



Rules, rights and justice: an introduction to law

Freedom of speech

MISHAL HUSAIN:

Freedom of speech is something we almost take for granted yet dig a little deeper and questions start emerging. What makes a controversial new play acceptable, while an extremist blog is seen as cause for serious concern? Where should we draw the boundaries between something that's not to everybody's taste and something that's downright illegal? And how do you weigh up one individual's right to free speech against the security of another, an entire community or even society at large? Well with me to discuss this are three experts with different perspectives on freedom of speech. Sandy Starr's a journalist on the current affairs website Spiked, as well as national newspapers and journals. You could say that freedom of speech is a prerequisite for his job. Ben Fitzpatrick's an academic lawyer based at the Open University and a writer on the W100 course and Clive Baldwin is a human rights lawyer and the director of international advocacy for minority rights group international. He has a particular interest in privacy and hate speech. Welcome to you all. Let's start with a very general question just to set the scene. Clive, if I can put this to you first, should there be limits to freedom of speech at all?

CLIVE BALDWIN:

We would say yes in certain circumstances. They have to be very clear, but if you remember the old phrase, sticks and stones may break my bones but words may never hurt me, in fact that's wrong. Sometimes words lead directly to harm and in our case we see time and time again around the world where certain minority groups suffer harm as a direct result of speech directed against them. So we would say in certain circumstances with strict limits there must be very great concern made about words directed in terms of hatred towards others.

MISHAL HUSAIN:

Sandy Starr would you accept that? In certain circumstances limits are appropriate.

SANDY STARR:

I wouldn't no. I take the unfashionably absolutist view there shouldn't be restrictions on freedom of speech. I believe that unless we're free to say and listen to what we wish, we can't truly be said to be free at all. And this is a view I hold not in the context of the human rights framework but rather in the libertarian tradition. The human rights framework may be central to European law and jurisprudence but I think it's worth stepping outside of it and even challenging it now and again.

MISHAL HUSAIN:

Ben, what would your view be on that? Should there be limits?

BEN FITZPATRICK:

I would argue for a strong presumption in favour of freedom of speech. Freedom of speech facilitates the circulation of ideas and as a consequence it enables bad ideas to be weeded out and through that we enable social progress. I think though that there are circumstances where we can identify speech which is causing identifiable harms and there may be a case then, may be - for the intervention of the law to restrict that speech.

MISHAL HUSAIN:

Okay, well that's the general picture if you like. Let's go on to talk more specifically because freedom of speech when it crops up is almost all in a specific set of circumstances that grabs people's attention. One of those areas where it's become a particular issue has been literature and the arts. Clive.

CLIVE BALDWIN:

Coming back again to this point of when can speech cause direct harm, you would [in point of?] say in what circumstances and for our point of view when it's directed in terms of incitement of hatred which will then cause direct harm to someone. I would say those would be in general situations where it's something very public and high profile such as the media. So issues around literature and the arts is very unlikely that you get situations where someone will see, even read a book full of hatred and go out and act immediately and attack someone.

MISHAL HUSAIN:

So your point, your worry's not so much the literature or the play or whatever it is, but the coverage of that?

CLIVE BALDWIN:

It could be the coverage of it. I mean our concern would be when there's a direct link. When you can say that someone by making a speech, by writing a piece of work, by producing something either has the intention that other people then not just read it but then act on it and you know in extreme circumstances by violently attacking others. And that's where it's say issues around literature, it's very rare you could say that there's a direct, can trace a direct link between a piece of work and an act of harm.

MISHAL HUSAIN:

Ben if you do accept that in certain cases it should be limited, should literature be one of them, or should it be a special zone?

BEN FITZPATRICK:

Well I think one instinctively might need to treat rather carefully in the field of literature and the arts. Suppression of the arts has been a practice with many totalitarian states and one might take the view that the arts are a special environment because it's there that we often find dissident voices. People voicing unorthodox views, minority interests and those interests are very important, it's very important that we hear those interests for the functioning of a healthy, free society.

MISHAL HUSAIN:

Sandy Starr, would you agree with that?

SANDY STARR:

I would. With regard to the arts in general, I do think it's important that we have freedom of speech, although with the caveat that just because something is controversial doesn't mean it's necessarily any good. What I think is interesting about literature in particular is that in recent years literature has been less likely to come under attack simply for the snobbish reason that it's considered to be a slightly more elite pursuit. It's more likely to be the popular arts, the popular media that come under - that provoke controversy in attempts at regulation because people assume that the masses are not sufficiently intelligent to watch something without taking it on board and acting upon it. Whereas readers are treated as somehow of being of a higher calibre.

