

# **Freedom of Expression**

Canterbury February 3 2015

Thank you VC. Onora and I are delighted to be here today to talk about freedom of expression and to mark the launch of the EHRC's new guidance document on the legal framework in the UK which protects our right to that freedom. For me this is the third time I have been here to deliver a public lecture as visiting professor and I am honoured and delighted that the university has renewed that appointment.

Our topic is so wide ranging that we cannot possibly do it fully justice in such a short time so we intend to concentrate on two main aspects. First I will try and describe some of the history and origins of free speech, and talk briefly about the main points of our new publication. And second Onora will talk about the key principles which underpin freedom of expression and how we should consider its application in the world of cyber space and the wild frontiers of the Internet.

Of course we had planned the publication of the new guidance and tonight s event some months ago. Well before the terrible attacks in Paris. In the aftermath of the murders both at the magazine and the supermarket the media has been full of debate and argument about free speech. In one sense it has made this lecture and our guidance all the more relevant, but it has also made us think more about the responsibilities we have in the Commission.

We are mandated by parliament to uphold the laws around equality and human rights and that certainly includes freedom of expression. And we are also charged with exercising all our functions and duties in ways which will promote the kind of society we want to see based on mutual respect and tolerance.

There can be no greater absence of respect than to take another's life, and as many have said in the wake of the Paris attacks there can be no excuse, no explanation which justifies those actions. Provocation comes in many forms but words or indeed drawings are frankly low on the list.

As Shami Chakrabarti from Liberty said in a speech to a Commission event a few weeks ago freedom of expression includes the right to offend, but it is not a duty to offend. We can choose to exercise our rights with care, with respect and in knowledge of the impacts of what we say. And that does include the freedom of expression. I will come back to that later.

So as I discuss freedom of expression tonight and largely focus on the legal history and framework do bear in mind that there is a wider context. Onora will talk a little later about one crucial aspect of that wider context in the world of cyber space and social media.

Yesterday I had the great privilege to be at the British Library for the launch of the exhibition which is bringing together the surviving copies of the great charter of 1215. Eight hundred years on it is still seen as a primary building block for the rights and protections we enjoy today and we will rightly be celebrating the anniversary and reflecting on its meaning in a very turbulent political climate.

You will though look in vain for reference in Magna Carta to freedom of expression. It was not one of the issues that divided John and the barons. If anyone had an opinion it would probably have been the bishops and abbots who were a central part of creating the charter and their views would probably not have inclined to much in the way of free speech if it meant a challenge to their position and power nor to the prevailing orthodoxy of the established church.

Alongside the copies of Magna Carta the British library is also displaying the equally precious copy of Thomas Jefferson's handwritten copy of the U.S. Declaration of Independence and the Bill of Rights. In that latter document you will indeed find freedom of speech writ large. One of the founding principles of the U.S. Constitution free speech remains a dividing line between the US and UK traditions. It is not just the 550 years which separate the charter and bill of rights which determined their different approaches. They also reflect different views and values.

There is very little in the documentation of the period after Magna Carta to suggest that freedom of expression or free speech, was much of a concern. To be honest when you could get your hands cut off for stealing a sheep that is perhaps not a surprise. The slow evolution of the ideas had two main drivers, increasing diversity in religion and the gradual growth of democracy.

Both have of course been driven at various times by the step changes in technology which allow people to disseminate their views more quickly and more easily than standing up and speaking in the market square. One of the issues we need to confront today is the now arguably uncontrollable access to instant views which the Internet provides. When the rulers of previous centuries cursed the introduction of printing as making censorship so much harder, they can scarcely have envisaged our problems!

I have spoken here in the past about the development of the legal framework protecting religious faith and I will not retread that ground. But clearly enough if the state starts to tolerate any differences in accepts religious belief, it is also going to need to develop a view and a legal basis for allowing expression of that difference. But the tolerance the state was prepared to put up with was also both limited and changeable.

