

FREEDOM OF EXPRESSION

INTRODUCTION

The essence of my presentation concerns the legal treatment of freedom of expression and, primarily so, in the media. But I would be among the first to concede that the extent to which freedom of expression is enjoyed or exercised will depend, to a significant extent, on the culture of governance which exists in the particular jurisdiction. This extra-legal concept by definition exists outside of the legal provisions which seek to enable freedom of expression or to preclude it in certain circumstances. Take for example the calypso in T&T and, to a lesser extent, in Barbados. Much of what is written and sung in these compositions is arguably defamatory, though only rarely the subject matter of litigation.

In general, there seems to be a tacit understanding in the society that such criticism is par for the course and to be ignored in the interests of entertainment. In some other non-regional jurisdictions there appears to be a certain licence permitted in respect of the lampooning of public figures - e.g. "Spitting Image" on

BBC-TV in the UK or the late night talk show hosts/“Saturday Night Live” in the US.

But there are other aspects of culture which might impact on the freedom of expression in a given society. The litigiousness of the members of that society will determine the extent to which persons will seek to redress, for example, a perceived injury to reputation, and this will have an impact on the degree to which the makers or publishers of statements will be prepared to risk defamatory comment. Also, litigiousness is likely to establish whether those who are of the view that their freedom of expression, in whatever guise, has been infringed will seek to enforce this right against the State. In turn, a State which has been subject to a multiplicity of law suits in this context might be less bold/more reluctant to engage in conduct which might be considered restrictive.

However, to a significant degree, litigiousness depends on the availability of an access to legal services which can be quite costly. To this extent therefore, there is a cost attached in one way or another to the freedom of expression.

Consequently, the law merely sets out the parameters within which the freedom exists. The precise nature of its enjoyment/exercise is a matter for the culture of the society with which we are concerned.

A. Importance of Freedom of Expression

The importance of freedom of expression in Western democracies has been stated and restated, whether in judicial decisions, academic writings or otherwise.

In a 1980 article in the *New York University Law Review*, the author, writing of the US Constitution's First Amendment, argued that it was:

“... a bold effort with no legal restrictions of any kind upon the subjects people could investigate, discuss and decry. The Framers knew, better perhaps than we do today, the risks they were taking. They knew that free speech might be the friend of change and revolution. But they also knew that it is always the deadliest enemy of tyranny. With this knowledge they still believed that the ultimate

happiness and serenity of a nation lies in its ability to explore, to change, to grow and ceaselessly to adapt itself to new knowledge born of inquiry free from any kind of governmental control over the mind and spirit of man. Loyalty comes from love of good government, not fear of a bad one ...”

This freedom was believed to be so essential, that the framers of the US Constitution considered it to be absolute. James Madison told Congress in 1784 that “the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and freedom of the press, as one of the great bulwarks of liberty, shall be inviolable. “Laurent B. Frantz in a contribution to the *Yale Law Journal* posited that “the expression of a viewpoint on a public issue cannot be punished or prevented on the ground that it is likely to cause or inspire unlawful conduct ... the danger that the public will be persuaded to adopt an incorrect opinion is not one which government has any right to prevent ...”

In spite of these propositions, however, it has always been recognised that “constitutionally protected freedom of speech is narrower than an unlimited licence to talk ...” So that there may be civil actions for defamation - justified on the basis that the issues involved do not compel public debate -, negligent advice, or assault by words and action.

Yet it may be remarked that these are not statal limitations on the public discussion of issues but rather attempts to protect the economic interest of other citizens. However, there is a legitimate place for state regulation where such freedom of expression is abused so as to cause harm to the society - blackmail, threats etc.

There is a more complex issue, however, when there is a blurring of the line between public comment and private speech. A classic example of this occurs in the area of political commentary where an individual publishes a statement or comment on the conduct of a public official or an identifiable public group. If this statement is likely to be injurious to that official’s (or group’s) chances of political

success, is this to be treated as a public discussion of the affairs of governance, and thus incapable of regulation? Or is it a purely private matter, public debate on which is neither necessary or desirable, and thus subject to the law of defamation? This issue has occupied the minds of regional courts on more occasions than one.

