

Opinion

Re-opening the Door to the First Amendment

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Introduction

Over the past half century, the European Court of Human Rights and other core European institutions have progressively developed a set of basic principles to govern media law across the continent. Through key court decisions and treaty changes, these principles have also been constitutionalised across the divide between European economic and human rights law and knitted together through concepts of necessity and proportionality.¹ As a consequence, the once singular European Convention on Human Rights (ECHR) stands at the apex of a grand accumulation of European Union and Council of Europe instruments, which include not least the EU's own Charter of Fundamental Rights. This body of law has moreover become familiar not just to European newspaper and broadcast editors, but also to online media providers based within and beyond Europe's territorial boundaries.

This is undoubtedly a major achievement for the European project. Yet something profoundly important has been lost in the process. Where European legislators and judges might once have easily entered into an open discourse on the subject of freedom of expression with their American counterparts, there are now insurmountable barriers to this exchange. There are not only deep differences on key issues of substance, such as the proper limits for offensive expression in public places,² but also on the principles of constitutional review.³ In short, there is a rift over freedom of expression at the heart of the liberal democratic world that resonates in all democratic states, although it is probably most acutely felt in the common law sphere. In these jurisdictions, there is a pronounced division between two leading influences: the decisions of British courts now imbued with European principles and methods and those of the United States, which continue to develop a distinctively different vision of freedom of expression.

My concern here is not with the comparative isolation of American constitutional jurisprudence on free speech issues, which is itself a problem of equal importance. Instead, my focus is on the progressive exclusion from European law of ideas and arguments that are fully legitimate within Europe's liberal democratic intellectual traditions. This narrowing of European law through the constitutionalisation of fundamental rights has taken it from its proper role as a guardian of the richness and diversity of liberalism and democracy in Europe

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¹ See, for example, the decision of the Grand Chamber of the European Court of Human Rights in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, (Application no. 38433/09), (7 June 2012), which followed closely related litigation in the European Court of Justice addressing the same basic complaint on economic law grounds. The Strasbourg decision demonstrates the underlying conceptual unity of contemporary European law.

² Compare, for example, *Mouvement Raëlien Suisse v. Switzerland*, (Application no. 16354/06), (13 July 2012) ECHR Grand Chamber, with *Snyder v. Phelps*, 562 U.S. (2011), United States Supreme Court.

³ See F. Schauer, 'The Exceptional First Amendment', in M. Ignatieff (ed.), *American Exceptionalism and Human Rights*, 2005, p. 29.

and made it a sectarian canon for a particular vision of state and society. Not surprisingly, First Amendment principles⁴ developed by American courts have become a significant point of reference in political and legal debate in Europe, filling the gap left by European supranational courts and law makers.

I. The Transatlantic Divide over Freedom of Expression

This growing rift has worked its way across the full range of contemporary media law and regulation, featuring regularly in controversial judgments as well as contentious regulatory rules. Most famously, Europe and America are constitutionally divided in their treatment of incitements to hatred. In place of the American tolerance for hate speech, European law has gradually shifted from passive ECHR support for domestic prohibitions on Holocaust denial and other hatred-related offenses to positive rules requiring EU member states to impose penal sanctions on public expression that incites hatred.⁵ Beyond the traditional core concern for incitements to hatred on the basis of race, religion and ethnic origin, European law is also moving outwards to offer protection to other potentially vulnerable groups.⁶ The American rule, established by the U.S. Supreme Court in *Brandenburg v. Ohio*, which prohibits laws restricting incitement to hatred or violence unless the words or expression at issue create a serious and imminent risk of harmful conduct, is thus no longer an option for EU member states.⁷

Even where prescriptive rules do not outright prohibit the application of American-derived free speech principles, the doctrinal foundations of European media law have become increasingly inhospitable to First Amendment-based law. In defamation and privacy cases, for example, the European Court of Human Rights long ago adopted the concept of the public figure in language evidently derived from American Supreme Court decisions.⁸ European and American courts are, as a result, committed to the principle that individuals prominently engaged in matters of public concern must accept less legal protection from defamatory allegations and intrusions into their privacy. In Europe, however, the public figure principle does not provide a categorical commitment to uninhibited, robust and wide-open debate on public issues, as it does in the United States. It is instead only a factor amongst others, albeit a

⁴ The rise of the First Amendment to its dominant position in American constitutional law only occurred in the latter half of the 20th century. First Amendment principles are moreover still developing and are certainly characterised by inconsistency as much as coherence. Nonetheless, in comparison to the principles concerning freedom of expression developed by the European Court of Human Rights and other European institutions, First Amendment case law sets out more radical and robust protections for the liberty of individuals to speak and publish. In *Whitney v. California*, 274 U. S. 357 (1927), an early Supreme Court judgement establishing the importance of the First Amendment in American law, Justice Louis Brandeis famously stated, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” The idea that more speech, not less, is the best defence of a liberal democracy remains central to First Amendment jurisprudence.

