STAR LAW *report*

Free speech law: How US experience works

A.K. ROY

"CONGRESS shall make no law... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Rarely has such an apparently simple legal text produced so many problems of interpretation. The extent to which solution have been influenced by various free speech theories, or can be justified by reference to them, is explored in later paragraphs.

The rich case law of the US Supreme Court shows, among other things, its reluctance to commit itself to any of these theories, although particular members of the court have taken a distinctive approach to free speech issues. As was suggested, the argument from democracy has been the most popular positive justification for the place of freedom of speech in US constitutional law, its influence being shown by the particularly strong protection given to political speech.

In comparison, the Court has been more willing to countenance restrictions on commercial speech, and advertising, while hard-core pornography may, in theory, still fall entirely outside the scope of free speech coverage.

The "marketplace of ideas" version of the argument from truth, formulated by Holmes, J. in his famous dissenting judgment in the Abrams case [Abrams v. US 250 US616 (1919)] has also exercised a significant influence on US free speech jurisprudence. While some commentators have found attractive rights-based arguments stemming from fundamental human rights to dignity and self-fulfilment, these arguments have not played a substantial part in shaping Supreme Court rulings on free speech.

By mentioning freedom of speech alongside rights of assembly and petition the text of the First Amendment itself appears to emphasize the freedom's rule in safeguarding the interests of the possession and minorities. But relatively little reliance has been placed on this point, except in the development of the linked freedom of association.

The first amendment literally only applies to the laws of Congress, but it has never been seriously suggested that executive and police orders are immune from judicial review (Pentagon Papers Case). Even more crucially, since the decision in Gitlo v. New York in 1925, it has been excepted that freedom of speech and of the press are fundamental personal rights protected from invasion by the States (as well as by Congress and the federal government) under the Due Process Clause of the Fourteenth Amendment.

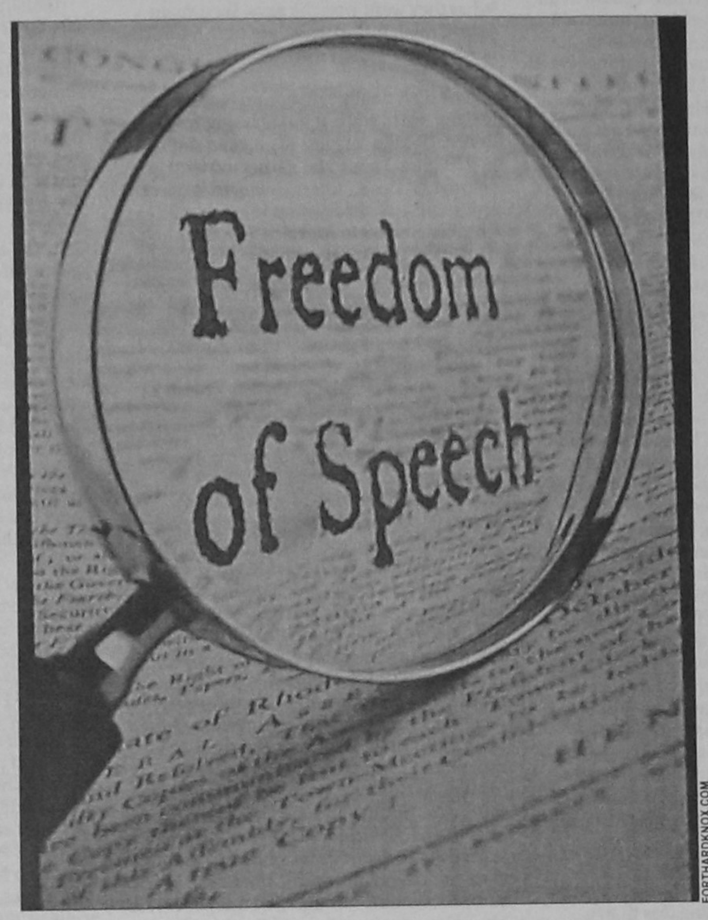
But the "State action" doctrine limits the scope of free speech protection. Under this doctrine constitutional rights in the United States are only guaranteed against invasion by government and public authorities. There includes the courts when they are called on to enforce statutes or common law rights, such as the right to reputation or privacy.

