Downloaded from UvA-DARE, the institutional repository of the University of Amsterdam (UvA)
http://dare.uva.nl/document/61921

File ID	61921
Filename	Summary

SOURCE (OR PART OF THE FOLLOWING SOURCE):

Type	Dissertation
Title	Communicatiegrondrechten: een onderzoek naar de constitutionele bescherming van het recht op vrijheid van meningsuiting en het communicatiegeheim in de informatiesamenleving
Author	L.F. Asscher
Faculty	Faculty of Law
Year	2002
Pages	268
ISBN	9075727097

FULL BIBLIOGRAPHIC DETAILS:
http://dare.uva.nl/record/111148

Copyright

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other then for strictly personal, individual use.

UvA-DARE is a service provided by the library of the University of Amsterdam (http://dare.uva.nl)

Summary

This study examines the relationship between the constitutional protection of freedom of expression and communications secrecy and the information society. Research has been done into the background of the 'fundamental rights of communication' as well as into the meaning of technological development for the protection of those rights.

The 'information revolution' has been described in a myriad of studies and dissertations. Here, we have focussed solely on its meaning for the protection of fundamental rights. The first Chapter of this book gives an outline of the present developments which are shaping the information society. It highlights the changing role of government and gives a brief overview of the technological revolution that lies at the heart of the information society. Convergence, digitalisation, circuit-switching and the intelligent network are but a few elements of recent dramatic change in information technology. A brief introduction to the fundamental aspects of the law of freedom of communications follows. The Dutch constitutional law system is also introduced.

The development of the fundamental rights of communication can be characterised as a reaction to government intrusion. Both the traditional right to freedom of expression and the related right to secrecy of communications contain measures of protection against intrusion by the State. The importance of the fundamental right to freedom of communications can hardly be overstated. Both as an essential right in the sense of self-realisation and individual autonomy, and as a right that lies at the heart of democracy, freedom of communications will clearly deserve solid protection in the future as well. Traditionally, the foundation of the freedom of expression has consisted of both the individual's right to self-determination and self-expression and the interest of the public in open and robust debate. Secrecy of communications is related to freedom of expression in more ways than one. First of all, both rights protect aspects of the communications process and it is fair to say that without the secrecy right, freedom of expression would also be hampered. Of course, communications secrecy can also be viewed as an integral part of the right to privacy.

The key elements of freedom of communications are introduced. The second Chapter examines the Dutch freedom of expression clause, Article 7 Grondwet (Gw), in greater detail. It deals with the problems of present protection and links them to developments in information technology. In addition, the proposals that have been made in light of the dawning of a digital era (the Franken Proposals) are introduced and discussed. In an analysis, some conclusions are drawn concerning the problematic protection of freedom of expression by Article 7 of the Dutch Constitution. The same procedure is applied in Chapter 3, where the protection of secrecy of communications, Article 13 Gw, is examined.

In Chapter 3, Article 13 of the Dutch Constitution is discussed. As in Chapter 2, the relationship with information technology is analysed. It follows that the scope of the current Article 13 has become too narrow as a result of the proliferation of new modes of private communications media. For a restriction on the secrecy of letters, a judge's warrant is needed, while for a restriction of the phone or telegraph secrecy such a warrant is not necessary, according to the Dutch constitution. This difference has become largely obsolete in the digital era. The divergence between privacy-based theories and transport secrecy theory is explained and analysed. The Franken Proposals concerning Article 13 are placed in a broader perspective. Recent government proposals seem to lead to a "reasonable expectation of confidentiality" test. It is argued that this focus has substantial disadvantages.

The main points of criticism of both articles are that Article 7 and Article 13 Gw are both technology-dependent, i.e., with changes in technology, they will no longer apply in the same way. New media are not protected at all, or are not protected in the same ways as the traditional media. Also, the lack of procedural checks on the necessity of restrictions of the right to freedom of communications renders Articles 7 and 13 rigid and inflexible.

The fourth Chapter introduces the European framework for fundamental rights of communications. The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the most important source for European guarantees of communications secrecy and freedom of expression. In Chapter 5, Article 10, ECHR, is discussed. This article provides strong protection for the freedom of expression and does so without being technology-dependent. In fact, Article 10 protects the whole communications process, while other and older constitutional provisions merely protect the expression right. Although

there is no case law yet on the relationship between Article 10 and the newest means of communication, it is generally expected that these media will also be protected under Article 10.

