Free Speech, the Common Good and the Rights Debate

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Introduction

Arguments around free speech continue to generate controversy in Ireland. Despite a long-standing constitutional guarantee of freedom of expression, highly restrictive censorship laws remain in place. Extensive restrictions on freedom of information and speech are permitted on grounds of state security and public morality, and a climate of moral paternalism holds sway, ostensibly justified on grounds of the common good. In this essay, it is proposed to examine these key aspects of the free speech debate in an Irish context.

The constitutional guarantee of free speech

The guarantee of freedom of expression set out in Article 40.6.1.i of the Irish constitution protects 'the right of the citizens to express freely their convictions and opinions'.[1] But, this protection is limited, since 'organs of public opinion' may not be used 'to undermine public order or morality or the authority of the State'. Moreover, the article further provides that 'the publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law'. The freedom of expression is thus significantly restricted; more severely, indeed, than most other constitutional freedoms guaranteed in Articles 40–44, the 'Fundamental Rights' provisions of the constitution.

The grudging protection offered to this vital freedom in the Irish constitution may be contrasted with the clear statement in the First Amendment to the US constitution that 'Congress shall make no law … abridging the freedom of speech or of the press'. Closer to home, the European Convention on Human Rights provides at Article 10(1), in similarly clear terms, that '[e]veryone has the 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'. While Article 10(2) provides for a range of

conditions to which the freedom may be made subject, the language of Article 10(1) is infinitely more generous than that of its Irish equivalent.

The freedom of speech is guaranteed in virtually every international human rights instrument and in the constitution of every liberal democracy, and the protection of this vital freedom is generally regarded as necessary in order for democracy to flourish. Despite this, the freedom is never guaranteed in an absolute form and is often seen as a negative freedom (i.e. an aspect of the private sphere, in which the state should not intervene) as opposed to a positive right (the exercise of which the state should actively facilitate and enable).

The debate around free speech, whether it is expressed as a freedom or a right, tends to divide along two broad political lines. On the one hand, liberals argue for the least restrictions possible upon individual freedom of expression. In the 1960s, particularly in the USA, liberals were united around free speech, arguing against state restrictions on civil rights protests. Since then, as Fiss writes, free speech controversies over complex issues like pornography and political campaign advertising have had the effect of dividing liberals among themselves.[2]

On the other hand, those who might broadly be described as having a communitarian political outlook argue that freedom of speech must always be seen in a social or community context, so that limits upon the individual freedom are justified in accordance with the common good. Like liberals, communitarians are politically divided. They may share a similar view on the need to restrict free speech in the interests of the common good, but they differ strongly on how to define the common good. Forty years ago, the communitarian argument for restricting free speech was often couched in paternalistic terms on grounds of public morality by those from a conservative political outlook. Now, arguments for restricting free speech are also made by feminists, anti-racist campaigners and those on the political left (progressive communitarians). The tension within and between the two broadly defined political positions over free speech is reflective of political tensions over concepts of human rights generally. Such tension is apparent in the ongoing conflict between two competing ideologies evident in the very language of the Irish constitutional rights articles themselves.

The rights articles

Articles 40–44 of the constitution adhere for the most part to the traditional civil-political model, with the individual having the right to take legal action to enforce binding rights to life, liberty, private property and freedom of religion, among others. By contrast, reference to

economic and social rights is relegated to Article 45 in the provision entitled Directive Principles of Social Policy, which, as its title suggests, does not bestow rights that are enforceable.

Article 45 expresses a commitment to ensuring that 'the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good', but this noble phrase has been largely ignored. No court has sought directly to hold the state to its pledge to 'safeguard with especial care the economic interests of the weaker sections of the community', nor to 'protect the public against unjust exploitation'.

Articles 40–44, the enforceable rights provisions, are thus based upon a different set of values to those underlying Article 45. The rights provisions are strongly influenced by liberal-democratic values, emphasising the autonomy of the individual and ensuring the protection of classic civil and political freedoms, such as freedom of conscience (Article 44.2.1). But, equally clear, particularly in the wording of Article 45, is the influence of communitarian values, prioritising the interests of the common good. However, these communitarian values are discernibly derived from a conservative theocratic ideology, rather than from a socialist tradition, so that their effect is to bestow group rights upon the (patriarchal) family (Article 41) and to recognise this family as the 'primary and natural educator of the child' (Article 42). Rights are not bestowed on any other social group in the same way.

