

FREE SPEECH LAW

Freedom of Speech by ERIC BARENDT, Oxford, Oxford University Press, 2005, Second Edition, xxxviii + 526 pp, Hardback, £79-95, ISBN 10: 0-19-924451-0; ISBN 13: 978-0-19-92451-5

It has been over 20 years since the publication of the first edition of Professor Barendt's masterful study of comparative free speech law. In the two decades between the publication of the first and this second edition there have been changes of orogenic proportions in the legal landscape inhabited by the free speech right.

Most obviously perhaps, for United Kingdom lawyers anyway, has been the passage of the Human Rights Act 1998 (HRA) which incorporates the right to freedom of expression under article 10 of the European Convention on Human Rights (ECHR). Thus, for the first time, those within the UK who, hitherto, merely had the *freedom* of speech, as long as that speech was not restricted by statute or common law, are now able to claim a *positive right* to freedom of expression. In a similar vein the Canadian Charter of Rights and Freedoms 1982 was virtually brand new at the time of the first edition. Since then there have been a series of important decisions developing the jurisprudence on freedom of speech, emanating from the Canadian Supreme Court.

Further there has been a steady and increasing stream of cases coming before the courts in different jurisdictions dealing with issues that might never have arisen 20 or 30 years ago. Examples include hate speech; holocaust denial; issues concerning copyright and the growth of the cult of celebrity with the concomitant conflict between freedom of expression and privacy. Indeed privacy itself is now afforded greater legal protection in the UK due to the boost given to breach of confidence by the incorporation of article 8 ECHR.¹

Another huge change impacting upon freedom of speech has been not a legal but a technological one: the inception and meteoric rise of the world wide web, the internet and email, making possible, for huge numbers of people, instantaneous global communication.

Given the complexity of these constitutional, legal, technological and cultural shifts, even to produce a work covering the law of free speech in England and Wales would be a major achievement. But this is a *comparative* work dealing in addition and in detail with the varying approaches to free speech in the United States, Germany, Canada and by the European Court and Commission of Human Rights at Strasbourg, as well as in, to a lesser extent, a range of other jurisdictions.

As a consequence of the changes outlined above the second edition of *Freedom of Speech* is a much longer book than its predecessor (the number of pages has expanded from 344 to 526) and there are several completely new chapters. However, the core approach of the book, which, to this reviewer's mind is its greatest strength, has remained. This is the linking thread that begins with the question posed in Chapter I: "Why Protect Free Speech?" Expression rights are less obviously worthy of protection than some other human rights (life; freedom from torture; physical liberty). There are many important interests that will, in particular situations, come into conflict with freedom of speech (*eg*, privacy, reputation, dignity, freedom from being caused offence, upholding morals, national security, fair trial). Indeed it is only when there is a *conflict* with some such interest that the free speech right *becomes* important, for when speech is innocuous, when no other interests are challenged, there is no *reason* to restrict it. It is therefore essential to establish, at the outset, *why* free speech is valued at all. To this end Chapter I explains and analyses the classic arguments justifying the free speech

¹ See *eg*, *Campbell v MGN* [2004] 2 AC 457.

right: that it is necessary for the pursuit of truth; for the attainment of individual self-fulfilment or autonomy; or that that it is a *sine qua non* of representative democracy. The extent to which these underpinning philosophical justifications lie behind judicial approaches (either expressly or, more usually, implicitly) to the protection of expression rights is a thread linking the subsequent chapters and facilitating the comparative approach. As the balance of underlying justifications varies between jurisdictions so do the levels of protection afforded to different types of free speech interest (political, journalistic, artistic, pornographic, commercial). This approach was one of the great strengths of the first edition of *Freedom of Speech*: and it remains so; and, despite the tectonic shifts outlined above, the various justifications as to *why* we value freedom of speech remain.

