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ARE THE CONCEPTS OF CANCEL CULTURE AND LAWFUL FREEDOM OF EXPRESSION IRRECONCILABLE?

In September 1838, Darwin recorded in his notebook his principles of Evolution.¹ Though he exchanged these thoughts in private correspondence, Darwin withheld his hypothesis from the public for over two decades.² The decisive reason for the delay is debated.³ But the classic Darwin biographies roundly endorse fear of social condemnation as the operative cause.⁴ When *On the Origin of Species* was eventually published in 1859, many in polite Victorian society accused its author of moral subversion.⁵ By the twentieth century, however, Darwin's fundamental insight had secured its place as biological orthodoxy.

The point that this little history illustrates is that society's condemnation of unsavoury views, what we would today call cancel culture, is not a twenty-first-century phenomenon. It is much older.⁶ But it was not until Mill that its pernicious consequences were properly analysed. In *On Liberty*, Mill set about criticising the dangers of the pressure of prevailing opinion. Informal mechanisms of ostracism by civil society that suppress discussion, he argued, posed a danger to the pursuit of epistemic goods.⁷ That is because all knowledge is provisional. A culture that suppresses controversial views will narrow its intellectual horizons.

¹ Notebook D, Transmutation Notebooks, 134–135

² Francisco J Ayala, 'Darwin and the Scientific Method' (2009) 106 PNAS 10033

³ John van Wyhe, 'Mind the Gap: Did Darwin Avoid Publishing His Theory for Many Years?' (2007) 61 Notes and Records of the Royal Society 177; RD Buchanan and J Bradley, 'Darwin's Delay: A Reassessment of the Evidence' (2017) 108 Isis 529

⁴ Adrian Desmond and James Moore, *Darwin: The Life of a Tormented Evolutionist* (Michael Joseph 1991)

⁵ Ibid

⁶ The idea is traceable to classical antiquity: see Aesop, *Three Hundred Aesop's Fables* (George Fyler Townsend tr, Routledge 1867)

⁷ John Stuart Mill, *On Liberty* (1859) ch 1-2

This cancel culture, then, is irreconcilable with Millian ideas of free expression in the pursuit of epistemic goods. But that is not the same as saying that cancel culture is irreconcilable with free expression under Article 10. That might seem a narrow distinction. But it is rather an important one. For the object of the framework of Article 10 is to protect against institutional violations of free expression. It is ill-suited to safeguarding expression where the suppressing agent is civil society.⁸ When, to take a prominent example, Kathleen Stock faced a cancellation campaign,⁹ the real problem was not that this was irreconcilable with her Article 10 rights. It was that society's pursuit of epistemic goods may have been impoverished by the absence of her contribution.

This view is not without critics. The rejoinder proceeds from the principle animating Article 10: that lawful freedom of expression is foundational to democracy.¹⁰ As a corollary to that principle, states have positive obligations to protect free expression from encroachment by private persons.¹¹ There is an obvious attraction in the argument that if cancel culture impinges on expression, then the state should have a positive obligation to intervene. Article 10 should, in other words, be construed to have indirect horizontal effect, so that it can be treated as irreconcilable with cancel culture. Such indirect horizontal application is already a matured feature of the ECtHR's jurisprudence. Article 10 has been construed indirectly horizontally to protect the views of academics,¹² journalists,¹³ and employees.¹⁴

But this assumes, without justification, that a human rights instrument is a suitable mechanism for combating a purely cultural phenomenon. It is not. The essence of the convention is in preventing institutional failures. Created in the shadow of totalitarianism, the ambitions of its drafters were rather

⁸ For a contrary view, see Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon Press 1993)

⁹ Sanchez Manning and Nicola Woolcock, 'Kathleen Stock: My Campus Harassment Was a "Medieval Experience"' *The Times* (London, 26 March 2025) <<https://www.thetimes.com/article/e985f191-e20d-4b25-9d8b-e57c3fcb80b1>> accessed 6 January 2026

¹⁰ *Handyside v United Kingdom* (1976) 1 EHRR 737 [49]

¹¹ *VgT Verein gegen Tierfabriken v Switzerland App no 24699/94 (ECtHR, 30 June 2009)* [46]

¹² *Lombardi Vallauri v Italy App no 39128/05 (ECtHR, 20 October 2009)*

¹³ *Dink and Others v Turkey App nos 2668/07, 6102/08 and others (ECtHR, 14 September 2010)* [137]

¹⁴ *Fuentes Bobo v Spain App no 39293/98 (ECtHR, 29 February 2000)*

more modest: to safeguard against state failure;¹⁵ not to remediate culture. When it was incorporated into UK law with the HRA, it was not intended to take horizontal effect.¹⁶

The existing categories of indirect horizontal effect under Article 10 already push interpretive boundaries. Yet even these operate in spheres where the state already exercises a high degree of regulation, from which one might infer a correlative obligation to preserve the expressive foundations of democracy. But extending Article 10 to address cancel culture contemplates something different. What is presented as a safeguard would actually involve the hitherto unseen regulation of culture. Far from preserving the marketplace of ideas, it would place it under state supervision. Only through an immoderate extrapolative exercise could this be achieved. But as the foregoing suggests, sound conceptual reasons militate against using a mechanism designed for institutional failings to address cultural ones.

This problem of construing Article 10 as irreconcilable with cancel culture is not just of conceptual significance. The conceptual mismatch breeds practical implications too. One problem is that the collective action by civil society against unsavoury views plausibly engages other Convention rights. Suppose a religious order encouraged adherents to rally against an agnostic critic, as was the case with Darwin in the 1860s.¹⁷ Would this merit protection under Article 9?¹⁸ Or suppose activists associated for the purpose of cancelling. This may bring Article 10 into conflict with Article 11. And what of the Article 10 rights of the cancellers themselves?¹⁹ Whose Article 10 rights should prevail?

¹⁵ Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010)

¹⁶ Richard Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48

¹⁷ Ian Hesketh, *Of Apes and Ancestors: Evolution, Christianity, and the Oxford Debate* (University of Toronto Press 2009)

¹⁸ See *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) for a summary of the relevant principles.

¹⁹ *Baldassi and Others v France* App no 15271/16 (ECtHR, 11 June 2020)

The other problem is that the test for determining whether a positive obligation exists admits no objective answer. In *Özgür Gündem v Turkey*,²⁰ the court confirmed that regard must be had to the balance between the interests of the community and the interests of the individual. But what constitutes a fair balance can be reasonably disagreed upon.

Naturally, courts are accustomed to balancing competing rights. They have tools at their disposal to help answer both problems. But on the sort of vexed cultural issues against which cancel culture thrives, this balancing is not value-neutral. Each individual approaches the issue with a certain amount of baggage. Stock illustrates the point. To my generation, her views on trans women were scandalous. To my grandmother, contrary views would border on heretical.

Discussions of rights in the context of cancel culture tend to obfuscate rather than address the problem. Cancel culture is not, on the foregoing analysis, irreconcilable with free expression under Article 10. They operate in different spheres. Article 10 addresses institutional failures. Cancel culture is a civic one. We should be concerned about cancel culture not because it infringes on a given right, but because it is irreconcilable with the pursuit of epistemic goods. It is a cultural problem, and it demands a cultural solution.

In time, Stock's views on sex may be treated with as much orthodoxy as Darwin's on evolution. Or they may not. Either way, we need to look a little less to our institutions to safeguard free expression, and focus more on our culture. Only through a cultural toleration of contentious views can epistemic goods be pursued.

[1000 words]

²⁰ *App no 23144/93 (ECtHR, 16 March 2000) [43]*