Thus, as Quinn writes, '[o]ur constitution pays homage to the ideology of theocracy as well as to the ideology of liberal democracy'.[3] He asserts that while the ideological tensions between these competing belief-systems were only implicit in the past, they are coming increasingly to light as 'the economic conditions come into existence that make liberal democracy a credible ideology in this country … as a market society comes to maturity'.[4] Theocratic principles have, in short, become marginalised due to increased economic prosperity and greater acceptance of a market-generated philosophy of individualism.

The resulting change has meant greater emphasis on the rights of the individual, yet the text of the constitution remains defined by the values of the 1930s, with the family still the 'natural primary and fundamental unit group of Society' (Article 41). A conflict thus persists between the rights and freedoms of the individual and of the community; and this is particularly apparent in relation to freedom of expression. Here, as outlined below, especially on grounds of state security and of public morality, the theocratic model of restrictions has continued to eclipse the liberal prioritising of free speech. From any standpoint, other than that of

a religious conservative, it is clear that at present the balance is overly weighted against individual liberties and in favour of a narrowly moralistic view as to what represents the common good.

Article 40.6.1.i

Given the central nature of the guarantee of free speech in most human rights instruments, it is surprising that since the enactment of the constitution the guarantee in Article 40.6.1.i has only rarely been judicially considered. Even where the guarantee has been invoked, the imposition of extensive censorship has been upheld as lawful in a range of different areas by the Irish courts. McGonagle writes that '[t]here have been relatively few instances of the courts invoking Article 40.6.1.i in support of media freedom'.[5] Such limited Irish case law as exists under the article has tended to emphasise the restrictions permitted upon the exercise of the freedom of expression. In 1996, the Constitution Review Group reviewed the relevant cases, concluding that 'the relative paucity of case law in this area is such that not much would be lost if [the article] were to be replaced'.[6] The group thus described the wording of the article as 'unsatisfactory' and recommended that it be replaced by a new clause modelled on Article 10 of the European Convention.

Despite this strong recommendation, no change to the constitutional guarantee appears likely, and, so, the state of free speech law in Ireland remains unsatisfactory. Restrictions continue to be permitted in a range of areas. Some are relatively uncontroversial: libel laws protect individuals' privacy rights and private reputations; contempt of court laws and restriction on the reporting of criminal proceedings protect the individual's right to a fair trial. However, more contentious are the restrictions based upon two other grounds: state security or authority and public morality.

State security

Extensive limitations on free speech are contained in legislation purportedly justified in the interest of state security. For example, section 10 of the Offences Against the State Act, 1939 makes it a criminal offence to type, print, publish, send through the post, distribute, sell or offer for sale any incriminating, treasonable or seditious document. An incriminating document means any document emanating from or appearing to emanate from an unlawful organisation; a seditious document is one which contains matter attempting to undermine the public order or the authority of the state. In *People (DPP) v. O'Leary*, a poster of a man in paramilitary uniform bearing the slogan 'IRA calls the

shots' was regarded as an incriminating document within the meaning of the Act; the defendant was convicted of the criminal offence of possession of such documents under section 12 of the Act. [7]

Further, section 4(1) of the Offences Against the State (Amendment) Act, 1972 provides that 'any public statement made orally, in writing or otherwise … that constitutes an interference with the course of justice shall be unlawful'; such a statement is unlawful if it 'is of such a character as to be likely … to influence any court, person or authority' in the conduct of any civil or criminal proceedings.