There is, in such an ambitious and wide ranging work, the ever present risk of the reader getting lost in the complexities of the jurisprudence of unfamiliar jurisdictions (especially, for UK and European lawyers, the First Amendment case law of the USA). Re-grounding the discussion in the reasons why we value free speech in the first place provides the reader with a compass enabling navigation through the labyrinth. *Freedom of Speech* achieves this tremendously difficult task with lucidity, fluency and elegance.

After the introduction to the philosophical underpinnings in Chapter I the following three chapters go on to discuss issues of general importance: Chapter II, "Free Speech in Liberal Legal Systems", introduces the approaches of the main jurisdictions under consideration; Chapter III, "The Scope of Freedom of Speech", considers the interesting and important threshold question – what *is* speech? – a question the resolution of which has been particularly important in the USA given the apparently absolute protection afforded to "speech" by the First Amendment: when, for example, can forms of expressive *conduct* be considered speech? Chapter IV, "Prior Restraints", examines the traditional hostility of the law to censoring expression *before* it has the chance to enter the "market place of ideas" (rather than letting the speaker take his or her chance with the civil or criminal law once he or she has spoken).

Having laid solid foundations the author goes on, in the remaining ten chapters, to analyse the whole range of free speech interests in the various jurisdictions under consideration. These chapters cover: political speech; libel and invasion of privacy; copyright and other property rights; meetings, protest and public order; free speech and the judicial process; pornography; commercial speech; freedom of speech and the media, freedom of speech and the internet; and freedom of speech in special contexts (which considers for example limitations on election expenditure, freedom of speech in employment and free speech in education and in prisons). Of these, the last four are completely new chapters.

Perhaps one of the most surprising and disappointing messages of the book, for the domestic reader at least, is that whilst free speech law in the UK "has in principle been transformed by the incorporation of the ECHR . . . [i]n fact it is doubtful whether the change has so far been much more than cosmetic".² Analysis of approaches by the courts in such cases as *R v Shayler*³ (in which the Official Secrets Act 1989 was found to be compatible with article 10 despite the absence of any public interest defence) and *R (on the application of the ProLife Alliance) v BBC*⁴ (in which the BBC's refusal, on the grounds of taste and decency, to broadcast a political party's election broadcast depicting an abortion was found not to breach article 10) would seem to bear out this conclusion. The recent case of *R (on the application of Animal Defenders International)*

² At p 39.

³ [2002] UKHL 11, [2003] 1 AC 247.

⁴ [2003] UKHL 23, [2004] 1 AC 185.

v Secretary of State for Culture Media and Sport)⁵ in which the blanket ban imposed by the Communications Act 2003 on all advertisements in the broadcast media that could even loosely be described as “political” was held to be compatible with article 10, notwithstanding apparently clear Strasbourg jurisprudence indicating otherwise,⁶ would seem to be further confirmation of this timidity.

The new edition of *Freedom of Speech* comes at a critical point. At a time of heightened anxiety about security there is always the temptation on governments to impose restrictions on the expression of certain groups. Justifications for freedom of expression are all the more important at such times. Also, however, in recent years there has been an increased sensitivity by those who perceive that the liberal, secular, human rights culture appears to value freedom of speech *above* other rights and interests. Perhaps something of this can be discerned in the furor concerning the publication (and worldwide re-publication in the name of free speech) of Danish cartoons depicting the Prophet Mohammad, provoking outrage and violence in the Muslim world.⁷ It is at times like these that we need to think carefully about why exactly we value freedom of speech and the extent to which it should receive heightened protection. It may well be that it should; but it is surely not good enough to dispense with the philosophical underpinnings and simply assert: “it’s freedom of speech – I *will* say it because I *can* say it”. It is for this reason, as well as many others, that the second edition of *Freedom of Speech* is so timely and important. It deserves to be read by scholars, legal practitioners and all those interested in this important, complex and fascinating area.

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⁵ [2006] EWHC 3069 (Admin).

⁶ *VgT Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 10.

⁷ Other examples might include the controversy over the broadcasting by the BBC of the musical *Jerry Springer: the Opera* and the violent opposition to the staging of the play *Beshi* at the Birmingham Repertory Theatre.

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