

# Licensed to kill...discourse? agents provocateurs and a purposive right to freedom of expression

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**Katie Pentney**  \*

Institute for Information Law, University of Amsterdam, Amsterdam,  
the Netherlands

## Abstract

Undercover police operations have emerged from the shadows and into the spotlight in the United Kingdom as a result of a public inquiry into undercover policing and the enactment of the Covert Human Intelligence Sources (Criminal Conduct) Act. The inquiry has revealed troubling details about the ways intelligence and police services have wielded their powers to infiltrate and undermine political groups and social movements over the course of five decades. The problem is not exclusive to the United Kingdom, but is seen the world over. Yet despite the widescale nature of the problem, the legality of *agents provocateurs* – undercover officers who infiltrate social and political movements to manipulate their messaging, instigate violent tactics and undermine public perception – has received scant attention in legal scholarship or the jurisprudence of the European Court of Human Rights. This article capitalises on the current spotlight to suggest that *agents provocateurs* can and should be conceived of as (potential) violations of the right to freedom of expression under the European Convention on Human Rights. A purposive approach is required to ensure protection for not only the means of expression – the exchange of information and ideas – but also the ends – vibrant democratic discourse and meaningful public debate.

## Keywords

Freedom of expression, ECHR, agents provocateurs, covert operations, counterintelligence, protest, positive obligations

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\* Visiting Researcher, Institute for Information Law (University of Amsterdam). I am grateful to Prof. dr. Tarlach McGonagle and the editors and reviewers for their helpful feedback and incisive comments.

## Corresponding author:

Katie Pentney, Institute for Information Law, University of Amsterdam, Nieuwe Achtergracht 166, Amsterdam, the Netherlands.

Email: [kaitlyn.pentney@wolfson.ox.ac.uk](mailto:kaitlyn.pentney@wolfson.ox.ac.uk)

## I. INTRODUCTION

The heroic spy, willing to do whatever it takes for Queen and country, is a much beloved and celebrated trope. James Bond – the perennial hero – gets the bad guy, each and every time. The tactics he employs, and the legality of his actions, are barely an afterthought: whether he is wooing (and bedding) the bad guy's wife or girlfriend to get the inside track or killing anyone who gets in his way, the ends always justify the means.

But undercover agents are not mere fictions on the silver screen or in the pages of spy novels. Their actions have real-world consequences (and often unhappy endings). Just ask the political groups and social movements around the world that have been targeted by *agents provocateurs* – undercover police and intelligence officers who infiltrate protest movements to manipulate their messaging, instigate violent tactics, and undermine public perception of the group, movement and message.<sup>1</sup> Critically, an *agent provocateur* – an 'authorized scoundrel' in the words of Joseph Conrad<sup>2</sup> – is 'someone who actually causes offences to be committed which otherwise would not be committed at all'.<sup>3</sup>

Governments in Europe and North America have been accused of employing *agents provocateurs* to infiltrate and undermine groups pushing for educational and race reforms, environmentalism, labour rights, nuclear disarmament and democratisation. The inherent secrecy of such operations makes it difficult to prove that an *agent provocateur* has been employed, much less to pinpoint their role within – or impacts on – the movement itself.

But *agents provocateurs* have emerged from the shadows and landed on the front pages of national papers in the United Kingdom of late for two reasons. The first is the Undercover Policing Inquiry, launched in 2015, which has started hearing evidence into undercover operations dating back to 1968 to unearth the 'truth' about undercover policing and provide recommendations for the future.<sup>4</sup> What has emerged paints a troubling picture of the ways intelligence and police services have wielded their powers in the shadows. Over five decades, undercover police agents are said to have infiltrated more than 1,000 political groups – including trade unions, anti-racist groups, women's rights groups, pro-Palestine campaigners, environmental activists and animal rights groups.<sup>5</sup> Undercover agents are said to have spied on more than seventeen families campaigning for justice and reform after the loss of loved ones – somber echoes of the Stephen Lawrence scandal which rocked the Metropolitan police nearly three decades ago.<sup>6</sup>

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1. Gary T. Marx, 'Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informant' (1974) 80(2) *American Journal of Sociology* 404. Marx notes that unlike an informant, an *agent provocateur* 'more assertively seeks to influence the actions taken by the group,' for instance by provoking illegal actions and violence 404.
  2. *ibid* 403, citing Joseph Conrad, *The Secret Agent* (Methuen & Co 1907) 75-6.
  3. *R v Mealey and Sheridan* (1974) 60 Crim. R. 59 [62] cited in ML Friedland, 'Controlling Entrapment' (1982) 32(001) *University of Toronto Law Journal* 3.
  4. Undercover Policing Inquiry (Inquiry) <[www.ucpi.org.uk/](http://www.ucpi.org.uk/)> accessed 28 April 2021.
  5. *ibid*; Rob Evans, 'Undercover police spied on more than 1,000 political groups in UK' (*The Guardian*, 27 July 2017) <<https://www.theguardian.com/uk-news/2017/jul/27/undercover-police-spied-on-more-than-1000-political-groups-in-uk>> accessed 28 April 2021. For a searchable database of the political groups alleged to have been spied on, see Rob Evans, 'UK political groups spied on by undercover police – search the list' (*The Guardian*, 13 February 2019) <[www.theguardian.com/uk-news/ng-interactive/2018/oct/15/uk-political-groups-spied-on-undercover-police-list](https://www.theguardian.com/uk-news/ng-interactive/2018/oct/15/uk-political-groups-spied-on-undercover-police-list)> accessed 28 April 2021.
  6. Rob Evans and Paul Lewis, 'Police "smear" campaign targeted Stephen Lawrence's friends and family' (*The Guardian*, 24 June 2013) <<https://www.theguardian.com/uk/2013/jun/23/stephen-lawrence-undercover-police-smears>> accessed

The second is the enactment, in March 2021, of the *Covert Human Intelligence Sources (Criminal Conduct) Act 2021* (CHIS Act or Act).<sup>7</sup> In the face of public outcry over the propriety of covert operations – and a pending appeal over their legality – the Act authorises ‘covert human intelligence sources’ to commit unspecified crimes in the course of their operations where necessary in the interests of national security, to prevent or detect crime or disorder, or in the interests of the ‘economic well-being’ of the UK.<sup>8</sup> Prior to its passage, the British government assured Parliamentarians, and the public, that the CHIS Bill (as it then was) complied with the European Convention on Human Rights (ECHR or Convention), including prohibitions on the unjustified use of force and torture, fair trial rights, and respect for private and family life.<sup>9</sup>

However, the use of covert agents may infringe other ECHR-protected rights – including freedom of expression and assembly – and affect broader democratic interests where such undercover agents go from *sourcing* information to *creating* or *manipulating* it; from surveilling individuals to *prevent* future law-breaking to actively *encouraging* it.<sup>10</sup> The legality of such operations from a human rights perspective has received scant attention by British Parliamentarians<sup>11</sup> or legal scholars,<sup>12</sup> and has yet to be considered by the European Court of Human Rights (ECtHR or Court).

This article explores this novel terrain to shine a spotlight on the use of *agents provocateurs* as a potential violation of freedom of expression under Article 10 of the ECHR.<sup>13</sup> The use of covert agents may contravene freedom of expression where the agents intentionally turn movements violent as pretext to suppress them: in doing so, they have impermissibly interfered with the means of expression (the exchange of information and ideas) as well as the ends (vibrant public debate and meaningful democratic discourse). More challenging cases arise where undercover

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28 April 2021; Rob Evans and Vikram Dodd, ‘Stephen Lawrence case: Theresa May orders inquiry into police spies’ (*The Guardian*, 6 March 2014) <<https://www.theguardian.com/uk-news/2014/mar/06/stephen-lawrence-theresa-may-inquiry-police>> accessed 28 April 2021.

