
The Idea Of Hate Speech Prohibition Laws In Light Of International Human Rights

“If you’re really in favour of free speech, then you’re in favour of freedom of speech for precisely the views you despise. Otherwise, you’re not in favour of free speech.” – Noam Chomsky

Chomsky’s quote begs the question of what exactly is ‘free speech’ and what exactly is ‘freedom of speech’. While they have been used interchangeably in conversation, casually and even in and by those more free-thinking about any perceived difference between the two statements, my initial thoughts were, what and how would this be understood and interpreted by the vast majority of just the ordinary person on the street?

Further, and more specifically, what is ‘hate speech’, and could ‘hate speech’ be classified as free speech.

Without any further information on the context of Chomsky’s quote, if I could find a differentiation between the two, my understanding would be that by ‘free speech’ he could have meant he was free to speak openly and even brutally without any reservations in expressing his thoughts and ideas. Freedom of speech however, could have given him the express right to speak freely, anywhere, anytime, through any medium and to any audience without any responsibility for any repercussions.

Universally, the general understanding is that ‘hate speech’ is any speech (through any medium) that could incite anyone to hatred. However, there is still much discussion and debate nationally and internationally, about whether a speech could be considered ‘hate speech’ on its own merits, or whether it has the essential component of actually ‘inciting’ someone to engage in some form of negative or dangerous activity, and at worst causing physical harm or resulting in fatal consequences.

There are two angles or extremes to where hate speech can land. Looking to international law, the expectation is that nations are required to monitor and curb any speech that erodes the foundation to anyone’s inherent rights and equality, threat of discrimination in any form, and in certain emergency situations to preserve peace and order in the community and or nation.

In 1948, the United Nations General Assembly adopted the Universal Declaration on Human Rights (UDHR) where Article 1 stated that..

“All human beings are born free and equal in dignity and rights, ” and Article 2 that “Everyone is entitled to all the rights and freedoms”...., “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” , and Article 19 that states....

Rights and Freedoms

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” .

While the above international declaration states everyone is entitled to their own opinion, on closer examination, though one’s freedom of speech is protected in some constitutions, and implied in others, it is still not an absolute right. This is to counter the extreme position of complete freedom of speech, juxtapositioned with the other extreme of licencing hate speech.

To that end, Article 7 makes reference to protection against discrimination and the incitement to discrimination. “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination” .

However, it was not till seventeen years later in 1965 that the United Nations General Assembly adopted the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) where the issue of hate speech was addressed. In Article 4 it set out how aspects of hate speech could be propagated, and here was the first reference to it being punishable by law. It condemned activities of all individuals , organisations, public authorities and public institutions that promoted hatred and discrimination in any form, dissemination of ideas based on racial superiority, racial hatred, incitement to racial discrimination, incitement to acts of violence against any race, and even the financing of such activities.

Article 4 (CERD) cross references the principles underlined in the Universal Declaration of Human Rights, as well as Article 5 (CERD) where it makes provision for the enjoyment of some twenty one human rights, which included specifically the allowance for freedom of expression.

The following year in 1965, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) Article 19 (2) where it further guaranteed the right to freedom of expression to include ‘ seek, receive, impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any media of his choice.’

Restriction

In Article 19(3) of the ICCPR, the rights and freedoms stated in Article 19(2) became subject to duties and responsibilities, and restrictions by law; as it concerned the rights of reputation of others and the protection of national security, public order and morals.

Prohibition

Article 20 (2) prohibited by law any advocacy of any scale of ‘hatred’ that led to the incitement to discrimination, hostility or violence, and in Article 20(1) any propaganda that incited war.

Offenses Punishable By Law

While the three Human Rights Treaties, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human People’s Rights,

recognised the rights and freedom of speech in the ICCPR, the incitement of hatred caused by any propaganda and advocacy became punishable by law only according to Article 13(5) of the American Convention on Human Rights.

It could be said that there is a conflict, because while Article 19 both promotes freedom of expression and safeguards restrictions on these rights, Article 20 (2) enforces obligatory restriction of some types of speeches. However, if seen in the manner that they are complementary, then as long as the prohibitions in Article 20(2) do not supersede what are permitted restrictions allowed by Article 19 (3), then equally Article 19 (3) must be construed in a way that observes the terms of Article 20 (2). Herein could lie the potential for conflict.

