

## Chapter 11: Human Rights

### Case Study: Hate Speech

The First Amendment of the US Constitution states that ‘*Congress shall make no law ... abridging the freedom of speech*’. Article 19 of the Universal Declaration of Human Rights states that ‘*Everyone has the right to freedom of opinion and expression; this right includes freedom of hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*’.

It might be expected that such strongly worded immunity rights would protect all expressions of opinion. Yet all states place some restrictions on speech, in relation, for example, to defamation, indecency, public safety, security, military secrets, privacy, confidentiality, and the perpetration of criminal acts.

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#### BOX 8.3 EUROPEAN CONVENTION ON HUMAN RIGHTS, ART. 10

<numbered list> (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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. < end of numbered list>

Recently, many states that pride themselves on their traditions of free speech have introduced legislation to outlaw speech that denigrates, or insults, ethnic and religious groups, and stirs up social discord by inflaming prejudice and hostility. This attempt to protect minorities from the humiliation and distress of hostile opinion appears incompatible with a commitment to **freedom of expression**, which has been thought to exclude state-imposed limitations on the content of what is expressed. Preventing people from expressing strong condemnation of the way of life of members of another group, or punishing them for fiercely criticizing the religious beliefs and practices of other people, runs counter to permitting everyone to say what they think, however misguided and vociferous they may be.

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**BOX 8.4 UK PUBLIC ORDER ACT 1986, S. 18**

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

<lettered list>(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.<end

of list>

<A>Analysis

Freedom of expression is a human right if there is a morally important human interest in expression that overrides other moral considerations and ought to be guaranteed to all human beings. On this view, free speech is a human right only if people are free to express themselves irrespective of what they say and the manner in which they do so, whatever the consequences. Yet we have seen that one human right may conflict with another human right, and that the content and scope of many human rights is affected by the perceived social consequences of their implementation.

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To work out the content, scope, and moral weight of freedom of expression, we need first to ask with what sort of right we are dealing: are we discussing free speech as a liberty right, or as a negative claim right, or, also, as a positive claim right? If freedom of expression is taken to be a pure liberty right, to the effect that there is, or should be, no rule preventing a person from expressing themselves, then this does not mean either that others have a duty to allow the right holder to speak or that laws may not be passed attaching liabilities to some things that a person says, provided that there is no prior censorship of that speech. We may read the First Amendment in this way and say that it prohibits censorship prior to speech, but does not rule out criminal liability for, for example, sedition, or civil liability for, for example, defamation or, indeed, hate speech.

To a person who takes civil liberties seriously, this analysis is inadequate, because it does not take into account the ‘chilling’ effect on speech that occurs when people do not speak up for fear of incurring such liabilities. From this perspective, free speech is a claim right for which the correlative obligation is the negative one of not interfering with the speech of other people. If this obligation is extended to the state, it means that there can be no laws penalizing speech, even after the event. This can be expressed by saying that there ought to be an immunity right excluding the enactment of such laws.

Yet few people want to exclude, for example, defamation or pornography laws altogether. How then are we to distinguish between those post-speech sanctions that do and those that do not violate the negative claim right to freedom of speech? In answer to this question, the first standard move is to say that laws limiting freedom of speech are permitted only to protect that same right for other people. This would enable the state to prohibit the use of hate speech in order to curtail the speech rights of others. It would also allow the state to regulate speech in relation to its time and place, so that everyone gets the chance to speak and even to be heard. None of this amounts to penalizing speech for its content.

The second standard move is to see if there are other human rights—such as the right to life or the right to privacy—that may be violated if there are no restrictions on the contents of expression. There are generally recognized human rights that protect a person’s reputation, thus requiring a balancing of freedom of expression and the protection of reputation. Under this approach, hate speech could be prohibited if, for example, it were to make unfavourable and factually unjustifiable assertions about the religious beliefs and practices of another person or group.

Insulting and hateful speech perhaps violates other human rights, in that it can lead to social unrest, and attacks on racial and other minorities. Social unrest, however, is not in itself a violation of a human right, but is an example of the ‘general happiness’ and ‘public good’ criteria that are characteristic of the consequentialist considerations that human rights are designed to trump. Yet perhaps we have here an example of a human right being overridden by the sort of consideration that permits non-rights factors to limit the scope of human rights, as is explicitly allowed for in modern bills of rights, such as the Canadian Charter of Rights and Freedoms, and the European Convention on Human Rights. In this case, there is no reason, in principle, why the distress caused by hate speech should not also be taken into account in determining the scope of the human right to free speech. This is a matter of moral and political judgement that cannot be settled by an appeal to agreed conceptions of what sort of right freedom of speech is and what its parameters are, but which requires us to take the consequences of different free speech laws into account.

