

Where do we strike the balance between religious hate speech and freedom of expression?

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Recent international experiences with religious hate speech have proved the point once again that the right to freedom of expression is practiced in a highly selective fashion by many states. These experiences have also show that the dignity of some religions are more worthy of protection by the state than others, and that anti-hate speech laws have a history of being applied unequally. They also point to the impossibility of establishing objective tests transcending ruling elite interests, that determine in an even-handed manner which forms of speech should be punished and which should not. This is the strongest argument against promulgating legislation that outlaws advocacy of hatred: it is not and can never be a law of general application in the truest sense of the term.

On the whole, states tend to protect religions from hates speech attacks depending on their relationship to ruling political and economic elites. These protective measures also tend to be highly censorious of religious groups representing dispossessed groups, such as diasporas in European countries, whose speech is censored often because it threatens the political and economic (dis)order in these countries.

On a general level, the rise of identity politics in the context of globalisation has meant that religion has become a powerful mobilizing tool for and against state power: hence the growing alarm about the power of religious advocacy in the West, and the increasing measures to contain it. South Africa has a great deal to learn from the most recent experiences around advocacy of religious hatred, as there is a very real possibility that this trend towards unequal application will manifest itself here too.

In Russia, for instance, the Constitution protects the right to freedom of expression, but prohibits the incitement of religious strife. Rather than being used to protect religious minorities, a law prohibiting incitement to religious hatred has been used to suppress critical and dissenting views of artists. In Turkey, the Penal code provides for three years imprisonment for anyone inciting hatred on the basis of race, religion, or other factors. This code has been used against organizations and individuals advocating for Kurdish nationalism. In Central Asia, hate speech laws have been used to repress all forms of Islamist movements.

But the most recent examples of unequal application have taken place in Europe. At the same time that European governments were resisting calls to prevent the publication of the Danish cartoons on the basis of freedom of the media, right-wing British Historian David Irving was jailed for holocaust denial in Austria. This is considered to be a crime in many countries, and as an affront to the Jewish religion, leading to laws having been promulgated in many countries, including Austria, Belgium, Czech Republic, France, Germany, Israel, Lithuania, Poland, Romania, Slovakia and Switzerland. This is in spite of the fact that, as one constitutional law expert noted at Vienna University, 'It is so clear that the Holocaust existed that everybody who denies it is considered a fool'.

- ^{subjective} selective application of hate speech laws
- ~~objective~~ difficulties of definition.
- favours entrenched economic/political/~~states~~ religious powers
- used as tool of repression.

No doubt, all these countries do not have hate speech laws preventing other historians from making fools of themselves by denying events of great historical significance impacting on other religions. The fact that many of these countries refused to act during the cartoon controversy underscores the impression of selective censorship.

In Britain, at the height of the cartoon saga, Muslim cleric Abu Hamza was jailed for his utterances in London, for inciting murder and racial hatred. It should also be noted that the British authorities had been monitoring Hamza for some time, and acted against him only when the United States administration sought his extradition on terrorism charges. This fact alone calls into question the real motive behind his conviction.

The judgement itself points to the trickiness of incitement charges. Judge Hughes, who presided over the trial, was equivocal in his statements, noting to Hamza that 'You are entitled to your views and in this country and you are entitled to express them, but only up to the point where you incite murder or use language calculated to incite racial hatred. That is what you did.' Yet later on in his judgement he stated that : 'No one can say now what damage your words may have caused - no one can say whether any of your audiences, present or wider, acted on your words'. In making this comment the Judge disavowed one of the main reasons why inciting speech is often punished: that there is a causal link between words and violent deeds. So even the judge had to admit that this link could not be established conclusively.

The political motives underlying the case also need to be understood. Chancellor Gordon Brown welcomed the verdict and stated: "We've got to take action in the interests of both national security and defending the true Islam religion in defence of moderate Islamists as against extreme Islam", Brown told BBC News. So the British government used the case to send out a clear message to the Muslim community: we will promote what we consider to be an acceptable version of Islam, and any other version that challenges the establishment will be suppressed. Undoubtedly this will include versions that mobilize resistance to racism and other forms of social and economic exclusion of diasporas.