Patrick MacEntee SC has described these provisions of the Offences Against the State Acts as having 'enormous powers of control and censorship of information'.[8] Apart from these provisions, the best-known example of censorship law under this heading is contained in section 31 of the Broadcasting Act, 1960 (as amended). Section 31 provides at subsection (1) that '[w]here the Minister is of the opinion that the broadcasting of a particular matter or any matter of a particular class would be likely to promote, or incite to, crime or would tend to undermine the authority of the State, he may by order direct the Authority [RTE] to refrain from broadcasting the matter, or any matter of the particular class, and the Authority shall comply with the order'. The constitutionality of this provision was challenged in *The State (Lynch) v. Cooney*, where the minister had used the section to prohibit the transmission of election broadcasts on behalf of Provisional Sinn Féin because of that organisation's association with the Provisional IRA.[9]

The applicant succeeded before the High Court in his claim that the section conflicted with the freedom of expression guaranteed in the constitution; but he lost in the Supreme Court, which held that the freedom could be lawfully restricted in this way. Then Chief Justice O'Higgins gave a trenchant judgment in defence of the restriction, saying that the wording of Article 40.6.1.i 'places upon the State the obligation to ensure that these organs of public opinion shall not be used to undermine public order or public morality or the authority of the State. It follows that the use of such organs of opinion for the purpose of securing or advocating support for organisations which seek by violence to overthrow the State or its institutions is a use which is prohibited by the Constitution. Therefore it is clearly the duty of the State to intervene to prevent broadcasts on radio or television which are aimed at such a result or which in any way would be likely to have the effect of promoting or inciting to crime or endangering the authority of the State'.[10] Given the context of the Northern Ireland peace process, no ministerial order has been made under this section for some years, but section 31 remains

capable of being reactivated by ministerial order at any time.

Apart from the restrictions on expression created in the name of state security, there are further restrictions imposed on the basis of official privacy. The Official Secrets Act, 1963 remains the principal statute in this area. It must be signed and complied with by all holders of public office or employees of the state (civil servants, gardaí, etc.). Section 5 provides that such a person should not communicate to any third party any information related to their contract with the state or expressed therein to be confidential. According to MacEntee, writing in 1993, this act 'is an Alice in Wonderland because, while it turns on the definition of what is official information, it provides that official information is what the Minister says it is. If the Minister says it's official information, then it is official information, and that is that. The Act is so broadly drawn that any document concerning the public service can be said to be an official document by the Minister and therefore is an official document'.[11]

The highly restrictive effect of the Official Secrets legislative regime has more recently been ameliorated by the passing of the Freedom of Information Act, 1997, which, in section 6, for the first time grants a right of access to records held by public bodies. Section 48 of the Act allows a defence to any prosecution under the Official Secrets Act to any person who is authorised to provide information under the Freedom of Information regime. While the new act has only been in force for a short time, it is bringing about a change in the secretive anti-information culture previously dominant in so many government departments and public offices.

Public morality

Extensive restrictions on free speech are also permitted on public morality grounds. Article 40.6.1.i itself places great emphasis on 'public order and morality', even containing within it the extraordinary acknowledgement that '[t]he publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law'. The inclusion of a penal clause within a guarantee of free speech 'seems inappropriate', to say the least;[12] but, due to a lack of blasphemy prosecutions, this tailpiece to the article appeared to be of academic interest only until the recent case of *Corway v. Independent Newspapers*.[13] This concerned an application by the plaintiff to commence a private prosecution for blasphemous libel against the *Sunday Independent* newspaper for publishing a cartoon in the wake of the successful referendum introducing divorce in 1995 showing a priest offering communion to three government ministers, each of whom was

rejecting it. The caption read 'Hello Progress—Bye-bye Father?', a play on the anti-divorce campaigners' slogan 'Hello Divorce—Bye-bye Daddy'. The Supreme Court, however, rejected the application, holding that '[i]n the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists'. This decision had 'the effect of removing blasphemy from the Constitution by silent amendment'.[14]

More importantly, beyond the arcane law on blasphemy, extensive statutory restrictions on free speech on grounds of public morality also exist in the Censorship of Films Acts, 1923–70 and the Censorship of Publications Acts, 1929–67. In relation to films, the Official Censor may refuse to grant a certificate that a film is fit for public exhibition on grounds that it is 'indecent, obscene or blasphemous or because the exhibition thereof in public would tend to inculcate principles contrary to public morality or would be otherwise subversive of public morality'.[15] Under the Video Recordings Act, 1989, the censor has similar powers relating to the certification and classification of video recordings. Similarly, the legislation provides the Censorship of Publications Board with power to prohibit the sale and distribution of publications that are 'indecent or obscene' or that advocate the unnatural prevention of conception or the procurement of abortion or miscarriage.