However, the question could also be asked, what must one say to incite discrimination, hostility or violence? Is there a clear line between speech that is merely offensive, and speech that incites hatred? How clearly laid down in law and obvious must the facts be, or will there always be the added consideration of its local and subjective context.

Cases

In the Rwandan Radio Television Libre des Mille Collines genocide case it was obvious where there was a call for the Hutus to 'kill the cockroach Tutsis', which is far from an incitement to hostility which cannot really be measured, is not clearly defined, and is rather more subjective. However, the ICTR Appeals Chamber found that the Trial Chamber distorted the distinction between hate speech and its direct nexus to a crime leading to genocide, and therefore wrongly relied on it.

The United Nations Human Rights Committee, in examining the link between protected and unprotected speech, found that the merits of the case needed to be considered, and a direct connection between the expression and the threat to be established.

Intentional Incitement

In a ruling by the European Court of Human Rights in 1994 of *Jersild v Denmark*, there arose a need to clarify whether Article 4(a) of CERD's requirement that the dissemination of ideas based on racial superiority or hatred, be mandatorily accompanied by intentional incitement to be punishable by law.

The Human Rights Committee emphasised that the right to freedom of expression also includes expressions that could be considered offensive.

Freedom of expression, which is crucial to a healthy functioning, developing, democratic society, applies to not only ideas that are favourably received, inoffensive, or indifferent; but also to those that offend, shock and disturb the state or any sector of the population.

Proportionate to the Legitimate Aim

In *Handyside v the United Kingdom*, where the applicant was prosecuted based on the Obscene Publications Act, it was held that his rights were violated under Article 10 of the European Convention on Human Rights. The Court recognised that in considering that society

is progressing with the demands of a pluralistic society, that it required that any penalties imposed must be 'proportionate to the legitimate aim pursued'

In *Erbakan v Turkey* a politician and former Prime Minister who was campaigning in 1994 for an election made a public speech of which there was no recording. In 1998 criminal charges were made against him for incitement to hatred and hostility based on religious and racial divisions.

In 2000, the State Security Court sentenced him to a year, for exceeding the acceptable restrictions of freedom of political debate.

However, the European Court of Human Rights held that proceedings carried out after nearly five years, were not reasonably proportionate to the legitimate aims pursued, and that at the time of the prosecution, given the passage of time, it was not likely to present an imminent danger, and held that his rights were violated in Article 10 of the European Convention on Human Rights.

In *Ross v Canada* the Human Rights Committee held that any restraint on speeches along racial or religious lines, had to be in line with the requirements set out in Article 19(3) of the ICCPR. The question raised was whether the curtailment on Ross's freedom of speech necessary to protect the rights (Article 20(2) ICCPR) of the students and families of a particular faith. In this case the court found that there was a causal link, and it was necessary to remove Ross from his teaching position to a non- teaching role.

Conclusion

There has been many attempts from both the academic and legal frameworks to provide a definition for and to distinguish between free speech, offensive speech, hatred, hate speech, and incitement. For one thing, inciting someone is far removed from someone actually carrying out an act, so on the surface and in certain conditions, it seems that speeches are harmless. The opposite would be true though if one were under some type of military rule under the leadership of Hitler.

With all that is happening worldwide, and the world becoming a smaller place because of technology, more urgent consideration needs to be given to constructing the legal boundaries of dissemination of expression, taking into account their relevant geographical, religious and racial contexts to name a few.

On a simplistic but all-encompassing level, expressions could be categorised into those that constitute an offence within the scope of international law, those that are not criminally liable, but could possibly give rise to civil claims, and those that could potentially cause a disturbance demonstrating a lack of respect and tolerance for the beliefs of others. I am not certain that these have been clearly defined at every level and allowing for its proper and specific context, so until this is done, it would be very difficult to quickly deal with what is prohibited hate speech and what isn't. It seems like the existing international mechanism in place to determine what might be considered 'hate speech' have not been well thought out and have just been developed haphazardly, to meet a timely objective.