Protection of Human Dignity, Distribution of Racist Content (Hate Speech)

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"And, tired of aimless circling in one place,
Steer straight off after something into space." [1]

Definitions[2]

'Hate speech' is a term which refers to a whole spectrum of negative discourse stretching from hate and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias.[3] In short, virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term. Various rationales exist for legal prohibitions on hate speech, including: intrinsic harm; harm to identifiable groups; harm to individuals; harm to the market-place of ideas; harm to educational environment.[4] This list is not exhaustive and other authors prefer to focus on the identity-implicating nature of the offence and the "psychic harm"[5] caused by hate speech.

Existing and Possible Regulatory Approaches

'Hate speech', as such, is not defined in any international conventions,[6] although a number of provisions do act as barometers for the extremes of tolerable expression. These provisions include the express checks and balances considered to be an integral part of the right to freedom of opinion, information and expression (eg, Article 19(3), ICCPR, and at the European level, Article 10(2), ECHR). They also include Article 20, ICCPR (which ought to be read in conjunction with Article 19) and Article 4, ICERD (which enjoins States Parties to the Convention, inter alia, to "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…", while having "due regard" to principles such as the right to freedom of expression). At the European level, Article 17, ECHR (Prohibition of abuse of rights), is an in-built safety mechanism of the Convention, which was designed in order to prevent provisions of the Convention from being invoked in favour of activities contrary to its text or spirit.

An examination of existing jurisprudence will reveal that despite a traditional deference to the principle of journalistic autonomy, international adjudicative bodies are clearly reluctant to compromise on their consistent refusal to grant legal protection to hate speech. The consideration of "journalistic" licence can prove very divisive in this connection, as evidenced by the famous Jersild case.[7]

At the national level, largely in reflection of the past, recent past or contemporary experiences of States, the dissemination of hate speech generally tends to be classed as a criminal offence. This would, prima facie , leave little scope for co-regulatory initiatives

in the media sector (which is invariably subject to the overarching provisions of criminal law) to influence legal/regulatory approaches to (sanctioning) hate speech. Offences under criminal law constitute a de minimis threshold. As such, the putative role to be played by co-regulation as regards hate speech could perhaps be to raise the threshold above that of ordinary criminal law in order to insist on higher standards in the audiovisual or journalistic sectors.

However, such a role could prove to be controversial in the finer details of its implementation. The first consideration here could be the wariness in certain human rights circles about endorsing any further restrictions on the right to freedom of expression.[8] The obvious subtext here is that an honest adherence to existing standards would preclude the need for the adoption of additional regulation of any description. The creation of a more sanitised environment for public discourse could, in theory at least, run the risk of whittling away the rougher, outer, most meaningful edges of the right to freedom of expression. It could trammel the protection consistently accorded provocative journalism by the European Court of Human Rights, at least as regards racist speech.

Nevertheless, the above line of argumentation overlooks the usefulness of operational guidelines pertaining to hate speech. Codes of ethics and conduct rarely, if ever, overlook this issue. As these codes tend to be devised by media professionals themselves, they are sector-specific and are coloured by practical experience of the profession. Such considerations are rarely factored into traditional State-dominated regulation (which by its nature is more general in scope than codes of ethics), thus depriving it of sensitivity to the cut and thrust of the workings of the media industry. In consequence, it could be argued that the gap separating both sets of standards offers an opening for concerted, consultative policy-elaboration, leading ultimately to some form of co-regulation of the media addressing hate speech. Therefore such co-regulation should not necessarily be ruled out. Potential does exist for synergies, but it must be carefully worked out.

International Provisions on Hate Speech

United Nations

The Universal Declaration of Human Rights, 1948, contains a specific Article devoted to the right to freedom of expression, Article 19: “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.” This right is also enshrined – and indeed fleshed out – in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and 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 other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

It is plain to see that the only restrictions on the right countenanced by this article are those which are “provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre

public), or of public health or morals." Nevertheless, Article 19 must be read in conjunction with Article 20, which further trammels the scope of the right. It provides for the prohibition by law of "any propaganda for war," and - of crucial importance for present purposes - "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

The mandatory provisions[9] of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 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, inter alia , to "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..."[10] Nevertheless, the fulfilment of this obligation by States Parties must be achieved while having "due regard" to the principles embodied in the Universal Declaration of Human Rights and the rights explicitly set out in Article 5, ICERD.[11] "The right to freedom of opinion and expression" is among those rights specifically enumerated at Article 5[12]

In their recent Joint Statement on Racism and the Media,[13] 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:

> 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.

Council of Europe

Article 10 of the (European) Convention on the Protection of Human Rights and Fudamental Freedoms (ECHR) reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In its seminal ruling in Handyside v. United Kingdom, the European Court of Human Rights affirmed that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society."[14]

Nevertheless, tolerance is not without its limits: it is limited, for instance, by a provision of the Convention that serves as an in-built safety mechanism. Designed in order to prevent provisions of the Convention from being invoked in favour of activities contrary to its text or spirit, the operative provision is Article 17 (Prohibition of abuse of rights). It reads:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

This is the rock on which most cases involving racist speech or hate speech have tended to founder: they are consistently adjudged by the European Court of Human Rights (and in the past, the now-defunct European Commission for Human Rights) to be manifestly unfounded in accordance with Article 17. These cases include: Glimmerveen & Hagenbeek v. The Netherlands (racist leaflets);[15] T. v. Belgium (publication of Holocaust denial material in conjunction with a banned author);[16] H., W., P. and K. v. Austria[17] and Kühnen v. FRG[18] (both Holocaust denial).[19]