This legislation has had a long and ignominious history, resulting in the censorship of over 1,000 books and other publications a year, among them novels by Kate O'Brien and, as recently as 1990, the English children's book *Jenny lives with Eric and Martin*.[16] It brought about the cutting and banning of countless films, including *Natural Born Killers* (refused a certificate in Ireland in October 1994, despite having been passed uncut and granted an over-18s certificate in Britain) and Monty Python's *Life of Brian* (banned in 1979 on grounds of blasphemy, but released some years later following resubmission to the censor). Infamously, a prosecution was even brought to prevent the staging of Tennessee Williams' play *The Rose Tattoo* in 1957, on the grounds that it was an 'indecent and profane' performance.[17]

Despite the highly restrictive nature of the legislation and the often absurd consequences of its application, during the years when censorship was at its height, its constitutionality was only challenged on one occasion, in *Irish Family Planning Association v. Ryan*.[18] The plaintiffs challenged a decision by the Censorship Board to ban an information booklet on birth control; the Supreme Court held against the Board, although on the narrow ground that by failing to communicate its decision to the IFPA, it had not observed the principles of natural justice.

The legislation has been applied in a particularly persistent way in the censorship of publications dealing with women's sexuality and reproductive health. Mary Kelly argues that its aim is 'to curtail the representation of female sexuality and fertility within circumscribed limits, and to control access to alternative information, images and hence choices apart from those tolerated within the relatively narrow world-view of nationalist and Catholic ideology'.[19] In 1987, the Censorship Board banned Dr. Alex Comfort's educational book *The Joy of Sex*; and, in 1989, the Board ordered the British women's magazine *Cosmopolitan* to withdraw its advertisements for abortion clinics or face a ban on distribution in Ireland. This latter ban led to a rash of self-imposed censorship, with another English magazine removing an information supplement on abortion from its Irish editions in 1990 and public libraries removing books on women's health from their shelves.[20] Other censorship was judicially imposed: in the Open Door Counselling case, the Supreme Court held that where counsellors gave pregnant women in Ireland information about abortion services lawfully available in England, they were breaching the constitutional right to life of 'the unborn'.[21] This decision led to further self-imposed censorship, so that students' unions were for many years the only agencies providing such information to women, until the law was finally changed following political campaigns around the X case.[22]

In more recent years, as social attitudes towards sexuality have changed and information on abortion has been made more widely available, the censors have become less proactive in imposing such outlandish bans. The issue of moral or sexual censorship has effectively gone off the political agenda, although information on reproductive health remains difficult to access for many women. However, the debate resurfaced briefly in the summer of 2002, when the Butler Gallery in Kilkenny was told that, under the Censorship of Films Act, 1923, it would need a censor's certificate before an exhibition of well-known artist Paul McCarthy's sexually explicit video works could be shown in public. In order to get around this problem, the gallery closed the exhibition temporarily, then reopened it as a 'club' for members only.

This ludicrous case has very disturbing implications for the public exhibition of art in the medium of film and video in Ireland. The 1923 Act provides that '[n]o picture shall be exhibited in public by means of a cinematograph or similar apparatus unless and until the Official Censor has certified that the whole of such picture is fit for exhibition in public'. The censor may refuse a certificate if, in his or her view, 'such picture or some part thereof is unfit for general exhibition in public by reason of its

being indecent, obscene or blasphemous or because the exhibition thereof in public would tend to inculcate principles contrary to public morality … '.

