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FREEDOM OF EXPRESSION

Sir Stephen Sedley

In 1909 my Inn of Court, the Honourable Society of the Inner Temple, disbarred and expelled an Indian barrister named Shyamji Krishna Varma. Varma was a prominent Indian nationalist who, like other nationalists, had found it possible to speak more freely in Britain than in India. He had written a letter to the Times[1] warning the British that their time as rulers and exploiters was coming to an end and that the end could be a violent one. His disbarment was moved by Master the Earl of Halsbury, the former Lord Chancellor, by then aged 86 but evidently incensed enough to take the lead in getting rid of a turbulent barrister. A generation later, in 1922, Mohandas Gandhi was convicted of sedition for his nationalist agitation in India and sentenced to 6 years in gaol. He too was expelled by the Inner Temple[2]. Both have now been posthumously reinstated: their heresy has become, if not orthodoxy, at least a respectable point of view.

Thus where Varma had incurred the benchers' wrath by writing that "Indian nationalists regard all Englishmen in India as robbers", and that "every Englishman who goes there for exploiting that country directly or indirectly is regarded as a potential enemy by the Indian Nationalist party", the distinguished British historian William Dalrymple has noted in a recent article that Powis Castle "is simply awash with loot, room after room of imperial plunder, extracted by the East India Company", whose governance had "quickly turned into the straightforward pillage of Bengal and the rapid transfer westwards of its wealth", while Indian markets were flooded with British products[3].

Varma's shade must have applauded; for one of the many risks of censure and censorship is that it will be the censor, not his victim, who is made by history to look foolish. In February 1803, during the brief cessation of hostilities which followed the Peace of Amiens, the Anglo-French writer John Peltier was prosecuted and convicted before the Court of King's Bench on a charge of seditious libel for publishing an attack (in elegant alexandrines) on the

[1] The Times, 20 February 1909
[2] See Inner Temple Yearbook, 2005/6, p. 62. The expulsion took place within 3 days of the conviction.
[3] The Guardian, 4 March 2015

monarchical ambitions of Napoleon, who was momentarily the head of a friendly state[4]. Within the year Peltier had been proved right, but by then he was in gaol.

In 1960, when Lady Chatterley was acquitted at the Old Bailey in the prosecution brought against Penguin Books, the Lord Chamberlain still exercised a power of censorship over the London stage. Shortly after the trial the script was submitted to him of a stage version of the novel, purged of four-letter words but including a bedroom scene. The Lord Chamberlain insisted that neither actor was to put on their underwear while on stage, and that Mellors was not to appear bare-chested: he could appear in his shirt, but only if his underpants were visible below the hem. Evidently the idea of making love unclothed was regarded by those in authority as one that must not get about.

I have argued in the past[5], and still think, that censorship is a pit with no bottom. But does it follow that there should be no limits on writing and speech? Most liberal societies adopt a harm threshold and criminalise speech or writing which transgresses it. I have little difficulty with this, even though it throws up a plethora of moral questions both about whether it is intent or effect which should be the crucial test, and about what constitutes harm. I have a great deal more difficulty with societies which use the harm test to criminalise religious heterodoxy by classing it as blasphemy. I also have some difficulty with the law which, at least in England and Wales, has replaced the common law offence of blasphemy with a statutory offence of incitement to religious hatred, seeking to ringfence one particular class of belief or point of view against the winds of hostility which other beliefs and viewpoints – political, aesthetic, social - are rightly expected to put up with. A particular asymmetry arises where hatred is promoted on religious grounds against secular and therefore unprotected targets – notoriously homosexuality, but also apostasy or atheism.

Where we lawyers tend to lose the plot is where the discussion gravitates away from bans and penalties and towards simple civility – a form of soft law - as a control on free speech. A great deal of potentially offensive speech takes place in controlled or controllable forums –

[4] *Le 18 brumaire, an VIII* ("Que faut-il à ses voeux? un sceptre? une couronne?"). See *R (Buonaparte) v Peltier,* cor. Lord Ellenborough CJ (in KB, on AG's information), 21 Feb. 1803.

[5] *Ashes and Sparks*, ch. 38

schools, universities, newspapers, broadcast media - which are able to make and enforce their own rules. For these reasons it may be legitimate to criticise a periodical such as *Charlie Hebdo* for giving unjustified offence – for incivility, in other words – without for a moment wanting to see it or any similarly pungent periodical penalised or banned. Correspondingly, the "no platform" policies adopted by many tertiary education institutions and supported in general by the National Union of Students are intended to protect minorities in the student body from insult or isolation. But the price of this, the stifling of unpopular or abrasive voices, is a high one, and it is arguable that it is healthier for these voices to be heard and challenged. Challenge of course brings its own problems: is it equally legitimate to shout a speaker down? But these are exactly the margins of civility which institutions need to think about and manage. They are not, I would suggest, a justification for taking sides by denying unpopular or abrasive speakers a platform.