7. Covert Human Intelligence Sources (Criminal Conduct) Act, 2021 c. 4. An additional pressure point for the government concerns the pending appeal before the Court of Appeal concerning the so-called ‘Third Direction’ judgment of the Investigatory Powers Tribunal, which assessed the legality of such operations: (2019) UKIPTrib IPT\_18\_186\_CH.
8. CHIS Act (n 7) ss 1(5)(5) and (6).
9. *ibid* Explanatory Notes, 1. See also Covert Human Intelligence Sources (Criminal Conduct) Bill, European Convention on Human Rights Memorandum by the Home Office (ECHR Memorandum) <[https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20\(CC\)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf)> accessed 28 April 2021. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), as amended by Protocols No. 11 and 14, 4 November 1950 (CETS, No. 5).
10. Ben Fitzpatrick, ‘#SPYCOPS: Undercover Policing, Intimate Relationships and the Manufacture of Consent by the State’ in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power: Consent and control* (Cambridge Scholars Publishing 2016) 218, 219.
11. ECHR Memorandum (n 9) 12–29. Indeed, the memorandum refers only to Articles 2, 3, 5, 6 and 8, as well as Article 1 of Protocol 1, of the ECHR; the right to freedom of expression in Article 10 is not mentioned.
12. By contrast, sociologists have been examining the impacts of undercover police officers on activist groups for decades: see eg Marx (n 1); Raphael Schlembach, ‘Undercover policing and the spectre of “domestic extremism”: the covert surveillance of environmental activism in Britain’ (2018) 17(5) *Social Movement Studies* 491; Nathan Stephens Griffin, ‘“Everyone was questioning everything”: understanding the derailing impact of undercover policing on the lives of UK environmentalists’ (2020) *Social Movement Studies* 459.
13. Of course, *agents provocateurs* may also impact ancillary rights, including Articles 8 (privacy), 11 (freedom of assembly and association) and 13 (right to an effective remedy) ECHR. An in-depth look at these provisions falls outside the scope of this article. However, the analysis urged here may apply with equal force to allegations under Article 11, as the Court has held that ‘the protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11’ (see *Ezelin v France* App no 11800/85 (ECHR 26 April 1991) [37]).

agents merely infiltrate protest groups and alter or interfere with the formulation and delivery of their messaging. The precise dividing line where States can operate in the ‘marketplace of ideas’<sup>14</sup> – through covert operations to foil terrorist plots, keep guns off the street, root out corruption – and where they violate rights is a difficult contextual exercise. The object of this article is to take a first step in this analysis to distill the principles at play when States intentionally manipulate the speech of private actors engaged in protest. Though *agents provocateurs* may interfere with freedom of expression in myriad ways, the focus of this article is on the most acute, rights infringing cases: those that infiltrate protest groups and incite violence and criminality. Greater scrutiny is required in light of such agents’ capacity to alter public discourse, quell dissent and undermine efforts for peaceful reform – the hallmarks of democracy.

The first section of this article provides examples of the phenomena in Council of Europe Member States – including the UK, Italy, Ireland, Germany, France and Ukraine – as well as across the Atlantic in Canada and the United States. This serves to illustrate the scale and complexity of the problem, as well as the variance in the forms and severity of the interference involved. The second section analyses the relevant (albeit limited) jurisprudence of the ECtHR on *agents provocateurs*, including a brief overview of the Court’s approach to such agents in relation to criminal proceedings, and the footholds in its Article 10 case law which provide guidance on how the Court might characterise the nature of the interference on freedom of expression. The third section sets out how the Court ought to approach the proportionality analysis in such cases under Article 10(2) ECHR in the event they come before it, focusing on instances where *agents provocateurs* push protest movements towards violence to justify State suppression. The conclusion reflects on the issues raised and suggests areas of further study and reflection.

## 2. SPIES, DAMNED SPIES, AND STATISTICS<sup>15</sup>

Despite operating largely in the shadows, the use of – and reliance on – undercover agents by governments is no secret. Indeed, governments around the world openly admit their use of undercover agents to root out corruption, foil terrorist plots, and prevent drugs and guns from reaching the street.<sup>16</sup> Moreover, some countries have legislated in and around the use of counterintelligence operations, including the extent to which undercover agents may move from passive informants to active participants in criminal activities.<sup>17</sup> This is the focus of the CHIS Act, discussed above. In such instances, the intention behind the use of such covert operations and their necessity in a

14. This is a North American term that has been invoked by the Court: see *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECHR 13 July 2012) (Dissenting opinion of Judge Pinto de Albuquerque).

15. This is a riff on the phrase ‘lies, damned lies, and statistics,’ popularised by Mark Twain. See also Michael Wheeler, *Lies, Damned Lies, and Statistics: The Manipulation of Public Opinion in America* (W.W. Norton & Co. 1976).

16. In some countries, clear demarcations are made between the fields of criminal law and policing, on the one hand, and intelligence and security services, on the other. Schlembach (n 12) 493–494; UK Home Office, Covert Human Intelligence Sources (Criminal Conduct) Fact sheet (1 October 2020) 1 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/920714/CHIS\\_Factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920714/CHIS_Factsheet.pdf)> accessed 28 November 2020; Department of Justice Canada, ‘Fact sheet: Measures taken by Justice Canada to Address Practices in Warrant Matters before the Federal Court of Canada’ (16 July 2020) <[www.justice.gc.ca/eng/trans/dsd-dda/pdf/fspwm-frpmm-eng.pdf](http://www.justice.gc.ca/eng/trans/dsd-dda/pdf/fspwm-frpmm-eng.pdf)> accessed 28 November 2020.

17. UK: CHIS Act (n 7); Canada: National Security Act, 2017, SC 2019, c 13; United States: Code, ss 509, 510 and 533 (‘Attorney General’s Guidelines Regarding the Use of Confidential Informants’) <<https://fas.org/irp/agency/doj/fbi/doj-guidelines.pdf>> accessed 28 November 2020.

democratic society are less controversial, though issues may still arise in relation to ensuing criminal proceedings. However, what of undercover agents who instigate violent tactics with the intention to curb criticism or provide pretext for State suppression of protest movements?

The secrecy inherent in these operations means one cannot point to statistics of when and how often such agents are used, let alone the extent of the means employed. Moreover, since the issue of *agents provocateurs* is primarily litigated when (individual) defendants invoke the defence of entrapment, States can avoid embarrassing findings by withdrawing criminal charges before adverse judgments have been handed down. This is all the more reason for recognising the human rights angle urged in this article: if the victims of these tactics could contest their use as a violation of freedom of expression – or ancillary rights – it would help to drive this harmful practice from the shadows and address the broader impacts of this technique on public discourse and democratic progress. *Agents provocateurs* tread on crucial rights to freedom of expression (as well as others such as privacy, assembly and the right to a remedy) and raise a critical question: how much trust are we willing to place in governments to respect our right to criticise, question and protest their (in)actions, where they act in secret and under the cover of (legislated) legitimacy? The question is a live one in light of troubling incidents in Council of Europe Member States, the United States and Canada. Several examples illustrate the nature and nuance of the problem.

