

## FREEDOM OF SPEECH

By Eric Barendt

Oxford University Press, 2<sup>nd</sup> Edition, 2005\*

### INTRODUCTION

The US's First Amendment is extremely vague, inducing much controversy. England has no written Bill of Rights; it relies on common law free speech doctrine. The English law provides least protection to free speech. Compared to the USA and England, Germany's Article 5 of the Basic Law and the European Convention's Article 10 are explicit in their language. The author's discussion centres on British and American law though he seems expert in British law. The inclusion of the European Convention on Human Rights (ECHR) makes the book richer. English courts consider decisions of the European court in Strasbourg, but they also take into account important judgments on free speech in Australia, Canada, and other commonwealth countries and rulings of the US Supreme Court.

### CHAPTER I: WHY PROTECT FREE SPEECH?

The author Eric Barendt in his book "Freedom of Speech"<sup>1</sup> gives us a comparative treatment of freedom of speech in England, USA, Germany and under the European Convention on Human Rights (ECHR). Freedom of speech begins with an exploration of four arguments put forward to justify a free speech principle under which speech is entitled to special protection from regulation or suppression. Barendt analyses four free speech theories:

1. *Arguments concerned with the importance of discovering truth:*

The "argument from truth" reflects John Stuart Mill's idea that truth is a fundamental good that can be ascertained over time, but not without open discussion of facts and judgments, regardless of their veracity. Freedom of discussion necessarily leads to the discovery of truth or, more concretely, to better individual or social decision.<sup>2</sup>

2. *Free speech as an aspect of self-fulfilment:*

The "aspect of self-fulfilment" theory sees free speech as an "integral aspect of each individual's right to self-development and fulfilment. This theory accentuates

---

\*Joydip Ghosal, Pursuing Ph D from WB NUJS, Kolkata; Guest Lecturer, Surendranath Law College, Kolkata.

<sup>1</sup> Eric Barendt, "Freedom of Speech" (Oxford University Press 2<sup>nd</sup> ed. 2005).

<sup>2</sup> *Id.*, at 9-13.

the value to individuals served by free speech (self-determination, autonomy), rather than the good to society as a whole, protected by the arguments from truth or democracy.<sup>3</sup>

3. *The argument from citizen participation in a democracy:*

The “argument from citizen participation in a democracy” is the most popular rationale used in modern Western democracies which sets the ultimate goal of the free speech as preservation of democracy by sustaining individual access to uninhibited public debate on political issues: without discussion, public opinion cannot form in a meaningful way.<sup>4</sup>

4. *Suspicion of government:*

The above four theories for free speech protection are positive in nature. The fourth theory “suspicion of government” argues that there are particularly strong reasons to be suspicious of government in this context; it is a negative argument in that it highlights the evils of regulation, rather than the good of free speech.<sup>5</sup>

## CHAPTER II: FREE SPEECH IN LIBERAL LEGAL SYSTEMS

This chapter sets out the relevant constitutional provisions of free speech in a number of liberal democracies and examines the approach of the courts of each jurisdiction to their application and interpretation.

### *ENGLAND*

In England, prior to the enforcement of the Human Rights Act, 1998 (HRA 1998), there is liberty to freedom of speech where statute or common law rules did not restrict its exercise. When HRA 1998 took effect, English common law no longer treats freedom of speech as a merely residual liberty. There is a presumption 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 either there is a presumption in favour of free speech at least it is assumed that it is entitled to as much weight as the competing interest.<sup>6</sup>

### *THE UNITED STATES*

---

<sup>3</sup> *Id.*, at 13-18.

<sup>4</sup> *Id.*, at 18-21.

<sup>5</sup> *Id.*, at 21-23.

<sup>6</sup> *Id.*, at 39-48.

In the US, speech is entitled to special protection from government regulation because some value is attributed to communication expression. The US Supreme Court has taken a number of principles in protecting the freedom of speech:

- (a) The “clear and present danger” test safeguards insulting and inflammatory speech, unless the state can show that, without such an order, it would suffer direct, immediate and irreparable damage;
- (b) The court should not grant a prior restraint, unless the state can show that, without such an order, it would suffer direct, immediate and irreparable damage;
- (c) 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;
- (d) 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.<sup>7</sup>

#### CANADA

Both Canadian and US free speech law guarantee free speech rights only against invasion by government or other public authorities and not against private individuals. Before the enactment of the Charter Rights and Freedom in 1982, Canadian free speech law had largely followed the common law approach of England. The Charter provides that everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. However, such freedoms are not absolute and are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>8</sup>

#### GERMANY

Article 5 of the Basic Law for the Federal Republic of Germany guaranteed freedom of expression, press freedom and other related freedoms<sup>9</sup>. The rights of the speaker to express

---

<sup>7</sup> *Id.*, at 50, 51.

<sup>8</sup> *Id.*, at 55-59.

<sup>9</sup> “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.”

opinions and recipient's right to receive information are separately recognised with the latter protecting the interests of recipients in unimpeded access to information supplied by sources willing to provide it. The Constitutional Court treats freedom of the press and broadcasting freedom distinct from the freedom to express opinions and has made it clear that broadcasting freedom is subordinate to the values of freedom of expression.

