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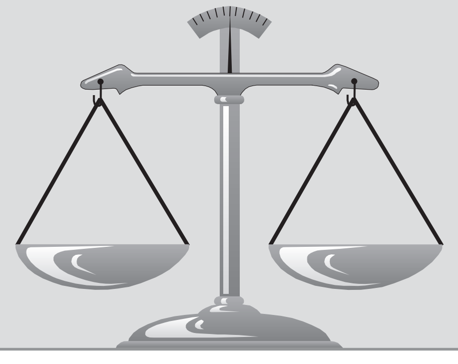

LAW in-depth

Freedom of Expression

Case law under European Convention on Human Rights

Sally Burnheim

"FREEDOM of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society." - Handyside v. UK(1)

The right to freedom of expression is probably the most universally accepted human right. Certainly, it has been the subject of considerable case law under the European Convention of Human Rights. Beginning with the Handyside case, the European Court has repeatedly underscored the fundamental importance of freedom of expression as a central pillar of democracy.

The opening sentence of the Handyside passage, quoted above, indicates the two underlying reasons why freedom of expression is considered to be essential. Firstly, it is central to the functioning of a democratic society - political representatives can only understand and represent the views of their constituents through an open, two-way process of airing views, opinions and facts. Secondly, a person can only achieve self-fulfilment and their full human potential through being able to freely communicate their feelings, opinions and ideas.

Through its casework, the European Court of Human Rights has established the range and means of free expression protected under the European Convention - including political, artistic and commercial expression through the written and spoken word, television and radio, film and art.

The Court has strongly established the importance of the media's role in being able to report freely on matters of public interest. As affirmed in the Handyside passage, freedom of expression extends to unfavourable information or ideas, as well as those that are popular or inoffensive.

However, with the phrase "subject to paragraph 2 of Article 10", the Handyside quotation also indicates that the right is not absolute. Free expression often impacts on the rights and interests of others - for example, it may damage another person's reputation, prejudice a fair trial or incite racial hatred. Therefore, the Court has sought to balance the right to freedom of expression with the state's legitimate need to restrict it in certain circumstances. In some instances, notably on issues of morality, it has granted states a large measure of discretion in determining that need.

The Scope of Article 10

The European Court has done much to interpret freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights. Article 10(1) of the Convention states that "everyone has the right to freedom of expression". This includes the right to "receive and impart information without interference by public authority and regardless of frontiers".

However, in order for states to prevent expression which may be harmful or infringe other's rights, Article 10(2) allows specific limitations on the right to freedom of expression which are "prescribed by law" and "necessary in a democratic society". These include such restrictions or penalties as may be needed to safeguard national security, protect public health and morals, prevent crime, or maintain the authority and independence of the judiciary. Extreme examples of harmful expression may include such things as violent or child pornography and incitement to racial violence.

In comparison with other Convention with a similar structure, the European Commission and Court has been less concerned with the definition of freedom of expression, but rather with states' justification for interference. States must show that any restrictions were lawful, that there was a pressing social need for the interference, and that they were proportional to the interest served.

The Court's main concern has been to strike a balance between protecting freedom of expression and protecting the rights and interests of others. It has allowed states a margin of appreciation on the basis that they are in a better position to determine whether a restriction is necessary in the light of local circumstances, especially with regard to the 'protection of morals'. This need may differ from state to state - even between democratic states - and may be constantly changing. However, the Court has also made it clear that states do not have free reign - any restriction must be interpreted narrowly and the Court maintains a supervisory role to monitor and scrutinise the restrictions imposed by states.

The development of case law

Several distinct categories of expression have emerged through the case law under the European Convention on Human Rights. In line with the concept that freedom of expression is essential in a democratic society, the Court has shown greater preference for political expression, followed by artistic expression, and lastly commercial expression. This article focus mainly on political and artistic expression.

Politica expression

A key ruling on political expression is found in Lingens Vs Austria (1986), in which the Court imported a concept from the US Supreme Court that politicians must expect and tolerate greater public scrutiny and criticism than average citizens. It stressed the media's crucial role in reporting matters of public interest. Freedom of the press provided the public with "one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders". The Court stated:

"More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."

In both Lingens and a later case, Oberschlick Vs Austria (1991), the Court made it clear that freedom of expression was not limited to verifiable, factual data. In other words, it was not 'necessary in a democratic society' for journalists to prove the truth of their opinions and value judgements about political figures, as these were impossible to prove anyway.

"Protection of journalistic sources is one of the basic conditions for press freedom... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. "

Contempt of court

In several cases, the Court has balanced the right to freedom of expression with the administration of justice, and weighed in favour of the former. For example, in Sunday Times Vs UK (1979), the Court stressed the media's role in reporting matters which the public has a right to know, saying:

"The thalidomide disaster was a matter of undisputed public concern... Article 10 guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed...

