

COUNTERACTING HATE SPEECH AND THE RIGHT TO FREEDOM OF EXPRESSION IN SELECTED JURISDICTIONS*

Abstract

The prevalent incidences of hate speech in selected jurisdictions such as Nigeria, Kenya, Japan and the United States of America and the assertion of the encroachment on the freedom of expression by those alleged to have uttered such speech form the fulcrum of this paper. The doctrinal approach is employed in the use of judicial authorities, statutes, textbooks, articles, sources from the internet and some international conventions relating to this subject matter. Hate speech does exist and freedom of expression may sometimes be curtailed whenever there is an occurrence of the uttering of hate speech whether verbally or in print that might endanger public safety, unity and national security. Legislation should be passed and prosecutions initiated and pursued against suspects irrespective of their status. Proactive public enlightenment should be embarked on by the governmental bodies saddled with this responsibility in partnership with the media to curb incidences of hate speech as it is a recipe for violence and anarchy.

Key words: *Hate Speech, Freedom of Expression, Violence, States*

1. Introduction

Adibe defined and described hate as that which employs discriminatory epithets to insult and stigmatize others on the basis of their race, ethnicity, gender, sexual orientation or other forms of group membership. It is any speech, gesture, conduct, writing or display which could incite people to violence or prejudicial action. There are individuals and groups in this country who openly relish the freedom to rain insults and profile others by appropriating to themselves the role of ethnic and religious champions. The problem is that hate speech is often the gateway to discrimination, harassment and violence as well as a precursor to serious harmful criminal acts. It is doubtful if there will be hate-motivated violent attacks on any group without hate speech and the hatred it purveys.¹ In a more elaborate term, Kukah describes hate speech as “communication that denigrates a particular person or a group on the basis of race, color, ethnicity, gender, disability, sexual orientation, nationality, religion, or other characteristic. It can be in the form of any speech, gesture or conduct, writing, or display and usually marks incitement, violence or prejudice against an individual or a group”.² Kukah maintains that the Recommendation of the Committee of Ministers of the Council of Europe issued in 1997 covers the internationally accepted definition of the term. Accordingly, “the term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.” As a result it generates stigmas, stereotypes, prejudices and discriminatory practices against those who are constructed as being different³. According to Neisser, hate speech refers to all communications (whether verbal, written, symbolic) that insults a racial, ethnic and political group, whether by suggesting that they are inferior in some respect or by indicating that they are despised or not welcome for any other reasons.⁴ Neisser argues that apart from causing danger of physical assault, hate speech risks violent reaction.

Hate speech is universally used to describe any communication that denigrates a particular person or a group on the basis of race, color, ethnicity, gender, disability, sexual orientation, nationality, religion, or other characteristic. It can be in the form of speech, gesture, conduct, writing, or display. Politically motivated hate speech is historically a precursor to election related harassment and violence in Nigeria.

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¹J Adibe ‘Fyose’s advert: Offensive or Hate Speech?’ Adapted from a paper presented at a roundtable on hate speech organized by the Kukah Centre, Abuja, on January 27, 2015.

²H Kukah ‘Hate Speech, Social Media and the 2015 Election < pointblanknews.com/pbn/.../hate-speech-social-media-2015-election/> accessed on 1 February ,2016.

³ *Ibid.*

⁴E. Neisser ‘Hate Speech in the New South Africa: Constitutional Consideration for a Land Recovering from Decades of Rational Repression and Violence’ (1994) 10 SAJHR ,333-356.

Hate speech is any speech, gesture, conduct, writing or display which could incite people to violence or prejudicial action. Essentially, such speeches rob others of their dignity. United Nations Committee on the Elimination of Racial Discrimination⁵ noted that hate speech includes: a) all dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means; (b) incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin; (c) threats or incitement to violence against persons or groups on the grounds in (b) above; (d) expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination; and (e) participation in organizations and activities which promote and incite racial discrimination.

