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Peter McDonald Right so we should start by introducing ourselves. I'm Peter McDonald and I've been working in the English faculty at Oxford for the last 15 or so years. My main areas of interest are literature in the 20th Century, I suppose the long 20th Century from 1880 to the present. But I've also been specifically working on the institutional aspects of literature; literature and the law and those sorts of things, and that's partly why I'm having this conversation with Liora Lazarus.

Liora Lazarus I'm Liora Lazarus and I am a law fellow at St. Anne's College at Oxford and I teach human rights; I work in comparative human rights, mostly to do recently with ideas of rights to security, but I look at different jurisdictions. And I wrote a book originally which looked very closely at the sort of different cultural conditions for beliefs about rights, and my interest in freedom of speech is obviously part of that discussion.

Peter McDonald So one of the reasons we are here, both of us, is because both of us have a background from South Africa and experience of South Africa during the apartheid years and that's relevant because part of the basis for the discussion is a book that I've just written called The Literature Police, Apartheid Censorship and its Cultural Consequences, which engages with some of the strange aspects of the Apartheid Censorship System. Most particularly the fact that, though it was obviously a system of primarily political and if you like moral censorship and repression, there were a particular group of censors who belonged to a particular faction within the Africana elite who saw themselves as the guardians of literature.

So within a system of repression you had people who were specifically protecting a certain kind of speech if you like, a certain kind of expression which they called literature. So we're going to use that as part of the background to the discussion, but we each of us have a different kind of expertise and a different angle on this history.

Liora Lazarus Yeah I mean one of the things that I think is interesting about having this kind of discussion between someone who is expert in literature and coming to it from the position of literature to law. And then someone like me who's looking at this from a range of legal perspectives but particularly from the position of looking at how rights like freedom of expression and freedom of speech are protected and not protected in different regimes is of course what particular perspectives we bring to this. One of the interesting sort of theories of law was developed by someone called Nicholas Lewman who talks about systems theory.

And he believes law has a sort of internal logic which we think about between legal and illegal, that there's a binary code in that framework and that what happens is that law itself has to

embrace concepts from the outside world which then what he calls [[Caesar's 0:03:12]] perturbations this was developed further by a theorist called Gunter [[?? 0:03:16]] and concepts that come into law then have to be redefined and reconstituted in a particular way to be understood from the perspective of what forms legality or illegality. And this is one of the key questions here because I'm coming at this looking at literature or at expression as a particular legal concept.

And of course you are coming at it from a position of, well what position are you coming from, to think about it?

Peter McDonald Well in a sense it would be, I hope keeping an eye on the questions that you've just raised and the questions within the legal tradition, and also within certain kinds of philosophical thinking about the nature of the law and freedom of expression, those sorts of things. But of course particularly coming at it from a literary point of view where despite the confidence and assurance of some literary people, one of the most interesting things, certainly in the late 20th Century one of the most interesting things we can say about literature is that it's constantly evading definition. So as a concept itself it is inherently fuzzy, contestable, debated.

And so for me what's interesting is what happens when you get into a, not just the discourse of the law but maybe even a situation in a court, you know there've been famous literary trials throughout history; Lady Chatterley trial in the 60's and so on and so forth. And where you've not only got this concept or category, this loose amorphous concept or category coming into the debate but you've also got pressures of evidential proof on say the part of prosecution or defence or juries to deal with. You know where if you're going to start saying that literature demands special treatment or exemption, you've also got to speak under constraints of proof which may be too much for this concept to bear.

So it's not only the category itself that's a problem but the conditions under which you may have to speak as a lawyer.

Liora Lazarus And in what sense, do you think that the law should have any relationship with literature? Can you just explain more about the - because this is your area of expertise, the statutory frameworks in literature or being defined as literature, what are the legal consequences of that definition?

Peter McDonald I think the - historically the law has had a lot to do with it, especially in the 20th Century and especially to do with obscenity law. And one of the concerns has always been amongst certain state elites is that when you start to want to ban or suppress pornography say, you tend to capture within that net, and historically have caught within that net great works of literature; James Joyce's Ulysses, Lady Chatterley's Lover et cetera, et cetera. So there has been an anxiety, certainly throughout the 20th Century, and in fact you can trace this back into the 19th Century, to protect what they consider to be literature, from this law.

