

The ends of free speech: challenging campaigners

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Over the last four years, English PEN has achieved notable success in its campaigns for freedom of expression in the United Kingdom. These campaigns have focused on legislative reform in areas where domestic law appeared to be incompatible with Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant of Civil and Political Rights (ICCPR). English PEN has worked closely with two other leading free speech NGOs, Index on Censorship and Article 19, to secure crucial amendments to the Racial & Religious Hatred Act (2006), to achieve the repeal of the blasphemy laws (2008), and to win promises from the government to repeal the laws of seditious libel, criminal defamation and obscene libel (2009).

Yet we are left with some outstanding questions. (1) Why is an international writers' association engaged in the human rights arena in the UK? (2) What real difference have such campaigns made to freedom of expression in this country? And (3) is parliamentary lobbying the most appropriate course of action for English PEN and other free speech organisations? In addressing these questions, this paper considers the role of civil society institutions such as English PEN in upholding human rights, in particular the right to freedom of expression.

1.

As the founding centre of the worldwide writers' association, International PEN, English PEN is one of 144 PEN centres around the world whose members include writers and other literary professionals – journalists, publishers, booksellers and academics – who share the organisation's aims of opposing censorship and upholding free speech. These aims were latent in the organisation when it was founded in London in 1921 as an international 'dining club' for writers. However, its first President, John Galsworthy, saw the potential in this rapidly growing network for something rather bolder, and he drafted an organisational 'Charter' under the heading: 'Literature knows no frontiers'. Galsworthy envisioned a literary equivalent to the League of Nations, which would work through literature towards world peace.

Work on the PEN Charter was continued under Galsworthy's successor as President, HG Wells, who was faced in 1933 with the spectacle of the German PEN centre being accused of complicity with the Nazis. There were allegations that left-leaning writers had been expelled from the centre, and even suggestions of book burning. At that year's Congress of International PEN, held in Dubrovnik, Wells asked the German delegation to explain their actions. They refused to do so, and in

response to repeated demands from the floor they walked out. In the heated aftermath of this controversy, Wells strengthened Galsworthy's Charter to reflect his own passionate commitment to 'the principle of unhampered transmission of thought within each nation and between all nations'. By signing this Charter, PEN's members pledged themselves 'to oppose any form of suppression of freedom of expression in the country and community to which they belong as well as throughout the world whenever this is possible'. However, this strong commitment to freedom of expression was framed within the organisation's overriding pledge to 'dispel race, class and national hatreds, and to champion the ideal of one humanity living in peace in one world.'

These are unusual, probably unique, aims for a free speech organisation. Not even the architects of the Universal Declaration of Human Rights (UDHR) dared allow themselves this utopian vision. The Charter places International PEN in an odd position, obliging its members to simultaneously uphold freedom of expression and dispel hatred. In its earliest days, when the most notable cases of imprisoned writers were those of Arthur Koestler and Gabriel Garcia Lorca, these aims may have been easily reconciled.

Life would be much simpler – albeit deeply unpleasant – if our commitment to freedom of expression required us only to campaign on behalf of unquestionably 'good' writers who are imprisoned by 'bad' states. This is not the case. It is hard to argue, for instance, that David Irving is doing his *utmost* to 'dispel race ... and national hatreds'. Nonetheless, his freedom of expression appeared to be violated when he was imprisoned by an Austrian court in 2006 after sharing his views on the holocaust at a public meeting. His name was a controversial inclusion on that year's International PEN case list, alongside more than 1,000 other writers around the world who faced imprisonment or persecution as a result of the peaceful expression of their views, however repugnant.

Irving is a well-known example of a case which apparently asks us to choose between freedom of expression and the principle of 'humanity living in peace in one world'. This choice also divided western liberals in the wake of the Salman Rushdie affair, when some accused Rushdie of 'going too far', or 'lacking sensitivity' for the plight of British Muslims. These sympathisers failed to acknowledge that the cultural attitudes behind the book burnings in Bradford were more commonly manifested in the imprisonment and persecution of Muslim writers in Muslim states. An oppressed minority in one country was in fact borrowing the oppressive discourse of states that use so-called 'hate speech', 'insult' or 'blasphemy' laws to criminalise dissenting voices. These laws appeal to such states because they allow them to circumvent the closer international scrutiny they might receive if they simply imprisoned writers for asking the wrong kind of questions. They harness the religious and nationalistic sentiments of the public in order to stigmatise the minority voices of writers, journalists and human rights campaigners. By introducing the category of 'offence'

into public and political discourse in the UK, the book burners enmeshed the free speech of British citizens in a global network.