Parliament, for its part, is now seeking to draw a legal perimeter around academic platforms, banning outright their use for the promotion of forms of extremism which may nurture terrorism. The aim is laudable, but the means are worryingly open to error and abuse, and the deliberate chilling effect on the exchange of ideas may do little to halt the serious proselytising which happens well away from public forums. A recent letter about the current Extremism Bill to the Home Secretary from the chair of the Joint Committee on Human Rights, Harriet Harman, highlights these concerns:

- How are 'non-violent extremism' and 'British values' to be defined?
- Will 'extremism' extend to beliefs as well as activities?
- How will Muslim communities be able to expect equality of treatment?
- What will be the bill's impact on freedom of religion, speech and protest?

What I want particularly to look at in this talk, however, is something that goes beyond incivility, disagreement or denunciation, however savagely or bigotedly expressed. I want to look at the freedom to lie.

A right to lie is not, of course, spelt out in any human rights document or charter. But once you have stripped away the numerous existing constraints on free speech – the criminal law governing not only hate speech but contempt, perjury, fraud, the law of libel and the developing law of privacy – there remains an entitlement to say whatever you want to,

regardless of its veracity. We all have this right, but while the individual today may have access through the web to new channels of dissemination, it is government and the media which possess the megaphones. Free speech (as I suggested some 15 years ago in allowing the appeals of two evangelical street preachers) is a right which includes "not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence"[6]. It also, more troublingly, includes the slapdash, the inaccurate and the downright mendacious, so long the untruth does not transgress the civil or criminal law.

The case for an ineradicable right to say whatever you please within the law is not that there exists some crucible of fact in which the dross of nonsense and falsehood is sooner or later purged. It is that to be silenced is one of the most fundamental insults there is to human individuality and personal dignity, and one which can therefore be justified only by a plain prospect of unacceptable harm. I have suggested that the negotiation of restraint by civility is to be preferred. But it's necessary also to be realistic: when secularist journalists and bloggers are murdered in Bangladesh, as several have been this year, by religious bigots to whom the police turn a blind eye, free speech becomes a matter of life and death, and civility ceases to matter very much.

For his part, Winston Smith in the nightmare state of *1984* was not asking for the luxury of freedom to claim that two and two make five: the freedom he wanted was simply to be able to insist, in a society which had lost its grip on truth, that two and two make four. Here too, however, caution is required. There is no Aladdin's cave in which truth is to be found, and one hopes there will never be an Orwellian ministry which decides what the truth is. People are entitled to get things wrong: indeed, as I suggested earlier, one generation's heresy is often the next generation's orthodoxy. But we need also to face the fact that Oliver Wendell Holmes's notion of a marketplace of ideas in which the true eventually drives out the false[7] is palpable nonsense. Just as real markets are constantly prey to manipulation, distortion and capture, so the marketplace of ideas is prey to misinformation, to disinformation, to suppression of information and to propaganda. The twentieth century, the era of the great lie, ought to have put paid to any whiggish notion that there exists (save perhaps in closed

[6] *Redmond-Bate v DPP* [2000] HRLR 249; (1999) 7 BHRC 375
[7] *Abraham v US* 250 US 6116, 630 (1919)

areas of pure science) a free market of ideas which spontaneously purges itself of falsehoods.

Among the principal reasons for this is the oligopoly of information managed by the media. The media at their best are an indispensable force for good, the heart that pumps information around the body politic. At their worst they are a source of irrational hatreds, moral panics, ignorance and bigotry, unmitigated by any enforceable obligation to the truth.

Many fibs, it is true, are inconsequential. When H.J.Heinz in 1896 decided to announce that his tinned foods came in 57 varieties, it didn't matter that it was completely untrue and that Mr. Heinz just thought that the number sounded good[8]. Other fibs are less trivial. The MRSA scare which ten years ago brought the NHS's hygiene standards into disrepute was a press fabrication. Tabloid journalists who took smuggled swabs to independent laboratories and were told they were clean, turned to a self-professed microbiologist, an individual with minimal qualifications who worked from a garden shed but who gave them the positive reports they wanted. Refutations from reputable scientists were simply ignored, and the man in the shed was elevated to "Britain's leading expert" on MRSA[9].