And the standard strategy has been to appeal and to seek some sort of exemption from the law for this particularly privileged kind of public writing called literature. But of course that's caused endless problems and that is built in to the Obscene Publications Act of 1959 in the UK where there is a special exemption clause for literature. And in fact the act was partly specifically designed as it says at the beginning to protect literature. But the consequences of that have been really problematic, the protection didn't extend for instance to Last Exit to Brooklyn in 1966 and so on and so forth.

My own conclusion would be that - is to share the conclusion of the Bernard Williams report in the UK in 1979, which is that if you want to protect literature the only thing you can do is not simply - is to simply remove debate about literature or literary worth or merit or anything from any legal context. And simply their recommendation was give exemption to the printed word, full

exemption to the printed word, in terms of obscenity legislation that was specifically. Of course the Apartheid Censorship dealt with much more than obscenity.

Liora Lazarus We'll come back a bit to Apartheid Censorship in a minute but what I'm interested in is if you give full exemption to the printed word, I mean now there's a huge discussion about how you manage the electronic age and the printed word in the electronic age and how do you create structures. I mean is that a viable recommendation of Williams's committee when you think that we're all capable of publishing our own books essentially electronically. And surely people would argue that there are still going to be things that are in printed form that raise questions that the state has to engage with.

Peter McDonald Absolutely I mean I think that's right, I mean the conclusion that was reached in 1979, the conditions have changed so dramatically and now for instance if you put it into the context now just recently in the UK there has been a trial and a conviction on race hate with publications on the internet. So there's no doubt that in a sense the ideal, if you like, that the Williams commission reached in 1979 is something that has to be rethought completely under these new conditions.

Liora Lazarus Then of course a lot of lawyers and legal philosophers would all say, we're dealing with this all the time, the deep contestability of most of the concepts that we deal with. I mean the simplest legal concepts that we have like reasonableness or the reasonable man on the Clapham Omnibus has given rise to that you know, hundreds of cases and endless pieces of whole academic careers are based on these things. So what is it that is specifically contestable about literature as opposed to something like reasonableness?

Peter McDonald The specific contestability would be the difficulty of simply establishing what it is that you are talking about, whether there is something general that you can appeal to which will help you define that. And part of the problem with that is that there seems to be, certainly in the theoretical debate within literary studies, there seems to be a problem of simply drawing the boundaries between certain kinds of writings you want to call literary and other kinds of writing that you don't. So for instance you know there can be a very convincing argument made for reading Darwin's Origin of Species as a literary work to approaching that as a literary reader.

So that's one question, where do you draw the boundaries between these kinds of writing. But the other one is again; a lot of people point out is that one of the most interesting things about literature is itself constantly changing its own rules about what constitutes literature. So there is if you like, you can almost say an internal and an external problem. And that seems to give it a particularly powerful lack of determinacy.

Liora Lazarus One of the things I thought was very interesting about your book which brought out very clearly is when you take this form of contestability and you then give rise to, I think there's additional problem, internal and external purely on a contestability question. But there's the problem of the structure around which that term is protected. So your book is really very interesting analysis of these committees, these people who get given the authority and power to determine the notion of literature. Because it seems like a lot of these regimes give, even in now in South Africa or in the UK, you have a set of people who determine what that is.

And that means that it's essentially the same, our old age tradition will argument against constitutional course for example where people say that you can't give the constitutional judges the last word on the notion of what dignity means for example because it's democratic, it has no sense of popular discussion around that notion and we'd rather have properly voted people. And this seems in the censorship framework, or let's call it the classification framework as what you talk about now. The classification framework seems to me to be even more elite than judges who in a sense are far more scrutinised in the public sphere.