For this reason, English PEN was alert to the threat behind the British government's proposals to outlaw 'incitement to religious hatred', in terms which could potentially have criminalised Rushdie himself. In campaigning against these measures, English PEN was also inspired by the example of the American PEN centre in New York, which is well known in the United States for upholding the First Amendment. American PEN has shown that in a globalised world this work on the domestic front is a necessary correlate to the promotion of human rights internationally. English PEN therefore now campaigns on two fronts, domestically and internationally.

2.

Freedom of expression is among the most contested of rights. As a qualified right, it is always susceptible to state incursions. The British state has historically treated freedom of expression as a negative liberty, enjoyed in the absence of specific restraints. Since the abolition of the Lord Chamberlain's office there have been few prior restraints on publication, with the notable exceptions of the Official Secrets Act, court reporting restrictions and copyright controls. However, freedom of expression has been damaged over the last twenty years.

Moral relativists have questioned whether a set of rights developed in Western Europe and North America in a particular historical context can have universal validity. Some have suggested that rights embody a form of Anglo-American individualism that corrodes the more collectivist identity of other cultures. Others have argued that rights must reflect a specific social contract entered into by citizens of a particular state, and cannot be supranational.

These broadly relativist critiques have developed alongside challenges grounded in religious belief. These reached their apotheosis on 14 February 1989, when Iran's Ayatollah Khomeini issued a fatwa against Salman Rushdie, urging Muslim believers around the world to seek his death and that of anyone associated with the publication of his novel *The Satanic Verses* (1988). Rushdie was immediately ushered into hiding by the British government. His Norwegian publisher was attacked and his Japanese translator was killed by fanatics. The Muslim Council of Britain sought to bring a private blasphemy prosecution against Rushdie, which failed because the court ruled that the English blasphemy law only protected adherents of the Church of England. Rushdie's barrister, Geoffrey Robertson QC, argued that in any case the alleged blasphemies were either the delusions of a fictional character whose mind is unbalanced, or notions that were familiar to Muslim scholars. Rushdie has described the attack on *The Satanic Verses* as 'part of a broader, global assault

on writers, artists, and fundamental freedoms'.¹ In response, it has been said that 'Islam is a religion of duties, and that the concept of rights, especially of fundamental rights, is foreign to the *Sharia*'.² This academic debate about the relationship between Islam and fundamental rights has run alongside a set of more violent confrontations between imaginative authors and religious groups in the late twentieth and early twenty-first century.

When Monica Ali's novel *Brick Lane* (2003) was published in the United Kingdom, she was accused of showing a patronising colonial attitude in her portrayal of rural Sylheti characters. Germaine Greer applauded the (successful) attempt of a local Bangladeshi group to shut down production of the film of the novel on *Brick Lane* itself in 2006, arguing that the 'community has the moral right to keep the film-makers out'.³ Reflecting on the fate of her novel and the film, Ali has described the new 'economy of outrage', in which groups and individuals capitalise on perceived insults to attract interest.⁴ The playwright Gurpreet Kaur Bhatti has similarly deplored the fate of her play, *Behzti*, which was removed from the stage by the Birmingham Repertory Theatre in 2005.

Rushdie, Ali, and Bhatti were not censored by the British state, yet each suffered verbal or physical intimidation as a result of their work. The state support offered to these writers has been uneven. Whereas the British government in 1989 offered Rushdie immediate and unconditional protection, Fiona Mactaggart, the Home Office minister at the time, bizarrely argued that the violent protesters who forced the closure of *Behzti* in Birmingham were also enjoying their right to free speech.

In the wake of these confrontations, the Government published a Racial & Religious Hatred Bill, which sought to criminalise incitement to religious hatred, even, potentially, in the context of a novel such as *The Satanic Verses*. Having seen how such 'hate speech' laws are used internationally to close down the space for vigorous debate and the exchange of information and ideas, English PEN, together with numerous human rights groups and religious organisations, opposed the Bill.