MISHAL HUSAIN:

But would you take the point that Clive Baldwin was making that if there is something in a particular work of art which then sparks the media's interest and then leads to an inflammation of opinion then perhaps it's something that we should avoid.

SANDY STARR:

Well I don't think people should avoid inflaming opinion although many artists do it simply to attract publicity. The challenge that I find in my job is actually defending the basic principle of free speech on behalf of artists and others whom I absolutely disagree with and whose work I might think is absolute rubbish.

MISHAL HUSAIN:

But that's not enough to limit their freedom of speech?

SANDY STARR:

Absolutely not, the principle must be defended nonetheless.

MISHAL HUSAIN:

Clive what would you say to that? That perhaps there is a special leeway that we have to allow to the literature?

CLIVE BALDWIN:

Well I would accept the point actually that there can be a degree of snobbism that we say that literature is deserving of a higher form of protection or issues around what things such as opera is very rarely example attacked on grounds of freedom of speech. And that again comes to the issue of power. It's very important with the restrictions of freedom of speech to say in whose interests are they being done and in what name. You should know historically freedom of speech has been limited in the names of governments and in the names of the majority community. That's why it's also that very often we are dealing with issues where minority groups had their culture restricted in the name of the majority and that's say classically in the UK you could say in the issues around that the blasphemy law only applies to Christians.

MISHAL HUSAIN:

Would you say that's fair? That that's an area that needs to be looked at Ben Fitzpatrick?

BEN FITZPATRICK:

I think it is fair to say that the blasphemy law is problematic. I suppose there are two approaches to it. Do you take the view that one applies a blasphemy law universally or do you take the view that there should be no blasphemy law whatsoever?

MISHAL HUSAIN:

This is of course what came up so starkly during the whole Salman Rushtie Satanic Verses affair.

BEN FITZPATRICK:

Indeed. And one might take the view that the very presence of a blasphemy law on the statute book at present or strictly speaking in the common law is offensive in itself in that it is excessively limiting on freedom of speech.

MISHAL HUSAIN:

Well a new take on an old theme is freedom of speech on the internet. Some people find cyberspace a threatening jungle where anything goes, while others see it as the last true bastion of freedom of speech. Let's explore first of all this point that is sometimes made that the internet should be a really special zone that the whole nature of it is somewhere where we should allow total freedom of speech. Sandy Starr, you're someone who makes their living writing on the internet, where would you stand on that?

SANDY STARR:

It's not so much that I think the internet is deserving of special treatment. It's more that the technical difficulties in regulating it have made it closer to the way I would like society to be. In other words not particularly regulated although that's changing. It's a fallacy to think that the internet cannot be regulated. Increasingly it is. What I think gets missed in panics about the internet and the content on it is that while undoubtedly it allows likeminded individuals at the extremes who we might disagree with and be intimidated by to collaborate and communicate, it also does the same thing for us at the other end and allows us to communicate and collaborate to progress events that's the corollary that I think it really helps create a level playing field which is worth defending but is currently under threat.

MISHAL HUSAIN:

So you'd say it's more important to allow it to flourish for a sort of greater good?

SANDY STARR:

Absolutely. The thing that people forget is that just because something is on the internet doesn't give it any consequence or credibility. Because there is such a low barrier to publishing, all you need is a computer and a connection, anyone can do it. And that's a fine thing because just because someone puts something out there doesn't mean you have to extend to it any credibility, doesn't mean you can make any assumptions as to how many people are reading it or being influenced by it and if people are reading it and being influenced by it and you disagree it's incumbent upon you to make the opposite case.

MISHAL HUSAIN:

Clive Baldwin would you accept that?

CLIVE BALDWIN:

Talk about the internet I think it's also important to distinguish between the providers and those who are actually writing or producing the information. The real danger we're having is that because it's easier to get the service providers, those are the people being attacked and they're just the delivery tool, it's the person giving the message that counts. And therefore we would also say you cannot have the internet operate in a vacuum, you can't have the internet operating outside any laws, particularly international laws. And therefore the normal rules that if you are directly inciting people to crimes and crimes of hatred you should be accountable for your actions in some ways ...

MISHAL HUSAIN:

But the point Sandy Starr was making is that we're all grown up enough to make those decisions for ourselves.

CLIVE BALDWIN:

If only that were the case. It doesn't always happen. And certain pieces of words said in the wrong way at the wrong time can have very dramatic effect. So if you were standing outside a pub and two people were having a fight and one of them produced a knife and a friend of his was saying to him, go on - stab him, and the person did stab the other person. The one who has shouted out, stab him, won't be held accountable for it.