That was the case not just in the fifteenth century of Wolf Hall when the changing faith of the monarch was the driver behind the changing orthodoxy of the church and hence what it was safe to say from one year to the next. It took a long slow road to achieve the removal of all laws on blasphemy for example. Perhaps we can return to that journey on a future occasion.

The importance of free speech in democracy was recognised by the founders of democracy itself in Athens. The ability of every citizen to speak in the Assembly was not just a right it was close to a duty, and a duty to speak the truth with courage. Sadly the requirement for the truth is not part of our current legal framework on freedom of expression. Of course in our terms this right was very limited as citizens excluded women and the huge slave population on whom the economy was based. And as Socrates discovered the authorities had firm views about topics that were not covered by any right to free speech.

Free expression in Athens was also very much associated with the right to self-government. The notion that freedom of expression is in some special way a right of those charged with our governance has been central to developments in this country and persists to this day in parliamentary privilege in parliament. It is in some ways different from the broader right of individuals to speak out, and indeed challenge authority and government which developed its own basis and philosophy in places like France and the US.

With the temporary demise of democracy in the UK and elsewhere freedom of speech followed it into abeyance. It was often associated with treason or dissent against king or church as the only established powers and authorities. The absence of any form of mass communication outside the reading of proclamations in the market place certainly played a significant part in limiting the opportunities for free speech.



It was a long time after Magna Carta, that we see the reemergence of the issue very much in parallel with the revival of ideas around democracy in the seventeenth century. It is of course no coincidence. The right to challenge authority and speak out for ones beliefs runs hand in hand with the desire to be part of the decisions which govern our lives. The focus of much of the debate then and a fair amount today therefore was on the rights of the media, as well as the rights of politicians or the individual rights of citizens.

I am sure it is no coincidence that the emergence of movements like the Levellers and new and revolutionary ideas on individual rights, including free speech, coincided with the advent of printing. You can't start a revolt unless people know it's happening. At that stage the ability to speak freely was often linked to speaking freely about religion. In 1647 the Leveller William Walywn published 13 demands including:

*That no man for preaching or publishing his opinion in religion in a peaceable way may be punished or persecuted as heretical by judges.*

That's a pretty fair description of the rights which we hold today. Around the same time John Milton was penning his arguments for free speech which are often cited as one of the founding philosophical works. He went wider than religion in pressing the rationale for individual freedom and the right to criticise authority. In other writers the right to participate in the government in democracy was often linked to the right to speak freely about politics and religion.

Some of this took root, but certainly not all. The demands of the Levellers were in some ways a couple of centuries ahead of themselves and their descendant in the Chartists in the nineteenth century would still be pressing for some of the democratic rights we now take for granted.

Those who assumed power from the monarchy were only slightly more inclined to allow unrestricted free speech than the Kings and queens they succeeded. The notion of libel - and particularly seditious libel - was a significant restraint in the period which followed. Though of course in the Bill of Rights in 1689 some peoples free speech was given specific protection in the clauses applying to MPs.

The great jurist William Blackstone covered this in his landmark texts and although he asserted the right of the media of the day to publish without prior constraint, he concluded that improper, mischievous or illegal words could lead an author to feeling the full force of the law. And truth was not itself a defence against such actions by the state. You might have written accurately about the doings of a politician but you might still find yourself in deep trouble.

In the later eighteenth century the political revolutions in the US and France did not leave the UK untouched. Works such as Paine's rights of man, and the views and writings of US thinkers were hotly debated. In some ways they represented a different strand of thinking on rights such as free speech which belonged inherently to the individual and which the state actually had a duty to uphold, rather than being dragged out of a reluctant state by popular movements.

The state indeed did not really distinguish calls for free speech from more threatening demands around changes to the entire political structure. The agitation and demonstrations which increased probably culminated in the massacre at St Peter's Fields in 1819 and the subsequent Six Acts in parliament which seriously constrained all manner of free speech outside of parliament itself. Meetings and assemblies were to be prevented.

