The Law and Politics of Freedom of Expression

Norman Barry

It is one of the main features of Western liberal society that freedom of expression is sedulously preserved. It is essential for limited government, a free economy and individual dignity. While is a crucial aspect of all human rights documents it is by no means as secure as liberal thinkers would like and its vulnerability does not merely come from authoritarian regimes but also from movements of opinion, and legal rules, within Western democracies themselves. The prohibition of free speech was essential for communist orders which could maintain themselves mainly by restricting all criticism; to permit open challenges to the enforced collectivist system would have seriously undermined whatever lingering support it might have had. But liberal regimes have also restricted free expression, even though the proponents of the limits have always tried to maintain that their prohibitions are somehow consistent with the original values of liberalism.

In the West freedom of expression has never been an absolute value. It has traditionally had to compete with rival goals. Some of these are quite plausible. For example, it would be unimaginable to allow complete disclosure of military secrets if the regime were under any kind of threat. National security must take precedence over what, in some circumstances, might be thought a luxury of liberal society. However, believers in liberty must be ever alert to the possibility, even likelihood, that a government will often use this as an excuse to deflect justified criticism of itself. In Britain, for example, the Official Secrets Act, a particularly severe limitation on the freedom of speech of government employees, has often been used to suppress informed discussion of government policy by former employees who are forbidden from revealing even harmless information after they have left office. Occasionally the jury system provides some relief from the rigour of the law. In Britain, Clive Ponting revealed secret information about the sinking of an Argentinian ship, the Belgrano, during the Falklands War. He was prosecuted, and even though he looked technically guilty, he was acquitted. Still, the law remains a serious inhibition on free debate. The restraint here comes from a statute but the common law, much praised by liberals, has over a long period time produced serious restraints on free speech, for example, the law of libel (to be considered below).

The essential *pluralism* of Western values is revealed by the fact that most legal systems contain other legal provisions that clearly can conflict with free expression; one of particular importance is the right to privacy. French law so closely protects a person's right to protection from an intrusive press that it constitutes a serious constraint on press reporting. There might be a rationale for this in that celebrities require some defence against an overbearing press concerned only with reporting some sexual scandal, but it is just as readily used by politicians anxious to conceal information about their private lives which might have a relevance to their public roles. The European Convention on Human Rights does not provide a defence of absolute liberty of expression and it is deliberately balanced against the demands of privacy. This, of course, involves the judiciary in difficult decisions in trying to satisfy the two competing claims.

Some of these difficulty here involve the problem of protecting freedom against those who would destroy it. Do the latter not have a right to free speech even if what they say is inimical to that value? The obvious example here is those such as anti-Jewish campaigners and Holocaust deniers who would openly organise marches and hate campaigns against the Jews. Indeed, there are some heroic organisations who do defend the right of people to espouse openly quite repulsive causes. The American Civil Liberties Union once famously defended the right of American Nazis to march provocatively in a Jewish area. Very few Western regimes are so protective of the freedom of expression. In Britain, for example, there is a myriad of anti-racist laws which are directed against the free speech of those who would say unpleasant things about racial minorities, even though their behaviour might not involve the possible common law offence of incitement to cause a breach of the peace.

More recently, liberalism seems to have turned full circle, for some members of the women's movement, who might be thought favourable to free speech, have opposed the ideal when it it is used to defend pornography. Here, the writer or artist who depicts scenes felt to be degrading to women, especially in sexual matters, has had to endure hostility and threatened legal action, especially in the United States. Free speech is thought to have direct effect on behaviour so that the man who writes about rape is said to be as culpable of serious wrongdoing as the rapist himself. The classic liberal distinction between merely causing offence and actually causing harm has been blurred.

