

THE PARADOXES OF LIBERTY: THE FREEDOM OF SPEECH (RE-) CONSIDERED

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Introduction

Liberty is a paradox. Or to be more precise: liberty is surrounded by paradoxes. One of these seemingly contradictory propositions is that when people are increasingly talking about freedoms and rights, true liberty itself may increasingly be in retreat as well. The European Union and the European Court of Human Rights have recently led societies on the European continent in a new direction. This course will have certain consequences for liberty in general and the freedom of speech in particular. It is therefore fitting to consider and reconsider the freedom of speech and some of its consequences.

An important aspect of the freedom of speech is that it requires more than just the possibility to *express* your personal views; it also requires the possibility to *hold* these personal views. It therefore involves both an ‘inner’ and an ‘outer’ element. This differentiation is evident in, for instance, the *European Convention on Human Rights (ECHR)*.¹ The freedom of speech is embodied in two articles in this Convention. Firstly, Article 9 ECHR claims that everyone has the right to “freedom of thought, conscience and religion,” and that this “includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.” Secondly, Article 10 ECHR states that “everyone has the right to freedom of expression” and “this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” Freedom of speech is therefore a twofold liberty: the freedom of thought and the freedom to express your thoughts.

I. Truth and Untruth

The English philosopher John Stuart Mill addressed an important paradox relating to the freedom of speech. Mill claimed that in order to be right one should have the possibility to be wrong, and that therefore liberty is essential

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¹ Also known as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

to the investigation and finding of truth. He states in his 1859-classic *On Liberty*:

“The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”²

There is much more to articulate about this matter. The idea of ‘truth’ not only logically implies the existence of something called ‘untruth’, just like the existence of ‘human’ requires the existence of ‘non-human’ (e.g. animals and minerals) and ‘tree’ requires the existence of something like ‘non-tree’, it also suggests that the untrue should be something which can be heard and can therefore be contested: if you prevent a certain view from being expressed, there is no longer any discussion possible. It is the replacement of dialogue with monologue. The theological concept of free will is based on a similar paradox: to do good, one has to have the possibility to do evil.³ The perception of the existence of right and wrong is therefore not only compatible with liberty, but fundamental to it: you ought to have a choice. In academia this implies that it is, according to Mill, impossible to find truth without a free and open discourse. If there is no possibility of differing from conventional views, the idea of the truth cannot be found. The freedom of speech is therefore essential for scientific progress and academic development.

In an open society a person should have the opportunity to say things that are wrong. It is the strength of a society that ultimately defines the boundaries of the freedom of speech. The wider the discourse, the stronger a society. A vigorous society can handle much more than an feeble society before the ‘costly fabric of society’ collapses, just like a healthy person can handle more hardship than an unhealthy person. The creation of stricter laws on the freedom of speech is consequently not so much an expression of civility, but rather a symptom of a society in decline. In other words: the call for civility only serves to conceal cultural decadence. The society is in decline not only because it loses its ‘open’ character, but also because a strict system of ‘hate crimes’ and ‘speech codes’ can effectually dissolve the distinction between true and untrue, right and wrong, good and evil. Liberty is a corrective mechanism in order to find and strengthen truth. If this mechanism does not exist or work as it should, a degenerate status quo conservatism will eventually be its result.

² John Stuart Mill & A.D. Lindsay (ed.), *Utilitarianism, Liberty and Representative Government*, London: Everyman’s Library 1964 [1910], p. 79.

³ See e.g. the Christian theologian C.S. Lewis, *Mere Christianity*, New York: The MacMillan Company 1960 [1952], pp. 37-38.

Furthermore, the differentiation between true and untrue presupposes that there is indeed something like truth. In a postmodern era where truth is in itself in doubt, the freedom of speech is in jeopardy as well. Differentiating between the true and the untrue requires certain fixed or at least agreed standards on what is truth – and what is not. Even a pluralist society cannot survive very long without at least assuming that the system of pluralism is correct. When certain standards of right and wrong do not exist, this wide variety of opinions, which is itself a result of liberty, can easily transform into ‘noise’. If there are no longer any *moral* standards to judge what is right, every opinion is as right or valuable as any other. Hence the only standard that remains is that of arbitrary might, which is a direct threat to liberty. Without these moral standards, even the idea of serfdom would not be of any less value than the idea of liberty. The freedom of speech, instituted to find truth, can then easily transform into a freedom of noise to prevent the finding of truth.

