HATE SPEECH BILL, DEAD ON ARRIVAL FOR UNCONSTITUTIONALITY*

Abstract

In recent time, no issue or legislation in Nigeria has generated severe criticism and public outcry than the introduction of Hate Speech Bill on the floor of the National Assembly. Hate Speech is a matter of great dispute and argument globally, although the standards on this under international law are in fact reasonably developed. International law equally requires States to ban certain speech on the basis that it undermines the right of others to equality or to freedom from discrimination and occasionally also on the basis that this is necessary to protect public order. Given the fact that freedom of speech and expression belongs to the group of fundamental human rights of every person and as contained in the Constitution of Nigeria, the bill on hate speech is a denial to freedom of speech. This is because the logical implication of hate speech bill is that without the freedom to offend through speech, freedom of expression ceases to exist. Open and robust public discourse without fear of prosecution serves as a fundamental check on governmental powers which hate speech seeks to repress. Freedom of speech reinforces all other human rights, thus, allowing society to develop and progress at a constant rate. The ability to state our opinion and speak freely is pivotal for any change in the society. However, a bill or law which unnecessarily restricts free speech and which can be adopted to redress dissenting voice in any nation would always have far reaching consequences for the growth of democracy. The work adopted the doctrinal method of data collection and relied on substantive statutory provisions, case laws, and published books to examine the unconstitutionality of the proposed hate speech bill in Nigeria and the consequences the passage of hate speech bill would bear on the Nigerian populace.

Keywords: Hate speech, Unconstitutional, Dead on arrival, Nigeria

1. Introduction

Traditionally, Hate Speech is not expressly linked to the basic limitation to freedom of expression under the Constitution of Nigeria and other international statutes. Whatever the semantic, ‘hate speech is more of a repression to freedom of expression. It is conceptually undemocratic. By its provisions, it is totalitarian, autocratic, despotic and a threat to human right provisions in the Constitution. Hate Speech can broadly be defined as a speech that antagonizes or marginalizes people based on their identification with a particular social or demographic group. Going by this definition, it appears that there is no difference between defamatory laws of libel and slander with hate speech. It has equally been seen as a type of discriminatory speech that arises when people from different social, ethnic or religious groups interact with one another or when one of such group asserts its power over others. Simply put, Hate Speech is defined as a bias-motivated, hostile, malicious speech aimed at a person or a group of people because of some of their actual or perceived innate characteristics. It expresses discriminatory, intimidating, disapproving, antagonistic, and/or prejudicial attitudes toward those characteristics, which include gender, race, religion, ethnicity, colour, national origin, disability, or sexual orientation. Hate speech is aimed to injure, dehumanize, harass, intimidate, debase,

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degrade, and victimise the targeted groups and to foment insensitivity and brutality against them. 2

The above conceptualization of ‘Hate Speech’ is contrary to s.39 (1) of the 1999 Constitution of Nigeria which guarantees freedom of expression as a fundamental right. This right to freedom of expression is also protected under the Universal Declaration of Human Rights and the various regional instruments and conventions on human rights, including the African Charter on Human and People’s Right 3. Freedom of speech is regarded as the first condition of liberty. The First Principles of a free society is an untrammelled flow of words in an open forum. It has been held that liberty to express opinions and ideas without hindrance and especially without fear of punishment plays significant role in the development of that particular society and ultimately for that state. It is one of the most important fundamental liberties guaranteed against state suppression or regulation. 4

Despite the conflict and express attack by hate speech bill on the Constitution of Nigeria, the Sponsor of the bill, Sen. Abdullahi Aliu Sabi (APC, Niger State) stated that the bill is aimed at ensuring the elimination of all forms of hate speech in the country. It defines hate speech as a comment that insults people for their religion, ethnic and linguistic affiliation among others and prescribes death penalty for certain offenders. It is against this backdrop that the work seeks to examine the unconstitutionality of the proposed hate speech bill in Nigeria and the consequences it will bring to bear on the entire Nigeria populace.

