Freedom of Expression and Limits on Racist Speech: A Difficult Symbiosis

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The enormous task of combating racism has been central to the activities of the UN since its inception. The World Conference will undoubtedly afford the UN a timely opportunity to re-examine its vision and strategies *vis-à-vis* racism. One of the issues sure to be raised at the Conference, and already reflected in an early draft of the Declaration and Programme of Action, will no doubt be the question of regulating 'hate speech', i.e., racist or otherwise identity-assailing expression.

It is submitted here, however, that care should be taken in advocating how such speech should be regulated, [1] particularly as it will require a delicate balancing of the rights involved, and in view of the fact that to date, such balancing has proved elusive under international law. Another central reason for such caution is the prevalent scepticism among freedom of expression experts of the effectiveness of laws aimed at restricting hate speech. It is often argued –cogently –that the potential for abuse of such laws by State authorities outweighs their potential or putative benefits.

Delineation of the Right to Freedom of Expression

The arguments in favour of the basic principle that freedom of expression and its concomitant freedoms must be protected are legion and incontrovertible. However, unanimity tends to prove elusive whenever efforts are made to trace the conceptual contours of the right to freedom of expression. While the existence of an inner comfort zone of inoffensive speech is undisputed, disagreement tends to stymie attempts to fix the outer definitional demarcations of the right.

In its seminal ruling *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." [2] The question of whether or to what extent hate speech should be protected is particularly contentious.

The right to freedom of expression is enshrined, *inter alia*, in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). 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 prohibits "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 UN Human Rights Committee Jurisprudence

The UN Human Rights Committee (HRC) has commented on the relationship between Articles 19 and 20, declaring the prohibitions enumerated in the latter to be "fully compatible" with the right to freedom of expression, indicating that such prohibitions are subsumed into the "special duties and responsibilities" upon which the exercise of the right (as *per* Article 19) is contingent. [3] It is therefore ironic that the HRC should repeatedly shirk opportunities to illuminate this difficult relationship in its jurisprudence. The case of *Faurisson v. France* [4] is one example of where it could have grasped the definitional nettle, but failed to do so.

This case arose from the conviction of Robert Faurisson, a professor of literature who denied the existence of the Holocaust. Crucial to the HRC's finding that his criminal conviction was not a violation of Article 19 was the French authorities' assertion that revisionist theses denying an universally-recognised historical reality constitute the principal [contemporary] vehicle for the dissemination of anti-semitic views. The restriction on Faurisson's freedom of expression was grounded in a broad deference to the "respect of the rights or reputations of others" in Article 19(3) and was specifically intended to serve "the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism." [5] While one concurring opinion explored in closer detail how Faurisson's statements might be considered "incitement" as envisaged by Article 20(2), it is submitted that the issue could have been probed further, specifically setting forth a standard by which to judge when such incitement occurs. [6]

In a further ironic twist, the HRC mentioned the *Faurisson* case in passing in the recent case of *Ross v. Canada*, where a teacher who published anti-Semitic tracts outside the classroom was disciplined by being transferred to an administrative post. The restrictions were held not to violate Article 19, as they had the purpose of protecting the "rights or reputations" of persons of Jewish faith, particularly in the educational sphere. [7] The HRC commented that the restrictions imposed on *Faurisson* "also derive support from the principles reflected in article 20(2) of the Covenant." [8] Yet this notion failed to achieve such prominence in the reasoning of the original case. There was no apparent need to consider the nexus between Articles 19 and 20 in another case treating similar issues. Specifically, in *J.R.T. and the W.G. Party v. Canada*, [9] the dissemination of anti-semitic messages by telephonic means was adjudged by the HRC to "clearly constitute the advocacy of racial or religious hatred" under Article 20(2), without more detailed analysis. [10]

The European Court of Human Rights

The mandatory provisions [11] 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…." [12]

International judicial and quasi-judicial bodies have regularly spurned the limited opportunities that have arisen for lengthy analysis of the compatibility of freedom of expression with relevant anti-racism measures such as those in ICERD. For instance, the European Court of Human Rights –a source of much developed jurisprudence on the right to freedom of expression –has only once examined the interaction between the right to freedom of expression and the obligations of ICERD. In *Jersild v. Denmark*, the

Court found that the conviction of a journalist –for aiding and abetting in the dissemination of racist views in a televised interview he had conducted with members of an extreme right-wing group ("the Greenjackets") –amounted to a violation of freedom of expression as protected in Article 10 of the European Convention on Human Rights (ECHR). The Court's consideration of Article 10 in light of ICERD (and in particular Article 4 thereof) [13] was, however, regrettably summary as it failed to grapple with the substantive issues involved. It merely stated that it is not for the Court to interpret the "due regard" clause in Article 4, ICERD, but that "its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention." [14]

Racism, as for example in *Glimmerveen & Hagenbeek v. Netherlands* (distribution of racist leaflets), [15] is consistently held to be beyond the final limit of protected expression. This case was held to be manifestly unfounded under Article 17 (Prohibition of abuse of rights), ECHR, [16] and thus declared inadmissible. This article, an in-built safety mechanism, was designed in order to prevent provisions of the Convention from being invoked in favour of activities contrary to its text or spirit. In fact, a swathe of cases touching on Holocaust denial and related issues taken under the ECHR to date have been declared inadmissible under Article 17. [17]

More recently, in *Feldek v. Slovakia*, [18] the Court found that the sanctioning of a journalist for referring to the "Fascist past" of a Government Minister constituted a breach of Article 10, ECHR, stating categorically that it could not "subscribe to a restrictive definition of the term 'fascist past'." [19] It continued: "[T]he term is a wide one, capable of evoking in those who read it different notions as to its content and significance. One of them can be that a person participated in a fascist organisation, as a member, even if it was not coupled with specific activities propagating fascist ideals." [20] Here, the boundaries of free expression are more precisely drawn, with a closer analysis made of the circumstances of the case.

Conclusion

While some of the above-cited cases are useful, it is submitted that further authoritative illumination is required in order to clarify precisely the standard by which "incitement" is judged and the status of performative speech which is offensive, but does not necessarily amount to one of the various forms of advocacy or incitement defined in the pertinent international instruments.

Although racism in all of its distasteful hues is anathema to advocates of human rights, it must be acknowledged that a difficult symbiosis nevertheless exists between the right to freedom of expression and the right to equality/non-discrimination. This is largely attributable to the traditional uncertainty as to the precise metes and bounds of both rights. It is to be hoped that the forthcoming World Conference will allow for some discussion on the interaction of both rights, with a view to producing synergic effects in the shared struggle against racism.