## 2.1. EUROPE

In perhaps the most notorious (and far-reaching) case, British police constable (PC) Mark Kennedy was exposed as an undercover *agent provocateur* operating in environmentalist, anti-capitalist and anti-fascist movements across Europe.<sup>18</sup> In 2009, more than one hundred environmental activists were arrested in a ‘pre-emptive strike’ against their alleged plot to take over a power station in the UK.<sup>19</sup> Twenty activists were convicted of conspiracy to commit aggravated trespass.<sup>20</sup> However, the case against a further six activists subsequently imploded when it was revealed that PC Kennedy had played a ‘central role in organising and paying for the invasion’.<sup>21</sup> In response to defence requests for disclosure of classified documents about PC Kennedy’s role in organising and funding the protest, prosecutors abandoned the criminal charges.<sup>22</sup>

PC Kennedy is also alleged to have acted as an *agent provocateur* beyond the island’s shores in protest movements in Ireland, Germany, Italy and Spain.<sup>23</sup> During an anti-capitalist protest in

18. Rob Evans and Paul Lewis, ‘Undercover officer spied on green activists’ (*The Guardian*, 9 January 2011) <<https://www.theguardian.com/uk/2011/jan/09/undercover-office-green-activists>> accessed 30 April 2021.

19. Juliette Jowit and Matthew Taylor, ‘Police arrest 114 people in pre-emptive strike against environmental protesters’ (*The Guardian*, 13 April 2009) <<https://www.theguardian.com/environment/2009/apr/13/nottingham-police-raid-environmental-campaigners>> accessed 30 April 2021.

20. Paul Lewis and Nidhi Prakash, ‘Ratcliffe coal protesters spared jail sentences’ (*The Guardian*, 5 January 2011) <<https://www.theguardian.com/environment/2011/jan/05/ratcliffe-coal-protesters-sentence>> accessed 30 April 2021.

21. Paul Lewis and Rob Evans, ‘Activists walk free as undercover officer prompts collapse of case’ (*The Guardian*, 10 January 2011) <<https://www.theguardian.com/environment/2011/jan/10/activists-undercover-officer-mark-kennedy?intcmp=239>> accessed 30 April 2021.

22. Evans and Lewis (n 18).

23. Matthew Taylor and Paul Lewis, ‘Undercover police officer Mark Kennedy at centre of international row’ *The Guardian* (13 January 2011) <<https://www.theguardian.com/environment/2011/jan/12/activism-protest>> accessed 30 April 2021. This raises a further issue about whether PC Kennedy was operating at the behest of these other States, or under the

Dublin in 2004, PC Kennedy ‘encouraged other activists to attack the police’.<sup>24</sup> In subsequent years, he returned to Ireland and was alleged to have acted as a ‘trainer on a programme for anarchist activists [...] on civil disobedience’.<sup>25</sup> In Germany, PC Kennedy allegedly worked as an *agent provocateur* within anti-fascist groups to ‘instigate actions together with them’<sup>26</sup> and in anti-capitalist protests opposing G8 and G20 summits.<sup>27</sup> He was alleged to be working with the German police.<sup>28</sup> Though the German government refused to answer parliamentary questions put forward by a German MP concerning PC Kennedy’s role,<sup>29</sup> it subsequently asked that the Undercover Policing Inquiry be extended to include covert operations by British agents in Germany.<sup>30</sup>

PC Kennedy was allegedly a member of the ‘National Public Order Intelligence Unit’ tasked with ‘monitor[ing] so-called domestic extremists’,<sup>31</sup> but the foregoing (publicised) instances suggest he went well beyond infiltration and collection-gathering. Similar allegations have come to light over the UK’s (formerly secret) Special Demonstration Squad (SDS), and the manipulation of protest groups’ formulation and delivery of their messaging. These cases illustrate the potential impacts of *agents provocateurs* on freedom of expression, even where they do not resort to violence or instigate criminal acts. Undercover police officer – and member of the SDS – Bob Lambert infiltrated an environmentalist group and co-wrote an anti-McDonald’s pamphlet at the centre of a defamation case which made its way to the ECtHR, nearly bankrupting his victim in the process.<sup>32</sup> Another SDS member, Rick Gibson, worked his way up the ranks to become Joint National Secretary of the ‘Troops Out Movement’ – an organisation calling for the demilitarisation of

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control of the British government outside its borders (raising an extraterritorial jurisdiction question). This is not addressed in this article but warrants further study and attention.

24. Henry McDonald, ‘Mark Kennedy “took part in attack on Irish police officers at EU summit”’ (*The Guardian*, 14 January 2011) <<https://www.theguardian.com/environment/2011/jan/14/mark-kennedy-eu-summit-protest>> accessed 30 April 2021.

25. *ibid.*

26. Matthew Taylor, ‘Mark Kennedy row escalates as German politician steps in’ (*The Guardian*, 12 January 2011) <<https://www.theguardian.com/world/2011/jan/12/mark-kennedy-undercover-police>> accessed 30 April 2021.

27. Helen Pidd and Paul Lewis, ‘MP in Germany says Mark Kennedy “trespassed” in Berlin activists’ lives’ (*The Guardian*, 10 January 2011) <<https://www.theguardian.com/world/2011/jan/10/mp-germany-mark-kennedy-activists>> accessed 30 April 2021.

28. *ibid.*

29. *ibid.*

30. Philip Oltermann, ‘Germany asks UK to widen undercover policing inquiry’ (*The Guardian*, 11 June 2016) <<https://www.theguardian.com/uk-news/2016/jun/11/germany-asks-uk-to-widen-undercover-policing-inquiry-mark-kennedy>> accessed 30 April 2021. This request echoed a previous one made by the Scottish government: Rob Evans, ‘Push to extend inquiry into police infiltration of campaigners to Scotland’ (*The Guardian*, 20 December 2015) <<https://www.theguardian.com/uk-news/2015/dec/20/extend-inquiry-police-infiltration-campaigners-scotland-theresa-may>> accessed 30 April 2021.

31. Evans and Lewis (n 18).

32. *Steel and Morris v United Kingdom* App no 68416/01 (ECHR, 15 February 2005) though the *agent provocateur* issue was not addressed. Paul Lewis and Rob Evans, ‘McLibel leaflet was co-written by undercover police officer Bob Lambert’ (*The Guardian*, 21 June 2013) <[www.theguardian.com/uk/2013/jun/21/mclibel-leaflet-police-bob-lambert-mcdonalds](http://www.theguardian.com/uk/2013/jun/21/mclibel-leaflet-police-bob-lambert-mcdonalds)> accessed 30 April 2021; Paul Farrell and Rob Evans, ‘Undercover UK police spy apologises after being tracked down by woman he deceived’ (*The Guardian*, 9 March 2016) <[www.theguardian.com/uk-news/2016/mar/09/undercover-uk-police-spy-apologises-after-being-tracked-down-by-woman-he-deceived](http://www.theguardian.com/uk-news/2016/mar/09/undercover-uk-police-spy-apologises-after-being-tracked-down-by-woman-he-deceived)> accessed 30 April 2021.