2. The Background and Unconstitutionality of Hate Speech Bill

Nigeria is a federation with multiple ethnic nationalities. Over the years, scholars have observed that there are more than 350 ethnic groups in Nigeria with Hausa, Igbo and Yoruba being the largest 5. Again, religious dichotomy between the Muslim and Christianity in Nigeria has degenerated into recurring violence, bigotry, chauvinism, political instability and social discrimination. It seemed however that the background of Hate Speech bill stems from thoughtful idea to create sustainable means of ensuring peaceful co-existence among Nigerians of divergent ethnic origin while also preserving diversity since the proposed bill intends punishing words or publication made to incite or stir up ethnic hatred.

On the other hand, a clear perusal on the actual provisions of the bill shows that it would infringe on the freedom of expression as enshrined in the 1999 Constitution if passed into law. Also, the laws of defamation and libel can effectively deal with the issues articulated in the bill, adding that the bill could be a ploy to gag the opposition of the ruling party in a Nigeria democracy. If the veil covering the practical intents of the bill is thrown aside, the extent of the executive powers in the president would be immeasurable and uncontrollable, thus, enthroning a despotic, autocratic and totalitarian leadership against the spirit of rule of law and constitutionalism in democratic state like Nigeria.

The hate speech bill defines hate speech as a comment that insults people for their religion, ethnic and linguistic affiliation, among others, and prescribes death penalty for certain offenders. Further, the bill

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3The Charter came into force in 1986
4Dheerendra, Paranjali ‘Freedom of Speech and Expression, India and America’. Whitehouse
proposed that ‘Any person who commits an offence under this section shall be liable to life imprisonment and where the act causes any loss of life, the person shall be punished with death by hanging’. It also proposes jail term of not less than five years or a fine of not less than N10 million or both for offences like harassment on the basis of ethnicity and racial contempt:
A person who uses, publishes, presents, produces, plays, provides, distributes and or directs the performance of any material, written and/or visual which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such a person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up against any person or persons from such an ethnic group in Nigeria.

It also seeks the establishment of a National Commission for the Prohibition of Hate Speech that would be saddled with the responsibility of discouraging persons, institutions, political parties and associations from advocating or promoting discrimination or discriminatory practices through the use of hate speeches; promoting tolerance, understanding and acceptance of diversity in all aspects of national life and encouraging full participation by all ethnic communities in social, economic, cultural and political life of other communities.

In the main, the proposed hate speech bill leaves so much to conjecture as to what strictly constitutes the speech, apart from those elements of speech that forms the law of libel and slander. Further, mere statement of facts may be adjudged as hate speech under the law whether or not the speaker intends to stir up ethnic hatred provided it can be reasonably inferred literarily from the body language of the speaker. This is in absolute disregard that not even the devil knows the intention of a man. The implication is that the proposed bill is dangerously restrictive of free speech, since the public may refrain from exercising their freedom of expression on important national issues for fear that their statements may be construed as stirring up ethnic hatred. It will also hinder constructive criticism of government policies by members of the public.

Instructively, Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) guarantees the right to freedom of speech and same admits of every limited restriction to the guaranteed freedom of expression. The section provides as follows:

39(1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:
Provided that no person, other than the Government of the Federation or of a State or any other person or body authorized by the president on the fulfillment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose or whatsoever.

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society
(a) for the Purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephone, wireless broadcasting, television or the exhibition of cinematograph films; or
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(b) imposing restrictions upon persons holding office under the Government of the Federations or of a State, member of the Nigeria Police Force or Other Government security services or agencies established by law.