The reality is that in the current international political context, some religions are more equal than others: a reality that is shaped by the political and economic hegemony of US imperialism. US President George Bush was elected back to office by a strong right wing Christian lobby in a particular alliance with powerful Zionist interests. US foreign policy is based on maintaining control over strategic oil supplies and ensuring the hegemony of the dollar, leading to oil wars in countries like Iraq, its propping up of regimes in the Middle East as buffer states, including Israel. This international political environment has led to an inherent bias towards certain religions or theological interpretations of those religions (such as the ascendance of the Zionist interpretation of Judaism), and a denigration of other religious streams as 'other', outside mainstream civilization or as inherently violent, irrational or dangerous. Islam especially has become a target, given the fact that Muslims are present in large numbers on countries where the US is fighting its oil wars. The ascendance of the right in Europe has also created fertile ground for Islamophobia, which in turn was the context that gave rise to the Danish cartoons.

However, while this very international context has created the basis for victimized religious groups arguing for legislative restrictions on religious hatred, such restrictions may land up being used against the very groups who seek protection. This is because hate speech legislation is rarely, if ever, politically neutral; its content and implementation invariably reflect and reinforce political and economic power, and

cancel those without power or marginal groups. It also seems that religious hatred laws tend to be invoked when dominant religions are attacked, and ignored when less dominant ones are attacked.

Which way will South Africa go on the question of advocacy of religious hatred. Will it manage to transcend the inherently biased nature of hate speech censorship? While hate speech cases have not dealt with religion per se, there are trends emerging in how quasi-judicial tribunals such as the Broadcasting Complaints Commission of South Africa (BCCSA) and the South African Human Rights Commission (SAHRC) are interpreting complaints of hate speech. Their approach, it would seem, has been to consider the right to freedom of expression clause narrowly while giving wider meaning to the hate speech provision including a broadening of concepts such as 'harm' beyond its physical parameters.

Interestingly, those who have found themselves facing accusations of hate mongering are by and large black people, while in an ironic twist of justice, perpetrators of hate-motivated crimes have largely been white people. From 'Amandiya' to 'Kill the Boer, Kill the Farmer' and Landless Peoples' Movement National Organiser Mangaliso Khubeka's statements, a trend has emerged where the hate speech clause is being used to censor rhetoric challenging the continued existence of enclaves of economic privilege. For instance, in its judgement on chanting of the 'Kill the Boer, Kill the Farmer' slogan at Peter Mokaba's funeral, the HRC found in an appeal hearing that the chanting of the slogan in context was hate speech. This was found based on the argument that 'harm' extends to include psychological harm that may be caused to – in the words of the SAHRC – 'minorities or vulnerable groups'. The SAHRC found that '...there can be no doubt that the slogan, given its content, its history and the context in which it was chanted, would harm the sense of well being, contribute directly to a feeling of marginalisation, and adversely affect the dignity of Afrikaners'.

Given these recent experiences with the hate speech clause, there is reason to believe that South Africa will not escape the sorts of contradictions described above when it comes to proscribing advocacy of religious hatred. It is very possible that bias may creep in where religions with access to political and economic power may receive greater protection than those that don't. These problems call into question whether s16(2)(c) of the Constitution should even be there, as it does not seem to lend itself to an objective interpretation.

In conclusion, it may be worth recounting an incident that took place at an FXI event on media/ government relations several years back. When asked if the slogan often associated with the Pan Africanist Congress, 'one settler one bullet' should be banned, government communicators to a person said that it should. But when asked whether 'Kill the Boer, Kill the Farmer', often associated with the ANC, should be banned, one government communicator commented 'that's not hate speech, that's poetry'. Therein lies the problem; one person's hate speech can be another person's poetry. Whether something is defined as hate speech or poetry may well be determined by who has access to power and who doesn't, and access to power is still very unequal in South Africa. Groups who feel marginalized or attacked, including religious groups, therefore need to think very carefully before calling for strong incitement to hatred legislation; there is strong reason to believe that such a call may backfire on the very groups seeking its protection.