

Freedom of Speech and Freedom of Religion: Three Types of Relationships

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Schematically speaking, there are two opposed ways of arguing against human rights and the values of liberal democracy. I shall call the first one the “frontal attack”: the “enemy” explicitly defends values that are radically at odds with liberal-democratic principles. For instance, the opponent defends an authoritarian conception of political power (fascism, Nazism, Soviet communism...), or a dogmatic conception of religious power (imposition of the law of God on earth, necessary “eradication” of the infidels, etc.). Such a rhetoric is very influential today, for instance – but not only – in the Islamic world. It is very preoccupying, as everybody knows. But this is not my present topic.

I am interested here in the second, totally opposed, strategy: in order to be at least heard by the democratic community, the “enemy” uses the language of liberal democracy. By doing so, he or she very often succeeds in radically distorting the language of human rights. I shall call such a strategy: “the wolf in the sheep’s den”.

The first strategy possesses at least a virtue: its clarity. The values and aims are stated in a rather straightforward way. For instance, liberal democracy is considered to be against religion, as it substitutes the law of God for the law of “We the People”, the divine law for a law emanating from the social contract. But such a frontal attack is not convincing at all in the liberal democratic community. So another approach is more and more used: here the opponent uses the language of liberal democracy, by subtly distorting the meaning of the concepts and values that are at the core of human rights and democracy. Such a distortion permeates the general discussion in the *polis*, so that at a certain point even democrats acting in good faith fall prey to such a sophistic manipulation. Of course, the strategy I call the “wolf in the sheep’s den” has the disadvantage (for us, democrats) of taking the interlocutors off-guard: as they think they are confronted with someone accepting liberal-democratic values, they do not see the danger. And so, as I said in the beginning, the democratic fortress has not to be stormed: the enemy is already inside, as a Trojan horse.

In order to make myself understood, I shall begin my demonstration by reexamining a very tricky problem, that is, some specific limits to free speech related either to religion (blasphemy) or to “race” (racist speech). I want to analyze the rhetoric which is used today not only in the public debates but also by judges sitting in high courts (at least in Europe). In order to make myself understood, I would like first to analyze a sequence of events that took place in 2005 when the Danish newspaper *Jyllands Posten* published the now famous cartoons on the Prophet Muhammad. Let us, as far as our problem is concerned, summarize the sequence as follows: when the Danish journalists were threatened, some newspapers in other European countries decided to republish the cartoons, not necessarily because they thought that they

were the result of a good and wise editorial policy, but out of solidarity with the threatened individuals, and in defense of free speech as a central value of liberal democracies. Now one can easily consider that these cartoons were blasphemous: of course, they could also be read in a political context, for instance if one thought they criticized a human, all too human, instrumentalization of religion. Whatever interpretation one decided to give to the cartoons (the meaning of a drawing is always more open than the meaning of a discursive expression), freedom of expression had to be protected. From the point of view of the (more or less violent) opponents of the journalists, the meaning of the caricatures was clear: it was an offense to the Prophet of Allah, that is, an insult to God, in other terms an outrageous blasphemy. One immediately sees the danger, for the advocates of the *Jyllands Posten*, of trying to show that the drawings, after all, were *not* blasphemous: it would have meant that *if* they were, the journalists would have been left without defense. "Another such victory and I am undone."¹

So it would be safer for the future of freedom of expression to accept that the cartoons can reasonably be interpreted as being blasphemous or sacrilegious, *and that this should be protected speech*. At least the situation would be intellectually clear, although it would be physically dangerous to defend such a position. The anti-blasphemy statutes that still exist in some European countries are, as it were, the remnants of a time when religion was officially protected and sanctioned by the secular powers. The conflict was between the "dissident" individual and a theologico-political entity. Now in pluralist societies, religion (or a particular faith) should not be immune from criticism. The problem is not only formal. It is very important to begin with a clear characterization of the nature of the conflict that took place in Denmark, then – which is unavoidable in an era of global communication – throughout the world. A newspaper exercised its right to free speech and was accused of blasphemy. For the moment, the problem is not to answer the question: "Is blasphemy a legitimate limitation of freedom of expression or not?", but to characterize the situation. Obviously, it is because Muhammad is a sacred figure in Islam that the cartoons were attacked, at least on two counts. First, they were a representation of the Prophet, which, according to a rather dominant tradition in Islam (although it is not the only one), is radically forbidden. Secondly, the content of the drawings was blasphemous in that, for instance, one of the caricatures portrayed the Prophet wearing a bomb on his head instead of a turban.

