

## CS 978 – Legal, Ethical, and Professional Issues for the Information Society



### Lecture 9 – Freedom of information and freedom of expression

#### Introduction

At first glance, there may not seem an obvious link between freedom of information and freedom of expression. Freedom of information is built around the ability of the citizen to access information on their government bodies for transparency, while freedom of expression relates to free speech, predominantly. However, the moral authority of both concepts stem from the same article of human rights, most recently enshrined in UK law under Article 10 of the *Human Rights Act 1998*, which states:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

This week we shall discuss both concepts under this broad umbrella.

#### Part 1: Freedom of Information

The concept of freedom of information relates to the idea that the openness of the business of governmental bodies aids transparency in decision-making, thus making societies more democratic. In being open about how they are managed, governmental bodies become more accountable to the citizens. In Resolution 59(i) the United Nations General Assembly stated that: "Freedom of Information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."

Over 100 countries in the world now have some form of freedom of information law on their statute books, however, in historical terms, the legislation is relatively new. The first legislation was passed in the United States in 1966, with New Zealand and Australia following in the early 1980s. The UK lagged behind other democracies in this regard, however, the New Labour government that came to power in 1997 made freedom of information a manifesto pledge, and two acts of parliament were introduced. They are:

- **Freedom of Information Act, 2000, UK level**
  - Relates to all government departments at UK level
  - Covers Scottish based departments of UK government departments
- **Freedom of Information (Scotland) Act, 2002**
  - Necessary post-devolution
  - Relates to all devolved services

For the purposes of our discussions, we will focus on the Freedom of Information Act (Scotland), 2002.

#### Freedom of Information (Scotland) Act, 2002

The Act gives a general right of access to all types of recorded information held by Scottish **public** authorities. This is a crucial point and one that can sometimes confuse. While the

Data Protection Act gives individuals rights over their *own* data held by any organisations, public or private, the freedom of information legislation relates only to information held by public bodies, thus private companies are exempt. We will discuss how freedom of information legislation and data protection legislation interact within public bodies later in the handout.

The Act covers all information already held in a recordable format, e.g. hard copy, electronically held information (including e-mail), video and audio formats (including CCTV). And includes information held by the Scottish Government, local councils, health authorities, universities, and the like. The main rights for citizens are enshrined in the two main ways public bodies can place information in the public domain

- Via a requirement that the public body sets up a publication scheme which states the categories of information which it will publish
- Via a right for people to request information, to be told whether it exists and if so to have access to it

Requests for information must be made in a *recorded* format: e.g. written, fax, email, or recorded telephone message and should be answered within 20 working days from the moment it is received. There is requirement in the Act to provide help and assistance, and an explanation is required if the release of the information is refused.

Requesters may specify the format in which the information should be provided. e.g:

- In summary written form
- Electronic form
- Or by inspection of documents (on the authority's premises) and the organisation must comply within reason

The requester must supply a name and address; however, this can be an email address. Some examples of the type of requests that can be made include:

- Organisational policies and internal decision-making procedures
- Financial matters (e.g. departmental paycales and funding of departments)
- Commercial matters (e.g. buying and selling land)
- Details of decision-making process about senior appointments
- Health policies in the NHS (e.g. "postcode lottery" enquiries)

However, these are just examples, and in reality, any information stored by a public body can be requested under the law. Certain kinds of information, or kinds of requests, can, however, be refused based on key categories, as we will see below.

Organisations are required to provide the information free or at a capped rate, however, if significant staff time will be spent answering a request a fee may be charged. The first £100 of costs must be borne by the organisation and only 10% of costs between £100 and £600 can be passed on to the person making the request. There is no onus on the organisation to supply the information where the cost to that organisation would exceed the "appropriate limit".

### **Issues in releasing information**

Unless the information falls under one of the exemptions, to be discussed below, the public body must supply the information requested, and cannot consider other issues such as

- The possibility of embarrassment to officials
- The possible loss of confidence in the authority

- The seniority of the people involved, or
- The risk of the person making the request misinterpreting the information

In terms of exemptions, there are 17, divided into 2 broad categories:

- Absolute: No requirement to consider the public interest
- Non-Absolute: Exempt, but public interest may require disclosure. Then you must consider if disclosure would substantially prejudice the activity or interest

In practice, under **absolute** we consider categories such as:

- The information is freely accessible elsewhere
- The information was provided in confidence
- Personal information on a living individual

Under **non-absolute** we consider categories such as:

- Health, safety and the environment
- Commercial interests and the economy
- Confidentiality
- National Security
- Personal Information

As you can see, some categories such as personal information and confidentiality appear in both. This is because in some cases the categories of information will be absolute (i.e. information public bodies store on individuals who have nothing to do with the business of the body) or non-absolute (information stored on an individual who is involved in the business of the public body).