⁵ See, for example, *Féret v. Belgium* (Application No. 15615/07), (16 July 2009) ECtHR. See also, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

⁶ See, for example, *Vejdeland and Others v. Sweden*, (Application No. 1813/07), (9 February 2012) extending the hate speech principles of the European Convention to the protection of homosexuals.

⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁸ See, *Lingens v. Austria* (Application No. 9815/82) (8 July 1986), ECHR in comparison to *New York Times Co. v. Sullivan*, 376 U.S. 254.

significant one, to be weighed when determining the proportionate balance between the ECHR right to freedom of expression and right to respect for private and family life.⁹

Beyond matters of constitutional principle, significant differences have also developed in the legal rules underpinning media publication and distribution. In Europe, for example, internet intermediaries who host unlawful third-party content are only protected from direct liability when they lack actual or constructive knowledge of that illegality or, on receiving reasonable notice that the content is unlawful, they act expeditiously to remove the content or to disable public access.¹⁰ American federal law is somewhat similar as regards liability for hosting third-party content that violates copyright. However, it grants sweeping protection from liability to intermediaries for such content that is defamatory, breaches privacy laws or contains unlawful pornography.¹¹ This divergence in standards therefore routinely cuts across the delivery of online social media services in Europe by major American-based providers.

European data protection standards stand in equally strong contrast to those established in the United States. The EU Data Protection Directive, which has become a global model for protection of personal data, rests squarely on the fundamental right of European citizens to information privacy.¹² In the United States, privacy rights are neither as fundamental nor as broadly conceived. The U.S. Constitution has no general information privacy right and is moreover principally concerned with the legitimate sphere of state action and not the imposition of positive duties on the state to protect citizens from other private parties. Data protection laws in America are thus a piecemeal assembly of corporate legal duties and personal rights created to address specific privacy risks rather than to provide comprehensive protection. Under the EU's current reform proposals for data protection, the transatlantic divide is likely to deepen further. The General Data Protection Regulation, proposed by the European Commission, would no longer be based on a right to privacy but instead would rest on a fundamental European right to data protection, for which there is no counterpart in American law.¹³

II. A Common Intellectual Heritage

Despite these and other legal differences affecting speech and publication, there has been no similar categorical parting of the ways in political or social discourse between Europeans and Americans on any level. Indeed, in the internet era, there are more points of connection across the Atlantic than at any point in the past and the exchange of information and ideas remains vibrant and fruitful. That of course is hardly surprising. Whatever differences may now be enshrined in European or American law, the political and social imagination on both continents is anchored in the same cultural and intellectual substrate. More specifically, society on both continents is organised on the same underlying commitments to capitalism,

⁹ See, for example, the decisions of the Grand Chamber of the European Court of Human rights in *Von Hannover v Germany* (No.2) (Application no. 40660/08), (7 February 2012) and *Axel Springer AG v Germany* (Application no. 39954/080), (7 February 2012).

¹⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Articles 12-14.

¹¹ Section 230 of the Communications Decency Act of 1996 (Title V of the Telecommunications Act of 1996) codified at 47 U.S.C. § 230.

¹² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

¹³ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

democracy and liberalism and consequently a shared orientation towards greater individual and collective liberty. Europeans and Americans therefore possess a common intellectual language, whether concurring or disagreeing on the principles and rules that ought to govern media law.

At best, capitalism, democracy and liberalism are loose concepts and have never provided a coherent intellectual framework for liberal democracy. There are nonetheless distinctive constellations of ideas grounded in those conceptual fields that serve to orient contemporary public debate and policy making. These notably include a set of arguments founded on the primacy of personal liberty, which define liberal democracy not only in relatively coherent terms, but also radically distinguish it from alternative forms of political order. These arguments also encompass an intense opposition to state restrictions on speech and publication and a forceful commitment to transparency, scrutiny and critical comment in public affairs. They are also frequently associated with scepticism towards claims that expression per se causes harm and an assumption that, where expression genuinely causes direct injury, its victims must sometimes bear that harm as the price of maintaining a free society. On that robust view, the liberal virtue of tolerance demands that individuals and communities tolerate expression that they find grossly offensive or even harmful. Most importantly, these arguments also embrace market-based liberties concerning rights to property and commerce, which are not just seen as the engine of social and political liberty, but also as being indivisible from those forms of personal freedom. This, in other words, is a conflation of the laissez-faire market with the marketplace of ideas famously wrought into the core of American law from the words of Justice Oliver Wendell Holmes.¹⁴

This intellectual perspective on freedom of expression is instantly recognisable in contemporary American political debates, legislation and judicial decisions. Yet this perspective, while blocked in key respects by European law, is also clearly present in public debates across Europe. Indeed, media editors and commentators frequently draw on these arguments when attacking restraints on the press. Plainly, these have comparatively less resonance here than they do in the United States, but they continue to figure in European political and social discourse.

