

FREEDOM OF SPEECH

Eric Barendt

Oxford University Press, 2007, Pp. xi, 550

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The book discusses the legal protection of free speech in countries including England, the United States, Canada, Germany, and under the European Human Rights Convention (ECHR). Eric Barendt examines the varied approaches of different legal systems and constitutional traditions to balancing free speech and freedom of the press against rights to reputation and privacy and to copyright and explores the case in law in light of the philosophical and political arguments for free speech guarantees.

Speech as used in the context of freedom of speech is not only limited to verbal or oral communications. It also includes conduct which produces comparable offense or harmful effects. Pornography, commercial advertising and public meetings on the streets are covered by the freedom of speech. Freedom of speech in media has two forms, one is through broadcast and the other is print media. The author has compared the different approaches taken by the abovementioned countries in protecting the freedom of speech. The use of non-linguistic symbols should be regarded as speech, particularly when their meaning is as clearly established as comparable verbal or written message.

The author compared several types of free speech in different countries and these are political speech, libel and invasion of privacy, privacy and free speech, copyright, meetings, protest and public order, pornography, commercial speech, freedom of speech in media, and freedom of speech and the internet.

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It is interesting to see how each country values freedom of speech. For example, in the United States, it has adopted the free speech principle where speech is entitled to special protection from regulation or suppression. It is entitled to a degree of immunity from government regulation because of some special quality or value to be attributed to communication expression. It means that expression should often be tolerated, even when conduct which produces comparable offense or harmful effects might properly be proscribed. The United States Supreme Court has adopted several principles in protecting the freedom of speech. One of them is the 'clear and present danger test. It has been applied to safeguard insulting and inflammatory speech, unless the state can show that as a result, imminent disorder is likely to occur. Another strong principle is that courts must not grant a prior restraint, unless the state can show that, without such an order, it would suffer direct, immediate and irreparable damage. The Court also formulated a rule under which a public official or figure cannot succeed in a libel action, unless he proves that the defamatory allegations were published with the knowledge that they were false. The most important of these principles states that content-based restrictions on speech should be subject to strict or heightened scrutiny. Under this test the state must show a compelling interest to justify the restriction. Further, it must show that it could not have achieved this aim by 'less restrictive means', in other words that a less draconian measure would not have been adequate to safeguard, say, a national security or another compelling state interest. In contrast, a content-neutral restriction is subject to intermediate scrutiny, a test much less severe than strict scrutiny, but harder to satisfy than a 'reasonable basis' test under which virtually all restrictions on speech may pass constitutional muster. Intermediate scrutiny all requires the state to show that there is a substantial interest to support the restriction and only that the measure was narrowly tailored to achieve that interest, without disproportionately suppressing speech.

In England, prior to the enforcement of the Human Rights Act 1998 (HRA 1998) on 2 October 2000, freedom of speech used to mean that liberty was largely residual. There is liberty where statute or common law rules did not restrict its exercise. But in the 1980s and early 1990s, English judges have already begun to invoke common law principles of freedom of speech or of the press to limit the scope of other common law rules which inhibit the exercise of these freedoms. When HRA 1998 took effect, English common law no longer treats freedom of speech as a merely residual liberty. It is a legal principle, to which the courts must pay attention when interpreting public order or obscenity legislation, or when considering the defenses to an action

for libel or breach of confidence or contempt of court proceedings. It means that the presumption is that other rights should be protected, unless there is a more powerful free speech argument to support the opposite conclusion. In contrast, where free speech is constitutionally guaranteed, the argument should normally be whether there is a sufficient justification for its exercise; either there is a presumption in favor of free speech or at least it is assumed that it is entitled to as much weight as the competing interest.

Canadian free speech law had largely followed the common law approach of England, before the enactment of the Charter Rights and Freedom in 1982. The Charter provides that “Everyone has the following fundamental freedoms: xxx (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” However such freedoms are not absolute unlike the First Amendment. The Canadian Charter further provides that the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The Canadian Supreme Court fully considers the context of the particular case and the value of the expression at issue when determining whether the state has made its case for restricting the exercise of freedom. Both Canadian and US free speech law guarantee free speech or expression rights only against invasion by government or other public authorities and not against private individuals.

Freedom of expression, press freedom, and other related freedoms are guaranteed in Germany by Article 5 of the Basic Law for the Federal Republic of Germany. It provides:

“1. Every person shall have the right freely to express and disseminate their opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. 2. These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor. 3. Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not absolve any person from allegiance to the constitution.”