Thus, according to a strict interpretation, the need for censor's certification applies to all public film showings, whether in cinemas or galleries. Although the application of censorship law in arthouse cinemas had already been an issue at the time of the ban on *Natural Born Killers*, the showing of art films in galleries had simply been ignored until this incident. The Kilkenny experience disrupted this state of blissful ignorance; but, the disruption did have a positive effect, leading to a renewed debate around the outdated censorship laws.[23]

Many argued that those working in the arts did not seize the opportunity to change the law; the danger was that a self-censorship culture would develop, with galleries refusing work that might be deemed indecent, for fear of being denied certification. Indeed, challenging shows like McCarthy's are still rare in Ireland, perhaps because such a culture already exists. Interestingly, while it is unthinkable now that Kate O'Brien's novels might be banned, or a Tennessee Williams play be the subject of a criminal prosecution, the application of censorship legislation to visual art remains an issue.

Given the continued application of outdated censorship laws, it may legitimately be said that a culture of censorship has developed in Ireland, based upon a particularly theocratic notion of what constitutes the common good. The challenge for progressive communitarians is how to redefine the common good so as to ensure that freedom of expression is more strongly protected and limited only according to a set of consistent criteria, a rational definition of what constitutes the common good that does not bring about the repression of women's sexuality or the muzzling of artistic expression.

Progressive communitarian definitions of the 'common good'

It is very difficult to devise a consistent progressive communitarian definition of the common good. Such a task may only be possible if free speech is viewed through a prism of equality or in a way that takes account of the imbalance of power in social structures. In this way, the law would presume that no restrictions on free speech are permitted. Where such a restriction was proposed, its implications would always be examined for their effect on upholding or challenging structural inequalities in society. This approach would test how freedom of expression affects social equality, in order to come up with a definition of the common good in each case where it was proposed to use it as a basis

for restricting expression. The question would be whether the exercise of the freedom amounted to an abuse of power by a stronger group or individual.

Such an approach would be greatly facilitated if the constitutional guarantee of freedom of expression were explicitly made subject to a core norm of equality. Equality before the law is guaranteed in Article 40.1 of the Irish constitution, but is subject to extensive restrictions and has been interpreted conservatively by the courts. This may be contrasted with the provisions of the 1996 South African Constitution, a document drafted, and recently enacted, in line with a progressive communitarian ideology. Unlike the Irish constitution, the South African charter seeks to protect socio-economic rights, some of which are as directly enforceable as the right to free speech. These include the right to basic education, the right not to be refused emergency medical treatment, and the right of a child to basic nutrition, shelter, basic health care services and social services. All of these are guaranteed in accordance with the principle of equality, and equality is the first substantive right guaranteed in the Bill of Rights.[24] Article 9 of the South African constitution provides that: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.[25]

Article 39 provides that, when interpreting the Bill of Rights, courts 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Because equality is a core norm in the context of which other rights must always be seen, the freedom of expression guarantee in Article 16 explicitly provides that this protection does not extend to 'a. propaganda for war; b. incitement of imminent violence; or c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.

But, while Article 16 may answer the question as to what sort of speech should be limited by common good criteria in a secular pluralist republic, it also specifies certain forms of individual expression as particularly in need of protection. It provides a general guarantee that '[e]veryone has the right to freedom of expression', and then states that this includes: 'a. freedom of the press and other media; b. freedom to receive or impart information or ideas; c. freedom of artistic creativity; and d. academic freedom and freedom of scientific research'.

It is argued that, from a socialist perspective, this formula amounts to a careful balancing of interests. Potentially vulnerable forms of expression, the free exercise of which are essential in any functioning democracy, are explicitly protected. Equally, forms of expression potentially harmful to the common good, which may cause harm or allow invidious discrimination against certain groups, are explicitly excluded from constitutional protection. Expression is always seen in the context of power. Where a group or class of persons is disempowered and needs society's protection in some way, then stronger groups should not be permitted to use the freedom of expression to abuse the power imbalance. Such balancing of interests may most easily be carried out in a context where equality is a core norm. But, even where it is not explicitly guaranteed as such, in practice an equality test is used to justify different types of restriction on free speech in every democratic society; democracy is premised on equality, and true liberty depends on equality of means to participate fully in society.

Justifying restrictions: the equality test

Even in the USA, where free speech is generally seen as a core norm, regulation of free speech is regarded as necessary in the form of controls on political campaign spending and advertising. Fiss describes such controls as exemplifying 'the tension between capitalism and democracy'; he writes about how the free speech decisions of the US courts in the 1970s allowed capitalism to win. In striking down legislative controls on election spending, the decisions served to 'impoverish rather than enrich public debate and thus threatened one of the essential preconditions for an effective democracy'.[26] In other words, controls on political access to the media during elections are necessary in order to preserve an equal and democratic system.