II. Limitations and Exaggerations

To suggest that both the freedom of speech and the idea of truth are of vital importance to an open society, is not to say that the freedom of speech should be unlimited. Another paradoxical aspect of liberty is that it implies boundaries. If you choose to marry a person that you happen to love, you are thereby limiting your liberty as well: by this particular marriage you are binding yourself not to marry someone else. A certain free choice limits other possibilities. You are not servile, for it is your own choice; but the limitations are clear. Boundaries are therefore an intrinsic element of liberty. In a society these boundaries are determined by the persons constituting that society. This is either by might, for instance by an absolute majority or an assertive minority, or by something else than might, such as reason, tradition or simply good manners. One limitation on the freedom of speech that is founded not on arbitrary might, but on mere logic, is the concept of ‘clear and present danger’, which has been first used in American law in the case of *Schenck v. United States* (1919). The underlying concept of clear and present danger, however, became most clear in *Brandenburg v. Ohio* (1969), a case between the state of Ohio and a Ku Klux Klan leader who presumably incited violence against persons of a different ethnicity. In this case it was decided that:

“These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴

⁴ See e.g. Theodore J. Lowi, Benjamin Ginsberg & Kenneth A. Shepsle, *American Government: Power and Purpose (Brief Tenth Edition)*, New York: W.W. Norton & Company 2008, p. 82.

According to this reasoning, a hate crime can only be a crime when it is clear that it is aimed at inciting violence against certain persons or groups of persons. The expression should have real, present consequences that limit the fundamental freedoms of someone else. Here the element of an act is more than just a result, for it is an act which will clearly end in a certain result. If these consequences cannot be made evident, it is no longer the 'act' but the 'mind' that is being punished; not the expression itself, but the holding of certain thoughts – however morally wicked these may have been. The concept of clear and present danger is therefore consistent with the 'rule of law' or what Robert von Mohl called 'Rechtsstaat'. Nevertheless, the classical idea of freedom of speech has never been instituted to protect defamation, profanity or other forms of hateful speech for their own sake. It is to protect the philosophical ideas that are potentially controversial, but indispensable for societal development. It is to ensure that modern civilisation will not forbid its future John Stuart Mills.

Another problem of the freedom of speech is the exaggeration of this liberty. The Dutch politician Geert Wilders wrote in his Declaration of Independence that "[t]he freedom of speech is the greatest good in a free democratic society and prevails over the other constitutional rights".⁵ Yet it can be questioned whether the freedom of speech is indeed more significant than, for instance, the freedom to life and the freedom from torture, as can be found in respectively Article 2 and Article 3 ECHR. The choice between not speaking your mind and being *arbitrarily* tortured to death in a public park (for no reason whatsoever) is probably not a difficult one. Focussing too much on the freedom of speech may even result in the situation that you can *say* that you want to walk in the park, but you are prohibited to actually do so. Freedom of speech is a valuable right, but it is not our only right, and it may not even be the most fundamental right.

Moreover, the effective freedom of speech requires the possibility to express oneself, and one of its limitations is the means to express it. A pundit in a national newspaper has more means to his expression than someone who does not even have an Internet connection to start a personal blog. One has little use of the freedom of expression if one cannot physically express oneself. There is in fact a subjective element in freedom and every constitutional right: certain freedoms are more valuable to some than to others, for the reason that they are more in need of these rights to strengthen their way of living. The freedoms that are indeed the greatest good are the freedoms that really improve people's lives. The misunderstanding and exaggeration of the right to the freedom of speech can therefore effectively limit liberty in general.

⁵ Geert Wilders, *Onafhankelijkheidsverklaring*, March 13, 2005, University of Groningen website: <http://www.rug.nl/dnpp/politiekePartijen/PvV/verklaring.pdf> (accessed on 8 December 2009). The original Dutch text says: "De vrijheid van meningsuiting is het grootste goed in een vrije democratische samenleving en prevaleert dan ook boven andere grondrechten."

III. The European Prospect

On the European continent at least three legal developments will have significant influence on the discourse of the freedom of speech. Firstly, with the Czech Republic all member states of the European Union have now signed the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*. This Reform Treaty will come into force on 1 December 2009 and will offer some important changes to the operation of the European Union. One of these changes is that the European Union now explicitly “recognises the rights, freedoms and principles” that are set out in the *Charter of Fundamental Rights of the European Union*.⁶