Other constellations of ideas, rooted in the same intellectual heritage, are often seen as representing a more 'European' view on the proper limits of harmful or offensive expression. While also emphasising the importance of personal liberty, these arguments are attuned to other concepts of human worth and well-being, in particular human dignity, which both sustain and also limit the liberty to speak and publish. From this competing view, the potential for expression to cause harm directly is more often accepted and legal protections from that harm, or even gross offence, are consequently more often deemed legitimate. Tolerance will thus frequently demand sensitivity and forbearance by speakers and publishers as much as it requires willingness by others to bear offence or harm. Less welcoming of the 'marketplace of ideas' and other market-derived conceptions of free speech, these arguments also tend to afford the state a greater legitimate role in maintaining laws or regulatory regimes that respect the autonomy and dignity of citizens as well as promoting the conditions that sustain them.

¹⁴ "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *Abrams v. United States* 250 U.S. 616 (1919), Holmes, J., Dissenting Opinion.

This alternative perspective may be instantly associated with current European public policies, but these arguments are also important in American public discourse, where notions of equality and dignity have a powerful and inescapable resonance. In short, while social imaginaries in Europe and America are often differently accented, sometimes sharply so in matters of personal liberty that threaten the public good, they draw from the same capacious intellectual heritage. Given the breadth of the liberal democratic tradition, national political communities have naturally arrived at different positions within that tradition through their own forms of collective agency. The specific differences in American and European law concerning the nature and proper limits for freedom of expression are therefore to be expected, but they are also neither pre-destined nor required.

What has most notably occurred over the past half century is the progressive and seemingly irrevocable entrenchment of those differences through the judicial constitutionalisation of fundamental rights. In both Europe and America, constitutionalisation of the right to freedom of expression has changed the articulation of ideas about public expression and its consequences. Debates about the purposes, scope and limits of expression have turned from an open discussion about the nature of free speech in a liberal democratic society to an articulation of constitutional doctrine. This turn to constitutional law, supranational in the case of Europe, is attuned to the structure and text of the governing instruments and the evolution of case decisions through distinctive processes of judicial reasoning. As a result, Europe and America have become divided not only on substantive principles but in their constitutional language and methods.¹⁵

III. The Consequences of Constitutionalised Rights

In Europe, constitutionalisation of freedom of expression has been an indirect and gradual process, galvanised more recently by the eastward expansion of the EU as well as the profound effects of the global revolution in communications. There is nonetheless now a common judicial language based on the ECHR and the EU Charter that defines the essential aspects of legitimate European liberal democracy. In this context, the core purpose of the right to freedom of expression is to further public debate on matters of importance in a democratic society. It is however proportionality analysis that has given the European concept of free speech its variable character, which contrasts with the more radical and confrontational delimitation of free speech developed through American First Amendment jurisprudence.¹⁶ European courts are less concerned with categorical protections for public expression and considerably more concerned with giving appropriate weight to each right or interest engaged in the circumstances. Within that balancing process, the sufficient protection of human dignity is a prominent goal.¹⁷ Given the supranational character of European law, this proportionality analysis must additionally provide an adequate degree of autonomy for member states, while also protecting the core values and meaning of European human rights.

¹⁵ On this divide and its potential resolution, see J. Mathews and A. Stone Sweet, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing', *Emory Law Journal*, (2011) vol. 60, no. 4, pp. 799-875.

¹⁶ On the global spread of proportionality analysis and resistance to this method of constitutional analysis in American courts, see A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism', *Columbia Journal of Transnational Law* 2008-47, pp. 68-149.

¹⁷ See the prominent place given to the protection of human dignity in European Union law (Treaty on European Union, Article 2 and Charter of Fundamental Rights, Article 1). Without a clear textual point of reference in the European Convention on human Rights, ECtHR case law references to human dignity are by no means systematic, although the fundamental importance of the concept is not in doubt: see, for example, *Erbakan v. Turkey* (Application No. 59405/00), (6 June, 2006), para 56.

The protection of human rights through constitutionalisation and the empowerment of courts has not accidentally become the signature mark of contemporary liberal democracy. These methods are plainly intended to protect the public from the arbitrary interferences of the state, the instrumental calculus of the market and the tyranny of the mob. Constitutionalised rights, secured by independent courts, are thought to offer the best hope of a certain and enduring understanding of freedom of expression in a dangerous world. That protection however comes at a steep and rising cost, particularly in Europe where supranational courts make law across a vast and diverse continent.