But they are not protected against the decision of private institutions and individuals. For example, the Supreme Court has held that freedom of speech was not violated by the refusal of a private broadcasting company to allow a political group advertising time to protect against conduct of the Vietnam War, (Columbia Broadcasting System v. Democratic National Committee 412 US 94, 1973), or by the decisions of owners of a shopping mall not to permit demonstrations on its property (Lloyd Corpn. v. Tanner 407 US 551, 1972).

The US Courts have departed from a literal or strict construction list approach to the intermediation of the First Amendment in one way. Of particular interest for comparative free speech jurisprudence, despite the frequent promptings of Black J., a member of the Supreme Court from 1937 to 1971, the Court has never taken literally the injunction "shall make no law...abridging the freedom of speech...".

The absolutist position, advocated by Black and Gouglas JJ, is impossible to sustain. Courts are aware of the vital interest that may be threatened by unrestricted speech, as Holmes J. pointed out in the first Supreme Court case seriously to consider First Amendment principles. Absolutists can try to defend their corner by asserting that "abridging" does not cover all forms of regulation and that "the freedom of speech" is not the same as "speech" so that rightly understood the term does exclude restrictions on some modes of expression. But really the game is up, the poverty of literalism laid bare.

The United States Supreme Court, therefore, like other constitutional courts, balances free speech and other important rights and interests on the basis of princi-



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ples it has developed over the last eighty years without guidance from the text of the constitution. Other interests, such as public order and decency, national security, the rights to reputation and a fair trial are weighed in the scales with free speech.

If these interest are found "compelling" or in some circumstances "substantial", they may justify restriction on the exercise of speech rights, at least if the Government or other authority seeking to justify the limit shows that the restriction has been narrowly formulated, so that it does not restrict more speech than the compelling interest warrants. One form of balancing test is the famous "clear and present danger" formula, which has the outstanding merit of relative precision, at least in its abstract formulation. Under the current version of the test, speech may only be curtailed when it is directed to producing imminent lawless behaviour and is likely to produce it (Bandenburg v. Ohio 395 US 444, 1969). This balancing process need not be incompatible with a strong and adherence to the free speech principle, though there is an obvious risk that judges will treat the speech interest as just one factor to be considered in conjunction with others, and so give it less protection than it should enjoy in a liberal society committed to freedom of expression.

The Supreme Court has, therefore, formulated a number of principles designed to avoid this danger. One of them is the "clear and present danger" test referred to in the previous paragraph. It has been applied to safeguard insulting and inflammatory speech, unless the state case shows that as a result imminent disorder is likely to occur. The test has also been used in contempt of court cases; as a result, contempt proceedings which might well succeed in England and other common law jurisdictions would almost certainly fail first Amendment scrutiny.

Under another strong principle, courts in the USA 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 has 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 (New York Times v. Sullivan 376 US 254, 1964). All these principles are designed to give speech more protection than it would enjoy if courts treated it and completing interests as factors of equal weight or importance in the balancing process. There is a strong presumption in favour of free speech.

The most important of the three 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. A further complication is that the court has sometimes upheld a content-based regulation, taking into account what it regards as the lower value of the speech in question. This development is particularly noticeable in cases concerned with the regulation of sexually explicit material.

Quite apart from reservation about the complexity of these tests two difficult questions should be asked: what is the distinction between a content-based and a content-neutral restriction, and does the distinction warrant the different levels of scrutiny? The clearest case of a content-based is one which prescribed the stating of a particular view or idea or the provision of particular information. It would obviously be contrary to the First Amendment for a law to prescribe the publication of any material abusive of Democrats or Catholics, allowing in effect the abuse of Republicans and Protestants.

It is less clear whether the hostility to content-based restriction applies to rules which prescribe or limit discussion of particular topics or subject matter, or which discriminate between different speakers, granting, say, facilities or tax advantages for some groups, but not others. The decisions of the Supreme Court of this point are inconsistent (Police Department Mosley 408 US 97, 1972).