Secondly, a new EU directive on equal treatment is currently being implemented by its member states. The main rule is that a directive should be transformed into national law before the rights and duties it offers have any effect in the national jurisdictions. There are, however, exceptions to this rule: for example, judges can interpret national laws in conformity with the directive.⁷ Therefore it is legally not possible for a national government to ignore the authority of a directive. This directive will not only limit the freedom of association and religion, but also the freedom of speech. The ‘harassment’ clause states that “unwanted conduct” which has the “purpose or effect of violating the dignity of a person” and of “creating an intimidating, hostile, degrading, humiliating or offensive environment” is forbidden.⁸ This kind of vague terminology is by definition harmful to liberty, because it creates a certain degree of legal uncertainty and consequently a feeling of suppression. Moreover, discrimination in this form does not suggest a clear and present danger as in the American jurisdiction, for under this clause everything that a person considers to be offensive will effectively be an act of discrimination. There is also no longer any intent needed for any act to be wrong, for the clause not only speaks of the *purpose*, but also about the mere – unintended – *effect*. The whole legal characteristics of an *actus reus* and a *mens rea* is absent.

Thirdly, while the European Union itself is no member of the Council of Europe and the ECHR, all the EU member states are. Moreover, there is a close cooperation between the European Union and the Council of Europe

⁶ ‘European Parliament and Council, Charter of Fundamental Rights: the Presidents of the Commission, European Parliament and Council sign and solemnly proclaim the Charter in Strasbourg’, *Europa Press Releases RAPID*, Brussels: December 12, 2007, Reference: IP/07/1916, Europa website: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1916> (accessed on 8 December 2009).

⁷ See e.g. F. Amentbrink & H.H.B. Vedder, *Recht van de Europese Unie (Tweede Druk)*, Den Haag: Boom Juridische uitgevers 2006, pp. 180-187.

⁸ Commission of the European Communities, *Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008) 426 final, 2008/0140 (CNS), Brussels: July 02, 2008, p. 18.

which may eventually result in the accession of the former to the latter.⁹ Hence any decision of the European Court of Human Rights is, except for opt-outs, already binding for the members of the Council of Europe and the European Union, and possibly in the near future for the European Union as a whole as well. The jurisdiction of the Court is as a result undisputed. One judgement that will have tremendous influence is the Court's opinion in *Lautsi c. Italie* (2009), in which the atheist mother Soile Lautsi claimed that she was offended by crucifixes in her child's school, and that the presence of these objects limits both her child's personal freedoms and the idea of a secular public space.¹⁰ The Court agreed with her and judged that Italy should pay her 5.000 euro's in 'moral damages' (*dommage moral*) and that all crucifixes should be banned from Italian (public) schools. This kind of judicial activism limits the freedom of religion and the freedom of education, for a vast majority of the population – Christians – is now limited in their freedom to send their children to a school where *their* beliefs subsist. If the state should not be allowed to teach children a certain fixed and biased set of beliefs because of secularism, then the ECHR should not have banned crucifixes, but public schools. Clearly this judgement will not widen, but limit the discourse in Europe.

These three legal developments will have significant effects on the development of *inter alia* the freedoms of thought, expression, education and religion on the European continent. As soon a person takes offence at someone else's words or deeds, he has now more legal means at his disposal to limit others in their liberties than ever before. Yet while the freedom of speech does not imply a freedom to offend someone else, there is neither a right to not be offended, for everyone is offended by something. The message of these new directives and judgements is that certain persons are too feeble for freedom. In the name of not being offended by your neighbours' views and habits, an accumulation of instructions and prohibitions is becoming a part of the European societies. It has the potency to end the era of modern liberty that was started by philosophers such as John Stuart Mill.

Conclusion

Liberty is surrounded by paradoxes, and this becomes very clear in the case of the freedom of speech. In order to find truth, one should have the possibility to express untruth, and in order to be free, one should also accept certain limitations. The greatest paradox, however, is that in an era when everyone talks about rights and freedoms, people may in fact have less of it than they think. Perhaps liberty can be compared with trying to find your lost

⁹ Jean-Claude Juncker, *Council of Europe – European Union: "A sole ambition for the European continent"*, April 11, 2006, p. 29.

¹⁰ Cour Européenne des Droits de l'Homme (Deuxième Section), *Affaire Lautsi c. Italie* (2009), Requête no 30814/06), Strasbourg: 03 novembre 2009. There is currently only a French judgement available, so the information included in this reference is also in French.

wallet. The moment you search for it, you cannot find it; the moment you stop searching, you notice that you already had it in your pocket. Perhaps the current developments in the European Union are an example of the spreading idea that people are free, but where freedom is becoming more shallow and hollow by the day. Liberty on the European continent will nevertheless venture into a new dimension, and hopefully into the right, true direction. Liberty is a paradox; a beautiful paradox that is still worth preserving.