MISHAL HUSAIN:

Ben, would you accept that as an argument for limiting freedom of speech on the internet?

BEN FITZPATRICK:

To some extent yes, but to some extent no. The internet has such a positive potential in terms of bringing ideas out into the open. And for sure, among those ideas will be some ridiculous ideas and some offensive ideas. But their very presence in the public domain at least makes people aware of those arguments and enables people to engage with them. I think -

MISHAL HUSAIN:

Which you see as a good thing?

BEN FITZPATRICK:

Yes, yes. And certainly prima facie. Clive's point about the regulation of incitement taking place between people in the same location is a very important one. I think that goes more to the issue of policing though and Sandy's already touched on the difficult practical issues of regulating the internet.

MISHAL HUSAIN:

Sandy what would you say to the specific example that Clive put forward about incitement to crime as a vehicle that is making something possible that is a crime?

SANDY STARR:

Well the current law in incitement is such an extremely uncomfortable way for precisely this reason. I think it's extremely important to maintain actions and people's thoughts and words as separate legal categories and not to confuse them. Because as soon as you confuse people's words with people's actions you cease to have a basis on which people can be held responsible for their actions. As soon as you can attribute someone's actions to something

that somebody's said to them, then that's an excuse on the form the devil made me do it. And the law immediately becomes a lot murkier. The only context in which I recognise incitement as a valid legal notion, is that laid down by the Supreme Court Justice Oliver Wendell Holmes Junior in his classic clear and present danger exception which stands in the nited States regarding free speech. He gave the famous example of somebody shouting fire in a crowded theatre. The difference there is that because people are in immediate fear for their safety, you can say that their rational judgement is suspended.

MISHAL HUSAIN:

So there you would accept that as a limit on the freedom of speech?

SANDY STARR:

That is an extremely narrow limit that I would accept.

MISHAL HUSAIN:

Is that the only one you would accept overall?

SANDY STARR:

It is. A lot of the things that people usually think should be dealt with through restriction on freedom of speech I think are actually confusions with other areas of law such as assault, intimidation, damage to property. I don't think you need supplemental categories that relate to speech to address crimes in those domains.

MISHAL HUSAIN:

Clive Baldwin, how do you feel about that?

CLIVE BALDWIN:

In terms of how the English law approaches this, it's purely sticking to the criminal law and knowing that it's not a defence to an act, it can be a, partly a plea in litigation. To say you were led into that by somebody else and it's that person's words who matter. And that doesn't just go to the sort of the incitement I was talking about, that's going to people who direct others, to criminal gangs, to an international law, armies - and it's the one's who give the orders who are probably the most liable. But they've only used words some of the time. So people are held accountable for their words and those who have committed the act itself can use those sort of words they've been told in litigation. It depends on the circumstances.

MISHAL HUSAIN:

Okay. We're going to talk more specifically about incitement to racial hatred and its conflict with freedom of speech in a moment. But I want to turn now to privacy and the crossroads between freedom of speech and privacy. Ben just take us through this. What do you think should happen when someone's right to free speech might come into conflict with someone else's right to privacy?

BEN FITZPATRICK:

To some extent freedom of speech and privacy exhibit similar characteristics. They're both about autonomy. If I'm claiming freedom of speech I'm exercising my autonomy to say what I like. If I'm claiming privacy, I'm exercising my autonomy to control the flow of information about me. And the judgement that one has to make is really about whether there is information about me which I can legitimately control and whether there is information about me which I have no legitimate control over. And it's over that latter part, that latter corpus of information if you like that the public at large may legitimately speak.

MISHAL HUSAIN: So where would you say - just to be specific, I mean where do you think it then is acceptable to curtail someone's freedom of speech in the interests of someone else's privacy?

BEN FITZPATRICK:

I think it's fair to say that there is a personal and intimate domain that attaches to each person over which other people have no legitimate interest unless the person about whose intimacy we're talking about has already placed that intimacy if you like into the public domain. Celebrities are an example which is often discussed here. If a celebrity claims that their

privacy has in some way been invaded then the rebuttal that's often put in by the media is that in effect they traded away their privacy by consorting with the media.

MISHAL HUSAIN:

Yes. Sandy Starr, how would you feel about that? This idea that each of us has this personal space around us that ought to be protected, even if that conflicts with someone else's freedom of speech.

SANDY STARR:

I think that the more loosely that's regulated and protected, the better. As with freedom of speech I come from a libertarian tradition of believing that the best way for the authorities to protect something is to give you the latitude to enjoy it by backing off, not by stepping in and enforcing it on your behalf as is the European human rights tradition latterly. Where clearly the right to privacy and the right to free speech can come into conflict, require minute negotiation and essentially both are compromised as a result.