The so-called 'PEN Amendment' to the Bill was the result of this campaign. The Amendment distinguishes between speech which actively incites hatred, and speech – however offensive – which merely provokes. Its success when the Bill received its Third Reading in the House of Commons paved the way for the repeal of the blasphemy laws in 2008, when Parliament finally accepted that laws protecting the

¹ Salman Rushdie, 'Coming After Us', in *Free Expression is No Offence*, ed. Lisa Appignanesi (London: Penguin, 2005), pp. 21-26, p. 21.

² Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997), p. 1.

³ Germaine Greer, 'Reality Bites', in *The Guardian* (24 July 2006), p. 24.

⁴ Monica Ali, 'The Outrage Economy', in *The Guardian* (24 October 2007), Review section, p. 4.

beliefs of only one sect – the Church of England – were now both inappropriate and redundant.

The following year, in response to further campaigning by English PEN, Index on Censorship and Article 19, the Government agreed to repeal the offences of seditious libel and criminal defamation, and also promised to repeal the offence of obscene libel.

However, campaigners should not be content simply to have cleared a number of ‘dead letter’ laws from the statute books. Governments do not relinquish the tools of censorship lightly, and in each area – blasphemy, sedition, defamation and obscenity – new measures have developed in place of the old laws. Placed under increasing pressure to decommission its weapons of censorship, the government has in fact hidden its armoury in the place no-one would think of looking – in the hands of the public.

These new laws radically reframe the relationship between the citizen and the state, co-opting our fellow citizens as censors. They rely on arguments as much weight to the offended sensibilities of the listener as to the speaker’s right to freedom of expression. Such arguments, whilst potentially valid in isolation, have coalesced into an onslaught on free speech. The new crime of incitement to religious hatred, notwithstanding the PEN Amendment, is triggered by public ‘offence’, and subject to the (politicised) judgement of the Attorney General before going to court. This unholy alliance between the offended party and the Attorney General is also a characteristic of the new offence of incitement to sexual hatred.

The crime of encouraging or ‘glorifying’ terrorism is in the eyes and ears of the beholder. Likewise, the possession of materials which might be useful to a terrorist – including books – is an offence that depends on the suspicious snooping of concerned relations or colleagues. The abolition of criminal defamation laws is a great achievement, not so much for British citizens as for people around the world who are routinely sentenced under such laws. Yet the civil libel laws in this country arguably pose more threat to freedom of expression than the largely redundant criminal law did. The burden of proof is almost entirely on the defendant. Combined with the high costs of fighting a libel action and the jurisdictional anomaly that allows English courts to hear foreign cases, these failings conspire to silence numerous publishers, newspaper editors, bloggers and even NGOs, which cannot afford to take the risk of losing a case in the High Court. The abolition of obscene libel cleans up the statute books, but it leaves us with a new set of offences around extreme sexual content, purportedly designed to tackle child abuse on the internet, yet granting the state powers against writers, photographers, artists and others who create material – even wholly imaginary material – which offends a few members of the public. New measures against ‘criminal memoirs’ currently going through Parliament also ask the public to trigger police proceedings if they are upset by the

publication of material by an offender or ex-offender relating to their crime. Again, the measures are purportedly designed to prevent criminals 'profiting' from their crime. They do not criminalise publication, yet they threaten complex court actions against those who have already served their sentence for the actual crime, and whose only subsequent offence is to remind the public of their existence.

These disparate measures share a common framework, which employs public disgust, fear and suspicion in the service of the state. To some extent, they appear to de-institutionalise the censorship mechanisms of the state. In fact, they grant the state new and extensive powers, by removing oversight for free speech from any democratically accountable forum, and blurring the boundaries between state control and citizenship. They ask 'good' citizens, whose speech offends nobody, to conspire with the state against 'bad' citizens, whose speech has rocked the boat.

3.

Is political lobbying enough to reverse this trend towards citizen censorship? What is the role of civil society free speech organisations in an era when censorship has itself become a tool of civil society? In answering these questions, it is important firstly to understand the constraints imposed on any organisation that wishes to uphold human rights in the United Kingdom if it wishes to have the public recognition and trust that comes with charitable status.

