

Hate Speech versus Freedom of Speech: Legal Theory Perspective

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Abstract

Words uttered by an individual are a medium of expressing one's thoughts and beliefs and form part of communications between individuals. However, as *tempus fugit*, communication becomes increasingly complex, words from the art of speech forms a fundamental right to most sovereign constitutions. Currently, freedom of speech is one of the most important rights guaranteed by international law, however such freedom is not final and absolute. Like all other fundamental rights, it is subject to restriction by specific states' laws. In the internet era, one may extend and share his beliefs via electronic social media without realizing she is advocating and spreading violence within the society *vis a vis* a hate speech. This article seeks to investigate the theory surrounding the speech that is depicted and derogatory in nature which may be the root cause of violence and prejudice to peace and harmony. The aim of the discussion prolongs the rationality of having fundamental rights in expressing people's ideas, beliefs, and positively sharing information to achieve the benefits bestowed to society and abusive misinterpreted expression on the same platform. Using the doctrinal analysis, the study shows that freedom of speech is a fundamental right that delicate balance and cannot be simplified by an objective mechanism. At the outset, it recommends society to protect it insofar as it does not infringe the other fundamental rights nor supersede the latter.

Keywords: Freedom of Speech, Hate Speech.

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Introduction

Freedom of speech is considered as a fundamental human right which had been conferred and well-guarded by most country in the world. Such fundamental right may include freedom of thoughts, expressing belief, opinion. It may also extend to freedom of press and media communication. However, freedom of speech or expression which had been conferred by the most constitution in the world is not final and absolute (Laura Beth Neilsen, The Case for Restricting Hate Speech (2017) para 11). As it is a fundamental right that delicate balance, a society is responsible to protect and support an individual's right insofar that individual does not infringe the rights of another person. As the matter of facts, freedom of speech has to compete with other rights for example right of liberty, rights to public security, rights to private life¹ etc. In other words, it does not propose that right of free speech² must prevail and supersedes from any other fundamental rights.

It cannot be denied that freedom of speech confers citizen medium to express their ideas, belief, sharing of information in a positive manner to achieve the benefits bestowed to the society. Nevertheless, the same medium to express their freedom is always been abused to achieve personal or group agenda. Such abused and misinterpreted expression either by words uttered or by actions can cause harm to individual person or groups in such negative way outweigh any claim to freedom of speech and expression.

In some critical cases, words uttered or expression by actions in depicted and derogatory ways may be the root cause of violence and prejudicial to a multiracial society that promotes peace and harmony. Having said that, I will argue in this essay that hates speech which can cause harm should not be tolerated within legal and moral perspective. The first part of the essay will discuss hate speech within the ambit of a legal perspective. Legal theorist's opinion upon will take place in the second part of the essay and the effect of hate speech to its victim and society at large just before the conclusion.

Legal Standing Towards Hate Speech

Before we proceed with the legal standing, let us examine the definition of hate speech. Hate speech is a controversial and always being misinterpreted as a speech which intended to degrade, intimidate or incite violence or prejudicial action against an individual or group of individuals based on their race, ethnicity, national origin, religion, sexual orientation, or disability (Rodney A. Smolla, Free Speech and Religious, Racial, and Sexual Harassment, (1991) p 207). It may take in an oral form as well as in conduct form either express or implied from a speaker to audiences.

Hate speech should be distinguished with the fundamental right of freedom of speech or expression³. The latter intended to function as a medium to communicate one's opinions or ideas using one's body and property to anyone who is willing to receive that particular idea or opinion without fear of retaliation, censorship, or sanction.

Basically, the right of freedom of speech and expression is a human, political or civil right recognized and appreciated by states and their citizens. The context of freedom

¹ Article 3 of Universal Declarations of Human Rights.

² Article 19 of Universal Declaration of Human Rights.

³ See Article 4 of Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965 that prohibit hate speech.

of speech and expression is safeguarded under the International Law. Article 19 of the Universal Declaration of Human Right (UDHR) stated that:

"Everyone shall have the right to hold opinions without interference" and 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"

Wording under Article 19 of UDHR offers no restriction or rules regarding the means or medium of how such rights should function and be administered in an ideal democratic society. The lacuna under Article 19 of UDHR had given a leeway to unlimited access to opinions, ideas, medium on receiving and imparting information regardless if it is harmful to others.

In discovering the needs to protect the interest of other rights, special duties and responsibilities were included in the amendment of Article 19. In exercising such rights "certain restrictions when necessary for respect of the rights or reputation of others" or "for the protection of national security or of public order (order public), or of public health or morals" were implicated.