Juxtaposing the proposed Hate speech bill with s.39 of the 1999 Constitution, one has to discern that protecting substantive equality among human beings, including freedom of discrimination is a fundamental idea in human right and this is reflected in the very first article of the Universal Declaration on human Rights (UDHR), adopted by the UN General Assembly in 1948\(^6\) which states: ‘All human beings are born free and equal in dignity and rights’. The second article of the UDHR provides for equal enjoyment of the rights and freedoms proclaimed, ‘Without distinction any kind such as race, colour, sex,…, and several other articles refer explicitly to the equal enjoyment of various rights’. Therefore, s.39 of the Constitution of Nigeria, 1999 and other international and regional statutes have already covered the scope which the proposed hate speech seeks to govern. It suffices to say that the rights to freedom of expression is a fundamental human right which finds protection in all human rights system, as well as in national constitutions. At the same time, it is not an absolute right and it may be limited to protect overriding public interest, including equality and public order. International law contains a number of provisions which provide a framework for balancing freedom of expression against these other interests in a particular context of hate speech.

Article 19 of the Universal Declaration of Human Right (UDHR) guarantees the right to freedom of expression, including ‘seeking, receiving and imparting information and ideas through any media regardless of frontiers’. The first international treaty to deal directly with the issue of hate speech was the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), adopted by the UN General Assembly in 1965\(^8\). Its provisions are not only the first to address hate speech, but also by far the most far-reaching. It is probably useful to distinguish four aspects of the hate speech obligation provided for in International Convention on the Elimination of all Forms of Racial Discrimination(CERD), found in its Article 4(a):\(^9\)

1. dissemination of ideas based on racial superiority
2. dissemination of ideas based on racial hatred
3. incitement to racial discrimination: and
4. Incitement to acts of racially motivated violence

Article 4 (c) also calls for prohibitions on public authorities or institutions promoting or inciting racial discrimination, illustrating the particular evil of public officials and bodies engaging in racist activities. International Convention on the Elimination of all Forms of Racial Discrimination (CERD), by virtue of its focus on racial discrimination, does not guarantee the right to freedom of expression. However, Article 4 does require that any measures taken to implement it have due regard for the principles set out in both the Universal Declaration on human Rights (UDHR) and Article 5 of CERD, which provides for the equality

\(^6\)General Assembly Resolution 217(3), 10 December 1948.
\(^7\)Article 7 provides for equality before the law, Article 10 for equality in public hearings and Article 21(2) for equal access to public service.
\(^8\)General Assembly Resolution 2106A (XX), 21 December 1965, entered into force, 4 January 1969. There were 173 Parties and six additional signatories to the ICCPR as of 11 February, 2010.
\(^9\)In its General Comment No. 15 of 23 March 1993, the CERD Committee refers to four categories.
before the law in the enjoyment of a large number of rights, including freedom of expression. Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966, guarantees the right to freedom of expression as follows:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impact information and ideas of all kinds, regardless of frontiers, either orally or in writing or in print in the form of art or through any other media of his choice.

Article 19 (3) of the ICCPR permits limited restrictions on freedom of expression where these are (a) provided by law; (b) for the protection of one of the legitimate interest listed; and (c) necessary to protect that interest. The ICCPR places an obligation on States Parties to prohibit hate speech in rather different terms than CERD. Article 20 (2) provides: Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. All of the three regional human rights treaties—the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Right (ACHPR)—guarantee the right to freedom of expression, respectively at Article 10, Article 9 and Article 13. These guarantees are largely similar to those found in the ICCPR. Perhaps surprisingly, only the ACHR specifically provides for the banning of hate speech at Article 13 (5) as follows: Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language or national origin shall be considered as offenses punishable by law.