In the same way, arguments for regulating advertising—prohibiting the advertisement of tobacco-based products, for example—can be based on an equality premise: that potential harm might be caused to vulnerable or disempowered members of the community were companies to have unfettered rights to advertise their products. It is possible to justify other restrictions on freedom of expression in the same way. Prohibitions on hate speech, child pornography, or on the right to march through sensitive areas in Northern Ireland may mean encroaching upon freedom of expression, but in a way justified in the interests of protecting weaker members of society from harm caused by abuse of power. Conversely, the application of the equality test would not justify restrictions on freedom of expression which cause the banning of sexually explicit

artwork in galleries or prevent access by pregnant women to relevant medical information. This is because neither the display of explicit art nor the provision of abortion information encroaches upon the rights of disempowered groups. Thus, a reframing of free speech in the context of equality and of social power is possible.

In many jurisdictions, the equality test is often applied in practice to justify restrictions upon 'hate speech'—speech promoting or inciting racial discrimination. This type of speech is explicitly excluded from protection in Article 16 of the South African Constitution and in the laws of many democratic states. In Ireland, although there has been little debate around hate speech, its restriction in the interests of the common good was accepted as necessary in the Prohibition of Incitement to Hatred Act, 1989. This forbids the publication, distribution or broadcast of material intended to stir up hatred against a group of persons on account of their race, ethnicity or nationality, religion, sexual orientation or membership of the Traveller community.

Like hate speech, pornography is also seen by many as harmful to the common good, but its prohibition is not so routinely accepted by progressive communitarians. The censorship legislation discussed above, with its emphasis on prohibiting obscene and indecent material, represents a form of legal moralism or paternalism, based on concern about the moral welfare of citizens. Most progressive people would argue for its repeal. But, new legislation criminalising child pornography, introduced more recently, is based on a more tangible concern, i.e. that such material involves the causing of actual harm to children and should be prohibited to protect this especially vulnerable group. The Child Trafficking and Pornography Act, 1998 introduced a new criminal framework for the possession, production or distribution of child pornography. Until its enactment, neither possession of child pornography, nor taking indecent photographs, nor making sexual video recordings of children were criminal offences, so long as no assault was involved. Again, few communitarians or, indeed, liberals, would question the pressing need for, or the ideological basis of, the new legislation.

The debate about adult pornography and whether it should be seen as harmful to adult women in the same way is more complex. Here, Irish law remains mired in a state of moral paternalism. Elsewhere, however, feminists have been seeking change in pornography laws to reflect the harm/equality perspective. As O'Malley writes, anti-pornography feminists are effectively united with the moralist/conservative position in seeking a ban on such pornography, although, of course, they differ from the conservatives in terms of their reasons for such a prohibition.[27]

Feminist anti-pornography arguments are based upon the concept that pornography causes real harm to real women—that it amounts to discrimination against women. As MacKinnon says, 'protecting pornography means protecting sexual abuse *as* speech, at the same time that both pornography and its protection have deprived women *of* speech, especially speech against sexual abuse'.[28] But the feminist movement is divided on this issue: Nadine Strossen, for example, has written a strong critique of what she describes as MacKinnon and Dworkin's 'pro-censorship' approach. She argues that the effect of their campaign against pornography is to blame the words and images that make up pornography for the social fact of violence against women and so to overlook the root causes of 'complex, troubling societal problems'.[29]

Conclusion

Feminists (and progressive communitarians) are divided on approaches to pornography and whether it can be restricted on the basis of applying an equality test. This is perhaps the most difficult free speech issue, since it would always be a matter of contention as to whether particular pornography amounted to discrimination against women; the definition of pornography is itself contentious.