In contrast to the US Amendment and the Canadian Charter, the detailed character of these provisions is striking. The rights of the speaker and recipient are separately recognized, as they are in ECHR. The relationship between freedom to express opinions and the right to receive information has been much discussed by the Federal Constitutional Court. It is clear that they are separate rights, the latter protecting the interests of recipients in unimpeded

access to information supplied by sources willing to provide it. Freedom of the press and broadcasting freedom are treated by the Constitutional Court as distinct from the freedom to express opinions. They protect the institutional independence of newspaper and broadcasting companies from the state, rather than the content of particular articles or programs from legal restriction. But the Court has made it clear that broadcasting freedom is subordinate to the values of freedom of expression. The interests of viewer's access to a wide variety of programs and information are more important than the unfettered freedom of a broadcaster. Censorship is prohibited under Article 5(1). It is an absolute prohibition. But its scope is limited to administrative control exercised before publication or communication. There are separate guarantees for freedom of assembly and for the free establishment of political parties. These freedoms strengthen the protection of free speech within particular contexts, for example, the conduct of demonstrations and peaceful protest. Other provisions of the Basic Law may limit the exercise of freedom of expression. Among them are the right to free development of personality and right to property. Article 5(2) of the Basic Law is not absolute. It may be limited by provisions of general laws. The German Constitutional Court does not prescribe exact steps which must be taken to satisfy freedom of expression values, but it does issue guidelines. This degree of intervention would be regarded as dangerous in the United States, where freedom of speech is protected only against the state. The freedom of art and science, and research are apparently unlimited. Article 5(3) does not authorize the imposition of any restrictions or conditions on the freedom it guarantees save for teaching freedom which does not grant exemption from loyalty to the constitution. Nevertheless, freedoms under Article 5(3) must be balanced against other constitutional rights and must give way to them when the latter are entitled to greater weight in the circumstances of the case. The Courts weigh freedom of expression against competing rights and interests, whether these are constitutional or reflect legislative objectives.

Article 10 of European Convention on Human Rights 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, 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.”

Article 10(2) does not remove the right granted by the first paragraph. Freedom of expression is presumably favored, the exceptions must be however, narrowly construed. The European Court has ruled that an interference with speech should only be treated as ‘necessary’ if there was a ‘pressing social need’ for it in the particular circumstances, if the restriction was proportionate to the aim pursued, and the reasons given for it were relevant and sufficient. The state has the burden of proving that there is a pressing need for the restriction of such right. The Article also covers commercial speech and professional advertising. Prior restraints or censorship are not forbidden, but are subject to particularly careful scrutiny, because they prevent or delay the exercise of freedom of expression rights. Journalistic freedom allows room for some exaggeration and provocation. But journalists must provide reliable information and act in good faith in accordance with the ethical standards; the exercise of free expression under Article 10(2) carries with it duties and responsibilities. The European Court allows member states a ‘margin of appreciation’ in determining whether it is necessary to impose a restriction on the exercise of freedom of expression. At the same time, the Court supervises both the formulation of the restriction and its application by national courts to ensure it is proportionate to the legitimate aim in respect of which it was imposed. While the Strasbourg Court is not an appellate court, it reviews the reasons for the national courts’ decisions with great care, often examining the facts of the case in detail. This approach allows it to intervene more readily to protect freedom of expression in some circumstances than in others.

One of the most prominent issues in the freedom of speech is libel. It is because libelous materials tend to give a person, business or group a negative image to the public, thus libel should be balanced with free speech. The author made an important discussion on how libel is treated in countries like the United States, Germany and England as well as the European Court on Human Rights.

In the United States, a public official must be able to prove that there is an actual malice. The difference between the US rule and the common law is that the common law assumes that the defendant will be able to show the truth of defamatory allegations in court and should accept liability if he does not do this. The states are free under the First Amendment to decide their own

standards of defamation liability, provided they did not maintain common law strict liability. Recovery in libel could only be permitted where the claimant proved actual loss or injury. In the absence of any showing of actual malice, there should be no recovery for presumed or punitive damages. Under the United States law, there is a need to draw lines between public officials and private individuals. A further distinction must be drawn between allegations made in speech of public concern and those made in the course of speech of only private concern.

