



Distinguishing freedom of expression from hate speech

Published in 2 *Metro Éireann* p. 15 (No. 7, November 2001), at p. 15.

T. Mc Gonagle

A key, if under-reported, issue discussed at the recent World Conference Against Racism was the question of regulating “hate speech” – an umbrella term covering all kinds of racist and other identity-based forms of abusive expression. The question is highly controversial and of direct relevance to the media as well as to government policy-makers.

Under international law, protection is generally granted even to forms of expression that are offensive, shocking or disturbing to either the State or any section of society. This fundamental precept is considered to be a *sine qua non* of democracy. The only contentious question concerns the fixing of the *ne plus ultra* of protected speech; the legal trammelling of the vigorous discourse on which democracy depends.

Scepticism concerning the effectiveness of laws aimed at restricting hate speech is prevalent among advocates of freedom of expression. It is often argued – cogently – that the potential for abuse of such laws by State authorities outweighs their potential benefits.

In their recent Joint Statement on Racism and the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, insisted that:

“3 Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate standards against abuse, including the right of access to an independent court or tribunal.”

The limited number of permissible restrictions on freedom of expression are clearly enumerated in the various international human rights instruments. Of greatest relevance, perhaps, for present purposes is the denial of protection to “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (Article 20 of the International Covenant on Civil and Political Rights).

The mandatory provisions of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination are also of instructive value when examining the interaction between freedom of expression and the elimination of racism. These provisions enjoin States Parties to the Convention to, *inter alia*, “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such

acts against any race or group of persons of another colour or ethnic origin....”

Despite the apparent symbiosis between freedom of expression and anti-racism on paper, international judicial and quasi-judicial bodies have regularly spurned the limited opportunities that have arisen for lengthy analysis of their compatibility with one another. Greater elucidation of this interface – which is actually quite problematic - can only come from the application of existing legal norms.

The policy preoccupations so manifest on the international scene are also replicated at the national level. The Prohibition of Incitement to Hatred Act, 1989, is the primary statute that addresses relevant issues in Ireland, but its shortcomings have been the subject of sustained criticism from anti-racism groups and others. Only a handful of prosecutions have been brought under the Act since its introduction and none of these – ultimately – proved successful. These statistics prompted the Minister for Justice to announce a comprehensive review of the legislation in September of last year, but as of yet, there has been scant evidence (if any!) of consultation with interested parties in this connection. The inefficacy of the Act has also led to it being described on these pages as a “toothless bulldog”. This description is warranted.

However, without seeking to diminish in any way the social imperative of eliminating racism, it must be stated that the proposed revamping of the Act ought to be mindful of the potentially adverse effects any new and aggressive wording could have on the right to freedom of expression. The uninhibited exercise of the right to freedom of expression can allow it to play a crucial role in the furtherance of anti-racism strategies. Only when there is a direct and incontrovertible nexus between particular forms of expression and actual harm or distress, should there be contemplation of curbing or, *a fortiori*, sanctioning, that expression.

Although racism - in all of its distasteful hues - is anathema to advocates of human rights, the objective of promoting equality and non-discrimination must not be allowed to ride roughshod over the right to freedom of expression. Rather, a considered balancing of these interests is what is required. Although these rights do, on occasion, find themselves at cross-purposes with one another, there nonetheless exists a real potential for synergic interaction between them in the shared struggle against racism.