These issues are, of course, closely connected to the second question: the reason for the special hostility content-based rules. It has been argued that this is unjustified, and that all restrictions which restrict speech without compelling reasons should be struck down. After all, a total ban on, say, all leafleting and canvassing on the streets would clearly have a more marked impact on political speech than, say, a more limited ban on the distribution of leaflets by political parties.

These points bring out and underlying aspect of United States free speech jurisprudence. Much of it is explicable in terms of a strong suspicion of government, and its motives for imposing restrictions on speech. The principles formulated by the Supreme Court also appear to reveal a distrust of lower states courts which can not be relied on, its seems to uphold freedom of speech when it is balanced against, say, the common law right to reputation or privacy or important public interests. That is while the Supreme Court has formulated a number of free speech rules and principles that must be followed by states courts. The best example of these courts is the contest of libel actions, where the court requires public official and figure claimants to prove with convincing clarity that the defamatory allegations were published with knowledge of their falsity. A clear rule or definitional balancing is preferred to ad hoc balancing on the basis of the particular facts of the case.

The strong suspicion of government interference with speech may have influenced US free speech jurisprudence in other ways. First, Courts are usually unsympathetic to measure which on one view promote free speech rights or values. The Supreme Court for instance, has invalidated a statutory right of reply to critical newspaper articles on the ground that it infringed press freedom (Miami Herald v. Tornillo 418 US 241, 1974).

A second consequence of the strong suspicion of government is that courts are unwilling to interfere with private censorship or control of speech for example, there are no First Amendment Access rights to demonstrate or distribute leaflets on private shopping malls. The point is simply that the First Amendment guarantees right against the state, not against media and other corporations which may be as anxious as government to limit the range of topics and views discussed in public.

The US approach to free speech issues differs considerably, as will be seen, from the jurisprudence in many other countries and jurisdictions. At the risk of considerable oversimplification, freedom of speech is more strongly protected against government regulation in the United States than it is, say, in Germany and under the European Convention on Human Rights (ECHR), which other systems, particularly France and Germany, are more willing to countenance restraints on the threats to pluralism from private interests. Courts in the United States distrust detailed, ad hoc balancing of free speech against other competing rights and interest, fearing that the former will inevitably be given too little weight in the scales.

A final point should be made. Free speech law in the United States is much more complex than it is in other counties. One reason for this complexity is that the Supreme Court has formulated a number of distinctive free speech doctrines and principles, some of which have been mentioned in this write-up. To some extent these doctrines represent an alternative detailed weighing of free speech and other interest which is characteristic in, for example, the courts of Canada and Germany and in the European Human Rights Courts.

But another reason is simply that the US courts have grappled with free speech issues for nearly a hundred years, while European Courts have for the most part only been engaged with them for the last forty or fifty years. Canada has developed serious free speech jurisprudence only since enactment of the Charter in 1982, while arguably the courts in England began this development when the Human Rights Act 1998 came into force.

There are a lot more American case laws to organize into coherent categories. It is no more surprising that free speech law in the United States is richer and more complex, than it is, say, that the law of torts or trusts is difficult in England and Australia.

The writer is District and Sessions Judge. This write-up was prepared on the basis of his experience on visiting USA Court at the invitation of the State Department.