Now everybody is entitled to give whatever meaning he wants to a drawing. A problem arises only when one considers that such an expression constitutes as such an abuse of the right and should be suppressed. Now we can limit ourselves to two different forms of suppression. The first one is legal censorship, that is, suppression (and possible punishment of the author) through the avenues opened by the rule of law. The second one is to be situated outside the law: one tries to suppress the expression or to sanction the author(s) by resorting to intimidation, threats and outright violence. In the present paper, I am only interested in the first form of suppression, that is, legal censorship. The question is thus the following: "Is it justifiable under the rule of law to censor an expression because a part of the population thinks it is blasphemous?" Let us, for the sake of argument, take the position of the advocates of

¹ Supreme Court of the United States, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), dissenting opinion of Justice H. Black.

ensorship. Their case is of course the easiest when they act in a country where an anti-blasphemy statute is in force: it suffices then to apply the law. But, rhetorically speaking, the situation is very different – and the case harder – when there is no blasphemy law on the books. An episode which took place in the wake of the publication of the Danish cartoons is well known: some European newspapers decided to republish the drawings out of solidarity with the threatened journalists. In sum, because there were attempts to suppress the cartoons in the second (illegal, violent) way, they wanted to show that, whatever they thought of the wisdom or the “prudence” of the editor-in-chief of the *Jyllands Posten*, they would defend freedom of expression against intimidation and fanaticism. But here comes the first “avenue”. The French newspaper *Charlie Hebdo* was one of the printed media that republished the cartoons. The advocates of a legal censorship filed suit, trying to get the suppression of the drawings by legal means. But here is the difficulty: France does not have an anti-blasphemy statute, so the case for censorship was much more difficult than it would have been, say, in Austria or in Britain.

This is not to say that the opponents of *Charlie Hebdo* were not entitled to bring the case before a tribunal. The problem is that, in order to have their claims heard by the judges, they first had to *translate* them into the language of French law. In other words, if there was no statute supporting censorship for blasphemy, they had to find another legal basis.

The strategy looks like this: one subtly transforms the conflict between a fundamental human right (freedom of expression) and the remnants of an official religion into a conflict *between human rights*. Instead, thus, of saying that the cartoons offend God, one says that they insult the religious feelings of a (more or less) defined community. The problem, then, is not that “God” is insulted (which is the original definition of blasphemy), but that certain individuals are (supposed to be) wounded in their religious feelings, which prevents them from exercising their right to freedom of religion. The translation works in the following way: the opposition between the individual and the order of God becomes a conflict *between rights: between freedom of expression and freedom of religion*. Now these are rights which are on the same level: in many jurisdictions, there is no hierarchy or priority rule (in the Rawlsian sense) allowing us to make one of them superior to the other. So, if they are of equal value, the only way of taking a decision is to “balance” them against each other. In other terms, as freedom of expression and freedom of religion have the same value, the judge will have to assess whether or not one of the rights has been exercised in an “exaggerated” way, preventing other persons from exercising the other right. There are many examples of such “systemic” conflicts, that is, conflicts arising *inside* the system of human rights, and not *between* a human right and some exterior Norm. For instance, freedom of expression must be balanced against the right of the suspect or the accused to a fair trial, so that the press must show some restraint; but on the other hand the press has to inform the public of cases that are important for the democratic life of the country. Freedom of expression must also be balanced against the right to privacy or the right to reputation (defamation). These are well-known examples of systemic conflicts between human rights. My point is that *in the case of* free speech and freedom of religion, the systemic conflict is artificially constructed, and, if one sees through it, particularly absurd.

I would like to show that such a process of “translation” is characteristic of the way judges reason in certain European countries and at the European Court of Human Rights. Then I

shall briefly contrast the European situation with the jurisprudence of the United States Supreme Court regarding blasphemy. According to me, the Court does *not* translate the problem into the language of the “rights of the others” (freedom of speech v. freedom of religion) but adopts a principled attitude about blasphemy or “sacrilegious” speech *a such*. Finally, I want to analyze a third model of reasoning about the possible conflicts between freedom of speech and freedom of religion. At the recently created UN Human Rights Council, an expression is very often used by representatives of some (often powerful) non-Western countries: “defamation of religion”. I would like to show that in this case, the process of translation becomes totally absurd, especially when it takes place in the framework of a conference on racism (the all too famous Durban II conference - “defamation of religion” was finally dropped from the final document).

To summarize my argument, I would say that in the US, the translation process has not so far been accepted by the Supreme Court; at the global level (Human Rights Council) it is widely used and endangers the very fabric of the language human rights; finally, Europe has adopted a “middle-of the-road” position. We shall have to assess whether such a choice is a sign of tolerance and reasonableness, or creates a dangerous “slippery slope”.