And are part of a kind of commonly understood constitutional framework of checks and balances and also who understand their own ideas of self restraint constitutionally. But now we have this thing called the classification board, now typically these classification boards are filled with experts, right, whether they're in the Apartheid South Africa and a particular form of sort of literary experts and Afrikaans Elite or whether they're in this country. Now that seems to me a really complicated relationship because it gives rise to issues of what you…

Peter McDonald Well I think you've hit exactly the problem. I mean so if you're dealing with an essentially contestable concept then the whole question shifts from what is literature to who is deciding and what kind of structures you've got.

Liora Lazarus And who has the last say.

Peter McDonald And who has the last say, absolutely right, it's crucial. And in fact within the UK and specifically within the English context that's been one of the arguments, going back to TS Elliot and EM Forster in the 1950's as to why no board as such should be set up. So there are these boards that deal with literature boards for instance in Australia, New Zealand, there was this bizarre one in South Africa of course that was straight forwardly a censorship board where they are tasked specifically to protect literature and similar sort of situations emerged in the Irish censorship context.

But in England one of the specific reasons for resisting that view, even though there have been efforts, and there are legally now efforts to get experts to testify in courts on behalf - but to set up a defined board they've been resisted because it's a question of, so who are the right people? And then it becomes a question, and that is so contested and so debatable but then it's been decided not to have that kind of board at all. Instead what happens is you get ad hoc groups that then emerges the expert testifiers in a particular trial. It's remained in other words within the jurisdiction of courts to make…

Liora Lazarus Why should courts be better placed to think about this than experts?

Peter McDonald I mean so in terms of the arguments within the UK the context is simply that they would be more ad hoc, that it would be set up specifically under changing conditions. You wouldn't have this kind of routinely established clientele if you like, or configuration of membership of the board which would be just so debatable and so contested in itself that it could not do anything effective.

Liora Lazarus It seems to me that the literature question or the concept of literature would be - I mean I've been thinking about this after reading your work as to whether or not you could actually get rid of the notion of literature altogether, now it seems that you're forced into a discussion or a close discussion of the boundaries of literature by the structure of exemptions. So that we in statutory frameworks look at - we say there are two factors here; one is that these are often statutes that invoke the criminal law, so you could of course have limitations that don't invoke criminal law.

And there has certainly been lots of discussion in the feminist circles in the US about how one might regulate pornography through private law rather than criminalising this activity. When you force criminal activity you then raise the stakes of course because you then raise the possibility that someone's liberty will be severely restricted as a consequence of this imposition. And it also invokes the state in a very particular way, in a particularly coercive way. And you have these criminal statutes and then you have these exemptions almost as if you're in the framework of self defence, you say, "But sir it was self defence. But sir this was literature."

And it seems to me that there's something gone wrong about this framework, that particularly when we look at the background rights that are actually at play in this discussion. So really what we're talking about is freedom of speech or freedom of expression where we want to be thinking

about, well what are the legitimate constraints on those rights? Rather than saying here the state is justified in criminalising certain forms of expression and now we have an exemption which allows us to then get into a heated and kind of complicated debate around the notion of literature which is whether you're in a classification regime and a democratic order.

Or whether you're in a particularly coercive order of Apartheid Censorship we end up with the same discussion.

Peter McDonald Exactly.

Liora Lazarus And it seems to me that you know from a legal kind of human rights perspective which is my interest you seem to need to turn this whole question around. So if we did say - let's take a sort of experiment that we might be living in an order where we are sitting in this office and we can redesign the world the way we wanted to which is a classic Oxford experiment. And we'd have to start off with basic values that our society wants to protect; their autonomy, dignity and these values.

If we decide that we are interested in these ideas, we would then start to say, "When we look at there is a freedom of speech or freedom of expression or even literature or art or any form we see them as crucial to self expression, self development and self fulfilment." And in that sense literature if we want to call it that is distinct from political speech, which is another form of speech which is often kind of - not often found in the written word but it could be found in polemic or another form.

So what I would want to see is a kind of discussion around well what kinds of values do we want to protect, what is connected to the values, how would we limit those rights, if at all? Because of course there are all sorts of background discussions here in different countries where people would say we don't limit the - we can't limit the right. It's essentially what Bernard Williams is saying is we can't even go into this discussion. Right.

