

Chapter 99

Dignity as the Ultimate Boundary to the Freedom of Speech: An Account of Jeremy Waldron's “Harm in Hate Speech” Argument

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ABSTRACT

*Freedom of speech as a prerequisite of free communication, expression, and dissemination of ideas is the most fundamental pillar of any truly democratic society. Though of extreme importance, freedom of speech is not unlimited. Therefore, in the vast majority of national legal orders the legislator as well as the jurisprudence impose limits on the freedom of speech when it reflects racism or hate against the ethnic, sexual, or religious identity of a polity's citizens. These paradigms of negative speech are widely known in the international literature, as forms of “hate speech.” The chapter offers an account of this dialogue while it adopts a principal argument in favor of imposing limits in cases of “hate speech”: the harm that hate speech may cause to human dignity. This argument has been illustrated in the book of Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012).*

1. INTRODUCTION: THE INTERNATIONAL DEBATE ON THE LIMITS OF SPEECH

Freedom of speech as a prerequisite of free communication, expression and dissemination of opinions and ideas is the most fundamental pillar of any truly democratic society. Indeed, the protection of free speech guarantees the conciliation between

rights and democracy. Freedom of speech provides the framework for the fruitful and harmonic co-existence between individualism and individual liberty and the collective-political autonomy of each and all members of any democratic polity. This extremely valuable function derives from the very nature of speech as a right that expresses both the individual and the political autonomy and thus serves as a means for the expression of

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individualism and as a vehicle for the political participation and expression. However, though of extreme importance, freedom of speech is not unlimited. Therefore, in the vast majority of national legal orders –with the exception of that of the United States’ – the legislator as well as the jurisprudence impose limits on the freedom of speech when it reflects racism, hate against the ethnic, sexual or religious identity of minority members of a given political community.

Thus, in Canada, based on Art. 319(1) of the Criminal Code, a punishable offence is committed by “...everyone who, by communicating statements in any public place, incites hatred against any identifiable group” Art. 266b of the Criminal Code of Denmark determines that a crime is committed by any person who makes a statement or imparts other information, by which a group of persons is threatened (*trueles*), insulted (*forhanes*) or degraded (*nedvaerdiges*) on the basis of race, colour, national or ethnic origin, belief or sexual orientation, publicly or with the intention of disseminating it to a wide circle of people. Art. 130(1) of the German Penal Code determines that a criminal offense is committed by “(1) whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population (*Volksverhetzung*) or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population....” Similarly, the Human Rights Act of New Zealand (1993) in Section 61(I) prohibits expression that is threatening, abusive or insulting, and considered likely to excite hostility against or bring into contempt a person or a group on the basis of color, race, national or ethnic origin.

At a constitutional level, however, the most characteristic limitation to the freedom of expression is the one included in the Constitution of South Africa (1996). It is a text strongly expressing the symbolic need for surpassing the *apartheid* authoritarian, discriminative regime. In particular, Art. 16 stipulates that “[...] the right

in subsection 1 (freedom of expression) does not extended to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Additionally, at an international and supranational level there is protection against expressions of racism. Thus, the International Covenant on Civil and Political Rights (ICCPR, 1966) provides in Art. 20(2) that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is prohibited by law,” and is complemented in an interpretative way by the General Comment, no 34 (May 3, 2011, in particular paragraph 54) of the United Nations’ Human Rights Committee. In the same framework, the International Convention on the Elimination of all forms of Racial Discrimination (ICERD, 1965), in Art. 4 prohibits any racial discrimination. Similarly, on the basis of Art. 10 of the European Convention on Human Rights a fairly high level of protection of the freedom of expression and speech is guaranteed. Nevertheless, the Council of Europe, though acknowledging the significance of protecting even provocative, annoying or shocking opinions in a democratic society, clearly restricts hate speech, the denial of the Holocaust and expressions appraising genocides or crimes against humanity. To this end, the Council of Ministers has adopted its respective Recommendation R(97)20, while the Council of Europe has founded the European Committee Against Racism and Intolerance (ECRI).

2. THE USA WAY OF UNDERSTANDING FREEDOM OF SPEECH AND HATE SPEECH

The USA presents an exception regarding the limitation of hate speech, since in the USA hate speech is protected in the framework of the First Amendment. This approach opposes the international consensus regarding the restriction of hate

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