A similar spirit was adopted under Article 10 of European Convention on Human Right eventually giving mandate and references to states to regulate legal provisions relating to freedom of speech and expression which can cause harm to others. Legal provisions such as Section 18 of Public Order Act 1986⁴, Criminal Justice and Public Order Act 1994⁵, and Racial and Religious Hatred Act 2006 are examples of regulation that prohibits the expression of hatred towards individual or groups on account of that individual's colour, race, disability, nationality, ethnic etc. Any intended communication which promotes threatening or abusive, harassment, alarming or distressing particular individuals may subject to punishment of fine, imprisonment or both.

Legal Theorist's Opinion

Legal theorist's view differs with two (2) distinct stream of interpretation regarding the discussion of freedom of speech and expression and hates speech. Advocates of the first stream believe that hate speech should be included in the right of free speech and expression. The importance to justify hate speech into the right of free speech depends on several grounds that is a discovery of truth, for the livelier apprehension and personal development, and democratic participation.

Discovery of Truth.

The very first justification to includes hate speech into Freedom of Speech is that the discussions of idea and argument that will promote truth. Usually, such speech is practiced in a free trade market where a speaker will communicate with a group of audiences. It has always been used as a medium for comparing and contrasting arguments, ideas and opinions.

⁴ Public Order Act 1986 s.18

⁵ Criminal Justice and Public Order Act 1994 s.4A

Possible participants in the trade of speech consisting of a speaker, audiences, and bystander. Where the speaker provides with his opinion as communication and the audience and bystander will evaluate and challenge the speaker's idea (Thomas Scanlon, *A Theory of Freedom of Expression: Philosophy and Public Affair*, Vol 1 & 2 (1972) p. 204-206). In other words, Thomas Scanlon proposed that in order for speeches, change of ideas and proposing an opinion, a speaker should be tested and challenged with arguments and critics from the audiences and evaluated by bystanders.

Livelier Apprehension and Personal Development.

The only way to apprehend the truth in a livelier way is by confronting or be confronted by people who dispute our beliefs. Such justification can be met only if the speaker or presenter give the opportunity to audiences to critics his thoughts and views. The advantage is that the speaker will develop higher intellectuality and maturity as he can respond to public criticism spontaneously. The above argument was supported by Eric Barendt whereby he concluded that:

“Restrictions on what a man is allowed to say and write, or to hear or read, inhibit the growth of his personality. People will not be able to develop intellectually and spiritually unless they are free to formulate their belief and political attitudes through public discussion, and in response to the criticisms of others” (Eric Barendt, *Freedom of Speech Second Edition: Oxford University Press* 11 Aug (2005) p. 14).

Democratic Participation.

The third justification to include hate speech into Freedom of Speech is through Democratic Participation. Such speech demands the speaker's interest in providing his idea or opinion on public-political life matter. The essence of this type of speech offers the audience to hear the views of other, accepting and considering political views and preferences. To be operative, the opinion should be given a freedom from any restrictions by the government. Any rules or regulation, in other words, will only undermine the objective of such speech. To prove that hate speech is worthy to be included and safeguarded under Freedom of Speech, Cass R. Sunstein insisted that:

“Free speech is to be protected because it facilitates the democratic articulation, aggregation and balancing of interest, and is necessary if the people are to be able to decide for themselves the candidates they think most suitable for public officials should pursue. This argument links free expression with a ‘commitment to political equality’ and ‘belief in democratic deliberation” (Cass R. Sunstein, *Democracy and the problem of free speech* (1993) pp xvi-xvii).

The second stream view argued to the view of including hate speech into the right of freedom of speech and expression. Referring to Stanley Fish who agreed that hate speech may in some form be protected by the right of free speech, because of relevant benefits bestowed to the society. However, speech always seems to be crossing the line into action, where it becomes at least potentially, and consequential (Stanley Fish, *There Is No Such Things as Hate Speech, And That Is A Good Thing Too* (1994) p106). As such, if speech used as a medium of communication and it can cause harm, then speech must be considered a type of action requiring regulation.

The first stream supported and defended that the freedom of expression assume that speech occurs in a vacuum, free from situational context. The idea of discovering the truth as mention before that when a person speaks, she speaks her own ideas and should not be controlled, without worrying what other will thinks about it. However, the second stream disagrees with this view which erroneous on two (2) grounds:

- a) That the speaker does not speak from a place that is vacuum and context-free because every topic in life has its own context. Thus, every speaker brings that context to her speech.
- b) Speech can only be meaningful if someone hears it which eventually be affected by the context of his life.

The second stream also believes that societies that tolerate hate speech institutionalized that form of harm. As hate speech has the potential to be the root cause of violence, it is hard to understand why one person's or group's right to freedom of expression should trump the right of a group not to have hateful things said about them. The reason being is that; why should the rights of the hater be held above those of the victims of hate speech?