The question of where responsibility for a tragedy of this kind actually lies is also a matter of public interest... [T]he facts of the case...did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the [Sunday Times] article might have served as a brake on speculative and unenlightened discussion."

On the issue of the state's margin of appreciation, the Court recalled its Handyside decision, which allowed variations between states on the need to restrict free expression for the 'protection of morals'. It said that states are generally in a better position to decide on such matters. However:

"Precisely the same cannot be said of the far more objective notion of the 'authority' of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area".

Therefore, the Court ruled that, even though the case involved sensitive matters before a court, the ban on publishing the articles did not correspond to a social need so pressing that it outweighed the public interest in freedom of expression.

The Sunday Times case was also significant for its consideration of the notion that a restriction was "prescribed by law". In the UK, contempt of court is a common law concept which aims to protect the administration of justice. The Sunday Times argued that the law of contempt was inherently uncertain. However, the Court determined that the crucial factor was not whether the law was written or unwritten but whether it was clear enough for citizens to know with reasonable certainty the likely consequences of a particular action. It found that the British law on contempt of court met that standard. However, 'the Sunday Times test' does not only ask whether a law exists in the state concerned, but whether it complies with the requirements of Article 10(2).In Goodwin Vs UK (1996) - another contempt of court case - the Court endorsed the freedom not to speak, i.e. the fundamental right of journalists not to disclose the identity of confidential sources of information, stating:

"Protection of journalistic sources is one of the basic conditions for press freedom... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

Both the Sunday Times and Goodwin cases concerned the issue of 'prior restraint' preventing the media from publishing sensitive information. However, it was not until the Spycatcher cases -involving suppression of media reports on Peter Wright's book about the secret service - that the European Court directly addressed the threat to press freedom posed by prior restraints:

"The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."

In the first Spycatcher case, involving the Observer and Guardian newspapers, the Court made a controversial distinction between two time periods - before and after the book's publication in the US. For the first period, it ruled by a narrow margin (14 votes to 10) that the injunctions against the newspapers were justified because of a risk that the material was prejudicial to the British secret service. For the second period, however, the Court ruled unanimously that Article 10 had been violated since the government's aim of protecting confidentiality was no longer relevant as the information had entered the public domain:

"Continuation of the restrictions after July 1987 prevented the newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern."

The Court's conclusion that the UK authorities were entitled to believe that, prior to US publication, the injunctions were 'necessary in a democratic society', was surprising. Earlier in the same judgement, it had reiterated the principle first articulated in the Sunday Times case that freedom of expression is not to be balanced against other interests, but rather is "subject to a number of exceptions which...must be narrowly interpreted".

Eleven judges disagreed with the Court's majority finding that the injunctions were acceptable during the first period. Judge De Meyer, joined by four others, stated that prior restraints, whether temporary or permanent, should be upheld only when a state can demonstrate concerns so serious that they 'threaten the life of the nation', and even then, only to 'the extent strictly required'.

Another dissenting judge, Judge Martens, said that prior restraint was undoubtedly "after censorship, the most serious form of interference" with freedom of expression and the 'age of information' meant that "information and ideas cannot be stopped at frontiers any longer". His comment highlights the implications for freedom of expression of advances in information technology. A state's decision to ban information or ideas is likely to become increasingly ineffective, especially with the rise of the Internet and satellite communication for news reporting.

The Spycatcher case was significant in establishing that neither maintaining the authority of the judiciary, nor national security could justify measures to suppress material in the book once it was published in the US. It was the first time that the Court had rejected a government's claim that an interference in a fundamental freedom was necessary to protect national security. The episode also proved that the best way to promote interest in a book is to ban it.

Obscene and/or blasphemous publications

The Handyside case (1976) is significant for its assertion of the importance of free expression, and also for its consideration of the concept that state interference must be 'necessary in a democratic society'. The Court ruled that the British Government's action in banning The Little Red Schoolbook and charging its publisher with obscenity was not out of proportion in a democratic society. Despite extending free expression to information and ideas that "offend, shock or disturb", the Court ruled in favour of the state, allowing it a margin of appreciation to determine the measures needed to protect morals. The fact that the book had been allowed in a majority of contracting states did not preclude it being necessary to restrain its publication in a minority of states if local circumstances required. The Court reasoned that it was not possible to find "a uniform European conception of morals" in the various laws of contracting states, and that "the requirements of morals varies from time to time and from place to place".

Therefore "By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a restriction or penalty intended to meet them... It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity'...".

