

Guest Editorial

Freedom of Expression Must Include the Licence to Offend

An address originally made at:

Intelligence Squared and the London Jewish Cultural Centre public debate
Royal Geographical Society, London, 7 June 2006

Speaking against the motion¹

Professor Francesca Klug

There should be no *legal* bans and no state censorship of free expression on the grounds of hurt feelings. Plays like *Beshiti*, books like *Midnight Children*, satires like *Jerry Springer's Opera*, wonderful films like *The Life of Brian*, these all offend people of various faiths, deeply and passionately in many cases. To ban them on the grounds that they may cause offense would be to deny the *essence* of free speech which, as the European Court of Human Rights is wont to say, "constitutes one of the essential foundations of a democratic society, applicable not only to information or ideas that are favourably received. . . but also to those that offend, shock or disturb." However, formal permission is only one aspect of the dictionary definition of license. The other is liberty of action, or complete freedom, especially when *excessive*.

Reflect for a moment on the following distinction. The statement that freedom of expression *must exclude* unwarranted censorship and bans and therefore *can* include the licence to offend, is *not* the same as the proposition that freedom of expression *must* include the licence to offend. But it is only the latter statement we are debating here. Let us look at each proposition in turn. But first a word about free expression—the idea which is *central* to this debate.

Our right to freedom of expression is set down in the 1948 Universal Declaration of Human Rights—and the many treaties it spawned—whose values and principles provide the bedrock of virtually every written constitution or bill of rights in the democratic world and beyond, including the Human Rights Act (the exception is the earlier American Bill of Rights). This right to free expression is not unfettered. In fact quite the contrary. It can legitimately be limited, in a proportionate way,

¹ Also speaking against the motion were David Cesarani and Tariq Ramadan. Speaking for the motion were Lisa Appignanesi, Alain Finkelkraut and Kenan Malik.

where necessary to protect people from libel or incitement to murder, amongst other grounds. Under the UN Bill of Rights there is actually a *duty* on states to *limit* free speech by outlawing incitement to national, racial or religious hatred.

But *offence*, in and of itself, is *not* one of the legitimate reasons for *the state* to limit free speech. Freedom of expression, in other words, clearly *can* include a license to offend. But *must* it? That is the questions we are debating. Must we, *in all circumstances*, offend if the alternative is to shut up, to temper what we say and how we say it, to self-censor if you like?

The editors of the Danish newspaper *Jyllands Posten* clearly took the view that free expression *must* include a license to offend. Their point was *not* to defy the *authorities* in the idiom of the great Enlightenment heroes. They had no doubt of their *legal* right to publish a cartoon of the prophet Mohammed with a missile in his turban. The only people they were bent on defying were the Muslim community, a large number of whom, in the context of the world-wide war on terror, were indeed likely to be ‘offended’—if that is the right word—by a set of cartoons published in a national newspaper, many of which unmistakably associated Islam with indiscriminate violence and terror. Anyone who tells you that the core of this issue was a benign portrayal of the prophet Mohammed published in violation of the tenets of Islam, has either not seen the cartoons or is ignoring acres of comment that the nub of the offence was the association of Islam, and therefore Muslims, with terror.

So why were they published? They were published in the name of free expression and with the knowledge that the cartoons were likely to cause offence and distress. The original Danish publishers, and even more so their counterparts across Europe, went further and argued that it was their *moral duty* to speak out to protect free expression in Europe from the scourge, as they saw it, not of *state censorship* but of *self-censorship*.

Like the proposors of this motion, these editors maintained that freedom of expression *must* include the licence to offend—license in the sense of complete freedom rather than just legal permission. That is their opinion, and I would, of course, defend to the death their right to express it [to paraphrase Voltaire]. I do not so much hate what they say, but dispute its validity. For simply put, just because you have a legal right to publish does not make it *right* to do so.

The Universal Declaration of Human Rights is not primarily a legal document at all. It is a declaration of values, addressed as much to the people of the world as to their governments, drafted after the Second World War, in the wake of “barbarous acts which have outraged the conscience of mankind” to quote the preamble; acts carried out by citizens as well as states. The very first Article reminds us all “to act towards one another in a spirit of brotherhood”. No-one is entitled to quote the exercise of one right as grounds for destroying the rights of others. All the rights interact with each other; in exercising free speech we also have to respect

the equal dignity and worth of our fellow human beings, especially those already marginalized.

The only right—yes, the *only* right—which explicitly refers to individual responsibilities in the European Convention on Human Rights and UN Bill of Rights is free expression. Why? Because the experience of the Second World War and the Holocaust demonstrated that sticks and stones may break my bones but words can soften up whole populations to collude in genocide. Not necessarily by direct incitement to hatred, which is notoriously difficult to prove, but by the drip, drip effect of dehumanisation and negative associations. A phenomenon we tragically witnessed again in Rwanda, decades later.

We now *know* that free speech, the cornerstone of a democratic society, can also be used to deny, or even obliterate, the rights of others in certain circumstances. They may not have known that in the Europe of the Enlightenment but we can't shun this knowledge today. The post-war human right to free expression encompasses the *totality* of this perception. To exercise our right to free expression in a spirit of brotherhood, in other words, sometimes involve refraining from speaking—or indeed drawing—when the people you are defying or denigrating are clearly more vulnerable than yourself, and it is them or their core identity you are attacking, rather than a philosophical or religious belief.

The cartoon controversy illustrates the thin line between offence, denigration, and incitement. We need to distinguish between offence based on difference of opinion and offence based on denigration. If we do not want to be plagued by laws banning free speech, we must develop the wisdom—and yes ethical sensibility—to make these distinctions *ourselves*. As the European Court of Human Rights is apt to remind us when defending holocaust denial legislation in the lands where the genocide took place, in exercising such judgement *context is everything*.

To conclude, why are we even having this conversation at this time? The unspoken backdrop is the claim that we need to hold our ground in the light of a growing clash of civilisations. Yes we are living in testing times and I don't disagree that we need to be able to clearly articulate the defining values of liberal democracies. But we are suffering more from a confusion of principles than a clash of cultures.

We likely all agree that free expression is a cherished principle of our society, hard won and easily lost. But does it follow that we therefore stand for the denigration of the vulnerable or the ridicule of the marginalized in the name of free speech? Is that what we want to say we stand for when we defend our values from those who would question their worth? As Aristotle reminds us: "Where we are free to act, we are also free not to act."

Freedom of expression must include a *legal right* to offend. But not, in all circumstances, the complete *license, to do so*.

Francesca Klug
Professorial Research Fellow
Centre for the Study of Human Rights, LSE