Northern Ireland.<sup>33</sup> His senior position afforded him the potential to ‘influence the direction of the movement as a whole’.<sup>34</sup>

British *agents provocateurs* have also gone digital: WikiLeaks documents revealed the use of covert agents to infiltrate online communities (including online protesters), influence their communications and sow dissension to ‘control, infiltrate, manipulate, and warp online discourse’.<sup>35</sup> The purpose of such ‘online covert ops’ is starkly stated: using ‘online techniques to make something happen in the real or cyber world’.<sup>36</sup>

No doubt additional cases will come to light during the Inquiry, which continues to hear evidence. But this is hardly a problem unique to the UK: to the contrary, *agents provocateurs* operate in democracies (and backsliding democracies) elsewhere in Europe. In a 2008 interview with *Quotidiano Nazionale*, Francesco Cossiga – former President and head of Italy’s secret services – admitted to using *agents provocateurs* during his tenure and urged his successor to infiltrate ongoing protest movements of teachers and students ‘with *agents provocateurs* ready to do anything’.<sup>37</sup> His stated aim was to turn public sentiment against the movement and provide pretext to violently suppress students demonstrating against governmental budget cuts to education.<sup>38</sup> In his words, *agents provocateurs* helped ‘extinguish the flame before the fire spreads’.<sup>39</sup>

Similar allegations have arisen in neighbouring France over so-called ‘*casseurs*’ or ‘organised thugs’. During workers’ protests in Paris in 1979, a scandal erupted when an undercover police officer named Gérard Le Xuan was apprehended while breaking a storefront window. A representative of the trade union noted that such actions – by Le Xuan and others acting as *agents provocateurs* – sought to ‘distort’ the purpose of the protest ‘by relegating to the background the social and human tragedy which targets the steel workers and their families’.<sup>40</sup> More recently, during the ‘Yellow Vest’ protests, allegations abounded that undercover police officers had infiltrated the protests and ‘[taken] part in acts of vandalism during demonstrations in Paris with the goal of

33. Inquiry (n 4), Metropolitan Police, ‘N297 – Risk Assessment’ 6 <[www.ucpi.org.uk/wp-content/uploads/2017/08/HN297-Open-risk-assessment-from-the-MPS.pdf](http://www.ucpi.org.uk/wp-content/uploads/2017/08/HN297-Open-risk-assessment-from-the-MPS.pdf)> accessed 28 November 2020.

34. Inquiry Opening Statements, Day 5 [16] James Scobie QC <[www.ucpi.org.uk/wp-content/uploads/2020/11/20201106-ucpi\\_opening\\_statements\\_transcript.pdf](http://www.ucpi.org.uk/wp-content/uploads/2020/11/20201106-ucpi_opening_statements_transcript.pdf)> accessed 28 April 2021.

35. Glenn Greenwald, ‘How Covert Agents Infiltrate the Internet to Manipulate, Deceive, and Destroy Reputations’ (*The Intercept*, 24 February 2014) <<https://theintercept.com/2014/02/24/jtrig-manipulation/>> accessed 28 November 2020; Glenn Greenwald, ‘Exclusive: Snowden Docs Show UK Spies Attacked Anonymous, Hacker’ (*NBC News*, 4 February 2014) <[www.nbcnews.com/news/investigations/war-anonymous-british-spies-attacked-hackers-snowden-docs-show-n21361](http://www.nbcnews.com/news/investigations/war-anonymous-british-spies-attacked-hackers-snowden-docs-show-n21361)> accessed 28 November 2020.

36. *ibid.*

37. Interview of Francesco Cossiga by Andrea Cangini, *Quotidiano Nazionale*. Quoted in Roberto Mancini, ‘Retribution and revenge’ (*The Guardian*, 24 November 2008) <<https://www.theguardian.com/commentisfree/2008/nov/24/comment>> accessed 30 April 2021. A transcript of the interview is reproduced in Italian at <<https://blog.armandoleotta.com/2008/10/intervista-a-cossiga/>> accessed 30 April 2021.

38. *ibid.* New York Times, ‘Students in Italy clash over education cuts’ (*New York Times*, 29 October 2008) <[www.nytimes.com/2008/10/29/world/europe/29iht-rome.4.17354341.html](http://www.nytimes.com/2008/10/29/world/europe/29iht-rome.4.17354341.html)> accessed 28 November 2020.

39. Interview of Francesco Cossiga (n 37) [author’s own translation].

40. [Author’s own translation]. Le Monde, ‘M. Georges Séguy : une preuve irrefutable’ [‘An irrefutable proof’] (27 March 1979) <[https://www.lemonde.fr/archives/article/1979/03/27/m-georges-seguy-une-preuve-irrefutable\\_2768513\\_1819218.html](https://www.lemonde.fr/archives/article/1979/03/27/m-georges-seguy-une-preuve-irrefutable_2768513_1819218.html)> accessed 30 April 2021. See also Claude Picant, *Le 23 mars 1979: Une provocation politique* (Jean Picollec 1981); Bastien Bonnefous, ‘Flics ou casseurs?’ [‘Cops or thugs?’] (*Slate France*, 28 October 2010) <<http://www.slate.fr/story/29345/flics-casseurs-histoire>> accessed 30 April 2021.

discrediting the movement'.<sup>41</sup> The police denied the claims, insisting that plain-clothes officers merely collected information on the march's movements, as is standard practice.<sup>42</sup>

In Ukraine, there's even a name for pro-government *agents provocateurs* – 'titushky' – though their roles and the extent of their interference remain far from clear.<sup>43</sup> During the so-called 'Euromaidan' movement nearly a decade ago, Ukrainian authorities were alleged to have used *agents provocateurs* in the form of 'paid instigators who infiltrate the protests and then start attacking the police to provoke a "retaliatory" suppression of the "violent protesters"'.<sup>44</sup> In another instance, the Security Service arrested a police officer and acknowledged that he was 'among other *agents provocateurs* who carried out a criminal scenario and were trying to disrupt the Verkhovna Rada [Parliament] meeting and destabilize the situation in the capital'.<sup>45</sup> The officer was said to have used a slingshot to shoot screws at journalists, protesters and police.<sup>46</sup>

## 2.2. NORTH AMERICA

Across the Atlantic, *agents provocateurs* have been alleged to incite or engage in violence during protests, and to infiltrate activist networks with the intention of pushing them in the direction of violence.

In Canada, undercover police officers (wielding rocks) infiltrated a peaceful protest during a North American leaders' summit in Quebec in 2007.<sup>47</sup> The peaceful protesters identified the officers as *agents provocateurs*, and demanded they put down their rocks and leave the demonstration.<sup>48</sup> Faced with damning video evidence of the events, the police force admitted that officers had infiltrated the protest, but denied they were there to provoke the crowd or instigate violence.<sup>49</sup>

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41. Liselotte Mas, 'Analysis of a rumour: Did undercover police try to discredit the "Yellow Vests"?' (*The Observers*, 4 December 2018) <<https://observers.france24.com/en/20181204-analysis-rumour-undercover-police-france-yellow-vests>> accessed 30 April 2021.
  42. *ibid.* Tweet by 'Police nationale' (2 December 2018) <[https://twitter.com/PoliceNationale/status/1069204012975689728?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1069204012975689728%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fobservers.france24.com%2Fen%2F20181204-analysis-rumour-undercover-police-france-yellow-vests](https://twitter.com/PoliceNationale/status/1069204012975689728?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1069204012975689728%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fobservers.france24.com%2Fen%2F20181204-analysis-rumour-undercover-police-france-yellow-vests)> accessed 30 April 2021.
  43. 'Ukraine crisis: Renewed Kiev assault on protesters' (*BBC News*, 19 February 2014) <<https://www.bbc.com/news/world-europe-26252679>> accessed 30 April 2021.
  44. Anton Shekhovtsov, 'Provoking the Euromaidan' (*OpenDemocracy*, 3 December 2013) <<https://www.opendemocracy.net/en/odr/provoking-euromaidan/>> accessed 30 April 2021. However, certain reports suggest that the *titushky* were engaged by senior government officials to attack protesters, and were provided assault rifles for this purpose: see Office of the High Commissioner for Human Rights, 'Report on the human rights situation in Ukraine,' A/HRC/37/CRP.1 (15 March 2018) [51].
  45. Oleg Sukhov, 'Police officer, suspected of being agent provocateurs during Rada clashes, is arrested' (*Kyiv Post*, 15 October 2014) <<https://www.kyivpost.com/article/content/war-against-ukraine/police-officer-accused-of-being-agent-provocateur-during-rada-clashes-368142.html>> accessed 30 April 2021.
  46. *ibid.*
  47. Canadian Press, 'Police accused of using provocateurs at summit' (*Toronto Star*, 21 August 2007) <[www.thestar.com/news/2007/08/21/police\\_accused\\_of\\_using\\_provocateurs\\_at\\_summit.html](http://www.thestar.com/news/2007/08/21/police_accused_of_using_provocateurs_at_summit.html)> accessed 6 October 2020; Joan Bryden, 'Police deny using "provocateurs" at summit' (*Toronto Star*, 22 August 2007) <[www.thestar.com/news/2007/08/22/police\\_deny\\_using\\_39provocateurs39\\_at\\_summit.html](http://www.thestar.com/news/2007/08/22/police_deny_using_39provocateurs39_at_summit.html)> accessed 28 November 2020.
  48. Video footage of the confrontation is available via CanadiansNanaimo's YouTube <[www.youtube.com/watch?v=St1-WTc1kow](http://www.youtube.com/watch?v=St1-WTc1kow)> accessed 6 October 2020.
  49. CBC News, 'Quebec police admit they went undercover at Montebello protest' (*CBC News*, 23 August 2007) <[www.cbc.ca/news/canada/quebec-police-admit-they-went-undercover-at-montebello-protest-1.656171](http://www.cbc.ca/news/canada/quebec-police-admit-they-went-undercover-at-montebello-protest-1.656171)> accessed 6 October 2020.



