The harms of hate speech legislation

Hate speech legislation chills freedom of expression more than it protects vulnerable minorities. Free speech lawyer Ivan Hare takes issue with Jeremy Waldron.

As should be clear from my subtle choice of title, I oppose legislation prohibiting hate speech. I do so for reasons of principle and pragmatism. Before I address them, I would like to say something about Principle 4.

I assume that in referring to speaking “openly”, Principle 4 is not intended to discourage people from expressing themselves about human difference figuratively or through their dress or conduct or in private. I shall assume that it means that when we engage in public discourse, we should do so with civility. Similarly, I see no reason why Principle 4 should be confined to speech about human difference. Why shouldn’t we express ourselves civilly whenever we wish to engage with others in a public forum? Subject to those clarifications, I would endorse Principle 4 as a useful guide to expressive behaviour in public.

However, it is clear from Timothy Garton Ash’s commentary and Jeremy Waldron’s response to it that we are taking about much more than a guide to behaviour. Some would advocate giving effect to this norm not just through legislation but also through criminal prohibition in the form of laws

against hate speech. To do so would be an error as the hate speech laws in existence in large parts of Europe and Canada are contrary to the free speech principle at a fundamental level.

The most convincing justification for free speech is that it is essential to our ability to engage in democratic self-governance. That is, our right to participate in the debates on issues of public importance that affect us all. Debates about race (such as immigration, accommodation, assimilation and so on) are central to public discourse in most modern democracies. To prohibit the expression of strongly worded and provocative views on the subject of race through hate speech laws deprives those speakers and their audience of their right to participate fully in that public discourse.

It is no answer to say that the speaker can re-phrase their contribution in more “civil” terms and avoid liability. The topics covered typically by hate speech laws (race, religion, homosexuality) engender strong emotions and speakers should be entitled (as in other areas of public debate) to express themselves forcefully. In any event, how can those misguided enough to assert the superiority of one race over another or the wickedness of homosexuality do so without inciting hatred against the criticised group?

Of course, the right to participate in public discourse is not absolute and if a speaker steps over the clear boundary between forceful advocacy of his views and incitement to criminal activity, the law can legitimately punish him. Equally, this right applies to public discourse, not to face-to-face verbal attacks for intimidation.

I say no more here of the pragmatic difficulties that such laws always present save that prosecutions under hate speech laws provide vastly wider dissemination for the very speech that supporters of such laws are seeking to suppress and clothe the otherwise solitary and pathetic purveyor of hate with the lustre of free speech martyrdom. In contrast, exposure to public scrutiny has a powerful tendency to reveal the absurdity of the views advanced by most purveyors of hate.

What of the positive case for such laws?

Professor Waldron appears to argue that hate speech legislation is a way of protecting vulnerable minorities from offence and damage to their dignity and collective reputation. Superficially, that is an attractive argument. Most of us who engage with this sort of forum will have little sympathy with views condemning homosexuality (such as those espoused by the Westboro Baptist Church in the photograph used to illustrate Professor Waldron’s response) or the white supremacists who burn a cross on the lawn of the only black family in the neighbourhood. However, that is not how legislation on hate speech works: it does not prohibit incitement to hatred against minorities, but against anyone on the basis of certain characteristics such as their race. As such, it is just as likely (and, experience shows, more likely in fact) to be used *against* members of ethnic or other minorities who express themselves forcefully about members of the majority population. If Professor Waldron’s aim is to protect vulnerable minorities from vilification, hate speech legislation

in the form which exists in most of Europe and Canada is a crude and ineffective tool.

In any event, liberal legal systems do not generally protect the rights of groups to vindicate their reputations by law and for good reason. What does it mean to say that I have an actionable right to vindicate the reputation of the group to which I belong in addition to my personal reputation? Is comment by people who belong to the criticised group to be punishable too? How can the concept of group defamation sensibly be applied to hate speech on the subject of religion (also referred to by Professor Waldron) where adherents necessarily expressly or impliedly assert the inferiority of other belief systems? In any event, any remedy for group defamation would (at least in the common law world) involve the civil law and not criminal prohibitions on hate speech.

As for arguments based on human dignity, there is little doubt that this interest underlies much of our human rights doctrine. In the context of hate speech, the right to dignity becomes the right not be offended or insulted. The difficulty with this is that we have no fundamental human right not to be offended in public discourse and it is a good thing that we do not. The law did not protect the dignity of the white supremacist deeply offended by the message of racial equality and de-segregation advocated by the civil rights movement in 1960s America and nor does it now shield the religious zealot sickened by the evolutionists' claim that his children are descended from primates. The effect of Professor Waldron's argument is to privilege what is no more than an interest (and a very nebulous one at that) over a fundamental right: the opposite of what human rights protection usually seeks to achieve. This also explains why Professor Waldron's analogy between hate speech legislation and environmental laws is flawed: the polluter is not exercising a fundamental right, but the contributor to public discourse is.

For these reasons (and many others), I welcome Principle 4 for what it is: a principle. To seek to enforce it by law, however, is a dangerous escalation which damages our fundamental rights and undermines the openness of public discourse.

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