3. Determination of what Constitutes Hate Speech

It is often very difficult to ascertain speech that is purely a hate speech. Outright ban or conditioning of speech is a breach of freedom of expression constitutional guaranteed in both national and international statutes. An interesting question is whether Article 19 (3) would permit restrictions on hate speech beyond the scope of what Article 20 (2) requires. Theoretically, this is possible: what States are required to ban to ensure equality is not necessarily the same as what they are permitted to ban to serve this goal without breaching the right to freedom of expression. At the same time, the drafting history of Article 20 (2) suggests that there was little scope for extending its provisions while still respecting Article 19. Proposals to restrict Article 20 (2) to incitement to violence were rejected, but so were proposals to extend it, for example to include ‘racial exclusiveness’ on the basis of concern about free speech. This suggests that the obligations of Article (20) (2) are either identical or extremely close to the permissions of s. 19 (3). However, in Faurisson v. France, it was held that there may be circumstance in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where…statements that do not meet the strict legal criteria of

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10 Article 5(d) (viii).
11 General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 4 January, 1976. There were 165 Parties and several additional signatories to the ICCPR as of 11 February, 2020.
incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement even though their effect may be as pernicious as explicit incitement, if not more so. This can be understood as a call for an extremely narrow and precise interpretation of incitement in Article 20 (2), alongside a recognition that there may be special cases where statements which do not fall within the scope of this narrow interpretation may still legitimately be prohibited because, in context and alongside other statements, they in fact constitute a pattern of incitement. Alternately, their point could be understood as a comment on the proper interpretation of incitement, rather than going outside of the boundaries of Article 20 (2), per se. Either way, the analysis confirms that Article 19 (3) and Article 20 (2) are legally contiguous or very nearly so.

4. Key Elements of the Offence of Hate Speech

Intent

Clear reading of Article 20(2) of the ICCPR and Article 13(5) of the ACHR implied intent requirement for only statement made with the intent of inciting hatred while Article 4(a) of CERD does not. This intent requirement in hate speech crimes is illustrated clearly in *Jersild v Denmark*, where Jersild, a journalist had been convicted for a television programme which included hate speech statement by racist extremists, although the purpose of the programme was really to expose racism in Denmark. The Committee on the Elimination of all Forms of Racial Discrimination (CERD Committee) was divided in its response, stating in its report to the UN General Assembly: Some members welcomed this decision as the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression. Other members thought that in such cases the facts needed to be considered in relation to both rights. The European Court of Human Rights, by a clear majority but a unanimous decision, held that the conviction by the Danish Courts was a breach of Jersild’s right to freedom of expression. The Court took into account the fact that the statements were made in the context of a serious programme intended for an informed audience and dealing with social and political issues. It also relied heavily on its finding that Jersild’s purpose or intent was not to promote racism but, on the contrary, to expose and analyze it, stating: An important factor in the Court’s evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas. In a concurring opinion in *Faurisson*, Evatt, Kretzmer and Klein expressed concern that the law pursuant to which the author of the complaint was convicted did ‘not link liability to the intent of the author’. However based on the facts, the Committee decided that Faurisson had clearly been motivated by a desire to promote racism and as a result, the conviction in that particular case was legitimate. In the light of these cases, the lack of an intent requirement in CERD presents a clear and problematical conflict with the right to freedom of expression.

Incitement

As for incitement, Article 7 of the UDHR, Article 20(2) of the ICCPR and Article 13(5) of the ACHR apply solely where incitement is present. Also, two of the four relevant provisions in Article 4(a) of CERD

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16 Application No 15890/89
require incitement, but the other two prohibit the mere dissemination of certain ideas, namely those based on superiority and racial hatred. The question of what constitute incitement is very controversial and complex. Even in international law, it lacks precise definition. In order to define incitement, International Courts focuses on the nexus between the statement and the proscribed result, and issues such as causation and context.

