Limits to the Freedom of Expression about the Past

Negotiating the Delicate Boundary between History and Hate Speech

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Freedom of expression is a cherished right but, unlike the right to opinion, it is not absolute.

Article 19(3) of the ICCPR: general limits which States may impose.

Article 20(2): specific limits which States must impose, including hate speech.

Historians, like everyone else, must respect (legitimate) limits.
The Boundary Issue

- Title – delicate boundary – may seem odd
  - Search for truth vs. vile attack on a group
- Professional historians – seeking the truth about the past – will not even approach the boundary
- But, can be complicated to identify boundary:
  - Racists can dress up their anti-social rhetoric in historical garb
  - Repressive States abuse hate speech to control historical narrative: defamation and false news laws weapons of choice but hate speech also part of arsenal (Turkey)
  - Emergence of “citizen historians”, much like citizen journalists; lack professionalism, may promote (‘like’) racist statements
Definitions

- **Hate speech**: used to be synonymous with Article 20(2) of the ICCPR (speech States must ban) but even UN has been migrating to new (illogical?) definition
  - Merit to having compendious term for what must be banned
  - Scope under international law reasonably clear

- **Racist speech**: negative stereotypes which fall short of hate speech; not just racism

- **Disinformation**: intentionally inaccurate statements

- **Misinformation**: unknowingly inaccurate statements
Restrictions

- Article 19(3) three-part test (must pass all 3 parts):
  - Provided by law: clear and accessible (notice of what is prohibited, not allocate discretion in application)
  - Legitimate aim: rights or reputations of others, national security, public order, public health, public morals
    - Exclusive list; primarily directed at that aim
  - Necessary (main part in practice)
    - Rationally connected: carefully designed, least intrusive means
    - Impair as little as possible; not overbroad
    - Proportionate: balance between protection and harm to speech; also applies to sanctions
Restrictions, cont’d

- Article 20(2): Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

- Five primary elements:
  - Advocacy: understood as intent
  - Hatred: not just racism; strong emotion; opprobrium, enmity
  - Nationality, race or religion: legitimate to extend to similarly placed (historically disadvantaged) groups
  - Incitement: inchoate (does not need to be successful); but courts assume at least hostility
  - Hostility, discrimination, violence: latter two defined and legally prohibited in most countries (incitement to crime); hostility actually protected as an opinion
Intent

- Four criteria: intent; content; audience; context
- Clear requirement – read into “advocacy” – imposed repeatedly by courts
  - E.g. Faurisson: upheld conviction but concerned that law did not link liability to intent
- Should at least be intent to promote hatred or racism
- Implications for historians:
  - Intent key dividing line between genuine historical research and racist revisionism
  - Easy to share messages, including hateful ones; being irresponsible does not constitute intent
  - This does not mean that historians should be unprofessional
Goes to several of the five elements of hate speech (e.g. may show intent, whether there is incitement)

Proof of truth key issue; e.g. defence in Canada

Truth key underlying rationale for free speech

Position not entirely established under international law
- Some courts have noted that if truth promotes hatred this is because of the underlying social environment
- But courts have relied on falsity, especially notorious falsity, as evidence of intent

Convention on discrimination bans superiority ideas
- Controversial since also reflect positive social group values
- In practice Committee accepts positive group values
Content, cont’d

- Jersild: do not need to formally distance yourself from racist statements you cite
  - But also cannot adopt or endorse them
  - His goal was to expose racism; similar to historical goal of exposing truth

- For historians:
  - OK if you are successful in exposing truth, but not if you make a mistake
  - OK to quote hate speech; probably enough not to endorse it
Audience

- Clearly relevant to issue of incitement
  - Look at factors like size and nature of audience and influence of speaker over it
- Ross: teacher removed from classroom; OK due to impressionable nature of kids
- Jersild: well-informed audience, serious programme
- For historians:
  - Difference between an academic publication and a tweet
  - Even for the latter, depends on who follows you
Wider Context

- Especially relevant to incitement; may provide evidence of intent
- “Shouting fire in a crowded theatre”
- Faurisson: Holocaust denial had become an established vehicle for anti-Semitism; not just denial of facts but role in promoting hatred
- Turkish cases:
  - Zana: former mayor, town in SE Turkey, at time of attacks
  - Incal: different, Izmir, limited violence, local activist
- Historians: cannot change context but if sensitive then perhaps be even more academically rigorous
Holocaust/Genocide Denial Laws

- Quite a lot of the legal cases involve this
- Disputed issue: no court has ruled it out
  - Goes to issue of notorious falsity and intent
- Garaudy: focused on intent; did not look at actual risk of incitement
- General Comment 34: rules this out
- EU Council Framework Decision: punish denying/trivialising genocide ... if likely to incite
  - Essentially brings it back within scope of Article 20(2)
  - Balance: ban denying genocide where it is hate speech
- Faurisson: cases where right to be free of discrimination goes beyond strict scope of Article 20(2)
False News

- Not legitimate to have a blanket ban despite massive growth in mis- and disinformation and harm they cause
  - General Comment 34, 2017 Joint Declaration
  - But OK if linked to a specific harm: defamation, perjury
  - Focus instead on reliable speech: access to information, States disseminate accurate information

- Question of hate speech status of opinions (not facts)
  - OK if could (not should) honestly be held by fair-minded person based on available facts
Historians should expose the truth, no matter how uncomfortable or what the consequences may be. Various moral, social or professional obligations in difficult cases may apply. Legally, it is OK if the actual goal (intent) was to expose the truth, even if the target was missed, especially if the work is professional. However, hate speech dressed up as historical research will not be protected.
Conclusion

Look forward to questions and debate

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