In the United States, a senator testified before a Commission of Inquiry that in his experience prosecuting labour activists, government spies would infiltrate trade unions and ‘try to get decent union men to commit some crime’.<sup>50</sup> More recently, allegations circulated that undercover police officers were responsible for instigating violence and damaging property during Black Lives Matter protests across the country.<sup>51</sup>

### 2.3. THE NATURE AND SCALE OF THE PROBLEM

These examples – from Europe and North America – illustrate the insidiousness of the problem, and the dangers of State interference with the formulation, content and expression of activists’ and dissidents’ messaging. They also demonstrate the varied nature of the interference: in some cases, *agents provocateurs* attended protests and sought to incite violence in order to justify State suppression; in others, undercover police officers played the ‘long con’, infiltrating activist groups and rising through the ranks, affording them the opportunity to exert control over the groups’ direction and messaging. While the focus of this article, and the Article 10 ECHR analysis to follow, is on the first category – those *agents provocateurs* who cause an offence to be committed – the latter category of infiltration, control and manipulation of the movement and messaging merits further consideration.

A final note on these case studies is warranted. Though some State officials admitted the use of *agents provocateurs* in activist networks, as in Italy and the US, the majority remain alleged cases for which the respective States have not had to answer. The secrecy inherent in these operations means that they are often easily dismissed by governments and police forces as ‘fake news’ or side-stepped through the withdrawal of criminal charges against activists to avoid disclosure. Determining whether such operations comply with States’ human rights obligations is not a task which should be left to governments alone: to the contrary, judicial oversight is greatly needed to ensure that appropriate safeguards are in place.

The next section examines how the ECtHR has addressed cases of *agents provocateurs* in the context of incitement cases under Article 6, before describing how the Court can and should conceive of this form of government interference with freedom of expression. While the ensuing analysis only applies to High Contracting Parties under the ECHR – and therefore excludes the North American examples provided above – similar obligations arise under Article 19 of the International Covenant on Civil and Political Rights. Accordingly, the UN Human Rights Committee may take a similar position on the matter were such a communication to come before it.

50. Marx (n 1) 419, citing Leo Huberman, *Labor Spy* (Modern Age 1937) 96–7. See also the case study concerning the American response to the ‘Republic of New Africa’ protest organization in Christian Davenport, ‘Understanding Covert Repressive Activity: The Case of the U.S. Government Against the Republic of New Africa’ (2005) 49(1) *Journal of Conflict Resolution* 120, 127–129. This concern was repeatedly cited by Labour Parliamentarians prior to the passage of the CHIS Act, in light of its authorisation of criminal conduct where necessary ‘in the interests of the economic well-being of the United Kingdom’: CHIS Act (n 7) s 1(5)(5). See LabourList, ‘Unions, MPs and campaigners release joint statement on CHIS “spycops” bill’ (13 October 2020) <<https://labourlist.org/2020/10/joint-statement-by-unions-mps-and-campaigners-on-chis-spycops-bill/>> accessed 28 November 2020.

51. ArLuther Lee, ‘Police deny link to mysterious “Umbrella Man,” who broke windows during riot’ (*The Atlanta Journal-Constitution*, 5 June 2020) <[www.ajc.com/news/police-deny-link-mysterious-umbrella-man-who-broke-windows-during-riot/3j8cSrBHjvvnX0PRwIYIP/](http://www.ajc.com/news/police-deny-link-mysterious-umbrella-man-who-broke-windows-during-riot/3j8cSrBHjvvnX0PRwIYIP/)> accessed 28 November 2020. Some have already been debunked: see Ali Swenson *et al*, ‘NOT REAL NEWS: A Look at What Didn’t Happen This Week’ (*Associated Press*, 29 May 2020) <<https://apnews.com/article/8869612df303dfa444df98a43dff035>> accessed 28 November 2020.

### 3. AGENTS PROVOCATEURS UNDER THE ECHR: Footholds in the Jurisprudence

To date, the ECtHR has only considered *agents provocateurs* under Article 6 of the ECHR, in relation to undercover investigative techniques and the fairness of ensuing criminal proceedings.<sup>52</sup> This case law has focused at an individual level – namely, whether a defendant was incited to commit a criminal offence by an undercover officer, and what use can be made of any evidence obtained in securing a conviction.<sup>53</sup> Moreover, the cases have largely arisen in the context of covert operations targeting serious crimes – suspected drug trafficking, corruption and terrorism.<sup>54</sup>

While these are admittedly very different circumstances, there are several takeaways from the Court's analysis which are noteworthy for present purposes. The first is the Court's definition of incitement:

Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.<sup>55</sup>

This definition is also applicable in the context of *agents provocateurs* operating in protest movements, where they move beyond 'essentially passive' investigations into inciting violence and criminality. As the Court has made clear in the Article 6 context, the authorities' intention is a critical component: in the incitement context, it is to cause an offence to be committed in order to lay criminal charges; in the protest context, the intention may be to undermine the group itself, alter the formulation and/or delivery of its message, or provide pretext for State suppression.

Second, although the Court has accepted the use of undercover agents as a 'legitimate investigative technique for investigating serious crimes,' it has required that 'adequate safeguards against abuse be provided for, as the public interest cannot justify the use of evidence obtained as a result of police incitement'.<sup>56</sup> This includes a searching judicial inquiry where criminal charges are laid and evidence obtained in the course of such operations is put forward to secure a conviction.<sup>57</sup>

Finally, the Court has repeatedly held that the burden of proof where incitement is alleged rests with the State.<sup>58</sup> This onus reflects the inequality of arms where 'operational information' is squarely within the knowledge of the State, and must be viewed in light of the trial court's obligation to 'take the necessary steps to uncover the truth'.<sup>59</sup>

52. *Lagutin and others v Russia* App nos 6228/09 and others (ECHR, 24 April 2014) [107]; *Murtazaliyeva v Russia* App no 36658/05 (ECHR, 18 December 2018) [157].

53. *ibid.* See also *Bannikova v Russia*, App no 18757/06 (ECHR, 4 November 2010) [33-65]; *Ramanauskas v Lithuania* App no 74420/01 (ECHR, 5 February 2008) [48-74].