In Canada, a jurisdiction with a constitutional structure and culture closer to ours than is that of the US, there have also been judicial pronouncements on the importance of freedom of expression. In *Boucher v. R.* [1931] SCR 265, Rand J queried:

“Freedom in thought and speech and disagreement in ideas and beliefs on every conceivable subject are of the essence of life. ... heresy in some fields is a mortal sin, there can be fanatical puritanism in ideas as well as in morals but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability”.

And later, in *Edmonton Journal v. AG for Atlanta* [1989] 2 SCR 1326 the court stated that:

“Freedom of expression is of fundamental importance to a democratic society and should only be restricted in the clearest of circumstances.”

In essence, then, it is widely accepted that freedom of expression is a critical component of democratic society. It is also accepted that it cannot be absolute and must be subject to some qualification. Nevertheless, the number of, and interpretation of, these exceptions might be said, to some extent, to be a barometer of democracy in a particular jurisdiction.

B. The Constitutional Provisions

The Guyanese Constitutional provision is typical of its regional counterparts.

According to section 146(1):

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence.

It may thus be seen that the freedom encompasses more than free speech, and while it has not yet been decided in regional cases, should include all modes of expression including the way you wear your hair, the colour you paint your house in, and the foods you might choose to eat or not eat.

However, it is equally arguable that the definition in s. 146(1) is exhaustive since it does not merely state that the matters stated are included in a definition of freedom of expression but that they *are* in fact freedom of expression. But then, is it not possible to communicate other than by speech?

In some regional jurisdictions, there is express provision for freedom of the press. Trinidad and Tobago has it as a discrete section, while Antigua & Barbuda does so in a marginal note. However, it has been held that the absence of such a provision does not entail that freedom of the press is not a guaranteed fundamental right since it is generally recognised as another aspect of freedom of expression.

Nevertheless, it is generally accepted that these freedoms are not absolute and that they are not intended to protect every kind of utterance. For example, they are taken to be subject to the law governing defamation:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ...

... (b) that is reasonably required for the purpose of protecting the reputations of other persons ...

Apart from defamation, the guarantee freedom of expression in regional Constitutions is also to be read subject to the law governing *blasphemy* (rights and freedoms of other persons), *contempt of court* (“maintaining authority and independence of the courts”) *public order* (in the interests of public safety, public order) *state secrecy* (in the interest of defence, public safety) *restrictions on court reports* (protecting the private lives of persons concerned in legal proceedings), *breach of confidence* (preventing the disclosure of information received in confidence) and *obscenity* (public morality).

Further, laws regulating the technical administration or the technical operation of wireless broadcasting or television is not to be treated as a contravention of the freedom to communicate ideas and information; and the Constitution permits the imposition of restrictions upon public officers or the officers of statutory bodies.

I am aware that there are two other presentations today which focus on the media and the law. I should imagine that there will therefore be some overlap with what I present. However, in order to avoid excessive duplication, I propose to limit my discussion to the constitutional aspect of the issue, though this will, of necessity, also involve a discussion of some civil aspects of the law.

C. The Limits of the Constitutional Restrictions

It must not be imagined that merely because there are express constitutional limitations to freedom of expression, that any restriction which is imposed by the State under an alleged head is *ipso facto* legitimate. According to constitutional theory, and as expressed in the various Constitutions, the law should be “*reasonably required*”. Some instruments add to this “*in a free and democratic society*”. In consequence, it must be established that the restriction is reasonable in the sense that it does not impair the guaranteed freedom no more than is necessary to pursue the intended objective.

This approach has led the courts in some jurisdictions to refashion the law relating to defamation in some respects. For example, in *Derbyshire CC v. Times Newspapers Ltd.* (1993), the House of Lords held that so far as criticism of the public service or the administration of justice is concerned, certain public interest considerations assume prominence. These are:

- (i) that every citizen has a right to criticise an inefficient or corrupt government without fear of civil or criminal prosecution;
- (ii) that debate on public issues should be uninhibited, robust and wide open ... it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials ... and
- (iii) that there is no such thing as a false idea ... however pernicious an opinion might seem.