MISHAL HUSAIN:

Aren't you assuming though that most people are pretty good perhaps and won't be doing things like this, infringing other people's privacy? I mean you're kind of making a lot of assumptions about the inherent goodness and our regard for each other in society.

SANDY STARR:

I'm not making those kinds of assumptions, I'm talking deliberately in the abstract because people's perceptions of privacy and its importance particularly privacy change over time as technology changes, as cultural habits change. We enjoy our private sphere and enforce it in different ways. I think that the more that the law is codified minutely to deal with our privacy concerns in the present that the less equipped it is to deal with changes that come up in the future. So I think that this is one domain in which I think the authorities should back off.

MISHAL HUSAIN: Clive how do you feel about that? Would you like to see this area more codified or left to our own devices more?

CLIVE BALDWIN:

I think there's a very important philosophical issue here which unfortunately we don't have time to deal with. But this is the point that Sandy's been bringing up about the European human rights tradition. But just to summarise that is that you have basic rights and they can only be limited in certain circumstances in very clear ways. But also there's a positive duty on the state to ensure the protection of those rights, particularly for the least powerful. And we can certainly say that in cases of privacy in that if you -

MISHAL HUSAIN:

That it should be protected?

CLIVE BALDWIN:

That it should - there is a special duty on the state to protect the privacy of the least powerful. If you just allow, where in the UK we haven't had a right to privacy for a while but it has been the celebrities and the most powerful who have been able to protect it through the defamation laws. But to use another example, an extreme situation. I worked for a while in Kosovo and right at the beginning when we arrived as the international community we were allowed absolute freedom of speech in the media. There was ethnic cleansing going on and some of the extreme Albanian newspapers started printing the names and addresses of Serbs remaining in the town Pristina. It's essentially getting people to go and drive them out. And we felt we had to impose a law to stop newspapers printing those names and addresses and the names of protecting the privacy of the people.

MISHAL HUSAIN:

Well that actually leads us in to the whole incitement to racial hatred kind of issue. Ben I want to come to you first of all on this because this is something that almost always comes up in relation to freedom of speech and we have seen some pretty horrific examples in the past where you know people have used their freedom of speech to incite others to terrible acts.

BEN FITZPATRICK:

For sure. If we're going to call freedom of speech a right then it has to entail the ability to say things that other people find distasteful and offensive. If that ability's not there it's not a right. However, to perhaps bring us back to almost where we started off the discussion, what the role of the law, the appropriate role of the law here perhaps is, is to draw a line between that speech which is offensive and that speech which is not merely closely linked to but is almost causally related to the production of harm.

MISHAL HUSAIN:

So you mean the line between something that's just not everyone's taste and something that's illegal?

BEN FITZPATRICK:

Yes, yes.

MISHAL HUSAIN:

And who do you think should be drawing that line there? That's the job of the law?

BEN FITZPATRICK:

In the last instance I share I think Sandy's approach that the law should have as light a touch as possible here, because going back to where I began, my view is quite firmly that the more ideas we have out in the open, the better because it enables bad ideas to be rebutted and as a consequence of that, the law should intervene in these cases only where it's absolutely necessary. But I think I would accept that it is necessary under certain tightly defined circumstances.

MISHAL HUSAIN:

Sandy, what's your take on that?

SANDY STARR:

No, I find the whole category of racial hatred more confusing than helpful in law. And I find it difficult to see how you know what we've heard described as a direct causation you know from somebody's words to somebody's actions, I find it hard to see how that can be objectively established in law. I think it's -

MISHAL HUSAIN:

But there are examples aren't there? In the past, I mean the holocaust and the Rwandan genocide were both times when we saw incitement to racial hatred and horrific consequences.

SANDY STARR:

The notion that historical events of that magnitude and that historically specific could have been dealt with by moderating people's ability to speak, I think is reading history backwards and does not help us.

MISHAL HUSAIN:

So you wouldn't accept at all that had there been strict laws against that kind of thing at the time that perhaps we would have seen those events turn out differently.

SANDY STARR:

I don't think that you alter the course of events with the law by designing out the opportunity to say certain things. For one thing I don't think it's likely to be successful, in the same way as prohibition in general is not really successful. It gives legitimacy to those ideas you're trying to suppress. It makes martyrs of those people whom you're trying to deny the right of freedom of speech.

MISHAL HUSAIN:

Ben it strikes me that one of the key issues here is how you balance the rights of different groups where their rights are possibly competing with each other. How would you approach that?

