

Do human rights laws in Europe adequately deal with offensive speech?

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Abstract

It is a widely accepted view that the universal nature of human rights and civil liberties are innate and fundamental in democratic societies. In the aftermath of the Second World War that saw massive human rights violations and bloodbath, the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948. The adoption of the Universal Declaration of Human Rights (UDHR) still reigns supreme to this day as a backbone of human rights. Those rights include freedom of expression, freedom of association, freedom of religion, right to dignity, right to life, among others.

The rise in anti-immigration and anti-Islam rhetoric in political debates across Europe has brought into sharp focus the role of human rights when faced with expression that offends particular groups within society. Thus, the Universal Declaration of Human Rights (UDHR), the European Convention for the Protection of Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Fundamental Freedoms adopted the freedom of expression although worded slightly different on each but the principles are similar.

The empirical basis for this paper has included mostly primary and secondary sources, including literature review on books, articles, reading annual UN and EU reports, global reports and relevant Statutes. This project is structured to include; firstly, an analysis of key frameworks that include the human rights, especially freedom of speech and offensive speech. Secondly, concluding a summary of the essence of the research and key findings. Those include that freedom of speech rights come with responsibilities. Thus, Legislative interventions and court precedents continue to bring legal and judicial clarity on what is an offensive speech.

Key Words: Human Rights Laws, Universal Declaration of Human Rights, Civil Liberties, Offensive Speech, Europe

1.0. Introduction

The promotion and protection of Human rights underpins democracies across many societies. Accordingly, Article 10¹ significantly outlines the importance and value of Freedom of Expressions, which is the topic under discussion in this paper. Article 10 states that:

“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”²

Freedom of Expression defined as one’s right to express one’s views freely without government’s interference.³ No doubt, these freedoms are the backbone of democratic societies. They give expression to the vibrancy of a democracy through free opinions and even public protests and demonstrations. Thus, ECHR argued that they are “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.⁴

Some scholars argue though that the freedom of expressions may have limitations, especially if they become harmful to others. Some scholars arguing this freedom is not sacrosanct because it carries both sides of the coin, if you like. That includes being a right and a responsibility, which is a very tricky balance to navigate in modern societies. Thus, law can restrict them if they harm others, as they are ‘not an impenetrable fortress but rather a flexible membrane that embraces the need to balance competing rights’. This happens in cases when freedom of expression is offensive, citing violence, and terrorist’s acts, among other. This is why’ the rise in anti-immigration and anti-Islam rhetoric in political debates across Europe has

¹ Article 19 of the Universal Declaration of Human Rights of 1948.

² Ibid.

³ Article 19 of the International Covenant on Civil and Political Rights

⁴ European Court of Human Rights

brought into sharp focus the role of human rights when faced with expression that offends particular groups within society'.⁵

2.0 Research Statement

Freedom of expression is a core value in democratic societies and as the European Court of Human rights consistently reiterates is 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'. However, it is not an impenetrable fortress but rather a flexible membrane that embraces the need to balance competing rights. Thus, this paper has critically analysed this research problem, which is to evaluate whether human rights law in Europe adequately deals with offensive speech.

3.0 Discussion

Role of Human Rights in Europe

Europe Union,⁶ as a block, is lauded for upholding human rights and highly regarded as a beacon of promotion of human rights. With its single market, the movement of people in Europe is very easy and that has led to many immigrants wanting to move to Europe as they ran away from places like Syria. This movement has brought political debates that are contentious, especially when there are acts of terrorism.

The Council of Europe's Convention on Human Rights contributed enormously to the European Union legislative interventions and human rights jurisprudential development achieved through decided case laws, which sought to balance the Treaty priorities over those of the interests of member states. No doubt, this balancing act has not been without difficulties and challenges. Thus, in dealing with "cases of conflicting fundamental rights.....using a

⁵ International Human Rights assessment Coursework 2021

⁶P Craig and G de Burca. EU Law. Text. Cases and Materials (Fifth Edition, Oxford University Press 2011)

neutral, objective methodology, the courts should not be afraid to engage itself in balancing of conflicting interests.”⁷ As alluded before, offensive speech is not clearly defined and this has become a challenging aspect in courts as they sought to strike a balance between freedom of speech and offensive speech. The overarching question has been how courts adjudicate offensive speech when there is no international consensus on a universal definition of it.