Relying on these principles, the House of Lords held that a local government authority did not have a legal right to maintain an action for damages for

defamation. Given the close textual affinity between the E.U.'s Convention article 10 and the regional one on freedom of expression, this decision is of highly persuasive authority.

In a relatively recent case from New South Wales, Australia, *Ballina Shire Council v. Ringland* (1994), it was held that a local government authority whose members were popularly elected may not maintain an action for defamation in respect of material reflecting upon the performance of its functions. Per Gleeson CJ:

“The idea of democracy is that people are encouraged to express their criticisms, even their wrongheaded criticisms. of elected governmental institutions in the expectation that this process will improve the quality of government. The fact that the institutions are democratically elected is supposed to mean that through a process of political debate and decision, the citizens in a community govern themselves. To treat governmental institutions as having a governing

reputation which the common law will protect against criticism on the part of citizens is, to my mind [untenable].”

Later Australian cases have held that the implied freedom of political communication in the Constitution afforded a defence to a defamation action in respect of discussion of the conduct, policies or fitness for office of government members, political parties, public bodies, public officers and those seeking public office, unless the defendant is aware of the falsity of the matter or closes his eyes to the facts. Any publication must also be reasonable in the process.

One South African case has also held that a government corporation could not maintain an action for libel. According to Schreiner JA, the citizen was free to express his opinion upon the management of the country’s affairs without fear of legal consequences, leaving the state to protect itself against such attacks by political action, not litigation.

There are also dicta in *Hector v. AG for Antigua* (1998) that a similar attitude could obtain in regional jurisprudence. There it was held that a law making criticism of the government a criminal offence because of its tendency to erode public confidence in public affairs was unconstitutional. As Lord Bridge of Harwich put it:

“In a free democratic society, it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind ...”

D. Freedom of Expression in the Commonwealth Caribbean

In spite of strong language used by Lord Bridge of Harwich in the preceding quotation, a survey of some of the relating recent defamation discussions from the region do not appear to take the view that in matters of the criticism of governance,

freedom of expression should always trump protection of political reputation.

While the courts are diligent in protecting the right to freedom of expression against infringement by the state, there is no identifiable trend in the cases that this right will be proof against an action for defamation by a public official in all circumstances.

An example of the former may be seen in the decision in *Observer Publications Ltd. v. The Attorney-General of Antigua et al.* In this case, Observer Publications Ltd. applied in March 1995 for a licence to operate a commercial FM radio station. Some seventeen months later, the application was said to be “still under consideration”, but after five years, the position remained the same. As the trial judge described them, the history and surrounding circumstances were “a euphemism for a refusal.” However, neither he nor the judges of the Eastern Caribbean Appeal Court considered that any constitutional right of Observer had been infringed. The Judicial Committee of the Privy Council was of a different view. The right to freedom of communication had been denied without

justification on any of the authorized grounds in the Constitution. While no one had a “right” to a radio licence, such a licence could not be refused on grounds inconsistent with the Constitution or without any stated or apparent grounds. Nor was the presumption of constitutionality an insuperable ground for denying licences, for example, for technical reasons had to be given in the circumstances.

To much similar effect is the case of *DeFreitas v. AG*. Here, a civil servant had participated in peaceful demonstrations against government corruption. It was held that he was in breach of the Civil Service Act which prohibited the communication by civil servants of any information or expression of opinion on matters of national or international controversy. On a true construction of the Constitution, restrictions on public officers were allowable only if reasonably required for the proper performance of their functions, except to the extent that the restrictions were shown not to be reasonably justifiable in a democratic society. In this case, the Civil Service Act, their Lordships found, was *prima facie* unconstitutional so that the main issues were whether the restrictions were (i)

reasonable and (ii) justifiable. The Eastern Caribbean Supreme Court of Appeal had sought to uphold the restriction on the basis of the presumption of constitutionality by implying words to the effect that it would apply only “when his forbearance from such publication is reasonably required for the proper performance of his official functions”. The board rejected this construction on the ground that it was too vague and upheld the grant of relief to DeFreitas. For Lord Clyde, legal provisions which interfere with individual rights must be formulated with sufficient precision to enable a citizen to regulate his conduct. The implication suggested by the sub-regional Court of Appeal merely described a constitutional provision of the kind of derogation which may carefully be made but did not expand on it.