54. *Bannikova* (n 53); *Ramanauskas* (n 53); *Miliniene v Lithuania* App no 74355/01 (ECHR, 24 June 2008).

55. *Ramanauskas* (n 53) [55]; *Bannikova* (n 53) [37].

56. *Teixeira Castro v Portugal* App no 25829/94 (ECHR, 9 June 1998) [34-36]; *Lagutin* (n 52) [90].

57. *Lagutin* (n 52) [90].

58. *ibid* [94]; *Bannikova* (n 53) [48]; *Ramanauskas* (n 53) [70].

59. *Lagutin* (n 52) [120-122].

The Court has yet to consider whether the use of *agents provocateurs* may infringe freedom of expression under Article 10 where they are used to undermine protesters and activist movements critical of the State. However, there are several strands of the Court's jurisprudence which provide guidance on how it might characterise the use of *agents provocateurs* from the perspective of freedom of expression.

First, the Court has repeatedly emphasised the importance of freedom of expression as an essential foundation of – and basic condition for – democratic progress.<sup>60</sup> As a result, there is little scope for restrictions of freedom of expression where they relate to either political speech or debate on matters of public interest.<sup>61</sup> Moreover, the limits of permissible criticism are wider in respect of the government than private citizens, as democratic systems must allow for close scrutiny of governments' actions or omissions and government restraint in seeking to limit or stifle such criticism is accordingly required.<sup>62</sup>

Second, the Court has noted that interference in protests '[does] a disservice to democracy and often even endanger[s] it'.<sup>63</sup> Outright bans on protests or demonstrations are not permitted, absent a real risk that they will result in disorder which cannot be prevented by other (lesser) means.<sup>64</sup> In addition, the utmost caution is required where measures 'are such as to dissuade [...] persons from imparting information or ideas contesting the established order of things'.<sup>65</sup> Care must always be taken to ensure that freedom of expression is not subject to the 'heckler's veto,' whereby limits are determined by the audience's response.<sup>66</sup> Such are the demands of democracy and pluralism.

Finally, the Court's pronouncements on States' positive obligations under Article 10 must be borne in mind.<sup>67</sup> When the ECHR was drafted, freedom of expression was seen as both 'a precious heritage as well as a dangerous instrument' in light of the 'powerful influence the modern media of expression exerted upon the minds of men'.<sup>68</sup> In the decades since, the ECtHR has rendered thousands of judgments on how governments control this 'dangerous instrument', by limiting or suppressing expression through censorship or other means. More recently, the Court has moved beyond censorship to consider the contours of States' positive obligations to facilitate expression through action or inaction, as the circumstances warrant. In particular, the Court has recognised

60. *Handyside v United Kingdom* App no 5493/72 (ECHR, 7 December 1976) [49].

61. *Lindon, Otchakovsky-Laurs and July v France* App nos 21279/02 and 36448/02 (ECHR, 22 October 2007) [46]; *Axel Springer AG v Germany* App no 39954/08 (ECHR, 7 February 2012) [90]; *Bédat v Switzerland* App no 56925/08 (ECHR, 29 March 2016) [49].

62. *Castells v Spain* App no 11798/85 (ECHR, 23 April 1992) [46]; *Sürek v Turkey (no 1)* App no 26682/95 (ECHR, 8 July 1999) [61].

63. *Taranenko v Russia* App no 19554/05 (ECHR, 15 May 2014) [67] [70]. See also Ronan Fathaigh and Dirk Voorhoof, 'Article 10 ECHR and Expressive Conduct' (2019) 24(2) Communications Law 62-73.

64. *Kablis v Russia*, App nos 48310/16 and 59663/17 (ECHR, 30 April 2019) [54] interpreting art 11(2) ECHR.

65. *Taranenko* (n 63) [81] citing *Women on Waves and others v Portugal* App no 31276/05 (ECHR, 3 February 2009) [39, 43].

66. *Vajnai v Hungary* App no 33629/06 (ECHR, 8 July 2008) [57]; *Fáber v Hungary* App no 40721/08 (ECHR, 24 July 2012) [57].

67. For a comprehensive analysis of States' positive obligations, see Tarlach McGonagle, 'Positive obligations concerning freedom of expression: mere potential or real power?' in Onur Andreotti (ed), *Journalism at risk: Threats, challenges and perspectives* (Council of Europe Publishing 2015) 9 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680706afe>> accessed 30 April 2021.

68. Council of Europe *Travaux Préparatoires*, 'European Commission of Human Rights Preparatory Work on Article 10 of the European Convention on Human Rights,' Council of Europe Library (Strasbourg 17 August 1956) [127].

that Article 10 does not merely impose negative obligations on High Contracting Parties to refrain from conduct which undermines the right; it also imposes certain positive obligations to ensure the ‘genuine and effective exercise’ of the right.<sup>69</sup> States are thus obliged to ‘create a favourable environment for participation in public debate [...] to enable the expression of ideas and opinions without fear’.<sup>70</sup> This is a critical shift, as States can cause just as much harm to public discourse and debate by infiltrating and undermining protest groups as by censoring or banning them.

How, then, should the Court approach the permissibility of *agents provocateurs* – like those in the examples provided above – from the perspective of Article 10?

#### 4. FROM THE SHADOWS TO THE COURTS: THE ANALYSIS UNDER ARTICLE 10

In order to establish a violation of Article 10, it must be established, first, that *agents provocateurs* constitute an interference with freedom of expression, and second, that the interference is not permissible under Article 10(2). An interference can only be justified under Article 10(2) where the State establishes three (cumulative) components: the interference was prescribed by law, pursued a legitimate aim, and was necessary in a democratic society.<sup>71</sup>

Based on its jurisprudence in the context of *agents provocateurs* under Article 6 ECHR, the Court should find that *agents provocateurs* interfere with freedom of expression where they move beyond ‘essentially passive’ investigations to incite or encourage violence.<sup>72</sup> As a starting point, the Court has held that an interference with freedom of expression (or peaceful assembly) ‘does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities’.<sup>73</sup> Such ‘other measures’ include withholding information necessary for public debate<sup>74</sup> and withholding appointments of public officials who express critical views.<sup>75</sup> The use of *agents provocateurs* falls within these ‘other measures’ shy of an outright ban: where they turn protests violent as pretext to suppress them, they have effectively prohibited activists from expressing themselves and caused a chilling effect which undermines the groups’ ability to formulate and deliver their message.<sup>76</sup> Indeed, the mere idea of police surveillance and infiltration within a political movement ‘may lead to feelings of demoralization, helplessness, cynicism and immobilizing paranoia, and can serve to disintegrate a movement’.<sup>77</sup>

69. *Palomo Sánchez and others v Spain* App nos 28955/06 and others (ECHR, 12 September 2011) [58, 62]; *Dink v Turkey* App nos 2668/07 and others (ECHR, 14 September 2010) [137] [translation].

70. *Dink* (n 69) [137] [author’s own translation].

71. ECHR (n 9) Art 10(2).

72. *Lagutin* (n 52) [107]; *Murtazaliyeva* (n 52) [157].

73. *Karastelev and others v Russia* App no 16435/10 (ECHR, 6 October 2020) [70].

74. See eg *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECHR, 8 November 2016) [155-70]; *Társaság a Szabadságjogokért v Hungary* App no 37374/05 (ECHR, 14 April 2009) [36]; *Centre for Democracy and the Rule of Law v Ukraine* App no 10090/16 (ECHR, 26 March 2020) [87].