Causation
It is clear that inciting an act is not the same thing as causing it. At the same time, international courts often look for causation related factors when assessing whether speech incites hatred. In the case of Ross v. Canada, a teacher was removed from the classroom for his anti-Semitic/Holocaust denial publications. The Supreme Court of Canada noted the evidence that a ‘poisoned environment’ had been created within the relevant school board and held that ‘it is possible to reasonably anticipate’ the causal relationship between that environment and the author’s publication. The HRC held that this satisfied the necessity part of the test for restrictions on freedom of expression and that, as a result, there was no breach of this right. In at least one case from Turkey involving allegations of hate speech, Erbakan v Turkey, the European Court of Human Rights found a breach of the right to freedom of expression on the basis that the impugned statements did not create an actual risk of harm, stating: ‘It was not established that at the time of the prosecution of the applicant, the impugned statements created an ‘actual risk’ and an ‘imminent’ danger for society or that they were likely to do so’

Context
Context is unarguably the greatest importance in assessing whether particular statements are likely to incite to hatred-as it may have a bearing on both intent and causation-and many of the hate speech cases refer to contextual factor. In Faurisson, for example, the HRC noted a statement by the, ‘then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism.’

The concurring opinion by Evatt, Kretzmer and Klein also referred to this problem, stating:

The notion that in the conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-Semitism cannot be dismissed. This is a consequence not of the mere challenge to well documented historical facts, established both by historians of different persuasions and backgrounds as well as by international and domestic tribunals, but of the context, in which it is implied, under the guise of impartial academic research, that the victims of Nazism were guilty of dishonest fabrication, that the story of their victimization is a myth and that the gas chambers in which so many people were murdered are ‘Magic.’

Similarly, in Ross, the HRC in line with decisions at the national level, was very sensitive to the contextual fact that the author had been a teacher: ‘In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities, which are inherent in every enjoyment of this right, are, inter alia, the duty to respect the rights and freedoms of others, the duty to act with due consideration of public order and morality, and the duty to act with due concern for the reputation and dignity of others.’

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22Ross v Canada (1996) 1 S.C.R. 825 Para. 101
23(2006) Application NO.59405/00 Para. 68.
responsibilities are of particular relevance with the school system, especially with regard to the teaching of young students.\textsuperscript{24}

**Proscribed Results**

Different international rules call for the prohibition of statements inciting different proscribed results. Article 13 (5) of the ACHR is limited to incitement to violence or similar illegal actions. Both Article 20(2) of ICCPR go beyond that to additionally cover incitement to discrimination and hatred (or hostility). Article 4(a) of CERD goes even further calling for the prohibition of all ideas based on superiority. Be that as it may, there have been numerous academic attempts to distinguish hate speech from merely offensive speech. One line of reasoning, which is helpful at least conceptually, is to distinguish between expression targeting ideas, including offensive expression targeting ideas, including offensive expression which is protected and abusive expression which targets human beings, which may not be protected. In *Giniewski v France*\textsuperscript{25}, the European Court of Human Rights seemed to support this approach, holding that the impugned speech was not a gratuitous attack on religion but rather, part of a clash of ideas.

5. Conclusion and Recommendations

Majority of the decided cases above recognized the complexity that there cannot be application of hate speech law without breaching the right to freedom of expression. So, the proposed hate speech bill is highly undemocratic and undesirable as whatever usefulness it may have in curbing hate speech, ethnic hatred and discrimination is outweighed by the overriding need to protect the sacrosanct freedom of expression which the proposed law may likely repress. If the law is passed, it may present a very gloomy picture for democracy as same may be a ready tool that may easily be adopted to silence dissenting opinions and constructive criticism that may encourage inclusiveness. Ethnic hatred is essentially caused by lack of knowledge and the best way to curb it is by enlightenment and not by a legislation that infringes on right to freedom of speech. It has aptly stated that instead of focusing on ways to censor hate speech, Nigeria should concentrate on answering such speech with more enlightenment speech. The battle against intolerance cannot be won through government regulation or mere legislative action. It is a fight that will be won or lost in the competition of ideas.\textsuperscript{26}


\textsuperscript{25}(2006) Application No. 64016/00 Para 50.

\textsuperscript{26}The Media Freedom Internet Cook Book: Vienna. OSCE, 2004. Pp21-22