However, the Court made clear that Article 10(2) did not give states unlimited power of appreciation; the Court would make the final decision on whether a restriction or penalty was permissible:

"The domestic margin of appreciation thus goes hand in hand with a European supervision...[which] concerns both the aim of the measure challenged and its necessity."

Similarly, in Müller Vs Switzerland (1988) - the first case in which the European Court extended the right to freedom of expression to artistic expression - the Court determined that it may be necessary for a state to restrict free expression in order to protect vulnerable citizens, especially children. In the absence of a uniform approach to morality among member states, the issue was not whether the Court agreed with the conviction, but whether the action was reasonable. The Court ruled that the state was entitled to regard the paintings as morally pernicious and thus had not violated Article 10.

The Court seemed to undermine this reasoning in Otto-Preminger Institute Vs Austria (1994), in which it also found in favour of the state. However, unlike in the Müller case, the Institute had restricted the showing of a 'blasphemous' film to paying adults above 17 years of age. There was little risk that children would chance to see the film as it was to be screened late at night. Therefore, the Institute had taken precautions which seemingly precluded the need for the state to interfere 'for the protection of morals'. Despite stating that people with religious beliefs have to tolerate criticism and denial by others, the Court gave the state a very wide of margin of appreciation, accepting that its action was necessary in order to keep the peace. In contrast, the Commission had said that "very stringent reasons" were needed to justify the seizure of a film - "which excludes any chance to discuss its message" - and that these reasons were lacking.

Similarly, the Court deferred to the state's margin of appreciation in Wingrove Vs UK (1997)(48), finding that the state's refusal to provide an official classification for an allegedly blasphemous film was not a violation of Article 10.

Hate speech

The delicate balance between freedom of the press and its impact on the rights of others was weighed by the Court in Jersild Vs Denmark (1994). The Court acknowledged that the racist remarks for which the Greenjackets were convicted "were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10", and that the Danish Government had acted to protect its minorities against racial discrimination. It also noted the potential impact of the medium, since "it is commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media". However, the Court found that the penalties imposed on the media in this case were not necessary in a democratic society for the protection of the rights of others:

"The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."

In the Jersild case, the Court took into account the intended audience of the message in determining whether state interference is justified. Unlike the Handyside case, in which the messages of The Little Red Schoolbook were aimed primarily at children, the Greenjackets item was part of a serious news programme directed at a well-informed audience, who clearly required less protection. With the exception of the Otto-Preminger case, the Court has shown unwillingness to accept interference with the communication of ideas and information to consenting adult consumers.

Concluding remarks

In keeping with its affirmation that freedom of expression is "one of the essential foundations of a [democratic] society", the Court has clearly shown a preference for political expression. This can be seen in its rulings in favour of political speech, largely through the media, when it has been balanced against other compelling interests, such as the administration of justice, confidence in national security services, and the protection of the rights or reputation of others. In matters involving artistic expression - especially that which has raised suggestions of obscenity or blasphemy - the Court has allowed states a greater margin of appreciation to determine the restrictions necessary for the protection of morals.

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LAW alter views

Laws alone cannot ensure rule of law

Shamsul Hoque

A scarecrow is a figure usually made of bamboo bars, straw or rugs. Dressed in old clothes, it looks like a person. Often it has a painted face made of a pumpkin skin.

The scarecrow is put in a cornfield to frighten birds away. The innocent, simple birds are really scared and they don't dare to come near the field. But some birdsstrong and greedydo not get frightened. They are often found not only to come near the scarecrow, but also to perch on its arms and head to rest after eating the grain to their hearts' content. Seeing these birds enjoying food and security, some other birds ask themselves, "They are having good meals. The scarecrow does not scare them. Why should we be fools and starve?" So all the birds join in the feast.

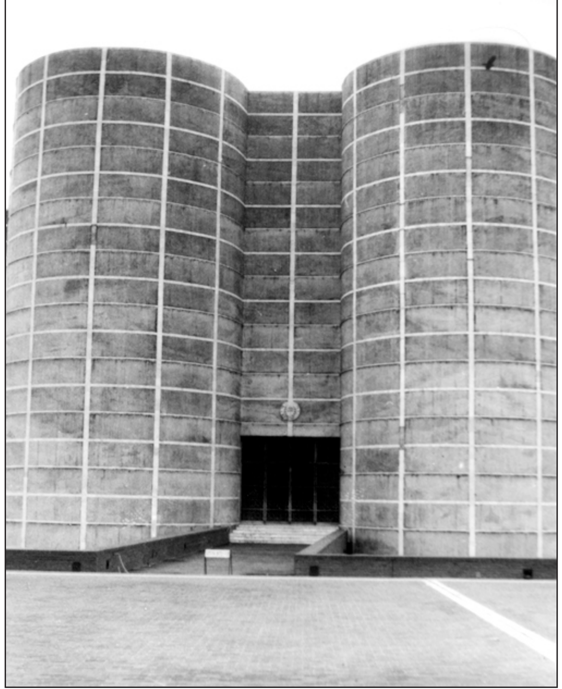
A law is made with the express intent to help people in getting justice through a legal system, thereby aiming to achieve the "greatest happiness of the greatest number" (Priestley: Essay on Government). But very often the law fails to serve this purpose. The innocent, simple, illiterate and the poor cannot access legal procedure because it is highly expensive, complicated and time-consuming to them. So they look upon law from a distance as a frightening scarecrow. On the other hand, some people in societylike those strong, greedy birdstame, twist or tarnish a law and use it for their own benefits. Some others follow suit and seize the opportunity too. Thus the law is made into a no-more frightening, rather a tattered scarecrow. It is this second group that is mainly responsible for making many laws ineffective. Not only that, they make law an accomplice in fulfilling their greed for power and possessions.