A difficulty with consequentialist reasoning about freedom of expression is knowing what effects speech does have on other people. The old adage ‘sticks and stones can break your bones, but words can never hurt you’ suggests that mere words do not cause distress—but it is clear that they often do, and more so in some cultures than in others. Indeed, in some cases, the connection of word and deed is so close that speech is equivalent to action, such as when one person tells another person to shoot a third person. In these instances, we may say that what is being prohibited is not speech, but action.

Further complexities are introduced if freedom of expression is construed as, in part, a positive claim right for which the correlative obligations include duties on governments, and others, actually to promote the conditions under which people are able to express themselves effectively. This is a point to which we return at the end of this case study.

#### <A> Justifications

We are now clearly far removed from simple intuitions about human rights as having to do with prohibiting those things that ought never to be done to other people. The only way forward at this point is to examine the range of arguments for and against free speech of one sort or another.

The neo-Kantian, stressing the fundamental importance of moral agency, can argue that speech and communication generally is a prerequisite of individual moral agents working out and acting on their own beliefs as to what is morally right and wrong, although how much speech is required for this purpose is not clear. Indeed, most theorists would say that self-expression is an intrinsically valuable aspect of human nature. Thus, natural lawyers take expression to be a wholesome natural phenomenon that involves the functioning of the distinctive capacities of humans. All of this can be seen as protecting the dignity and autonomy of people, although it does not establish how much moral weight should be given to the intrinsic value of expression.

Utilitarians can also argue that self-expression is intrinsically valuable as a highly enjoyable experience in itself and can add that speech is instrumentally important, in that it enables people to protect their interests. Speech is also important for the intellectual and moral progress of a society, because discussion is an essential element in enabling us to distinguish between truth and falsehood. As J. S. Mill (1859) famously argued, only by allowing freedom of expression can we have the confidence that our beliefs have withstood critical questioning. Free speech is also necessary for the proper functioning of democracy, which requires voters to make a judgement on the performance of elected politicians and governments, which process requires open debate and

free passage of information.

The consequentialist arguments here may be subject to the caveat that not all speech is necessary for securing these individual and public benefits, thus opening the door to free speech limitations. But governments tend to use what seem to be reasonable exceptions to the immunity of speech from restrictions to protect their own interests. Governments abuse apparently reasonable restrictions by, for example, using defamation laws to limit political speech and to suppress unpopular groups. While it may seem a good thing to limit speech that insults and threatens sections of the public, such laws will be used selectively to prevent criticism of powerful groups by less powerful ones. Hence the argument that, in practice, there should be no restrictions on free speech.

It is worth noting that many of the strongest arguments for freedom of expression, such as the argument for justified belief and the argument for promoting democracy, are instrumental ones, so that balancing human rights against each other is not all that is involved in determining the analysis and justification of a human right in practice. This is very much the case with hate speech, the most convincing justifications of which relate to the preservation of social harmony and the elimination of discrimination.

#### <A>Implementation

Given the complexities of the moral argument about sanctioning hate speech, the mass of empirical evidence that is relevant to these moral arguments, and the practical matters of what sort of rules are effective in different circumstances, it is difficult to see how decisions as to how much weight to give to freedom of speech can be described as legal rather than political. It follows that determining the limits of free speech should be a matter for political debate, rather than determination by courts. Further, it seems inconsistent to argue that the benefits of freedom of speech should not apply to debates about freedom of speech itself. Free speech is, however, a good

example of the need to protect societies from the manipulations of elected representatives who wish to avoid proper scrutiny of their actions. It can be argued that elected politicians will not protect the interests of those minorities who have most to lose by being the subject of vilification.

On the one hand, this may be seen as one area of human rights in which strong **judicial review** has produced more robust defence of free speech as a human right, because the US Supreme Court has a record of striking down hate speech laws. On the other hand, little has happened in the USA to protect freedom of speech against the political inequalities arising from the unequal distribution of material goods and hence access to the mass media, on which the outcome of elections depends. If the duties correlative to the human right of freedom of expression are positive duties to enable people to make an equal contribution to public debate and to possess an equal capacity to protect their interests, then laws curbing expenditure on political advertising and promoting education may be seen to be an integral part of the human right to freedom of speech in a democracy. In this case not only curtailing hate speech, but also empowering minority groups to communicate their views and culture successfully may be construed as part of what it should mean for a society to respect freedom of speech fully.