75. *Wille v Liechtenstein* App no 28396/95 (ECHR, 28 October 1999) [50-51].

76. See eg *Lingens v Austria* App no 9815/82 (ECHR, 8 July 1986) [44] wherein the Court noted that although a penalty imposed on a journalist ‘did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future. [...] In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community’.

77. Marx (n 1) 428.

In sum, there may be two components to the interference posed by *agent provocateurs*. First, *agents provocateurs* may interfere with the formulation and content of activists' expression. In the examples provided, *agents provocateurs* infiltrated and undermined protests by teachers and students, peaceful demonstrations over free trade, environmentalist networks across Europe, workers' rights organisations and protests for racial justice. In each case, the government sought to undermine the curation of expression and the value of the protesters' speech – from planning and funding criminal trespass, to turning peaceful protests about free-trade and educational reform violent, to infiltrating trade unions and encouraging 'decent men' to commit crimes.<sup>78</sup> Far from allowing expression to flourish, *agents provocateurs* frustrate the processes that freedom of expression is meant to protect: individuals and groups in democratic society challenging the status quo, asking difficult questions, and promoting awareness of matters of public interest. In essence, they are attempting to enforce or engender silence and/or alter the narrative.<sup>79</sup> Significant scrutiny should be brought to bear on measures which dissuade the open and meaningful exchange of information and ideas, and if the Court were confronted with such a case, it ought to take a dim view of democratic governments intentionally thwarting lawful speech.<sup>80</sup>

Second, *agents provocateurs* may interfere with the way the expression is received by the public, thereby lessening the quality of activists' expression. The perception of social movements is often tarnished when protests turn violent, as the discourse surrounding the Black Lives Matter protests in the US illuminated. As Professor Gary Marx noted, *agents provocateurs* 'can serve to stigmatize the movement as violent, alienate it from its potential constituency, and focus attention away from the basic issues'.<sup>81</sup> This is precisely the government's intention – in Cossiga's words, to turn popular consensus against the protesters, and 'extinguish the flame before the fire spreads'.<sup>82</sup> While less tangible than overt censorship, the use of *agents provocateurs* is contrary to the spirit and intent of Article 10 and the public's right to be 'properly informed'.<sup>83</sup> A State interferes with this right where it surreptitiously distorts and manipulates a protest movement's message, for Article 10 'protects not only the substance of the ideas and information expressed but also the form in which they were conveyed'.<sup>84</sup>

With the interference established, the analysis turns to whether it can be justified under Article 10(2). As a starting point, States have a margin of appreciation to determine where limitations on expression may be necessary, because domestic authorities are better placed to make this determination.<sup>85</sup> However, this margin is narrower where – as here – the contents of the speech concern individual (political) expressions, the information is in the public interest,<sup>86</sup> and the object of the speech is (criticism of) the government.<sup>87</sup> Moreover, the nature of the restriction is the distortion of the formulation and contents of the expression and the suppression of protesters' rights to assembly

78. *Steel and Morris* (n 32); *Lewis and Evans* (n 32); *Farrell and Evans* (n 32); *CBC News* (n 49); *Marx* (n 1) 419.

79. This notion of 'enforced silence' is drawn from Justice Brandeis (concurring) in *Whitney v California* 274 US 357, 377 (1927). See Philip M. Napoli, 'What if More Speech is No Longer the Solution: First Amendment Theory Meets Fake News and Filter Bubble' (2018) 70(1) *Federal Communications Law Journal* 60.

80. *Taranenko* (n 63) [81] citing *Women on Waves* (n 65) [39, 43].

81. *Marx* (n 1) 429.

82. Interview of Francesco Cossiga (n 37) [author's own translation].

83. *Sunday Times v UK (no 1)* App no 6538/74 (ECHR, 26 April 1979) [66].

84. *Murat Vural v Turkey* App no 9540/07 (ECHR, 21 October 2014) [44]; *Women on Waves* (n 65) [39].

85. *Handyside* (n 60) [49].

86. *Éva Molnár v Hungary* App no 10346/05 (ECHR, 7 October 2008) [42]; *Sunday Times (no 1)* (n 83) [65].

87. *Castells* (n 62) [46].

and expression – often by violent means. As a result, States are entitled to a narrow margin of appreciation with respect to the restriction.

The Court's jurisprudence suggests that, even where the use of *agents provocateurs* is prescribed by law (as the CHIS Act purports to do, for instance), it should fail at both the 'legitimate aim' and 'necessity in a democratic society' stages. The aim pursued by government infiltration of movements to turn them violent, undermine public perception, and justify State suppression can only be said to be the limitation of criticism and dissent, which is neither legitimate nor necessary for democratic society. Unlike censorship or banned protests, which may be permissible in some instances in the interests of national security or the prevention of disorder,<sup>88</sup> it is decidedly more difficult to conceive of legitimate aims for *agents provocateurs* in the case studies above, which aimed to provoke violence and stoke public disorder. Public authorities may use police and other means to monitor demonstrations and protect the peaceful assembly and expression of protesters. They may also undertake secret surveillance, or infiltrate movements to monitor their actions in certain circumstances.<sup>89</sup> However, the Court has recognised the need for safeguards as operations 'set up to protect national security may undermine or even destroy democracy under the cloak of defending it'.<sup>90</sup>

Agents like those in the above-noted case studies cannot be said to be necessary in a democratic society. The circumstances must be borne in mind: the targets of these operations were environmentalists, advocates for racial justice, trade unions and anti-fascists. These were not operations akin to those which target criminal organisations or terrorist networks. The purpose was not merely 'passive' collection of information, but active efforts to affect the formulation and delivery of these movements' messages – and the way their messages were received by the public – by nudging them towards violence. The pre-emptive silencing of criticism and dissent in such circumstances cannot be said to meet a 'pressing social need'. Importantly, the necessity criterion is particularly rigorous where, as here, the interference is a form of prior censorship.<sup>91</sup>

In any case, the means used must be proportionate to the aim pursued.<sup>92</sup> The Court has found a violation of Article 10 where police arrested and detained disruptive (but otherwise peaceful) protesters, on the basis that the protest 'could have been countered by less draconian measures'.<sup>93</sup> Similar reasoning applies here: even if the agents are pursuing the legitimate aim of preventing disorder or crime, surely there are more proportionate ways of doing so than instigating or inciting violence or criminality by activists. The Court's case law on secret surveillance and undercover operations, summarised previously, is particularly instructive in this regard: though such techniques may be used, they do not provide *carte blanche* for States, even in cases where the ends sought to be achieved might appear to justify the means States seek to employ.

*Agents provocateurs* also violate States' positive obligations with respect to freedom of expression.<sup>94</sup> The Court has recognised that Article 10 does not merely impose negative obligations on

88. See eg *Sürek* (n 62) [51]; *Women on Waves* (n 65) [35].

89. *Lagutin* (n 52) [107]; *Murtazaliyeva* (n 52) [157]; *Big Brother Watch and others v United Kingdom* App nos 58170/13 and others (ECHR, 13 September 2018) [489]; *Weber and Saravia v Germany* App no 54934/00 (ECHR, 29 June 2006) [151].

90. *Big Brother Watch* (n 89) [308].

91. *Sunday Times v UK (no 2)* App no 13166/87 (ECHR, 26 November 1991) [51]; *RTBF v Belgium* App no 50084/06 (ECHR, 29 March 2011) [114].

92. *Lagutin* (n 52) [107].

93. *Açık and others v Turkey* App no 31451/03 (ECHR, 13 January 2009) [46].

94. *Dink* (n 69) [137].

