of peaceful protest of differing seriousness; and within the offending very different levels of harm may be suffered by individuals or groups of individuals. They carry various maximum sentences. Some are triable only as summary offences (for example low level criminal damage or willful obstruction of the highway) and others are indictable. Many protests are directed at government or official bodies and the harm is suffered at what might be described as official level only. Trespassing at military bases or damaging their perimeter fences, are examples. But the essential approach to sentencing by looking at harm and culpability and with the three aims of sentencing in mind (punishment, deterrence and rehabilitation) remain in play. The motivation of an offender can go to increase or diminish culpability. It forms no part of a courts function to adjudicate, even sub silentio, on the merits of controversial issues but it is well established that committing crimes, at least non-violent crimes, in the course of peaceful protest does not generally impute high levels of culpability.”*
- *Per Lord Burnett of Maldon at para. 32*



# HOW TO PROTECT THE RIGHT?

- The Courts repeatedly decline to tell Parliament what law to pass and will often decline to express value judgements on the matters before them
- In the sentencing phase, the Courts must consider the offender's motives along with the surrounding circumstances of the offence
- Sentences must be proportionate



# HOW TO PROTECT THE RIGHT?

- Scales must always be balanced
- Proportionate responses to 'free speech' are required
- The Court remains the protector of rights and freedoms



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