The Charity Commission of England and Wales rejected English PEN's application for charitable status on the grounds that the organisation's campaigns on behalf of writers in prison were 'political' in nature. The Commission stated in March 2007 that 'the campaigns appear to relate to all infringements or restrictions of the liberty of writers in respect of freedom of expression whether or not such restriction may be lawful in accordance with the law of the country concerned.' English PEN subsequently appealed successfully against this decision. However, the Commission's breathtaking ignorance of the widespread incompatibility between domestic law and international human rights standards has implications for the role of English PEN and other human rights charities in the UK.

Most immediately, the Commission's ruling showed how little public understanding there is of the supra-national status of human rights law. In responding to the Commission's concerns, English PEN was obliged to show that its campaigns were compatible not with the PEN Charter (which the Commission also deemed 'political') but with the ECHR. This obliged the organisation to grapple with the extensive – and sometimes contradictory – case law of the ECtHR. This in turn led English PEN to recognise that human rights law is not a definitive body of truths, but a work in progress, subject to the rolling definition and implementation of the state *and* civil society. The UDHR states that 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote

respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.'

So far as they are legally enforceable, human rights are shaped by those responsible for making and implementing the law. In the UK, the executive, legislative and judicial branches of the state are all charged with upholding Britain's human rights commitments. Every Bill must be signed off as compatible with the ECHR before its first reading; Parliament is responsible for a further assessment of this compatibility; and the judiciary is empowered to declare the incompatibility of laws with the Human Rights Act (HRA) when they arrive in the courts. In theory, this should provide a triple defence against non-compliant legislation. In practice, civil society interventions are crucial to ensure that human rights are upheld.

Civil society therefore plays an important role in the development of human rights practice. There are some very good reasons for this. Firstly, civil society organisations do not share the government's responsibility for balancing every possible consideration. They are not obliged to account for the impact of freedom of expression on the public finances, or the government's electoral standing. Secondly, civil society organisations reflect the expertise and experience of groups that may not be represented in government, parliament or the judiciary. Thirdly, civil society organisations have the time to devote themselves to areas of the law that may escape the notice of parliamentarians, overwhelmed by a mountain of legislation.

However, all these virtues can also be vices. Charities and NGOs can easily be accused of a lack of realism, of failing to account for the impact of freedom of expression on national security or the sensitivities of particular constituencies. They are accused of representing special interests: 'You would say that, wouldn't you.' And they are vulnerable to the charge of paranoia, the result of long hours considering worst case scenarios and listening to the testimony of human rights victims from other parts of the world. 'Of course that wouldn't happen here,' they are told.

Nonetheless, these structural weaknesses of the voluntary sector are outweighed by a final consideration: charities are trusted by the public. Unlike politicians, lawyers, journalists and numerous other public servants, charities are not perceived as 'on the make' or self-interested. The Joanna Lumley effect can be more powerful than any number of hours of Parliamentary debate or media scrutiny. It is therefore appropriate for charities to campaign on behalf of human rights – particularly in a society where those rights are also being contested within civil society.

The increasingly decentralised mechanics of censorship pose challenges that free speech campaigners have not yet fully absorbed. Human rights organisations should seek to disentangle our rights from our emotions, and restore overview of freedom of expression to the democratic institutions of the state. There are three general

conclusions. (a) Campaigners need to be better tuned into the threats posed to free speech by forthcoming legislation. (b) Campaigners need to supplement this work with a sustained attempt to rebuild public support for the right to free speech, showing how it is fundamental not only to political participation but also to such public goods as scientific progress and personal fulfillment. (c) Campaigners need to be prepared to engage openly with arguments against free speech. This is a highly complex right, and it is not well defended with a fundamentalist approach.

Civil society organisations have a fundamental role to play in upholding free speech in part because the government has devolved some responsibility for censorship to civil society. This is why we urgently need to build an alternative bridge between the state and its citizens, across the stream of hatred and fear that allows the government to criminalise disruptive speech acts. We need to show both the state and our fellow citizens that free speech is of universal value.