Censorship, an absolute prohibition, is prohibited under Article 5(1) but its scope is limited to administrative control exercised before publication or communication. The German Constitutional Court does not prescribe exact steps which must be taken to satisfy freedom of expression values, but it does issue guidelines.<sup>10</sup>

### *THE EUROPEAN HUMAN RIGHTS CONVENTION*

Freedom of expression is presumably favoured, the exceptions must be however, narrowly construed. The European Court has ruled that an interference with speech should only be treated as 'necessary' if:

- (a) there was a "pressing social need" for it in the particular circumstances;
- (b) the restriction was proportionate to the aim pursued; and
- (c) the reasons given for it were relevant and sufficient.

The exercise of free expression under Article 10(2) of the European Convention on Human Rights<sup>11</sup> carries with it duties and responsibilities. Prior restraints or censorship, which prevent or delay the exercise of freedom of expression rights, are not forbidden but subject to particularly careful scrutiny. 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.<sup>12</sup>

### CHAPTER III: THE SCOPE OF FREEDOM OF SPEECH

Noted that all four jurisdictions derive their free speech principles from the above mentioned four theories, in Chapter III the author examines the meaning of speech and scope

---

<sup>10</sup> *Supra* note 1, at 59-63.

<sup>11</sup> "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."

<sup>12</sup> *Supra* note 1, at 64-67.

of the freedom of speech. The author uses the terms “freedom of speech” and “freedom of expression” interchangeably. According to him speech is really a term of art when used in constitutions, and courts should ask whether, in the light of the reasons for protecting expression from legal regulation and so adopting a free speech principle, the type of communication in issue should be covered by the principle .Having established the basic structure Barendt applies the above mentioned four theories to the next eleven chapters.

## CHAPTER VI: LIBEL AND INVASION OF PRIVACY

One of the most prominent issues in the freedom of speech is libel. It is because libellous 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, England as well as the European Court on Human Rights.

### *ENGLAND*

Under English law, 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.<sup>13</sup>

### *USA*

In the US, a public official must be able to prove that there is an actual malice. 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. 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

---

<sup>13</sup> *Id.*, at 219-222.

not do this. Recovery in libel could only be permitted where the claimant prove actual loss or injury.<sup>14</sup>

### *GERMANY*

In balancing the freedom of expression and reputation rights, the Constitutional Court has emphasised that more freedom should be allowed the expression of an opinion than assertion of facts. The laws protecting individuals against defamation must be interpreted and applied so they do not unduly restrict freedom of expression. Limits are imposed by the criminal law of insult and defamation and by provisions of the German Civil Code. 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.<sup>15</sup>

### *ECHR*

The court gives greater protection to value judgments than to factual allegations. In that respect, it adopts the same approach as courts in the US, Germany, England and other jurisdictions. The European court ensures that national courts have balanced freedom of expression and the right to reputation correctly.<sup>16</sup>

## CHAPTER VII: COPYRIGHT AND OTHER PROPERTY RIGHTS

The author has rightly pointed out that while the relationship of freedom of speech to copyright protection has increasingly attracted the attention of copyright lawyers, the topic has rarely been discussed by writers on freedom of speech. The courts, even in the US, have almost always rejected arguments that the scope of copyright is constraint by free speech considerations.

Much of the chapter VII is concerned with the relationship of copyright to freedom of speech. The author has given stressed on balancing copyright and free speech rights. The argument that freedom of speech limits copyright and other property rights is taken more seriously in the book than it used to be.

## CHAPTER IX: FREE SPEECH AND THE JUDICIAL PROCESS

---

<sup>14</sup> *Id.*, at 206-208.

<sup>15</sup> *Id.*, at 213-218.

<sup>16</sup> *Id.*, at 223-225.

Powerful private institutions, such as the press and other media, should respect fundamental constitutional rights such as the right to a fair trial, a perspective which may require the courts to balance the right against freedom of speech and of the press. On that approach, it makes sense to refer to a conflict between two fundamental rights, the weight of which must be assessed in the context of the particular facts.

This chapter discusses two types of contempt of court that clearly raise major free expression issues: attacks on the judiciary and publications that are thought likely to prejudice the fairness of future legal proceedings, particularly criminal trials. The open justice principle, under which the press and public area are free to attend and report court proceedings, is also considered. Among other issues, it raises the question of whether freedom of speech entails rights of access to attend, and to film and broadcast, legal proceedings.<sup>17</sup>

## CHAPTER XII: FREEDOM OF SPEECH IN THE MEDIA

### *USA*

The US Supreme Court treats ordinary individual speakers and writers in the same way as the press and other media, that the non-media defendants enjoy the same degree of protection as the press and broadcasters from libel actions. In the US, broadcasters enjoy editorial freedom to determine program schedules, including a right to reject political advertisements.<sup>18</sup>

### *GERMANY*

The German court has made distinctions between the press freedom and broadcasting freedom and is constitutionally protected as institutions. It considers freedom of the press and broadcasting as an instrumental freedom guaranteed only in as much as it promotes the values of freedom of speech. German decisions show press freedom clearly entitles an editor:

- (a) to select the letters for publication in his paper;
- (b) to allow a writer to contribute anonymously;

---

<sup>17</sup> *Id.*, at 314-316.

<sup>18</sup> *Id.*, at 422.

(c) to freely determine its general outlook and its views on particular political and social issue.<sup>19</sup>

#### *CANADA*

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.<sup>20</sup>

#### *ECHR*

The ECHR does not provide any separate guarantee for the press or broadcasting media, it emphasised the vital function of the press as a 'public watchdog' in imparting information and ideas of public interest.<sup>21</sup>

---

<sup>19</sup> *Id.*, at 425.

<sup>20</sup> *Id.*, at 424.

<sup>21</sup> *Id.*, at 424.