High Contracting Parties to refrain from conduct which undermines the right – it also imposes certain positive obligations to ensure the ‘genuine and effective exercise’ of the right.<sup>95</sup> As noted above, the positive obligation arising under Article 10 requires that States ‘create a favourable environment for participation in public debate [...] to enable the expression of ideas and opinions without fear’.<sup>96</sup> Far from fostering an environment for discourse to flourish, the *agents provocateurs* in the examples from Europe (and North America) sought, *inter alia*, to frustrate and distort, manipulate and mislead, stigmatise and suppress – thereby undermining protesters’ right to disseminate their message, and the public’s right to receive it. In this sense, the use of *agents provocateurs* is government interference in a more insidious and surreptitious, but no less damaging, form than long-recognised violations such as censorship.<sup>97</sup>

Two broader points which ought to inform the Court’s analysis are warranted: the first concerns the individual repercussions for activists targeted by *agents provocateurs*, while the second relates to the ‘chilling effect’ on the activist group and movement.<sup>98</sup>

First, the use of *agents provocateurs* may not only violate Article 10, but also limit individuals’ rights to claim Convention protections. The Convention does not extend to protests where the organisers and protesters have ‘violent intentions’.<sup>99</sup> As a result, where *agents provocateurs* succeed in turning protests violent, they have effectively stripped protesters of Convention protections.<sup>100</sup> This reveals the insidious and damaging nature of this form of interference, and its repercussions for activist groups and their individual members.

Second, existing remedies – including entrapment defences – are no answer to the broader implications and chilling effects of *agents provocateurs* on political and social activism, and on democracy itself. While an individual may succeed in arguing for an acquittal on account of the interventions of an undercover agent – or the State may decide to withdraw charges to avoid disclosure, as in the case of the British environmental activists referred to previously – the long-term damage to the survival, work and reputation of the activist group is much harder to rectify.<sup>101</sup> The democratic project survives and thrives on all of the elements that make up peaceful protest: formulating ideas, expressing outrage, questioning and criticising majoritarian views and mainstream beliefs, ‘speaking truth to power’. State efforts to frustrate or undermine these processes with *agents provocateurs* can and should be labelled violations of freedom of expression.

95. The ‘positive obligation’ conceptualisation originated in *Marckx v Belgium* App no 6833/74 (ECHR, 13 June 1979) [31] under art 8 ECHR. With respect to art 10, see *Palomo Sánchez* (n 69) [58, 62]; *Dink* (n 69) [137] [translation].

96. *Dink* (n 69) [137] [translation].

97. See Scott Rutherford, ‘Canada’s Other Red Scare: Rights, Decolonization, and Indigenous Politics in the Global Sixties’ (DPhil Thesis, Queen’s University 2011) concerning the long-term destabilising impacts of *agents provocateurs* on protest movements and Indigenous politics in Canada.

98. *Taranenko* (n 63) [95]; *Cumpăna and Mazare v Romania* App no 33348/96 (ECHR, 17 December 2004) [114] wherein the Court noted that the chilling effect ‘works to the detriment of society as a whole’.

99. *Taranenko* (n 63) [66-67].

100. The Court’s (burgeoning) case law on art 18 ECHR may also be relevant, if the authorities can be shown to have acted with an ‘ulterior purpose’ in subjecting protesters to criminal and other sanctions, particularly against a backdrop of law enforcement targeting opposition groups or protest movements. See *Khadija Ismayilova v Azerbaijan* (no 2) App no 30778/15 (ECHR, 27 February 2020) [119]; *Merabishvili v Georgia* App no 72508/13 (ECHR, 28 November 2017) [264-283] [309]; *Ibrahimov and Mammadov v Azerbaijan* App nos 63571/16 and others (ECHR, 13 February 2020) [153].

101. Griffin (n 12) outlines the (overlapping) effects on environmental activists and their networks as a result of ‘spycops’ – including activists reporting a fractured reality, being diverted away from their advocacy, and the loss of bonds of trust between and among activists [7-13].

## 5. CONCLUSION

In his long-awaited report concerning the British government's investigatory powers, David Anderson QC surmised that the polarised nature of the debates surrounding government surveillance boils down to 'a question of trust'.<sup>102</sup> This description applies with equal force to *agents provocateurs*. But beyond the propriety of such techniques, or the trust society is willing to place in its government, the legality of *agents provocateurs* deserves greater attention and debate. This includes whether they constitute a violation of freedom of expression under Article 10 of the ECHR.

This article offered examples of (alleged and admitted) *agents provocateurs* operating in Europe and North America. Public inquiries and admissions by individuals involved suggest the significant scale of these operations, and their frequent targets: trade unions, environmental activists, anti-war protesters, advocates for racial justice. Existing footholds in the jurisprudence of the ECtHR framed the analysis of how such agents should be conceived. In particular, the Court has been clear that outright bans on protests or demonstrations are impermissible absent a real risk of disorder that less intrusive means cannot address. Similarly, the Court has viewed with significant scorn measures designed to dissuade individuals from speaking truth to power or challenging the status quo. The *agents provocateurs* in the examples provided sought to silence or suppress activists doing just that.

Freedom of expression demands not only that individuals be free to impart their information and ideas; it also enshrines the public's corresponding right to receive them. *Agents provocateurs* illustrate that governments can violate Article 10 when they set out to meddle in the 'marketplace of ideas' by impeding the process and contents of expression.<sup>103</sup> Freedom of expression is not only the right to speak, but the right to calibrate, craft and convey one's message free from undue government interference. A government that significantly alters *how* one is heard may violate the right to freedom of expression.

In the final section, the article suggested a line of analysis for whether such interference could be justified under Article 10(2). The margin of appreciation afforded to States should be narrowly circumscribed in light of the individual (political) contents of the targeted speech, the public interest of the information and ideas at issue, and the object of the speech (criticism of government). Though the analysis would turn on the facts and argument in the individual case, it is difficult to conceive that the Court would find that *agents provocateurs* meet the three-pronged requirements, particularly necessity in a democratic society.

The article also highlighted the potential afforded by the Court's jurisprudence concerning States' positive obligations in respect of expression. Limiting or suppressing communication through censorship is only one of the roles governments play in communicative processes, yet it has dominated academic scholarship and ECtHR jurisprudence. For the right to freedom of expression to be genuine and meaningful, States' conduct in *facilitating and enabling expression* must also be scrutinised. Further research and study in this area – including how it relates to infiltration, control and manipulation by State authorities of protest movements and their messaging, and the safeguards necessary to ensure protection of freedom of expression – is warranted.

102. A Question of Trust: Report of the Investigatory Powers Review, David Anderson QC (Independent Reviewer of Terrorism Legislation, June 2015) <<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>> accessed 28 April 2021.

103. *Mouvement Raëlien Suisse* (n 14) Dissenting opinion of Judge Pinto de Albuquerque.



The use of undercover operatives raises complex questions concerning the proper line to be drawn between protecting national security interests and public order on the one hand and respecting and fulfilling human rights obligations on the other. The ends achieved by undercover agents – foiling terrorist plots and keeping guns off the streets – should not be ignored; but neither should those ends be used to justify any and all means, at the expense of rights long recognised. Greater attention ought to be paid to how the balancing of rights and interests should be done in concrete terms, and how far States are permitted to go in committing – or instigating – criminal activity, in nudging democratic discourse towards violence. States can and do exercise their power in any number of ways; but they ought not be allowed to do in secret what would not be permitted in the light of day. The use of *agents provocateurs* goes to the heart of what the public ought to be able to expect from its government. A question of trust, indeed.

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### **ORCID iD**

Katie Pentney  <https://orcid.org/0000-0003-1006-7447>