In Germany, under Article 5(2) of the Basic Law, the right to free expression is limited by the right to inviolability of personal honor, as well as the provisions in general laws. Limits are imposed by the criminal law of insult and defamation and by provisions of the German Civil Code. The lower courts must weigh the competing interests in freedom of expression and in personal reputation appropriately in the light of all relevant facts in the case. The Court will uphold a constitutional complaint if the balancing has not been conducted properly. The laws protecting individuals against defamation must be interpreted and applied so they do not unduly restrict freedom of expression. In balancing the freedom of expression and reputation rights, the Constitutional Court has emphasized that more freedom should be allowed the expression of an opinion than assertion of facts. Unlike the American approaches, the German case-law makes little attempt to formulate precise rules on the basis of which free speech and reputation rights are to be balanced. The Constitutional Court lays down guidelines on the basis of which the ordinary civil and criminal courts are required in some circumstances to give priority to reputation or freedom of speech. It removes the need to draw lines between a public figure and a private individual.

Until recently, English courts refused to recognize defense of qualified privilege to defamation actions brought in respect of communications to the general public of inaccurate information. There is libel when the defendant could not prove the truth of any factual allegations. English libel law may cause the media to refrain from publishing allegations which they believe on good grounds to be accurate, when, for instance, there is not enough time to verify them or the claimant is unavailable for comment, thus libel continues to chill freedom of speech. But the chill should only be regarded as undesirable if it is accepted that there is a right to publish material damaging to an individual's reputation whenever the allegations are of public interest and there is some basis for believing them to be true.

The European Court on Human Rights is concerned with the character and subject matter of the defamatory material rather than the status of the libel claimant. The Court would carefully scrutinize constraints imposed by libel law on the discussion of any matter of public concern. The Court gives greater protection to value judgments than to factual allegations. In that respect, it adopts the same approach as courts in the United States, Germany, England and other jurisdictions. The Court attaches weight to the general purpose of the publication and the relative importance within that context of the defamatory allegations. The European Court ensures that national courts have balanced freedom of expression and the right to reputation correctly.

Another aspect of free speech that is relevant is the free speech in media. The freedom of speech and freedom of the press are equivalent. The right of the media to provide information and to know is neither more nor less than that of the general public. Since the media provide information to the public, their right must be protected so that the public will be benefitted from the information they provide.

The United States Supreme Court has not given the 'freedom of the press' limb of the First Amendment any specific content which is clearly distinct from the coverage afforded by freedom of speech. It treats ordinary individual speakers and writers in the same way as the press and other media, so avoiding any charge of discrimination in favor of the latter. It is clear that non-media defendants enjoy the same degree of protection as the press and broadcasters from libel actions. In the United States, broadcasters enjoy editorial freedom to determine program schedules, including a right to reject political advertisements. Even public broadcasting channels are free to take a distinctive view on controversial public issues.

The German Court, however, has made distinctions between the press freedom and broadcasting freedom. Both branches of media are constitutionally protected as institutions. Their independence from state control is an essential element of liberal democracy. It considers freedom of the press and broadcasting as an instrumental freedom guaranteed only inasmuch as it promotes the values of freedom of speech. German decisions show press freedom clearly entitles an editor to select the letters for publication in his paper and to allow a writer to contribute anonymously. He is also free to determine its general outlook and its views on particular political and social issue.

The Canadian Charter provides that everyone has the fundamental freedom of expression including freedom of the press and other media of communication. Media freedom is not a right to be enjoyed solely by the media themselves, although the press or broadcasting institution is entitled to assert it. But when they do so, they are in effect claiming to exercise a freedom on behalf of everyone.

The European Convention on Human Rights and Fundamental Freedoms (ECHR) does not provide any separate guarantee for the press or broadcasting media, it emphasized the vital function of the press as a 'public watchdog' in imparting information and ideas of public interest.

Broadcasters have been more tightly regulated than newspapers publishers and editors. This is particularly true in Canada and Europe, where channels are usually required to be impartial in their presentation of news and treatment of political issues. They are also subject to stricter controls than the press with regard to the use of bad language and portrayal of sex and violence. They are usually required to show current affairs and other serious programs, so they are not completely free to determine their own schedules.

In an era where different forms of communication and expressions are rapidly sprouting numerous in view of the advancement of technology and where more and more countries are shifting to democracy, a form of government in which freedom of speech plays an important role, it thus becomes significant to draw the line between speech or conduct that can be legally protected and that which may be validly restrained by the government. In striking such difficult balancing of the values involved, this book can well serve as a guideline. It is also a helpful aid for both students of the law and legal practitioners in their continuous study of the law on free speech.