This leads us to the very important linkage between freedom of information and data protection. A request by an individual subject for information about his/herself is an **absolute** exemption under the FOI Act. However, a request by an individual for personal information about an identifiable third party falls under the FOI Act. It is an FOI request, but it must be handled paying heed to the data protection principles.

For instance, a request for information about the educational qualifications of a public body employee would be an FOI request, but you would need to deal with it under data protection guidelines. If an employee was deemed to be under-qualified or was appointed through nepotism or some other form of corruption, revealing this information about the individual *may* be in the public interest, and therefore become **non-absolute**.

The implications of data rights and FOI form one of the most important ethical debates around the legislation.

### **The role of the Scottish Information Commissioner**

The role of the Scottish Information Commissioner (SIC) is vital to the administration of the FOI Scotland Act. The UK Information Commissioner deals with the data protection act, and the Freedom of Information Act, 2000 (which applies to UK public bodies). Because Scotland has its own act related to FOI, it required its own commissioner to administer it.

If a request is refused, the requester may appeal to the SIC who may, after investigation, issue a decision notice ordering the authority to comply. The SIC also has the power to serve an information notice on a public authority requesting further information in relation to the matter, as well as the power to negotiate between both parties in an attempt to effect a settlement.

In some circumstances, the SIC may issue a decision or enforcement notice requiring disclosure of the information in the public interest. When serving a notice of any kind the SIC must include an explanation of the appeals mechanism to both parties.

Where a decision notice has been served, either the complainant or the public authority may appeal, on points of law, against the decision to the Court of Session. Much more information on the role of the SIC is available on her website:

- <http://www.itspublicknowledge.info/>

There is a list of all current appeals there, which is worth checking out to see how authorities are responding. The appeals can be searched under various categories and is found under the category, *Decisions*. Section 18 is the part of the Act that relates to information on individuals.

## **Conclusions**

The FOI legislation is relatively recent, only having come into force in 2005, and therefore it is essentially still being shaped at the moment. Awareness of your rights, and responsibilities, with regards to the Acts, is an important element of your knowledge related to information law.

## Part 2: Freedom of expression

The right to freedom of expression is one of the most contested, not merely contemporaneously, but also historically. The limits of what free speech should be, for instance, have been argued over for centuries.

Although Article 10 of the Human Rights Act recognises free expression as a right, it also qualifies it in section 2:

*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The debate therefore basically comes down to the limits that should be placed on free speech in a democratic state.

### Arguments for and against free speech

The arguments that are posited for defending and protecting free speech are usually presented as a counter to those who may wish to restrict it for various reasons. Barendt highlights some core defences that are often used to justify the protection of free speech, and these can be summarised as:

- Argument from truth
- Argument from autonomy
- Argument from democracy

The *argument from truth* is largely associated with the approach to issues of individual freedom posited by Mill in *On Liberty*, although as Barendt observes we can trace similar sentiments in the defences provided much earlier by Milton in *Areopagitica*, and latterly by the dissenting judgement of Oliver Wendell Holmes in the famous *Abrams vs. US* 250 US 616 case (Barendt, 2006, p.7). Another over-arching term applied to the concept of the argument from truth is that of a *marketplace of ideas*, referencing the notion that people should be presented with the broadest possible range of ideas to select their truth, or in other words: “we cannot deny currency to any expression of opinion without reducing the efficiency of the knowledge market” (Campbell, 2006, p.143).

As Campbell has also suggested, the argument from truth could be classified as a justification for freedom of speech that is based on a consequentialist rather than a rights-based point of view (Campbell, 2006, p.143). In other words, truth matters to society because it ultimately benefits the majority of people, rather than truth being fundamentally about any one individual's rights. However, we could contend as Barendt does that truth could also be seen to be “an autonomous and fundamental good” in and of itself (Barendt, 2006, p.7). For Mill truth was “justified belief” and this justification was only valid when an idea or viewpoint has been thoroughly tested and critiqued within society through argument and debate. As Campbell summarises with regards to Mill's view, to suppress freedom of expression on a topic “is to make the epistemological mistake of assuming that you know in advance of hearing an opinion that it is false” (Campbell, 2006, p.143). Therefore, the argument goes that we should not exclude any perspectives because we cannot be certain whether a viewpoint that is being expressed bears some truth to it that can challenge an orthodoxy and make proponents for it justify the truth of that view in the public sphere. By this token, we should also *not* suppress false views we know to be false, as the expression of a falsehood may also have value since it entails the speaker of a truth justifying their

truth in the face of said falsehood. As Mill states, no one has “authority to decide the question for all mankind, and exclude every other person from the means of judging” (Mill, 1869, p.11-12). Therefore, under the argument from truth we can surmise that even an untruth serves a purpose in that quest for truth: even if we are absolutely certain of the error of an expressed viewpoint, “stifling it would be an evil still” (Mill, 1869, p.11).