FOR YOUR *information*

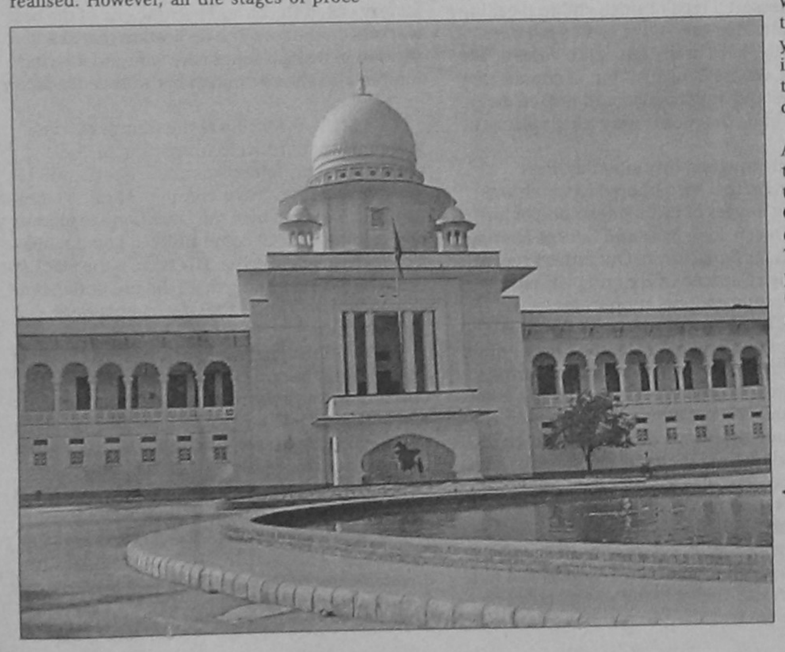
PROCEDURAL JUSTICE IN THE SUPREME COURT

A concern for new lawyers with fresh minds

BARRISTER MD. ABDUL HALIM

AS opposed to substantive justice which is pronounced by way of judgment by the court or tribunal, procedural justice is the system of realising or ensuring the substantive justice and if you cannot realise that justice, the whole concept of substantive justice and its mechanism, i.e, the judicial system itself come into question. The matters of procedural justice come at different stages of a judicial proceeding: it could be at the stage of filing a case; it could be after hearing and getting the order or judgment implemented or realised. However, all the stages of procedural justice are handled by some traditional officers, clerks, peshkers, bench officers, ardalis, peons etc. whose conducts are rarely controlled or questioned under administrative mechanism in our judicial system and both the litigants and new lawyers have to face unwanted problems every day in getting the fruits of substantive justice realised if not they are prepared to get that at the cost of bribes, tips or baksis whatever terms you phrase them.

Let me talk about the procedural justice involved in a writ matter in the Supreme Court. Suppose, you have drafted a writ petition on behalf of a litigant and want to file it in the section of the High Court Division and get it heard. You have a very fresh mind while working in the chamber for a litigant by drafting and preparing the writ application but your eyes will turn blue when you will go to the section people for filing and submitting to the Bench for hearing. The stages before getting a writ heard are as follows:



Step 1: Going to the Bar Association Office to get a seal of the Bar Association. This is without any hassle and you do not have to persuade anyone at that place.

Step 2: Going to the record section (writ) where your petition will be verified whether proper stamp has been affixed and then a number of Writ Petition will be given (e.g. WP No. 2179 of 2004). Here your writ petition is filed and numbered but at this stage you will first face the situation of persuading; you or your clerk will have to give some tips or baksis; the people in the section will claim it 'as of right'.

Step 3: Going to the Commissioner of Affidavit. The Commissioner will check all the pages and annexures whether the petition is in order with everything. The Commissioner will initial at the bottom of every page and will sign every annexure. This is to prevent any further insertion of pages without the authority of the Commissioner. The rationale is that there is no system of taking direct evidence in the Supreme Court and hence you need to get it verified by the Commissioner of Affidavit. The petitioner needs to be present in front of the Commissioner for verification of his age, sex etc. However, giving some tips to the Commissioner will mean you can get it signed without the presence of the petitioner or his authorised person. Even if the petitioner is present, still you will have to give tips or persuade the Commissioner and he or his clerk will claim it 'as of right'. If you do not give tips, he might refuse or delay your petition. Once the Commissioner of Affidavit has affixed his signature and initials, you will have to go to an adjacent table where one sits only with the seal of the Commissioner and you will have to persuade him/her again. You will wonder whether this person who sits with the seal of the Commissioner of Affidavit is at all an employee of the High Court Division.

Step 4: Going to the Attorney-General's Office to give the Notice Copy of your petition. The Attorney General's Office will accept the copy and seal the main petition that a copy has been accepted by the government. The seal will also be accompanied by the court number where the matter will be moved. This is to make sure that it is not moved in any other court; this is also to make clear that the Assistant Attorney General from the Government side will have the copy of the petition in that particular court while the petition will be heard. The copy received by the A-G's Office will be sent to the numbered court and not elsewhere. Here again the people receiving and sealing the copy will need to be persuaded.