The Historical Background

The arguments for freedom of expression are associated with the liberal political tradition but they precede the rigorous and elaborate formulation of that doctrine. Perhaps the first systematic defence of that liberty is in the poet John Milton's *Areopagitica* in the seventeenth century. Free speech, and conscience, were features of the Protestant ideological objections to despotic Catholic monarchs. But freedom should not be seen as exclusively a feature of the Protestant religion, the school of Salamanca in Catholic Spain was basically libertarian. And John Locke's *Letter on Toleration*, while arguing persuasively for freedom and non-absolutism with regard to doctrine, did not extend that right to Catholics: an early example of the way in which liberty is sometimes sacrificed to other values, in this case the fear of external papal power overrode the value of liberty. Throughout the eighteenth century, however, Britain experienced the gradual emergence of a rule-governed liberal society in which freedom of expression was scarcely questioned. Instrumental in this was the Scottish Enlightenment in which the major figures, David Hume and Adam Smith, showed in their works in philosophy and economics the great social and intellectual advantages of freedom of enquiry. They were mainly (especially so in Hume's case) utilitarian defenders of freedom of expression.

It was John Stuart Mill's *On Liberty* (1859)[1] that provided the first systematic philosophical defence of freedom of expression. What is interesting about that work is that it combines both a utilitarian rationale for the ideal and a more expansive ethical defence of it; this indeed summarises Mill's general moral and political outlook, its eclectic approach to theoretical issues. The utilitarian case for liberty of expression is easy to demonstrate. Only if there is complete freedom here will knowledge advance and only the unrestricted exchange of ideas will prevent established ideas from decaying. Mill is quite prepared to encourage the discussion of quite heterodox ideas,

those that go against the grain of accepted opinion, for fear that without the replenishment that constant debate and discussion provides there will be an ossification of truth. He also claimed that those who would inhibit the range of discussion by coercive law are implicitly claiming infallibility for their own ideas.

Yet there is also the claim in Mill's *On Liberty* that freedom of discussion is a good thing in itself quite apart from the utilitarian value it brings to society. Free speech is essential for his rather precious idea of 'self-development', i.e. that people would be mere cogs in a machine if they were not given, or did not take, the opportunity to challenge conventional values. Just to show that utility, or pleasure, was not the only valuable thing he declared (in *Utilitarianism*) that it was better to be a Socrates dissatisfied than a fool satisfied.[2] The truth is that Mill had a rather elevated idea of utility: one that went beyond the pleasure-maximising calculus of Jeremy Bentham. In fact, it is easy to show how an orthodox Benthamite could use utilitarian calculations to restrict liberty of discussion. The complete freedom to develop scientific ideas might well have an adverse effect on humanity: can the freedom to pursue atomic research be regarded as an unqualified blessing? It might be impossible to devise coherent rules which could distinguish between beneficial and harmful aspects of scientific freedom. Here, it is much more likely that a utilitarian calculation of the costs and benefits of human action would be more useful than a direct appeal to the liberty principle itself.

A consistent application of the utility principle means that a justified limitation on free speech can be produced which does not necessarily imply that the government is making a claim to infallibility. It might think that certain sorts of speech are so potentiality dangerous that they have to be controlled for security reasons. Of course, within Mill's principles it would be permissible to forbid speech likely to incite people to violate life and property. In times of acute social tension, with rival groups encouraging dissent, it might be difficult to maintain press freedom. In such circumstances it would be plausible to invoke a *plurality* of principles with no one having absolute priority. Of course, governments are always likely to use such arguments to reduce liberty to vanishing point and citizens should always be vigilant in the protection of liberty but it is still difficult to see that it should have absolute precedence over security. The arguments here have nothing to do with infallibility.

In America there has been some partial resolution of the problem with the invocation of the 'clear and present danger principle': this means that the onus is on the prosecution to demonstrate that a certain form of words and action is likely to bring almost immediate harm to a community. But, of course, it is much easier to formulate acceptable guidelines, those that reserve the maximum of liberty, in a community where there is a measure of agreement about ultimate social values. Even Mill conceded that his liberty principle only applied to societies that already had reached a certain level of civilisation. In countries which are deeply divided on religious grounds, complete liberty of discussion and, most importantly, publication may be difficult, if not impossible, to maintain.