Now let us examine 3 most popular types of hate speech that can cause harm and should not be tolerated.

Targeted Vilification.

The first type of hate speech is targeted vilification. This is the kind of speech that focused at precise individuals or small groups with the intention to harm and insult the audience physically. According to Kent Greenawalt, such speech includes the attempt of the speaker to select the wording consciously for the potential harm and insult the audience. The primary objective is not to wound, although they may be aware that effect will happen and may even welcome it (Kent Greenawalt, Free Speech in US and Canada (1992) p.17).

On the other hands, Susan J. Brison added that speech that vilifies individuals or group on the same basis and which is either face to face or non-face to face vilification manifested through verbally or in writing. In other words, speech that vilifies either face to face or non-face to face may include any writing communication with threatening words and actions or gestures vandalism of public or private property. (Susan J. Brison, The Autonomy Defense of Free Speech Vol.108, No 2 (1998) p.312 -339). The context and the content of the targeted vilification speech features may comprise:

- “i) The speech does not usually qualify adequately as an assertion of fact, evaluative opinion or even a valid political preference. It usually based on false accusations.
- ii) Speaker argues that non-racist is privileged over racists and clashes with the rights of others to be equally autonomous.
- iii) It does not encompass the essence of the rights nor it promotes the interest that the right seeks to.”

Diffuse Vilification.

This is the second kind of Hate Speech that focused at a responsive or of mixed opinions but larger audience than targeted vilification but nonetheless has the same intention. The context and content usually intended to cause greater emotional distress and may function as a root cause of violence. The use of symbols or banners with groups specific insult and intimidating.

In Harry Hammond⁶ case in 2001 for example, whereby the accused speech involved "Jesus is alive, stop immorality, stop homosexuality, stop lesbianism." Such speech was decided as a speech which intended to cause greater emotional distress among LGBT group members. In this case, the accused was convicted and was fined 300 pounds. It must be noted that the case was decided as such before the amendment under Section 29A of Racial and Religious Act 2006⁷.

In Malaysian experience, diffuse vilification can be shown through hate speech and racial insult made by the Democratic Action Party (DAP) broadcasted by the Chinese to the Malay society in Kuala Lumpur on 13 of May 1969⁸. The context and content that cause greater emotional distress function as a root cause of violence. This was made through gestures of sweeping with a broom and insulting words such as "Malay get out from Kuala Lumpur" and "Malay can go to die, this is our country now" etc. by DAP member.

The gestures and insults speech made soon after their candidates won most of the parliamentary position in 1969 Malaysian General Election had triggered racial insults to the Malay community in Kuala Lumpur and Selangor. Such insults had invoked a chain reaction between Chinese and Malay Community until the first racial killing had occurred at a cinema where a group of Chinese killed over 50 Malay audiences after warning in Chinese language had been given through the cinema's screen (The National Operations Council. The May 13 Tragedy: A Report. Kuala Lumpur: The National Operations Council, 1969)⁹.

Harmful Assertion of Facts

Basically, the assertion of facts and evaluations are kind of speech that protected the Rights of Speech. The characteristic of this speech which specifically concentrated on a discovery of truth, audiences' autonomy assertion of facts and democracy justified such speech although it attacks specific racial and religious issue. However, such assertion of facts and evaluation still may produce significant harm if the facts and evaluation fall short of proof or false accusations. Especially when the assertion of facts and evaluation includes denigratory speech associating with some racial and religious believer with criminality or disease i.e connecting all Muslims with violence and brutality of ISIS.

Another classic example is that when the Dutch politician Geert Wilders was temporarily barred from entering Britain as a "threat to public policy, public security or public health" because he made a movie that called the Koran a "fascist" book and

⁶ Harry John Hammond v DPP (2004) EWHC 69.

⁷ Racial and Religious Act 2006, s.29A.

⁸ The National Operations Council. The May 13 Tragedy: A Report. Kuala Lumpur: The National Operations Council, 1969.

⁹ Report made by the Director of Operation, Malaysia National Security Council Tun Abd Razak, The Deputy Prime Minister of Malaysia in 1969.

described Islam as a violent religion (Micheal W. McConnel, You Can't Say That, The Harm in Hate Speech by Jeremy Waldron: Sunday Book Review (2012) p.Br 14).

Effect of Hate Speech in a Multiracial Democratic Society

The effect of hate speech which can cause harm specifically involve racism and racial sentiment remain one of the most dominant methods through which injures dignity and self-regard of the person or group to whom it was addressed. In this part of the essay, we shall examine harm that caused by hate speech particularly racial speech insult and racism to the victim and to the society. The argument will show that why hate speech should not be tolerated in a free multiracial democratic society such as Malaysia.

The effect on the Victims.