Analysis whether human rights adequately deals with offensive speech

The common view advocates for states/governments to have the primary obligation to protect human rights. Thus, human rights are very important as they are, “not simply antecedent basic moral rights that are given legal expression, but rights that involve institutional recognition. They are both moral and institutional.”⁸ Below, we will discuss the dilemma of freedom of speech and offensive speech, the Convention and case laws and lastly, gaps that lead to inadequacy of these human rights laws in so far as offensive speech is concerned. From the literature review, gaps do exist; they often lead to lack of enforcement.

The dilemma: freedom of speech and offensive speech

These two freedoms are often in conflict with each other. Therefore, striking the balance between the two is often tricky. Many issues compound this dilemma, including what really constitutes offensive speech. It is a widely accepted view that the term ‘hate speech’ or ‘offensive speech’ are often not clearly defined or at worst ambiguous. Thus, this analysis will attempt to bring together the right to free speech and the duties that come with that. In international human rights law, this nexus is highly debatable. The discourse is focused mainly on free speech versus offensive speech. Consequently, many questions arise: to what extent is freedom of speech free? Can we reconcile the two? Where do we draw the line on offensive speech? Is it when it incite violence or discriminatory to others? The trick therefore is not limit

⁷ Sybe A de Vries. ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’ (2013) 9 (1) Utrecht Law Review 170>accessed 2 May 2023.

⁸Nien -he HSIEH (n 3) 2.

that right and “put in jeopardy the right itself.”⁹ Thus, the standard of necessity and proportionality are the ones said to be effective in restricting the right to free speech.

The term adequate simply means whether current human rights laws are enough to stop or deter violations and in some instances be a deterrent to governments who may enact laws that infringe upon these rights, in this case, offensive speech. The question, however, is how do laws deter that is even subjective and difficult to define. The interconnectedness of the world and migration across Europe has posed huge challenges on upholding these freedoms, especially with “the rise of anti-immigration and anti-Islam rhetoric in political debates across Europe.....”¹⁰ Asylum seekers and foreigners have been the subject of this rhetoric. No doubt, there has been a resurgence of anti-Muslims sentiments and some politicians making general statements that the rise in terrorist attacks in recent years means all Muslims are security threats. Truth is, some politicians have been found either to be complicit or at worse fuelling these anti-Muslim sentiments. While European countries, like other countries world over, have a right to determine their immigration laws but that does not give rights to politicians to violate rights of immigrants by using offensive speeches. That is against the international norms on protection of human rights.

Balancing freedom of speech and other human rights is a complex tight rope to walk. Thus, the question often arise if human rights laws are adequate to deal with offensive speech. Some activists and policy makers even calling for criminalisation of offensive speech while others criticise that based on free market principles which purports that people have a right to say whatever they want to say in a democratic society.

Online hate speech

Offensive speech has an additional complication in recent years, the easy and instant access to information, through internet and social media, among other platforms. Some have used

⁹Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, paras. 2 and 4; see also *ibid.*, paras. 5–6.

¹⁰ *Ibid.*

these platforms to express their views, which were found to be offensive; the difficulty has been how governments regulate online hate speech. Online offensive speech has posed great difficulties on regulations especially social media. Broadly, offensive speech defined as harmful speech.

Assimakopoulos et al (2017) quote the definition of The Organisation for Security and Co-Operation in Europe (OSCE), thus offensive Speech is the “expression of hatred towards an individual or group of individuals based on protected characteristics, where the term ‘protected characteristics’ denotes membership to some specific social group that could, on its own, trigger discrimination.”¹¹

Some used it to make racist comments and hate speech that spread very fast as it can be accessed instantly. Thus, online platforms like Facebook, Twitter, among other have been under scrutiny for the kind of content they distribute on their platforms. The former President of the US, Donald Trump, was banned by twitter; some were arguing that is an infringement of his freedom of speech while others felt he was using hate speech.