Step 5: Giving the main copy and the copy for the second judge to the Bench Officer of the court where your petition will be heard. Writ is an unlisted motion and many courts do not maintain any serial number of unlisted motion. You will have to wait for your petition to be called by the Bench Officer for hearing. Only two days of the week are allocated for motion days and these days are very busy. If you do not manage the Bench Officers or persuade them, your petition may not be called for even a month; it will go at the very bottom of the piles of the petitions and you will not be able to get it heard. However, there are some courts which do maintain serial numbers for unlisted motion and there is less likelihood of bad practices being exercised by the Bench Officers of those courts.

This writer is practicing in the Supreme Court.

HUMAN RIGHTS *watch*

Time to move towards abolition of the death penalty

WITH Asia executing more people each year than any other part of the world, Amnesty International called today, on World Day Against the Death Penalty, for India, South Korea and Taiwan to join the global trend and establish a moratorium on the death penalty immediately.

China, Iran, Saudia Arabia Pakistan and the USA accounted for 88 per cent of the 1,252 known executions that Amnesty International recorded in 2007.

In Asia, 14 countries still carry out executions but 27 countries have now abolished the death penalty in law or in practice.

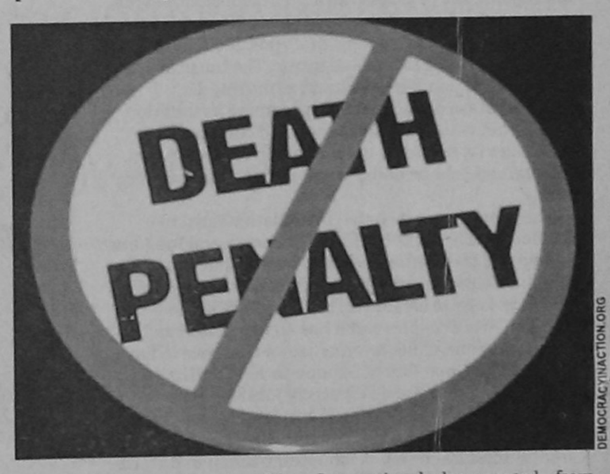
"There is a window of hope and a chance for change in Asia. Today we are urging India, South Korea and Taiwan to join the global trend towards ending executions and set an example for the rest of the continent to follow," said Irene Khan, Secretary General of Amnesty International.

India has not executed anyone since 2004, although death sentences are still handed downat least 100 in 2007 -- often in trials where poorer defendants have inadequate legal representation.

South Korea last executed people in December 1997, when 23 people were put to death. On 31 December 2007, six people had their sentence commuted to life imprisonment by the President. However, 58 prisoners remain under sentence of death.

Taiwan has not carried out any executions since December 2005. This year two individuals have been sentenced to death, meaning Taiwan now has 30 people on death row.

"Death sentences continue to be imposed for a wide range of crimes and people executed often after unfair trials in a number of countries in Asia. There is also a terrible lack of transparency about the use of the death penalty," said Irene Khan.



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In Japan there have been 13 executions so far in 2008 -- compared to a total of nine in 2007 -- and more than 100 people are currently on death row. Hangings in Japan are typically shrouded in secrecy, with a prisoner being notified hours before the execution.

In Pakistan at present there are around 7,500 persons, including children, under sentence of death, mostly for murder, with at least 130 people executed in 2007 after trials that are often marked by their unfairness and lack of justice for defendants.

In Viet Nam, a total of 29 offences in the country's Penal Code carry the optional death penalty, including drug trafficking crimes. Statistics on executions, by firing squads, are classified as a state secret but from January 2007 to the end of May 2008, Amnesty International documented, from media sources, 91 people, including 15 women, sentenced to death.

"A year ago the vast majority of countries voted in favour of a moratorium on the death penalty at the UN. This year we ask Asian leaders to take steps towards making this a reality," said Irene Khan. "They should listen to the calls of people, worldwide, who are joining together today to demand an end to this cruel and inhumane punishment."

Amnesty International believes the death penalty violates the right to life, has no clear deterrent effect on crime and has no place in a modern criminal justice system.

The organization recorded at least 1,252 executions in 24 countries in 2007, with at least 3,347 people sentenced to death in 51 countries. China, Iran, Saudi Arabia, Pakistan and the USA executed the most people, with China the world's leading state executioner.

Source: Amnesty International.