The psychological harm caused by hate speech based on racial stigma is much more severe than other types of harm. It is considered as the most fruitful causes of human misery. The effect can be much more severe to the minority. They may be the victim of racism or racial insult and the impact is that minority may come to believe the frequent accusations that they are lazy, ignorant, dirty and superstitious (Richard Delgado, Words That Wound (1982¹⁰) Vol 17 p.137).

The chain reaction to the psychological responses as the result of hate speech based on racism or racial insult is that victim feels humiliation, isolated and self-hatred. They feel unusual or abnormal to feel themselves ambivalences about self-worth and identity. Such ambivalence arises from the individual awareness that they are falling short of societal standards.

The psychological effect of hate speech based on racism does not stop there. It may also cause a chain effect that resulted from mental illness and psychosomatic disease. As the result of severe emotional distress, the victims always turn to react seeking escapism especially through alcohol, drugs, and experience anti-social behavior (Laura Beth Neilsen, The Case for Restricting Hate Speech (2017) para 7). If it is not treated, or inconsistent treatment by other to minority groups will result from a continuing psychological stress, strain, and frustration. Such social diseases caused by hate speech were also faced by and among minority group member of high socioeconomic status. The minority group of high socioeconomic status felt regret for being born and originated from their race (Richard Delgado, Words That Wound (1982) Vol 17 p.138).

Apart from that, parent's practices among the minority especially upon their children are affected by the effect of hate speech particularly based on racism. Parents will fail to raise confidence, achievement orientated and emotionally stable children (Richard Delgado, Words That Wound (1982) Vol 17 p.139). Racism and racial labelling as the result of hate speech on the other hands have the even greater impact on children than on adults. For example, the majority children learn to associate dark skin with undesirability and ugliness. Similarly, the minority will assimilate themselves as falling

¹⁰ Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets and Name Calling, Published in the Harvard Civil Rights-Civil Liberty Law Review Vol 17 (1982).

short of society standard and feels self-hatred because of their dark skin colour (Richard Delgado, Words That Wound (1982) Vol 17 p.142).

Racial stigmatization may undermine pecuniary interest to the minority. Victim of racism mostly had a fare poor in the employment setting. For example, between black and white, the black exhibited defeatism, half-hearted competitiveness and high expectancies of failure.

Career option for the victim of racism is closed off by institutional racism. This argument can be seen through the Malay youth opportunity career option in any Malaysian Chinese oriented company. Chinese prefer their own as an employee rather than the Malay because of the customs, language, and race. This can be shown through statistic of 22.1% call back rates for Chinese employment in Chinese owned company compared to the Malay with only 4.2% (Hwok-Aun Lee & Muhammad Abdul Khalid Discrimination of High Degrees: race and graduate hiring in Malaysia (2015) p.16).

The Effect on the Society.

Hate speech has always been used as a tool to convey racial issues in an abusive way. Racism is considered as a breach of the ideal egalitarian or the concept of "all men are created equal" (Richard Delgado, Words That Wound (1982) Vol 17 p.140). The failure of the legal system to prevent harms of racism or racial insults convey that egalitarianism is not fundamental and the respect of individuals is as a little importance. Thus, the breaches of egalitarianism ideal may demoralize people who prefer to live in harmony, democratic and equal society.

Racism contributes to a class system and subsequently injures career prospects, social mobility and interracial contacts of the minority group. This injury had assimilated into the economic, social and political mainstream of society. When racism is used as a tool to preserve an economically advantageous by the majority, the minority choose not to contribute because of anger, demoralized or they were prevented by a racist institution, society is seen as the loss as a whole (Richard Delgado, Words That Wound (1982) Vol 17 p.140).

Conclusion

As the conclusion, it is mutually accepted that Freedom of Speech and Expression offers citizen the medium to express their ideas, belief, sharing of information in a positive manner to achieve the benefits bestowed to the society. As I emphasized earlier in the introduction, Freedom of Speech and Expression is not final and absolute. It has on certain kind of speech to be controlled and regulated to prevent it from infringing other rights. What I mean is that as such right of Freedom of Speech is a fundamental right that delicate balance, a state must take charge in order to protect and support an individual's right insofar that individual does not infringe the rights of another person.

Nevertheless, the same medium to express their freedom is always been abused to achieve personal or group agenda. Such abused and misinterpreted expression either by words uttered or by actions can cause harm to individual person or groups in such

negative way outweigh any claim to freedom of speech and expression. It has been proven from experience that words uttered or expression by actions in depicted and derogatory ways may be the root cause of violence and prejudicial to a multiracial society that promotes peace and harmony. For this reason, I submitted that hate speech that promotes, prejudices or can cause harm should not be tolerated and declared unprotected under the law in multiracial democratic society.

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