Many jurisdictions had to draft online policies to deal with the resurgence of online hate speech. Examples can be drawn from the European Commission drafted a Code of Conduct in 2016¹² which saw hateful content removed within 24 hours on these online platforms.¹³ These are some of the measures adopted to adequately deal with offensive speech.

Equally, the human rights regime has Article 10 further states “.....since it carries duties and responsibilities, maybe subject to such formalities, conditions, restrictions or penalties as are prescribed by law.....territorial disorder or crime.....”

¹¹ Assimakopoulos S and Others, Online Hate Speech In The European Union: A Discourse-Analyst Perspective (1st Edn, Spring Briefs 2017)

¹² Therese Enarsson and Simon Lindgren. Free speech or hate speech? A legal analysis of the discourse about Roma on Twitter (2018)

¹³ Enarsson, T. and Lindgren, S. 2018. Free speech or hate speech? A legal analysis of the discourse about Roma on Twitter. Information and Communication Technology law >
<https://www.tandfonline.com/doi/full/10.1080/13600834.2018.1494415> accessed 2 May 2023/

Legalities

In its objective to deal with hate and offensive speech, Europe, like many regions, has used legal processes to uphold the freedom of speech in a democratic society as seen in the *Handyside v the United Kingdom case*.¹⁴ Though there have been ambiguities in hate and offensive speech but largely, the rule of law still operates as a guiding principle as seen in many jurisdictions, although not without criticism. Examples can be drawn in my own jurisdiction, South African Human Rights Commission adjudicates on these matters and in some cases, courts are not scared to make a very unambiguous ruling on offensive and hate speech. The famous Penny Sparrow case is a case in point, as she was found guilty of hate speech by a court of law. In other parts of Africa, offensive speech against homosexuality has been topical as human rights laws seem to fall short to protect these offended by these speeches. Thus, the African Charter on Human and People's Rights (ACHPR) under article 9(1) is a progressive move to protect freedom of speech as long as is permitted by law.

Politicians across jurisdictions have been found wanting in their usual rhetoric as seen in former President Trump's anti-immigration and anti-Muslimism views, which have been criticised in some corners that he incited, hate speech against minorities in the US. The rise of populists' in Europe has also seen some political rhetoric which is against immigration laws and politicians have been found to be offensive in their speeches that express anti-Islamic sentiments. The rise in recent terrorists attacks has been a contentious debate, some politicians criticising immigration laws that arguably contribute to home-grown terrorism. In these cases of rhetoric from politicians, the legal protection varies from case to case, as context will matter a great deal. Due to anti-Islam rhetoric, Muslims are often unfairly targeted. This can be a violation of the rights of individuals, groups and even freedom of religion. Victimization of these groups can be seen as a violation of their fundamental human rights.

¹⁴ *Handyside v the United Kingdom*

The rise of Islamic fundamentalism in the US, UK, Europe and some parts of Asia has also created tensions on human rights. Thus, bodies like the European Convention on Human Rights have a legal duty to protect these fundamental rights. The European Court of Human Rights has been hailed as it protects the kinds of speech that may “offend shock or disturb.”¹⁵

Broadcasting institutions are often required to obtain a license, which will stipulate what is permissible or language that is not and if found in violation, the offense will attract penalties. Thus, courts contribute significantly in ensuring these rights are upheld.¹⁶ The European Court of Human Rights has also ruled several times in favour of upholding the freedom of expression as elucidated in *Sunday Times v the United Kingdom*.¹⁷ From the literature review, it can be argued that the enactment of progressive legislation has also contributed significantly in upholding of the human rights but gaps still exist. Thus, the Human Rights Act 1998¹⁸ incorporates the Council of Europe’s Convention on Human Rights (ECHR).¹⁹

However, the Strasbourg Court has been criticised as it often held that hate speech does not enjoy protection under Article 10. These bring uncertainties in protection against offensive speech; this is why we submit that human rights laws are not adequate to deal with offensive speech. There is also an issue of whether or not political debate should also have freedom of speech limited to deter them from using offensive speech. This lack of clarity also complicates this debate as the public are held to a stricter rule while politicians are often let off the hook when making political statements that maybe xenophobic or offensive to others.