When Mill considers the possible reasons for restricting liberty freedom expression, he scarcely uses utility at all. His very simple, and famous, principle is self-protection. The only justified limitation on liberty is the prevention of harm, or, as Mill misleadingly put it, only actions that *affect* others should be condemned. No other

argument, such as the good of the person concerned, or even general utility, is admissible. In other words, nobody can be legitimately coerced for their own good. Thus if my actions threaten you then I can be restrained and the use of words can only be prohibited if they are an incitement to the commission of an indisputable wrong. He illustrates this in a famous example. It would be acceptable for someone to protest verbally about the price of corn but it would be wrong for the protester to encourage a crowd to burn down the property of the corn merchant.

Of course, the extent of morally justified liberty will depend always on the interpretation of Mill's principles. If the actions simply *affect* others then almost nothing may be permitted. The point of free speech is that it should affect others; at least, change their minds. To get over this potentially restrictive definition Mill is normally understood to mean affecting the *interests* of others; convenient examples would be personal security and property; although modern American liberals are much more concerned to protect the rights of (private) religious and civil liberty than they are to secure private property. But implicit in Mill's argument is an important distinction between affecting a person's values and *harming* him. Thus we have the basic liberal principle that no person can claim protection from verbal assaults that might *offend* him, as compared to attacks on his person or property. Nobody can claim a special privilege for his personal values since in the marketplace of ideas they must compete with others. This, of course, creates problems in communities with serious religious differences and communal affiliations which are deeply held. Britain experienced this in the Salman Rushdie affair. He had written a novel which parodied Islam and that community was deeply offended, resulting in death threats to Rushdie. It is clear that Western liberal values, which enshrine freedom of expression, conflict with those community principles which insist on special protection for certain beliefs. It might be difficult to make the extreme Islamic position consistent with Mill's liberalism but no doubt devout Muslims might claim that their values were as much harmed by Rushdie's novel as others would claim that their property right were undermined by the actions of a thief. At least, the whole argument indicates that the so-called universal appeal of Mill's liberalism is less persuasive than was at one time thought.

For the orthodox liberal position, Mill's principles do point to a way of discussing liberty of expression without an appeal to a certainly contentious morality. Take the example of sexual expression. An orthodox liberal could object to the public display of erotic or pornographic material, for example, in a public place. This might be prohibited, not because it caused some moral offence, but because it damaged the 'property' rights of those who are unavoidably exposed to it. As members of the public they, in a sense, own the streets and ought to be protected from open displays of obscenity. But if the material were forbidden because it is morally wrong then even *its* private consumption would, presumably, be banned. Still, while the distinction between public and private is very useful to the liberal, it has to be conceded that most controversial questions of freedom of expression do involve the public. After all, people with unorthodox views do want to persuade the public. Issues of what does, or does not, cause genuine offence do frequently occur and there is a certain ambiguity in Mill's arguments.

I would like to explore this ambiguity in two controversial areas: the law of libel, in Britain especially, and the question of freedom and obscene literature in America.

Britain has very strict libel laws, yet the country is still remarkably liberal and defenders of those laws would claim that the restrictions on speech, or more particularly publication, they involve may have a more or less liberal rationale. Feminists in America who fiercely oppose 'artistic' works that depict women in degrading or unfavourable ways do seek some justification within Mill's notion of harm.

Libel and Freedom of Expression

The law of libel in England, which has largely developed through common law, is a particularly severe limitation on free speech, affecting especially press reporting and restricting open comment on politicians. Indeed, some public figures have managed to hide themselves from exposure by threatening libel actions. The corrupt financier, Robert Maxwell, kept the press at bay for many years through his repeated use of the libel weapon. Although free speech is guaranteed under the European Convention on Human rights (now incorporated into British justice under statute law)it has made little difference. Libel damages are quite significant, and could bankrupt some minor, and even major, publications. Although there have been some improvements through case law and statute in recent years, the law of libel remains a significant inhibition on free speech in Britain. It is noticeable that although most tort actions in Britain are heard, and damages awarded, not by a jury but by a judge this is not true of libel. Here the payouts approach American levels where all tort cases are decided by the jury. It is quite predictable from conventional assumptions about human nature that juries would be much more generous in their awards than judges