Who are the major actors in this grab-all-you-can chase? They are well known in society. They are strong, influential people belonging to all the stakeholder groupslawmakers, law-protectors and enforcers. Let's see how they are going on this wrecking spree.

1.Some lawmakers and decision-makers have an implied intent behind making a law. The purpose here is to protect the interest of, or punish, a group or section or class of people. Laws like Special Powers Act, Indemnity Act and the like are examples in question. These laws more often than not fail to ensure justice and equity for the greatest happiness of the greatest number. Rather they often tantamount to becoming instruments of misuse or abuse of power.

2.Some lawmakers fail to see whether a law is justifiable. As a result, its breach is not normally considered punishable by the enforcers. Cars are found parked right under the 'No Parking' signs in front of some shopping centres. If the law here is strictly enforced, there will hardly be any buyers coming to these shops, as there are no parking lots around. Again, people are found passing water on the edges of the city footpaths in broad daylight, as there are hardly any public toilets on the crowded city roads.

3.Some law enforcers are negligent in performing their duties. All the law enforcement agencies and personnel are to see that the laws are enforced, so that their intended goals are achieved. But this often does not happen. With the blessing of their saviours and godfathers, musclemen, terrorists and extortionists are often found freely, often defiantly moving in society. Water bodies and land in big cities are being grabbed by a powerful section of people. A bus stops in the middle of the road to collect passengers right under a traffic policeman's nose. Another traffic policeman is found allowing a flag car to make a U-turn ignoring a 'No U-Turn' sign. In many offices files do not get moving from one table to another until they are pushed either by an underhand deal or by a powerful hand from above. Wild birds are sold openly on the city roads. Your phone line has been out of order for a week or more, but you can get it fixed soon by generous bakshish or by a phone call from a powerful uncle. Polythene bags, the culprits causing serious environmental degradation, are now more seen than they were before the ban. These are just the tip of the iceberg.



4.Some bureaucrats follow their own code of conduct. They do not listenthey only order and in doing so they naturally follow just one principle, that is 'Doing Things Top Down'. A bureaucrat is often heard to say to a person: "Do you know who you are talking to? You are talking to the sarker." So he is the Law and he means it. Hence almost all the cases of recruitment, promotion, transfer, posting, etc are carried out through top-down orders.

Often these unfair, unjust and illegal activities of the so-called protectors and enforcers of law are carried out ex parte more speedily and more smoothly (?) with the help of some auxiliary force or bahini, ie the armed cadres of musclemen and a section of students. The result is: the general people who are often denied justice and whose fundamental and constitutional rights are not often protected become demoralized, frustrated, outraged. Then they develop deep disrespect for law-a debasing, depraving situation that makes them almost believe that the only law is the absence of law, that a person is law, that might is right. To them law is nothing but a mockery of justice, a big joke, just like a scarecrow in a cornfield. As a result, there exists a free-for-all everywhere in society. And hell is let loose.

So where do we go from here? It is no easy job on the part of the lawmakers and the law-enforcers alone to contain this orgy of lawlessness. This is because both the cause and the effect of this situation, if expressed in one word, are corruption that thrives on self-interest and personal aggrandisement. Hence the way forward cannot be any short-cut, one-off, legal measuresrather it calls for a long-term process of raising awareness about, and educating general people on, the benevolent power of law that can render justice and equity to all the deserving people irrespective of class, caste and creed. This is doable. Make the study of basic laws compulsory in a graded way in our curriculumprimary through higher secondary. Side by side, continue making legal education and practice both means and end of social good through the law curriculum followed at the country's universities and colleges. Only then will people in general develop, over time, a sense of duty and responsibility, build their character and respect law. Only then will people appreciate and accept what Thomas Fuller said 300 years ago, "Be you never so high, the law is above you."

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