The decision of their Lordships in *John Benjamin et al v. The AG for Anguilla et al* supplies further evidence of the diligence of the JCPC in protecting the fundamental right to freedom of expression. There, the Government of Anguilla suspended a popular radio call-in programme “Talk Your Mind” after

there was a threat by a businessman to sue the radio station for defamation, injury to economic interest and other serious tortious action over a comment by the host, Mr. Benjamin, that the Anguilla lottery was illegal. Benjamin sued the State, arguing *inter alia* that suspending the programme infringed his right to freedom of expression. The trial Judge, Saunders J (as he then was), agreed with this submission. He concluded that, via the call-in programme, Benjamin was engaging in his right to hold opinions and to receive and impart ideas and information that “the decision to suspend the programme directly infringed on those rights. It was unlawful to do so.” Nor did it matter that the suspension was a purely executive act and not a legislative one:

“The executive branch of Government also has an obligation to refrain from infringing individual fundamental rights.”

But at the Court of Appeal level, the Judges held that the right to freedom of expression did not “place a positive obligation in the government to provide a

means for exercising that fundamental right.” Mr. Benjamin had merely been granted a licence to express his views on the radio and that licence had been revoked by [a] administrative decision. Their Lordships in the JCPC did not support this. Relying on substantial European and Commonwealth authority, Lord [redacted] who gave the unanimous judgment of the Board held that the government’s suspension of the programme was an arbitrary or retaliatory withdrawal of a platform which it had made available and which amounted to a denial of freedom of expression. This act was not within any of the available derogations provided, nor had anything been put forward to show that the closure of the entire programme was reasonably justifiable in a democratic society. Among the dicta cited by their Lordship is a most instructive proposition from a decision of the European Court of Human Rights:

“Freedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. ... it is applicable not only to

“information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and, broadmindedness without which there is no democratic society ...”

Such sedulous efforts as these to protect the freedom of expression from state interference are not mirrored in the decisions where the freedom itself is challenged by an action for defamation. In *The Gleaner Company Ltd. et al v. Eric Anthony Abrahams*, a pertinent issue was whether the large award for the defamation at first instance might be viewed as inhibitory of the right to freedom of speech. The jury at the first hearing awarded a sum of J\$80.7 million or £1.2 million in 1996. The Court of Appeal decided that this award was excessive and substituted an award of J\$35 million or £533,000 at the date of the judgment. It

should be noted that this is still a substantial sum. But their Lordships were not inclined to alter it. According to Lord Hoffman:

“... the only question is whether the damages were no more than was necessary adequately to compensate the plaintiff. ... their Lordships would not interfere with the Court of Appeal’s assessment of the necessary amount. They were entitled to take the view that if it had a chilling effect upon this kind of conduct, that would be no breaking. Their Lordships see no reason to think that the award of so large an amount in the special circumstances of this case will inhibit responsible journalism.”

But perhaps the most disappointing regional decision from a freedom of expression perspective in recent times has been that in *George Worme and Grenada Today Ltd. v. The Commissioner of Police* appears almost anomalous in the light of these progressive decisions. In this case, Mr. Worme, the editor of a well known Grenadian newspaper published in the issue for September 7, 1999 a letter which

accused the Prime Minister of Grenada, Dr. Keith Mitchell, of “[spending] millions (sic) of dollars to bribe the people to vote for you and your party, disregarding what the law says governing the electoral process” during an election campaign.