The European Court of Human Rights does make a distinction between different kinds of speech. It seems that political speech is awarded a high level of protection. However, controversial speech concerning obscenity or blasphemy is often left for the national authorities to judge, under the so-called "margin of appreciation" doctrine. It is uncertain how the Court will view these cases when it comes to universally-accessible speech. The example of the "Yahoo" case demonstrates that the implications of restrictions on freedom of speech can spread globally in the Internet era.

In Chapter 6, European protection of privacy and more precisely, the protection of respect for correspondence are examined. In its case law the European Court of Human Rights has extended the scope of Article 8 to telephone conversations. It is expected that the Court will, in due course, include other new media (i.e., the Internet) within the scope of Article 8. This article protects the communications channel instead of the content, which is protected by Article 10. The content of private communications can still be relevant when deciding whether a restriction was justified. It is unclear which criteria, are used to decide whether a particular mode of communications is protected by Article 8. On the one hand, the word "correspondence" is unqualified. On the other hand, in the Klass case, the European Court of Human Rights used both the term "correspondence" and the term "private life" to describe a telephone conversation. As to whether transport data are protected, the answer remains unclear. In Malone, the Court deemed a metering record worthy of some protection. However, in the more recent Kopp case, it is clear that transport data, though covered by Article 8, enjoy a lower level of protection.

Chapter 7 introduces the American system of constitutional protection for freedom of speech and communications secrecy. Chapter 8 deals with the role of the First Amendment. The protection of freedom of speech in the US is discussed with special emphasis on the case law of the Supreme Court. An analysis is also conducted of the treatment of different communications media in American law. It is concluded that the First Amendment offers a strong system of protection. Although the level of protection provided for broadcasting seems to be lower than for the print media, the Internet is offered the highest standard of protection.

There is no section in the US Constitution on privacy or communications privacy. However, the Supreme Court has interpreted the Fourth Amendment as awarding protection to privacy. The protection of privacy has evolved from a form of protection that was based purely on the notion of physical intrusion to a model based on the reasonable expectation of privacy test. It is unclear what level of protection will be awarded to newer modes of communication such as e-mail and chat. Although there have been some cases on the issue, they do not offer a consistent picture and the Supreme Court has yet to render a decision on modern electronic communications privacy. It is concluded that the lack of a clearly formulated protection of privacy in the Federal Constitution complicates the development of a consistent privacy law. This leaves a lot of uncertainty as regards the standard of protection that is offered against electronic surveillance or the criteria which should be met before a restriction on privacy rights can lawfully be made.

In the final Chapter, the Dutch, European and American systems are compared. From this comparison, it follows that both Article 10, ECHR, and the First Amendment offer broad protection for freedom of speech, largely independent of the media used. Also, political speech is accorded strong protection in both systems. However, when it comes to certain types of speech deemed unfit for public debate, the European Court of Human Rights is quicker to denounce speech as worthless and to refuse it protection accordingly. Under the American system, the principle is to protect any speech independently of its content. When it comes to restrictions, the ECHR offers a balanced structure for assessing whether an interference is/was lawful. In the US, some categories of speech are outside the scope of the First Amendment (because they are not viewed as speech) and otherwise, a distinction is made between restrictions based on content and restrictions based on time, place and manner. Article 7 of the Dutch Constitution offers strong protection against censorship, but offers no answers for the digital era. In comparison, the ECHR system seems privileged, especially when combined with the position of speech in the US. When compared, Article 8, ECHR offers a more reliable protection of communications privacy than the Fourth Amendment system protection in the US. Article 13 of the Dutch Constitution suffers from technology-dependency. The Dutch requirement of a judge's warrant could be combined with the ECHR requirement of necessity in a democratic society.

In sum, it is recommended that:

- The Dutch Constitution should be amended;
- The digital era requires communications rights to be defined in a technologically-neutral way;
- The amended sections should consistently state the function, objective, scope and restrictions of communications rights;
- The preferred position of the fundamental rights of communication must be expressed;
- All aspects of the communication process must be protected;
- The right to receive information must be awarded the same level of protection as the right to send information;
- Constitutional protection should not be restricted to the contents of communication
- The requirement of a judge's warrant and the prohibition of prior restraint should be maintained in the amended constitution;
- The requirement of necessity in a democratic society should be added as well as the requirement of a legitimate aim;
- It is not advisable to codify the case law on restrictions on the right to distribute information. Instead, the American distinction between content based restrictions and time, place and manner restrictions could be adopted;
- Due to rapid and ongoing technological changes, a system of permanent review of possible restrictions should be introduced, comparable to the ECHR system.