The application of an equality test wherever restrictions on speech are proposed might not resolve that most difficult free speech issue of pornography, but it would go some way to solving what has always been the principal problem with free speech for progressive communitarians. The fact is that laws favouring freedom of expression have consistently permitted the dominance of the individual interest over the collective, the victory of capitalism over democracy. The left and the women's movement need to reclaim freedom of speech by placing it within the equality context, so that it becomes a right that must always be seen in a constitutional framework in which equality is the core norm. As MacKinnon argues, we require 'a new model for freedom of expression in which the free speech position no longer supports social dominance, as it does now; in which free speech does not most readily protect the activities of Nazis, Klansmen and pornographers, while doing nothing for their victims, as it does now; in which defending free speech is not speaking on behalf of a large pile of money in the hands of a small group of people, as it is now'.[30]

As progressive communitarians, as feminists, and as socialists, we can only reclaim free speech when equality becomes the core norm. Then, expression would no longer be only a liberal freedom, a marking of private territory upon which the public sphere should not encroach.

Rather, it could be seen as a positive right, the exercise of which the state would facilitate where necessary to empower those disadvantaged in society and restrict only where necessary to prevent abuse of power by dominant groups. This approach to free speech would protect the interests of those who are genuinely not free to speak, due to economic or social conditions, and could ensure a greater harmony between the right to free speech and the core norm of equality in democratic societies.

Notes

[1] *Constitution of Ireland—Bunreacht na hÉireann* (Dublin: Stationery Office 2000). The full text of Article 40.6.I.i reads:

'The State guarantees liberty for the exercise of the following rights, subject to public order and morality: i. The right of citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law'.

[2] O. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder & Oxford: Westview Press, 1996).

[3] G. Quinn, 'The Nature and Significance of Critical Legal Studies', (1989) *Irish Law Times* 282.

[4] Ibid., p. 282.

[5] M. McGonagle, *A Textbook on Media Law* (Dublin: Gill & Macmillan 1996), p. 23.

[6] *Report of the Constitution Review Group* (Dublin: Government Publications 1996), p. 292.

[7] (1988) 3 Frewen 163.

[8] P. MacEntee, 'Publish and be Banned', in P. Smyth & E. Hazelkorn (eds.), *Let in the Light: Censorship, Secrecy and Democracy* (Dingle: Brandon Press 1993), p.113.

[9] [1983] ILRM 89.

[10] Ibid.

[11] Ibid., pp. 114–5.

[12] S. Ranalow, 'Bearing a Constitutional Cross: Examining Blasphemy and the Judicial Role in *Corway v. Independent Newspapers*', (2000) 3 *Trinity College Law Review* 95, p. 95.

[13] Supreme Court, 30 July 1999.

[14] Ranalow, op. cit., p. 109.

[15] Section 7 (2), Censorship of Films Act, 1923.

[16] S. Bosche, *Jenny lives with Eric and Martin* (London: Gay Men's Press 1983).

[17] *AG v. Simpson* (1959) 93 ILTR 33. For a detailed commentary on the case, see G. Whelan and C. Swift, *Spiked: Church-State Intrigue and the Rose Tattoo* (Dublin: New Island 2002).

[18] [1979] I.R. 295.

[19] M. Kelly, 'Censorship and the Media', in A. Connelly, *Gender and the Law in*

Ireland (Dublin: Oak Tree Press 1993), p. 185.

[20] See McGonagle, op. cit., p. 234–5.

[21] *AG (SPUC) v. Open Door Counselling Ltd* [1988] I.R. 593.

[22] *AG v. X* [1991] I.R. 1. Following this decision a constitutional referendum was passed in November 1992 allowing the freedom to give information on abortion. The Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 was then enacted providing for the conditions under which such information may be given by counsellors, doctors, etc.

[23] See, for example, H. Linehan, 'Calling the Censor to Account', *Irish Times*, 18 November 2002.

[24] South African Constitution, chapter II.

[25] South African Constitution.

[26] O. Fiss, op. cit., pp. 10–11.

[27] T. O'Malley, *Sexual Offences: Law, Policy and Punishment* (Dublin: Round Hall 1996), p. 417.

[28] C. MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press 1993), p. 6.

[29] N. Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (London: Abacus 1995), p. 279.

[30] MacKinnon, op. cit., p. 109.

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