The major reason why plaintiffs are normally successful in libel suits is that the burden of proof is reversed in comparison to normal law. It is not up to the plaintiff to prove (by the 'balance of probability') that he has been defamed but the onus is on defendant to show that he is not guilty of such action. That is why plaintiffs often win on some of the most dubious of grounds. It is sometimes extremely difficult for journalists to prove that what they say about someone, a politician, for example, is absolutely true: and this, with a controversial qualification to be considered below, is the only defence in a libel action. Yet the most elementary conceptions of a liberal society would include the idea that the public interest is enhanced by a free press able to explore and expose cases of wrongdoing without fear of financial ruin. Since so much depends on the 'flexibility' of the common law one might think that only a code, protected from judicial meddling, could protect this aspect of free expression.

In fact, there has been some improvement in recent years and since the *Reynolds* case (1998)[3] a defence of 'qualified privilege' is admissible as a defence in libel actions. If a newspaper has good evidence that someone has acted criminally or dishonourably but cannot actually prove it, and if it can show that it has duty to reveal the relevant information, then it may make statements which in other circumstances would be libellous. But given the common law system of judge made law, even this right is precarious and the admissibility of the public interest defence insecure. For in the recent *Loutchansky* case (2001), at the first hearing (in the High Court) the judge interpreted the 'qualified privilege' defence in such a narrow way that the plaintiff won. The highly respected London *Times* had good evidence, acquired from police and other public and private sources, that Dr Grigor Loutchansky, a Russian businessman, had engaged in seriously corrupt activities.[4] In fact his presence in the country was said not to be conducive to the public interest and he was refused

permission to enter. However, he was eventually allowed in for the sole purpose of pursuing his libel action against *The Times*. Despite this and other evidence against Loutchansky, which could not be conclusively demonstrated, the plaintiff won. The principles established in *Reynolds* appeared to be reversed. In that case Lord Nicholls, in using qualified privilege, had stressed the 'public's right to know' and had said that the onus should be on those who would restrict freedom of expression to prove their case. But in *Loutchansky*, Mr Justice Gray seemed to be going back to the earlier libel law that strongly implied that whatever cannot be proved to be true must necessarily be false.

Fortunately, the ruling was reversed at the Court of Appeal and *The Times* won on the major issue, although in some respects it was not entirely successful. But the legal saga strongly suggests that the common law is not the best protector of liberty, despite what writers and philosophers, such as Friedrich Hayek, have always said. One crucial conceptual connection between law and liberty is that the rules of a legal system should be clear and known in advance. To the extent that they depend on extensive judicial interpretation they fail to provide that security and predictability that agents require if they are to be fully free.

America is in a much better position with regard to freedom of expression because it has a 'code', the Constitution, superimposed on the common law. And that Constitution has the First Amendment which forbids government inhibiting freedom of discussion. Originally this applied only to the federal government but the right was incorporated, along with some other rights in the Amendments, into the laws of states early in the twentieth century. Some writers have maintained that the freedom was limited to political expression, indeed state law against libel has remained, but liberals, and sometimes the Supreme Court of the United States, have interpreted it as a general right to liberty, including the non-restriction of the publication of explicit sexual material.

But it is not just the Constitution that is favourable to freedom of expression in America. Court cases have produced a legal environment that is much more hospitable to liberty than that in Britain.[5] The most important was *The New York Times v. Sullivan* ((1964) case which protected journalists and writers against law suits by public officials. They do not have to prove the truth of everything they say, which is still largely the case in Britain, so that mistakes of fact can be excused as accidental lapses. The *Sullivan* case established the principle that for a libel action to succeed the plaintiff has to demonstrate 'actual malice': not an easy thing to do. The case originally applied only to public officials; however, the definition of what is or is not 'public' has been considerable widened so that almost anyone who has any kind of public role is seriously disabled from bringing a libel action. Many classical liberals would like the 'actual malice' rule to be extended to cover all libel cases. Some might argue that this would allow many untrue statements about people to go unpunished. Still, in state law in America the old rules about libel still apply but there is at least a legal environment which rigorously protects freedom of expression. There is an initial 'prejudice' in favour of liberty.