Human rights Convention and case laws

The greatest challenge is the thin line between the freedom of expression and hate speech. Striking the right balance is not easy, thus punitive measures are adopted by some

¹⁵ European Court of Human Rights, *Handyside v. the United Kingdom*, application No. 5493/72, Judgment, 7 December 1976, para. 49. See Sejal Parmer, “The legal framework for addressing ‘hate speech’ in Europe”, presentation at the international conference on addressing hate speech in the media, Zagreb, November 2018.

¹⁶ Section 12 of the Human Rights Act of 1998

¹⁷ *Sunday Times v the United Kingdom* 1979

¹⁸ Human Rights Act 1998

¹⁹ Europe’s Convention on Human Rights

jurisdictions. The European Convention on Human Rights Courts are usually read with the case laws as they operates under common law. Case laws are binding as courts interpret and apply the law on offensive speech.²⁰ This underpins the importance of court's jurisprudence as judgements are binding. However, courts are sometimes reluctant to overreach and governments may enact insufficient and ambiguous legislations, which make it difficult to enforce these laws on offensive speech.

The role of an independent judiciary can never be overestimated, given the heightened emotions that are usually involved in hate speeches. The role of the media in upholding freedom of speech while not violating others through offensive speech has also come under scrutiny in Europe, as it has elsewhere. In *Jersild v. Denmark*,²¹ the court found that the journalist had used racist comments, thus his assertions were found to be offensive. This balance is needed to both promote freedom of speech while simultaneously eliminating racism and other forms of discriminations.

4.0 Conclusion

From the foregoing discussion, it is safe to argue that freedom of speech is a very important right in democratic societies. However, striking the balance between that freedom and offensive speech is the greatest dilemma faced by many governments world over. It can be argued that offensive speech undermines the freedoms of others and discriminates against other. However, the importance of clearly defining offensive speech has been found to be an important aspect of this essay. Education and awareness, reforms of human rights legislation are also necessary to ensure adequacy and enforcement.

From the literature review, it has been noted that that rights come with responsibilities. Thus, human rights international and national bodies sought to deal effectively with offensive speech through legal processes as demonstrated in the discussion above. Legislative interventions

²⁰ Protecting the Right to Freedom of Expression Under the European Convention on Human rights> <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>>accessed 2 May 2023.

²¹ Ibid.

and court precedents continue to bring legal and judicial clarity on what is an offensive speech. However, Courts had to often rely on vague concepts as they do most of the work in interpreting and application of law. While it is commendable that courts through case laws bring some clarity but gaps have been observed and grey areas exists in political discourse, with legislations that are ambiguous.

Bibliography

TABLE OF CASES

Handyside v the United Kingdom

Sunday Times v the United Kingdom

TABLE OF STATUTES

Human Rights Act 1998

The Universal Declaration of Human Rights (UDHR)

The European Convention for the Protection of Human Rights

Article 19 of the International Covenant on Civil and Political Rights

Fundamental Freedoms: Europe's Convention on Human Rights

BIBLIOGRAPHY

BOOKS

P. Craig and G de Burca. EU Law Text Cases and Materials (Fifth Edition, Oxford University Press 2011)

ARTICLES

John Ruggie, 'Human Rights Council. Eighth session. Protect Respect and Remedy: A Framework for Business and Human Rights.' (2008) United Nations Report of the Special

Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf> accessed 2 August 2023.

Sybe A de Vries. 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 (1) Utrecht Law Review 170>accessed 2 August 2023.

Therese Enarsson and Simon Lindgren. Free speech or hate speech? A legal analysis of the discourse about Roma on Twitter (2018)