2. Determination of Hate Speech

There are several considerations to examine before abusive language or innuendo can be considered hate speech. Any list of such considerations should include the following. First, hate speech can be identified by the severity of what is said, the severity of the harm advocated and the intensity of the communication.⁶ Another way is to look at the intention⁷ of the author of the statement. Content of the speech is also relevant and connotes specifics of the speech including its tone and if it requires listeners to respond with certain actions or inactions are important. The inciters themselves should be considered, specifically their standing in the context of the audience to whom the speech is directed⁸. The level of their authority or influence over the audience is relevant as is the degree to which the audience is already primed or conditioned, to take their lead from the inciter. Again, for speech to qualify as hate speech, it must have occurred in public. This also means that communication has to be directed at a non-specific audience (general public) or to a number of individuals in a public space⁹.

3. Applicable Nigerian Law

Electoral Act¹⁰ contains detailed provisions specifically prohibiting politically motivated hateful speech. Section 95¹¹ of the Act provides that no political campaign or slogan shall be tainted with abusive language directly or indirectly likely to injure religious, ethnic, tribal or sectional feelings. Abusive, intemperate, slanderous or base language or insinuations or innuendoes designed or likely to provoke violent reaction or emotions shall not be employed or used in political campaigns. Section 102 of the Act further provides: “Any candidate, person or association who engages in campaigning or broadcasting based on religious, tribal, or sectional reason for the purpose of promoting or opposing a particular political party or the election of a particular candidate, is guilty of an offence under this Act and on conviction shall be liable to a maximum fine of N1, 000,000 or imprisonment for twelve months or to both. Similarly, paragraph 10 (c) of the Guidelines for Political Rallies issued by Independent National Electoral Commission (INEC)¹² also prohibits the use of hate speech and discriminatory rhetoric during campaigns.

The dearth of legislation specifically mandating issue-based campaigns in Nigeria is a likely result of the rights to free speech and expression guaranteed by Section 39¹³ of the 1999 Constitution (as amended). Constitutionally protected freedom of expression connotes the liberty of every person to openly discuss issues, hold opinions and impart ideas without restrictions, restraint or fear of

⁵ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December, 1965. Entry into force 4 January 1969 in accordance with Article 19.

⁶ Nigeria’s Human Rights Commission denounces Hate speech in political rallies and social media <newsdiaryonline.com/nigerias-rights-commission-denounces-hate-speech-political-rallies-social-media/>accessed on 1 February, 2016.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Nigeria Electoral Act of 2010. The principal law that governs the overall conduct of elections in Nigeria.

¹¹ *Ibid.*

¹² The Guidelines for Political Rallies issued by Independent National Electoral Commission (INEC).

¹³ Constitution of the Federal Republic of Nigeria.

punishment. The Guidelines offers the only attempt at mandating right speech. Paragraph 25(b)¹⁴ of the Guidelines provide that campaigns shall be in compliance with all extant laws, regulations and codes including the Code of Conduct for Political Parties, as well as codes issued by media regulators like the National Broadcasting Commission and shall be based on issues as contained in the manifesto and constitution of the party.

4. Instances of Hate Speech

Some instances of hate speech recorded during campaigns for the 2015 general elections may be identified to include the following: Katsina State Gov. Shema¹⁵ reportedly urged his supporters to attack opponents and referred to his political opponents as cockroaches urging his supporters to kill them as they kill cockroaches. The Ekiti State Governor, Peter Ayodele Fayose¹⁶ in January repeatedly took out front page newspaper advertorials warning voters not to vote for the APC presidential candidate Muhamadu Buhari. These adverts, now widely known as “death wish advertorials,” insinuated that the Presidential candidate was likely to die in office if elected, like the late President, Yar adua. Speaking during the PDP Women Presidential Campaign Rally in Kogi State, the then Nation’s First Lady¹⁷, reportedly described Gen. Buhari unfit to be the country’s president, calling him old and brain dead. Patience Jonathan is also recorded¹⁸ as having urged the members of the Peoples Democratic Party (PDP) to stone anyone that promises them change. Change is the slogan of the All Progressives Congress (APC). In the same campaign speech given at a rally which held on Monday, March 2, in Calabar, Mrs. Jonathan is quoted as saying “*Our people no dey born shildren wey dem no dey fit count. Our men no dey born shildren throwway for street. We no dey like the people for that side,*” thus making derogatory statements obviously referring to the Northern parts of the country where the awful practice of child abandonment known as ‘Almajiri’ still occurs. After emerging unscathed after the plethora of criticisms that followed the documentary on General Muhammadu Buhari, Presidential candidate of the APC earlier in the year, a popular television Network, AIT, on 1 March 2015 aired a documentary titled ‘Lion of Bourdillon’¹⁹. The hour-long documentary aired at 11 p.m. showcased various properties and companies across Lagos purportedly owned by Mr. Tinubu, a top leader of the APC describing him as “Nigeria’s biggest landlord”. It also alleged that the APC chieftain was charged for narcotics in 1993.