Peter McDonald Sure, even though within most jurisdictions specific limits have always been attached to the freedom of expression to do with state security.

Liora Lazarus Well there's an argument in the US constitutional framework that the first amendment is absolute, the way they get around that of course is quite complicated. It's led to an extremely elaborate system of classifications, of getting outside of the first amendment. But I don't know what you think of this idea, whether you think of this as turning it on its head instead of seeing literature as an exemption from state coercion. We start off with the notion that literature is fundamental and that state limitations of this thing, whatever it is, have to be justified.

Peter McDonald I think that's absolutely spot on because in a sense what it - to my mind again referring primarily to the post script of the book, one of the things that we capture is the extraordinary contradiction in the current situation in South Africa between the constitutional provisions and the publications act, a specific act that covers the publication which set up the new classification board that they have in South Africa that replaced the old censorship, Apartheid Censorship bureaucracy. Although in many ways it's rather similar to the Apartheid Censorship bureaucracy, it is a modernised classification board.

And the thing that seems to me, really actually my discussions with you and what you have pointed out have alerted me too much more readily is the contradiction is fascinating. Because on the one hand you have in the publications act specific clauses exempting literature again not only from the things that are deemed illegitimate by the Bill of Rights, racial hatred for instance or religious hatred, incitement to imminent violence, those sorts of things. They are specific exemptions written into the act that if it's a work of literature and it still advocates racial hatred with the intent to cause harm then it would be exempt.

Equally with bestiality, child pornography, if it's a literary work that includes something like Nabokov's Lolita for instance it's going to be protected because - but again it's under the logic of exemption. And what's fascinating about that is that one of the key people behind the Publications Act, in fact the chair of the taskforce that set up the new Publications Act was a former key figure in the Apartheid Censorship Bureaucracy called [[?? 0:20:22]] was in many ways fighting the battles that he fought in the late apartheid era in the 1980's to try to get literature exempted from the censorship law which he never succeeded in.

They continued not to offer formal exemption although they had the strange system of special committees that protected literature supposedly, which created all sorts of arbitrariness. So in many ways there's a kind of a legacy of those old battles against the apartheid regime built into the Publications Act. Meanwhile on the other hand the constitution seems to me, and you know this better than I do, but it seems to me one of the most avant-garde progressive constitutions in the world. In particular because it has not only the positive right of freedom of expression endorsed.

So this is not freedom of expression as some sort of negative right, but a positive right, a freedom of expression, plus a positive right of creative activity. That's also specifically headlined in the Bill of Rights. And then on the other hand you've got this principle of proportionality which in a sense I think is partly what you were alluding to, again built into the Bill of Rights as a section 36 which is a kind of a general limitation clause. Where under specific conditions any of the rights in the Bill of Rights can be limited, but the conditions have to be rather specific.

So that seems to me an extraordinarily interesting kind of example of the kind of contradictions and tensions that history can bring into legal systems, that there's a kind of a legacy at the level of the Publications Act which is in some ways - in many ways I think what you're pointing to, completely at odds with a totally different kind of thinking at the level of the Bill of Rights.

Liora Lazarus Well this is part of the interesting aspect of the formation or the change of legal cultures. I mean obviously what South Africa has had to go through, I mean effectively the structures of statutes and the impulses that people have when they legislate, whether to go to the criminal law or to the civil law for regulation of these things, is actually deeply embedded in historical legal traditions that have informed that particular country.

So South Africa is the consequence largely I think of influences to do with Rome and Dutch law but largely to do with British Common law and British statutory instincts with respect to - which look to me sort of like - like going back to the Victorian era which is about sort of intervening at a criminal level.

Peter McDonald Absolutely.

Liora Lazarus Now what Section 16 of the Bill of Rights in South Africa protects is very important in section one. So it says freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research, so these are all forms of expression. Well what it also says quite clearly is subsection 2 is that the right does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

Now clearly the South African constitution had to do that because it's one of its overriding principles is protection of equality clearly having come out of the apartheid era it wanted to redefine that range. But this right in a sense has now been inverted because in the publication sphere you still have a criminal possibility and the exemption so in a sense what you're putting is section two before section one.