The history of the MMR triple-vaccine scare is more nuanced because it was no less a periodical than the *Lancet* which first published an anecdotal research paper based on a dozen cases with no control group, unscientifically associating the administration of the vaccine with autism. The *Lancet* later repudiated the report and apologised for having published it. But once in the hands of the press, the scare proved ineradicable. A meta-analysis of the entire epidemiological literature, which indicated no link whatever between autism and the vaccine, was simply ignored by the media[10]. Even today uptake of the triple vaccine has not returned to its previous level, and outbreaks of measles (which can kill) and mumps (which can disable) are a continuing consequent threat.

One of the most successfully propagated myths is that Britain is in the grip of a compensation culture. The expression seems to have originated in an article about welfare by Bernard Levin in the Times in 1993. Between 1996 and 2004 references to it in the press

[8] See Bill Bryson, *Made in America* (1994), p. 283
[9] See Ben Goldacre, *Bad Science* (2008) p. 278-289
[10] See Ben Goldacre, *Bad Science*, ch. 16

rose year on year from near-zero to over 450. It had some basis, without doubt, in the advent of conditional fee agreements and of claims management companies which were making a living by ambulance-chasing. But the House of Commons' Constitutional Affairs Committee in 2006 found no evidence that the growth of risk aversion was related to these factors. Over the same period, although tribunal claims increased with the creation of new causes of action, the total number of claims in the courts steadily declined [11].

This, naturally, had no effect at all on those for whom the existence of a compensation culture was the springboard for an assault on the Human Rights Act, health and safety legislation, personal injury litigation and laws forbidding discrimination and restricting dismissal. The assault was supported – as it continues to be – by an unstoppable stream of news items about absurd claims, most of them allegedly human rights-based, showing how easy it now was to get compensation for anything, and absurd rules and practices provoked by bureaucratic risk-aversion. That few of the claims ever came to court, and that those which did generally failed, went pretty much unrecorded. Prisoners, the public now believes, can sue the government for not being allowed to access pornography; robbers under siege by the police have to be supplied with Kentucky fried chicken and cigarettes; customers who spill hot coffee on themselves can collect massive damages from the fast food chain that supplied it; photographs of fugitive criminals cannot be publicised because of their human rights; acquiring a cat is now a complete defence to deportation … the nonsense rolls on.

In 2006 the Commons' Constitutional Affairs Committee concluded, despite the prevalent mythology, that the UK was not moving towards, much less embedded in, a compensation culture. The problem, it found, was a culture of risk aversion which the myth was actually reinforcing. In 2010, enter a new government. The Prime Minister asked the veteran politician and entrepreneur Lord Young "to investigate and report back … on the rise of the compensation culture over the last decade, coupled with the current low standing that health and safety legislation now enjoys, and to suggest solutions". Lawyers will admire the way the questions came armed with the answers: as every cross-examiner knows, you don't leave these things to chance. Despite this, Lord Young reported:

[11] See James Hand, 'The compensation culture: cliché or cause for concern?', *Journal of Law and Society,* vol 37 no 4 (Dec. 2010)

"Britain's 'compensation culture' is fuelled by media stories … The problem … is, however, one of perception rather than reality." That, chiming as it did with all that had previously been established, seemed to be that. But what did we read in the prime minister's foreword? "A damaging compensation culture has arisen….".

Yet, for reasons I have touched on, you cannot demand a right to be told the truth without being prepared to hand over to somebody (or to some body) the terrifying power to decide what the truth is. What you can do is give people access to evidence – the records and facts which may fortify or falsify a public assertion – and in this way restrict the power to lie or mislead. One of the most dramatic examples in recent times was the discovery, by the Oxford scholar Avi Shlaim, of an intact copy of a protocol signed at Sèvres in 1956 by the French, British and Israeli governments, agreeing that the latter would invade Egypt and thereby enable the other two to intervene and to repossess the recently nationalised Suez Canal – a conspiracy of which the existence had been repeatedly denied by ministers in Parliament[12]. The fact that Tony Blair now regrets the enactment of the Freedom of Information Act 2000 is a tribute to the Act's success. What ministers and their advisers have come to regret is that the FoI system makes it harder to get away with spin and distortion. It's therefore troubling that a commission including two ex-Home Secretaries has recently been set up by the Cabinet Office to advise on the future of the Act.

If then, as has to be accepted, an affirmative right to be told the truth carries too high a price-tag, a right of maximal access to information is probably the nearest we can come to a human right capable of cutting down the most troubling of all unacknowledged human rights - the dark side of freedom of expression - the freedom to lie.

Sir Stephen Sedley

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[12] Avi Shlaim, *The Iron Wall* (2nd ed. 2014), p. 180ff.