BEN FITZPATRICK:

I think my starting point would be to say that you should use as little law as you can get away with. The law can be rather a blunt instrument here. But I think that the line that the law needs to draw is between that behaviour which is merely unpleasant which other people don't like, and that behaviour which is causative of harm.

MISHAL HUSAIN:

Would you say Clive that you would agree with the idea though that the law should intervene as little as possible in this area of freedom of speech?

CLIVE BALDWIN:

It should intervene only when it needs to. That at times may be quite a lot but hopefully it will be as little as possible. But also it should be clear. I mean one of the basic principles about the human rights framework is you have a basic right. If it's going to be limited, it can only be done for a legitimate reason and the law has to be as clear and specific as possible in how it limits your right.

MISHAL HUSAIN:

Would you accept that Sandy, that as long as it's clear and specific then would you accept some kind of limit on freedom of speech?

SANDY STARR:

The problem is I don't think it's possible to have a clear and specific limit within the human rights framework which gets to the heart of the problem I have with it. Because the human rights framework defines people's rights positively as things that are enforced on your behalf by the authorities, firstly it puts people's rights in conflict with one another and you have this notion of balance which is quite alien to my conception of rights. And second, rights are constantly up for negotiation. They need to be clarified. There are ambiguities that keep coming up. There are actually some fairly laudable statements of principle in the founding documents of the human rights framework, the universal declaration and European Convention. The problem is that those documents aren't very good at dealing with subsequent events when ambiguities are thrown up and the authorities are constantly given the latitude to renegotiate and add exceptions and qualifications to freedom such as freedom of speech. I prefer a model of rights that is unambiguous.

MISHAL HUSAIN:

Ben what would you say? Number one I suppose, is it possible to have such a model? But would you accept that there are deficiencies with rights such as freedom of speech when it comes to the way they are set out?

BEN FITZPATRICK:

I certainly take the point about ambiguity in law, and to be fair that's not just a problem to do with freedom of speech, that besets the law as a whole. I do think however that with rights in a legal framework the notion of balance and the notion of conflict is to some extent inevitable. If I am actually claiming a right then I may well be claiming the ability to do something that you don't like. And there has to be somebody, perhaps the state, who's going to stop you stopping me doing what you don't like.

MISHAL HUSAIN:

Which probably brings us to this whole issue of rights versus responsibilities. Clive I want to ask you what you think of that. Do you stand more on the side of responsibilities rather than rights?

CLIVE BALDWIN:

Well the starting point is the rights, its called human rights. But it's knowing that every right almost brings with it a responsibility. Under the human rights framework a few rights are absolute and can never be limited, such as torture. But even in those realities many governments still carry it out. But freedom of speech is one of those which specifically brings with it duties and responsibilities under the human rights framework. And another critical issue

under it is that you cannot use rights to interfere with other people's rights and abuse other people's rights. It's not a cover for it.

MISHAL HUSAIN:

Sandy, I am assuming that you probably wouldn't like the rights and responsibilities idea at all.

SANDY STARR:

No I don't believe that rights in general and the right to free speech in particular brings with it concomitant responsibilities. I don't think there's any prescription in the notion of free speech as to what that speech will consist of because then it wouldn't be free. And I think that it's inevitable that rights such as the right to free speech will be used to ends that we disagree with by people whom we detest. It's up to us to use those same rights to fight in the sphere of ideas for what we believe to be true. Not to withdraw those rights from other people whom we disagree with.

MISHAL HUSAIN:

This all becomes very subjective though doesn't it? It's basically then you're leaving it to individuals' perceptions.

SANDY STARR:

I trust individuals to decide the truth on the basis of arguments that are put to them in a democracy where free speech exists.

MISHAL HUSAIN:

Ben would you accept that?

BEN FITZPATRICK:

To a point I would, provided that everybody is sufficiently well informed, that everybody has access to the same kinds of information. I think the difficulty arises when we accept that perhaps people don't all have access to the same information and aren't always well informed as each other.

MISHAL HUSAIN:

Clive, a final thought from you.

CLIVE BALDWIN:

Go back to how I started and say although I'd accept the basic principle that was just said, that in certain circumstances when words do kill or cause harm and those cases we have to limit them.

MISHAL HUSAIN:

Well we could of course talk on this topic for hours, but I'm afraid in this particular studio there's a definite constraint on our freedom of speech and that's the ticking of the clock. So I'd like to thank our contributors Ben Fitzpatrick, Sandy Starr and Clive Baldwin and to invite you to pick up the conversation where we've had to leave off.