Blasphemous and seditious libels prevented and punished. And publications were made subject to the stamp duty.

The point of the stamp duty was to effectively price free speech out of the market. It would be today's equivalent of paywall on the internet stopping access to anything the government didn't want you to read.

Of course these increasingly authoritarian actions failed to stem the tide of opinion and the pressure for reform though they contributed to delaying the achievement of those changes for the next hundred years, more has arguably until the 1918 Representation of the People Act when the end of the First World War marked the end of much of the social and political order which generations of politicians had fought to maintain.

In the course of that hundred years many people had written and argued in favour of free speech.

John Stuart Mill's work *On Liberty* is often quoted and he certainly argued for much more permissive laws on freedom of expression. However his arguments were perhaps more an intellectual rationale based on the fallacy of assumed infallibility than a robust statement of the right of individuals to express themselves.

What eventually had an impact was the impossibility of the state holding back the tide of demands. For example in 1867 the Clerkenwell branch of the Reform League announced a march to Hyde Park. The Home Secretary of the day announced that if they entered the park for the purposes of preaching and discussing that would be trespass and they would be arrested.

However the crowd of some 150,000 was clearly vastly beyond the power of the police to arrest.

A popular verse of the day said:

*Our right is all that we ask  
To meet with each other when labour is  
done  
And speak our minds in the park.*

The great extension of the franchise after 1918, including the emancipation of women, the breaking down of social taboos and structures, and the impacts of the Great Depression all contributed to a gradual weakening of the laws preventing free expression. But it might surprise some of our younger audience that some of us were around when censorship of plays in London and trials for obscene books were still a normal feature of our legal system.

Indeed when you look at the development of free speech in this country compared to say the US or France it would be easy to wonder which history some of our politicians have read when they extol the centuries of free speech in Britain.

Actually most of our rights to freedom of expression have been rather reluctantly conceded by the powers that be. Some of our newspapers indeed believe that the current political leadership is intent on turning back the clock to the time of stamp duty with the proposals for press complaints in the wake of the Levenson inquiry.

It is certainly true to say as the title of this event suggests that in the UK freedom of expression is still a qualified right. The nature and extent of those qualifications though is widely misunderstood and misinterpreted. It was to help tackle that lack of understanding that the Commission decided to publish the document we are launching today. I want to take the final part of my section of this lecture to describe briefly some of the key constraints the law places on your freedom to express yourself, and why.



Onora will then continue the theme by talking particularly about the wild west of free speech which we all inhabit every day in cyber space.

As I have very briefly tried to outline freedom of expression had a difficult birth in this country. Unlike some others it was not a right which was codified and expressed early in a constitutional settlement and depended more on common law and tolerance than legal basis really until we first signed up to the European Convention on Human Rights and then incorporated those rights into our domestic law in the human rights act in 1998.

It is Article 10 of the convention which protects our right to freedom of expression. And as I shall hopefully make clear that freedom extends to views which are offensive or even shocking. But not to expressions which promote hatred of others.

And it can be a crime to stir up hatred on grounds of race, religion or sexual orientation.

The law still protects freedom of expression more strongly in some contexts than others. There is a particularly high bar in the context of political debate and campaigns. Unfortunately this is likely to mean that we see more unpleasant material crossing the media in the coming months. The media itself has a high level of protection when it comes to what it can lawfully say and write.

The state does constrain our free speech in a number of ways, some are specific to times and places and people and others are more general. The grounds for lawful constraint include:

*National security or public safety*, in the classic example to prohibit hoax bomb claims or shouting fire in a crowded theatre or cinema;

*For the prevention of disorder or crime*, for example prohibiting incitement to racial hatred which could lead to violence or criminal acts against others

*For the protection of health or morals*, which is where you will find laws against some types of pornography

*Protecting the rights of others*, particularly around defamation

*Protecting commercial or trade secrets*

And maintains the *authority and impartiality of the judiciary*.