In fact, there is an argument in libertarian thought that objects to any libel law in principle: it is worth examining briefly. Presumably, the justification for libel law derives from the 'rights' that people have in their reputations. The rights here are akin

to property rights. For someone to utter blatant untruths about another person is to damage them in some quasi-measurable way: that is why, presumably, very heavy damages are awarded in English libel cases. Yet libertarians maintain that we do not have property rights in our reputations in the way that we obviously do in our legitimately acquired possessions. Our good reputations are created by the approval of others. They also argue that damage to reputations through the spread of lies and falsehoods would not be significant in a genuine free market in ideas. People simply would not believe the regular purveyor of malicious stories. It is only because we already have a law against libel that there is a market for malice. There is an initial prejudice in favour of the person spreading scurrilous stories about persons because the public think there must be some truth in them otherwise the victim would have sued. And this leads to a second feature of the libertarian argument: it is implicitly egalitarian. Under the present law only the rich can afford to sue so that the poor are, in effect, unprotected. It may be the case, in England especially, that the plaintiff has a very good chance of winning but for less well-off people there are still costs involved and some considerable efforts. It just might not be worth the risks for someone not already wealthy. The fact that the country has the 'loser pays' rule, under which the loser has to pay the costs of the other side, unlike in America, has not been a sufficient incentive for the poorer members of society to embark on possibly hazardous legal actions.

There is a certain plausibility, indeed slickness, to the libertarian argument but some sort of libel law does have a rationale. All legal systems seem to recognise that a person's loss of reputation through the circulation of deliberate, and demonstrable lies, is a genuine kind of harm and one in which the free market in ideas may not adequately protect people. An overall process, in this case complete of freedom of speech, may be benefit society as a whole but it might also leave innocent victims; in this case those particular persons who are wronged by the spread of false stories. What is required in Britain is not the repeal of all libel laws but a coherent statutory framework which clearly specifies rights and duties so that people know in advance how the law will affect them. A key feature would be the reversal of the burden of proof.

One of the main features of the liberal order is a set of predictable laws. In Britain, the common law produces a serious lack of predictability and it is this that no doubt contributes to the monetary disincentive for the poorest to bring libel suits. It might have been thought that the country's adoption of the European Convention of Human rights would have brought some order and clarity to the whole subject but that seems not to have happened.

Sex, Liberty and the Law

In recent years many of the liberal advances in freedom of expression in America have been threatened by some particularly strident arguments from feminists in relation to sexual publications. Of course, there are laws against obscenity, which are consistent with the Constitution, but they have not been strictly enforced. Furthermore the expression has been stretched way beyond publication in print. In one notorious case, the activities of a stripper, which were clearly in breach of a local obscenity statute, were protected on the ground that the public display of a naked female body is a form of speech entitled to full constitutional protection; much to the chagrin of

conservatives, as well as feminists. The conservatives think that free speech applies only to political utterances.

The liberal view of freedom of discussion is that it should be extended to all areas, especially those to do with the arts, and that no variety of speech should be excluded from protection. Liberals do not wish legislatures to be entrusted with the task of picking and choosing which type is to be legally enshrined: thus for both utilitarian reasons and for more controversial justifications to do with the right to self-expression' and personal development, radicals want wide liberty. The only limitations should be to be derived from some Mill-type notion of harm, contentious though that is. The important point here is that liberals value the freedom to express views which we may have good reason to oppose. No doubt they would regard many modern forms of free expression in the sexual area as quite repulsive but that can never be a reason for forbidding them: freedom necessarily involves the right to do the wrong thing and only persuasion and rational argument may be used to change people's attitudes and behaviour, not coercive law.