Peter McDonald Yes.

Liora Lazarus Right so you're saying, "We shall criminalise the advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm." I mean note here there isn't actually a reference to corruption of morals which is a sort of older...

Peter McDonald Absolutely right, or blasphemy, crucial thing.

Liora Lazarus Or blasphemy, all of those questions. So we shall criminalise it and we will exempt you if we can say that they fall under 1a, b, c or d.

Peter McDonald Yeah.

Liora Lazarus And it seems to me that the statute needs to be thinking far more from a rights basis that the statute starts out again from the premise that there is freedom of these particular values. And then it says that the state shall limit these values using different forms of devices. So it may be that you say the state would want to restrict distribution particularly of particular text that might be seen by a subsection of your population to be inciting hatred of a particular religion. Now section 36 limitation clause proportionality should give rise to that possibility.

If we were to design statutes now through the proportionality clause we would ask ourselves that question technically speaking. Sorry to get technical but simply what is the least restrictive way of achieving this goal? We start out with a right, we say, "Here is the possible basis for the limitation" that's incitement of religious hatred for example. And let's take the Satanic Verses example that you used in the postscript which was discussed in South Africa, and certain restrictions on distribution.

Peter McDonald This is in 2002.

Liora Lazarus In 2002.

Peter McDonald Yeah.

Liora Lazarus Now clearly what you would say is, "Well what is the least restrictive way of achieving the outcome of balancing the rights of people to protect some of their religious beliefs, their equality and their perceived notion of the Satanic Verses as causing offence to their beliefs." And we are balancing two rights and now we are going to see what is the least restrictive way of doing that. So clearly the criminal law as always the last - as always the first resort seems to be another problem complicating this.

Peter McDonald Absolutely right yeah.

Liora Lazarus Yeah so how am I cracking the nut in that sense?

Peter McDonald Yeah.

Liora Lazarus And that's why these exemptions become so important because they're forcing, what you're doing is defining literature in the face of state coercion. You're actually thinking about it in very high stakes.

Peter McDonald Yeah.

Liora Lazarus Yeah but anyway that's my sort of response to this idea of...

Peter McDonald Yeah it's an interesting thing though isn't it because the Satanic Verses decision in 2002, so 1988 under rather peculiar circumstances to do with political contingencies of the moment, the apartheid censors actually banned it in response to Muslim outrage. And it was again specific, the Muslim community in South Africa then was divided but didn't speaking in one voice certainly but nonetheless they responded to this for reasons that I go into in the book we'd only deal with here. When it was called for it to be unbanned under the new legislation in 2002 the same Muslim groups protested.

And what's I think really interesting about that decision, specifically in terms of what you've said now is that the committee of experts - the classification committee as it is now, specifically in their report it's claimed a, that the Satanic Verses was a great work of literature. So they just said, "This is incontestably a great work of literature." Of course the literary quality of the Satanic Verses is still debated by literary critics but nonetheless they of course took that for granted, made a case for it. Secondly they said it does not incite religious hatred, they made that again specifically referring to the limitations explicitly registered in the Bill of Rights, so they put both of those aside.

But nonetheless they imposed constraints on distribution, two things really, one is that commercial booksellers can't publicly display the work but you can ask for it under the counter as it were. And the other one is that you can't - no public library, interestingly they exempted university libraries, but no public library can hold a copy of it, so any state funded library can't hold a copy. And the interesting thing is they said, "Not incitement of religious hatred, it is a great work of literature but then we're still going to impose this kerb, limited kerb", and they did that specifically under the proportionality clause.

Liora Lazarus Yeah.

Peter McDonald Which I think is one of the interesting things, so it wasn't a question of, "Oh this is religious hatred and we're going to have proportionality" but it was…

Liora Lazarus Well it seems to me - I mean this is the board itself right?

Peter McDonald Yeah.