Through the constitutionalisation of fundamental rights, courts almost everywhere in the liberal democratic world have progressively articulated and entrenched divergent visions and attendant principles of the liberty to speak and publish. This is the logical consequence of case-specific fact-finding and doctrinal reasoning, which is necessary to the resolution of practical disputes concerning allegedly harmful or offensive expression. It would be contrary to the purpose of a court to deny an applicant clear reasoning as well an effective remedy where one is warranted. The result however is the incremental articulation of an ever more specific doctrine.

This has of course given supranational courts and domestic appellate courts an immense power to shape not only the basic institutions of state and society but also our ways of life. In the United States, the Supreme Court has become a focal point in national political battles and its rulings affecting freedom of speech often count as victories or defeats in that struggle.¹⁸ Constitutional precedent offers the possibility of placing a principle beyond the reach of political opponents. While nothing can be put entirely beyond reach and precedents can be overturned, once constitutional principles are established they cannot be moved or avoided without considerable skill and effort. Inevitably, this damages the American democratic process as much as the courts. It forecloses alternative arguments that may well become vitally important in changed circumstances. Judicial constitutionalism neuters one of the key functions of the democratic political process, the retention of ideas and the ability to keep options open.

The politicisation of the Luxembourg and Strasbourg courts has yet to reach these proportions.¹⁹ These courts are however major forums for efforts to achieve strategic pan-European victories or at least stave off changes to European and domestic institutions. Indeed, establishing a legal principle through judicial action in Europe is often much easier than persuading member states to fund or support more positive forms of intervention. For well over a decade, it has, for example, been widely known that the EU universal service obligation must be raised to a broadband standard to ensure that all European citizens have adequate access to a diversity of information and ideas.²⁰ Yet while that debate over the provision of public access has continued without decisive resolution, a stream of major decisions affecting freedom of expression has meanwhile flowed out the Luxembourg and Strasbourg courts.

IV. Conclusion

¹⁸ See, for example, the contentious reactions to the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Retrieved from <http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/>

¹⁹ On the confirmation process for U.S. Supreme Court justices, see, G. R. Stone, 'Understanding Supreme Court Confirmations', *The Supreme Court Review*, Vol. 2010, No. 1 (2010), pp. 381-467.

²⁰ Body of European Regulatory for Electronic Communications (BEREC), *Report on Universal Service—reflections for the future* (BoR (10) 35), (July 2010).

In sum, the constitutionalisation and elaboration of European fundamental human rights has become one of the towering achievements of the European project. Yet the strains on this edifice are growing ever more apparent. In the field of media law, European law has progressively excluded concepts of the liberty to speak and publish that are not only entirely legitimate in liberal democratic terms, but have also found a decisive place in American First Amendment jurisprudence. This growing disconnection between European human rights doctrines and public discourse is evident not just in the exasperated editorials of newspapers and innumerable personal blog posts, but within the European courts themselves. This is most evident in dissenting and concurring opinions penned by judges of the European Court of Human Rights, which regularly feature arguments calling for a greater emphasis on the liberty to speak and publish.²¹ The argument that political and social liberty flows from economic liberty is in the genetic code of any society formally founded on capitalism and liberal democracy and cannot be expunged by the doctrinal elaboration of fundamental rights. In this respect, European human rights law is a distraction from the urgent necessity of understanding the consequences of contemporary capitalism for liberalism and democracy and persuasively articulating ideas in the public sphere.

There are undoubtedly many who would be deeply dismayed by a call for dismantling any part of European human rights law as it affects freedom of expression. One only needs to look at the situation in Hungary over recent years to see the importance of common European standards that protect free speech.²² Plainly, there is a continuing need for hard boundaries that protect democratic processes as well as the liberty and well-being of individuals across Europe's diverse polities. Beyond that, European democracies require sufficient space to work out their problems collectively through public debate and political participation. Often the best solutions are found within the communities most affected as individuals contribute their ideas or knowledge to the general debate. And even when these communities manage their affairs badly, it is often better that they grapple with their problems themselves rather than have a solution thrust upon them that is unnecessarily prescriptive and limiting.

²¹ See, for example, the Dissenting Opinion of Judge Pinto De Albuquerque, in *Mouvement Raëlien Suisse v. Switzerland*, supra at note 2, who extensively cites with approval the 'public forum doctrine' developed by the United States Supreme Court through its interpretation of the First Amendment.

²² See, for example, the European Parliament Resolution of 10 March 2011 on media law in Hungary, P7_TA(2011)0094, or the Parliamentary Assembly of the Council of Europe, Monitoring Committee's Request for the opening of a monitoring procedure in respect of Hungary, AS/Mon(2013)08 (23 April 2013).