Subsequently, Mr. Worme was questioned by the police. Following this, he reprinted the letter, at the same time accusing Dr. Mitchell of using the police “to try and silence the ... newspaper.” Three days later, Dr. Mitchell initiated civil proceedings for libel against Mr. Worme and Grenada Today in relation to the letter. The day after, Mr. Worme was arrested by the police and charged with criminal (intentional) libel contrary to the Criminal Code of Grenada. The civil action was stayed and a preliminary inquiry into the charges was begun. However, after the evidence of the Prime Minister had been led, counsel for Mr. Worme raised the point that the provisions of the code relating to libel were inconsistent with the right to freedom of expression under section 10 of the Constitution of Grenada. This being a matter of law uniquely for the High Court, the Chief Magistrate stated a case with three questions for the decision of the High Court:

- (1) Whether the constitutional guarantee of freedom of expression protects a freedom to publish material (a) discussing political matters, (b) concerning the conduct of public figures in relation to the election of persons to Parliament in Grenada and (c) in relation to the suitability of persons for office as members of Parliament in Grenada?
- (2) If the answer is yes to any part of question 1, is the guaranteed freedom of expression violated by the Criminal Code of Grenada which makes intentional libel a criminal offence? And
- (3) If the answer to any of question 1, is the guaranteed freedom of expression under section 10 violated by a criminal prosecution by the state in respect of such material when it concerns the reputation of an individual and does not touch and concern any public interest?

At first instance, Alleyne J. answered questions 1 and 2 in the affirmative and found it unnecessary to decide question 3. On appeal, the Court answered question

1 in the affirmative, but both questions 2 and 3 in the negative. There was a further appeal to the Judicial Committee of the Privy Council.

Before the Board, counsel for the appellants contended that the relevant section of the Criminal Code was inconsistent with the freedom of expression guaranteed under the constitution since (1) it hindered freedom of expression, (2) it was not reasonably required to secure the necessary protection of people's reputations since (a) the remedies afforded by the Civil Law were sufficient; (b) prosecutions for such crimes are virtually unknown in Grenada; and (c) the sections prevent publication of what is true; and (3) since the Code was re-enacted in 1994, the sections were not "laws" for the purposes of the constitution. The provisions were therefore void.

For the respondents, it was argued that the material had to be published "unlawfully" which meant proving that it was not true. Further, it was reasonably justifiable in a democratic society since it was to be found in the legal systems of

other democratic countries. And the Code was an existing law which could be suitably modified to become consistent with the Constitution.

So far as their Lordships were concerned, the prosecution had the burden of proving that the publication was unlawful and, moreover, that it was false. There was however no need to go further and prove that the defendant knew that it was untrue. In addition, it must be established that the publication was not for the public benefit once this matter is raised by the accused.

Lord Rodger of Earlsferry also found that the sections in the Code as interpreted by their Lordships benefited, rather than disadvantaged, a publisher so that there could be no valid complaint that the law had been changed from what it was always understood to be to his detriment.

The JCPC concluded therefore that the protection of the good reputation of an individual is conducive to the public good, and that “[I]t is also in the public interest that the reputation of public figures should not be debased falsely.” [We] are therefore satisfied that the objective of an offence that catches those who attack

a person's reputation by accusing him, falsely, of a crime or misconduct in public office is sufficiently important to justify limiting the right to freedom of expression. Moreover, the offence is rationally connected to that objective and is limited to situations where the publication was not for the public benefit ...

Further, the fact that there had been no prosecutions for criminal libel in previous years did not show that it was not needed. It was thus held that the offence was reasonably required to protect people's reputation did not go further than was necessary to accomplish that objective and could not be said not to be reasonably justifiable in a democratic society.

Conclusion

It may be concluded therefore that:

- (i) There is a constitutional guaranteed right to freedom of expression in Guyana and the rest of the region.

- (ii) This right is not absolute, but is subject to certain express qualifications or restrictions.
- (iii) These restrictions will only trump the right to freedom of expression if they are reasonably necessary in a democratic society.
- (iv) This concept depends largely on judicial interpretation of the issues.

From the cases referred to regional judges appear to be less protective of freedom of expression than the judges of the JCPC.
- (v) A critical element in the ability to exercise freedom of expression is the constitutional culture of the society in which one seeks to do so.

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