Liora Lazarus It seems to me there's a slight fallacy in their argument which is I think really what they were trying to do was to try and not say it was hatred because they wanted to - racial hatred, religious hatred because they wanted to opt out of the possibility of the criminalisation of that particular book, or certain other consequences that might arise. But then they used proportionality to say that there's some reason to intervene. Now I'm not familiar enough with their reasoning, with the boards reasoning.

It seems to me you could have argued that there was a separate right of play here which was not necessarily one that was limited under the subsection of the freedom of speech, but simply that we were balancing two rights to religious belief and the respected religious belief that would have had to be balanced through the limitations clause.

Peter McDonald Yeah.

Liora Lazarus But it doesn't sound like it was kind of watertight in the sense of the reasoning. I mean I'm not familiar again with what they were arguing.

Peter McDonald Yeah well there's kind of another interesting South African case to throw in there which is the one to do with the Danish cartoons in 2006 and there it seems to me the situation is quite different and not comparable to the decision made at the Satanic Verses. Simply that what happened there was a newspaper was prohibited from reprinting the Danish cartoons that caused the crisis in 2006 legally by a judge's decision, where it was explicitly that dignity overrode the right to freedom of expression. So there it was a question - there was no balancing, it was simply dignity trumped the freedom of expression.

Liora Lazarus Well you could argue there was balancing but the balanced framework outweighed the - dignity essentially outweighed freedom of expression in that situation.

Peter McDonald Yeah that's right, I mean...

Liora Lazarus Well I suppose what happens is that whenever dignity gets invoked it's a trump card. You can't say this is an infringement - fundamental infringement of people's dignity and it's okay.

Peter McDonald Yeah except the complication always comes in that some people will come back and say, "Well hang on; the freedom of expression is a fundamental aspect of human dignity."

Liora Lazarus Exactly.

Peter McDonald So that complicates the dignity.

Liora Lazarus That complicates the dignity.

Peter McDonald Expression, division, yeah. In terms of the various things that we've been covering, if we think about it now, the situation that we're in now, my sense is that there are new questions that have to be asked about, if you like, the ethics of literary judgement. You know how do you make these judgements, in what circumstances do you make these judgements? Who makes these judgements? Because if you like from a theoretical point of view, if we have theoretically within literary studies got to the point where there is no longer any point in addressing the question, what is literature? And we simply have to ask the question, who decides?

Then it does seem to me we have moved back into a kind of socio-political space in which to think about these issues. But as a socio-political space and indeed a media space and a legal space that is now so radically different because of the internet, because of principles of proportionality for instance, coming in from the legal perspective, that the kind of thinking that has been going on for really 150 years in terms of these issues and literature; literature is something you can protect, you know what it is, or that you can define a particular group of experts who can sort it out or whatever it might be.

That all that thinking is now up for grabs and you know we're really calling for a radical reassessment.

Liora Lazarus I mean if I was to come with a radical reassessment of it I mean I would say that we should get - we should see whether we can design a system that actually just talks about expression which is limitable and think more carefully about types of expression and the types of interest that are at stake. So the key question is proportionality is deeply context based so that when you're thinking about limitations you've got to think about what kind of expression it is. So for example if it is political speech whether it is creative speech.

Now of course you may come back and say, "Well this is going to raise more questions of controversy" but what we might want to be thinking about is less about always invoking the most coercive restrictions on these ideas. So there may actually be a very strong call here for clear decriminalisation of racial, of types of expression, whether it's literature or not, that give rise to other rights violations. And that would be a most extreme form of reform thinking, and you might argue, "Well there are some things that have to be stopped" yeah.

Peter McDonald Yeah.

Liora Lazarus I mean this is famous when you look at the works of freedom of speech theorists they say, "Well it's all very well" they had freedom of expression in `[[Weimar 0:33:43]]`.

Peter McDonald Yeah.

Liora Lazarus So then we have to - we're always going to be in the realm of the things that are - that liberalism is about self-defeating the tolerance of all the things we want to be expressed sometimes defeat the systems in a nub themselves.

Peter McDonald Sure.

Liora Lazarus So within that framework I think there may be an argument for looking at use of the criminal law as a mechanism of last resort and thinking of different ways and legal devices for limiting or for respecting different values of rights within a particular multicultural society.