Several criticisms can be applied to the argument from truth, with the most obvious being the potential error of assuming that truth will always out in the public square, even if all arguments are presented. There are various ways in which a falsehood can become accepted within society: vested interests with the appropriate financial clout could ensure that their message drowns out others (e.g. in commercial advertising). In addition, a majority population can decide that only their version of truth will be allowed to be the accepted one, something we could see in a theocratic culture, for instance. As Barendt suggests, “the marketplace is not in practice open to everyone who wants to communicate his ideas...Differences in the availability of ideas have little to do with their truth” (Barendt, 2006, p.12).

The *argument from autonomy* is based on the concept that freedom of expression is a fundamental right for individuals if they are to achieve their potential as persons. It is one of the most overt justifications of free speech from a liberal standpoint since it is entirely focused on the rights of individuals rather than any societal benefits that may accrue: it “is intrinsic not an instrumental right...It values speech for its own sake, not for the indirect results that flow from it” (Campbell, 2006, p.147). By the same token, however, it could be seen to be antithetical to consequentialist arguments for free speech, since no consideration is given to the impact of free speech on wider society under this justification.

As Barendt suggests, “restrictions on what we are allowed to say and write, or...to hear and read, inhibit our personality and its growth” (Barendt, 2006, p.13). Under this justification, we can also see links between and some other fundamental human rights such as the “rights to freedom of religion, thought and conscience” (Barendt, 2006, p.13). As he also notes, however, the argument from autonomy also veers into territory that can see a clash between one person’s right to express their freedom of speech, versus another’s right not to be insulted or defamed. Campbell offers that the argument from autonomy is “powerful in its scope, for it can take in all forms and types of speech, and it is powerful in its foundations, for it finds its justification in the flourishing of distinctively human capacities” (Campbell, 2006, p.147).

There are, again, some major criticisms that can be offered in opposition to the argument from autonomy. Firstly, as noted above, the exercise of one person’s free speech or expression right may clash significantly with the rights of others. Where the interference with the rights of others is delineated lies at the heart of the debate about how free speech should be restricted. An advocate of free speech rights along a libertarian path may advocate for speech that also includes a right to indulge in hate speech or have access to extreme pornography. In both cases, as we will see below, the groups affected by such free expression may consider such speech acts to be harmful to them. In addition, many countries legislate for speech acts that are deemed to step over a proscribed line: for instance, the United Kingdom has historically seen legislation that made blasphemy illegal, and in the modern era legislates against hate speech, and in Scotland offensive behaviour related to football songs deemed to be sectarian. We regularly see, then, countries place limits on the exercise of free speech that could be argued to be a restriction on the autonomy of individuals in their exercise of said right. At the root of such restrictions is the belief that those speech acts harm others, either as individuals (defamation) or cultural groups (group libel).

The *argument from democracy* relates to the notion that “freedom of speech is a necessary ingredient of the accountability on which the benefits of democracy are posited” Campbell,

2006, p.145). This defence focuses on the importance of a free flow of information and viewpoints within a democracy, allowing citizens to be informed and able to hold their elected representatives and the institutions that they manage on our behalf to account. This defence also not only bestows rights to free speech on citizens, it also often focusses on the importance of rights to freedom of information from the point of view of government documents, and many countries have legislated for such rights. In other words, a citizen would have the right to exercise their freedom of speech in asking from the government and getting the information they wish to see to hold them to account.

There are again some key criticisms that can be levelled at this defence: if the focus is primarily on democracy and the institutions and people who are a part of it, free speech could be argued to be defined in a very narrow sense. Unlike other defences which focus on the totality of human experience, the argument from democracy would be in danger of focussing only on speech that supported political decision-making at the expense of artistic, or spiritual expression. As a consequentialist defence of the right, a plausible scenario could be posited that any speech act that harmed democracy could be made illegal. Therefore, it could be deemed wrong “to tolerate the circulation of material advocating its overthrow” (Barendt, 2006, p.19). Schauer goes further in his analysis: “the very notion of popular sovereignty supporting the argument from democracy argues against any limitation on that sovereignty, and thereby argues against recognition of an independent principle of freedom of speech” (Schauer, 1982, p.41). As Campbell summarises, the argument from democracy “provides some powerful rationales for increased and different types of freedom of speech, but only within the domain of political assessment and debate” (Campbell, 2006, p.145).

We can also highlight that a major argument for free speech relates to the rights of both the speaker *and* the listener. While the arguments in defence discussed above relate to the rights of the speaker, we need to also consider the importance of the right for an audience to hear what is being said to be sure that they are presented with the widest possible set of views to enable them to make their own mind up on a topic. Even hearing a blatant untruth or irrational point of view on the part of a listener has some value if it ensures their own viewpoint is stronger and more evidenced as a result.

## **Conclusions**

This short summary around the theories of free expression have highlighted some of the key arguments and limits that are argued should be placed on the right. As an age-old debate, it is unlikely to be resolved to everyone’s satisfaction, and with the spread of the arguments over it into the social media world, it is a debate that will be with us for a long time to come.

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