Feminists who oppose the public (and perhaps private) display of pornographic material on films, in books and other media try to use a version of Mill's arguments. In a book, *Only Words*,[6] Catherine MacKinnon, argues that the display of women in degrading positions in videos, advertisements and literature generally harms them because it leads directly to sexual crimes. The filming of a rape scene is equivalent to an actual physical rape itself; which is surely stretching the notion harm of harm too far. She and her collaborator, Angela Dworkin (who actually thinks that normal consensual sexual intercourse in marriage is rape), succeeded in getting Indianapolis to adopt an ordinance forbidding pornography, only to see it struck down by the courts on First Amendment grounds. Although a similar law was upheld by the Canadian Supreme Court.

It is difficult to make much sense of MacKinnon's argument, especially within Mill's liberal framework. It might be possible to claim that on empirical grounds there is a connection between the consumption of pornographic material by males and acts of sexual violence against women but the evidence is by no means favourable to her case.[7] In fact, some countries, such as Denmark and Japan, with very few restrictions on pornography, also have the lowest rates of sexual crime. It is quite likely that women would experience greater harm if pornography were to be banned. Its very existence provides an outlet for men's sexual aggression which otherwise might be directed at women themselves.

Furthermore, there is no evidence that women have to be coerced by men to take part, for example, in the making of pornographic videos. Indeed, if MacKinnon's arguments were embodied into law they would reduce the employment prospects of women quite significantly. The real threat to liberty of expression in her proposals is the fact that pornography is so loosely defined that quite minor expressions of sexuality, such as *Playboy* magazine, could be forbidden. One suspects that she has transformed things that she doesn't like, perhaps for good reasons, into activities worthy of criminal prosecution. One of the consequences of liberty of expression is that we have to tolerate things that we don't like. Different arguments apply where children are concerned, both in the making of obscene material and its dissemination, but all legal systems have laws protecting children. In a liberal society we expect

adults to make up their own minds on what ought to be read and watched. MacKinnon tries to use arguments derived from the harm principle but one suspects that their real force is based on a type of paternalism, of which women are often the victims.

Conclusion

By far the more controversial examples of freedom of expression come from regimes that restrict political speech. Here the evidence of a liberal universalism, that the doctrine embodies values that can be easily adopted in all cultures, is meagre. Throughout the world there are examples of the suppression of free speech in circumstances in which little harm can result from its exercise. There are a number of international human rights documents, all of which proclaim the virtues of the liberty of speech, but few countries actually honour them. In some countries they are openly condemned as examples of Western cultural 'imperialism': the attempted enforcement of alien norms on communities that have their own indigenous moral values.

However, the advantage of traditional justifications of freedom of expression is that its protection is quite consistent with the preservation of local and traditional cultural standards. If a cultural tradition is secure it can survive any of the importation of Western values that might occur through the recognition of freedom of expression. It is hard to imagine that the Japanese way of life, which is non-Western, was ever threatened by freedom of expression. One suspects that strict limitations on free speech are imposed by regimes that are insecure about their traditions and values, that cannot put them up for competition in the marketplace of ideas. And this, of course, applies equally to regimes that suppress free speech for straightforward political reasons: they wish to eliminate rivals for their power and the free flow of ideas is one sure way of allowing competitors to attract support. One of the reasons communism lasted so long was that it forcibly obliterated all competitors so that the population was kept in ignorance of alternative economic and social systems. But it could not do that indefinitely.

Norman Barry, January 2002

---

[1] John Stuart Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, London, Everyman, 1972.
[2] *Ibid*, p. 10.
[3] *The Times*, April 28th. 2001
[4] *The Times*, December 13th. 2001
[5] See Ronald Dworkin, *Freedom's Law*, Cambridge, Mass., Harvard, 1996, ch. 8.
[6] *Only Words*, Ann Arbor, University of Michigan Press, 1993.
[7] See R. A. Posner, *Overcoming Law*, Cambridge, Mass. Harvard, 1995, ch. 17..