These are potentially wide powers for the state to interfere with our right to freedom of expression but in all these cases there are also further tests around the proportionality of the bar against the aim it is trying to achieve. Not everything is protected as freedom of expression but neither are any of the bars or constraints absolute or unchallenged.

There is one important legal point I should try and convey. That is that the majority of the text in article 10 is actually about the State's duty not to infringe your freedom of expression, rather than a right held by the individual. So challenges to this article are generally framed as assertions the state has intervened to restrict freedom of speech in an unwarranted or disproportionate way.

This can mean that cases under the law can look a bit back to front!

The arguments can focus on the actions of the state in barring something rather than the right to say it in the first place.

So although the article 10 begins simply enough - by stating that everyone has the right to freedom of expression, and that this right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority –

It then goes on to detail the various ways in which we are indeed legitimately prevented by the state from imparting those ideas to others. These are essentially the same criteria I described earlier.

The article also goes on to say that the exercise of these freedoms since it carries with it duties and responsibilities may be subject to a number of constraints.

I raise that point in passing since some would have you think the European Convention is all about rights with no balancing duties or responsibility. In fact the authors, mainly British conservatives, included just such important and necessary balance in the Convention from the start.

This construction however also means that different countries have different forms of constraint to freedom of speech, all of which are lawful under the European Convention.

For example some other European countries have laws which specially outlaw denying the Holocaust but that is not an offence in this country, although a European Court case suggests it might be found to be unlawful.

The state in the UK has acted to constrain Freedom of Speech in various ways and notably in the area of what is generally termed hate speech. It is worth going into some details on this as different rules apply in different regards.

*On race* - the words used must be threatening or abusive and there must have been an intention to stir up hatred or a likelihood that it might be stirred up

*On religion or sexual orientation* the words must be threatening, not just abusive, and there must have been an intention to stir up hatred. A specific defence exists though protecting freedom of expression.

This provides that neither criticising, insulting or ridiculing religious beliefs nor criticising sexual conduct or, practices or urging restraint, are offences.

There is also a later and specific exclusion to deal with comments or criticism on equal marriage which says that any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken if itself to be threatening or intended to stir up hatred.

In the topical and tragic case of the French magazine these definitions and exclusions are obviously very relevant.

Our law provides a lower threshold for incitement to racial hatred in terms of abuse than it does for religious hatred which must be threatening.

Obviously these issues apply to the broad forms of speech which might attack groups or beliefs.

There are also specific offences when abusive speech is directed at one individual on a recurrent basis and that forms the starting place for considering an offence of harassment.

We are of course also in the middle of a heated debate about free speech on the campuses of universities in the context of the proposals in the Counter Terrorism and Security Bill and the proposed role of university authorities in countering extremism. This is an issue we will need to return to in our work in the Commission.

I am close to the end of my time, and I want to say just a few final words about the EHRC's role and views beyond the legal framework. Although much of our work is about the regulation of the equality acts and monitoring and reporting on human rights our purpose is much broader.



Parliament, in establishing the Commission, gave us duties to act in a way which *encourages and supports the development of a society in which there is respect for human rights, for the dignity and worth of each individual and mutual respect between groups based on understanding and valuing of diversity.*

I have quoted here from our founding purposes, but deliberately left out the references to legal roles because I want to return in finishing to the point I made earlier.

Delivering the equality and human rights legislation is necessary and will create positive changes.

But that is a need not a sufficiency to create the kind of society envisaged in the act by parliament.

Respect and understanding and value are not states you can legislate into being.

The question beyond our right to freedom of expression is the same which the authors brought out in drafting the Convention. That this freedom carries it with duty and responsibility. And how we want our society to make good on that responsibility which freedom brings is an unresolved question which the events in Paris only serve to bring into sharp and tragic focus.

Thank you.