5. Hate Speech and Counter-Measures in Some Other Jurisdictions

Kenya

The massacre of 48 people in the Tana River district resulted in large part from the hate speech of politicians²⁰. Hate speech is the precursor to violence and in every electioneering year in this country. “We must begin to seriously hold people accountable for inciting people to violence and hatred.”²¹ A judicial report²² into 2008's post-election violence said political rallies, vernacular radio stations, leaflets and mobile phone texting services had all been used by political and even religious leaders to transmit messages that contributed to the violence. Sang, a presenter on a local-language radio station, is one of four Kenyans charged by the International Criminal Court (ICC) of committing crimes against humanity during the last general election; his charges relate to the alleged dissemination of hate speech²³.

¹⁴ *Supra* n.12 p5.

¹⁵ *Premium Times*, 19 November 2014.

¹⁶ *This Day*, January 19 2015.

¹⁷ *The Express News*, March 14,2014.

¹⁸ *The Nation*, March 15, 2015.

¹⁹*The Nation*, March 10, 2015. Recently an unreserved apology was tendered by the Chairman of DAAR Communications, the owners of AIT to Mr. Tinubu.

²⁰ www.irinnews.org/report;96168/analysis-taming-hate-speech-kenya accessed on January 28,2016.

²¹ *Ibid*.

²² www.academia.edu/9401535/Prosecuting_Hate_Speech_In_Kenya accessed on January 28,2016.

²³ *Ibid*.

In an effort to stem political and ethnic violence, the Kenya National Cohesion and Integration Commission (NCIC) was set up in 2008 to promote ethnic harmony and to investigate complaints of ethnic or racial discrimination or any issue affecting ethnic and racial relations. It has since recommended that the Director of Public Prosecution indict at least six politicians, two of them cabinet ministers and three musicians for hate speech. Section 13 of the National Cohesion and Integration Act²⁴, which established the Commission, criminalizes the use of hate speech and bars the use of threatening, abusive or insulting words or behaviour in any medium if they are intended to spur ethnic hatred. The regulatory National Communications Commission of Kenya has drafted guidelines that put the responsibility of filtering out inflammatory text messages on mobile phone service providers. It has also banned the use of any language other than Swahili and English, the country's two official languages when sending political text messages during the designated campaign period. The police have also been provided with audio recorders to monitor any hate speech at public gatherings. The 2008 law defines hate speech as that which advocates or encourages violent acts against a specific group, and creates a climate of hate or prejudice, which may, in turn, foster the commission of hate crimes. Halakhe says part of the problem in enforcing this act is that this definition is broad so providing evidence that passes the prosecutorial threshold is somewhat difficult.²⁵ Where can we draw the line between what constitute hate speech and infringement of freedom of expression? He asked. This question runs through before the courts. Cabinet minister, Mwakwere, who stands accused of inciting hatred against Arab settlers who he said had taken land from indigenous coastal communities, claims his right of expression was being "grossly violated" by the case.

Three Kikuyu musicians whose songs praising Presidential aspirant and International Criminal Court suspect Uhuru Kenyatta were termed by the Commission as insulting and threatening to the Luo community. The musicians claim their prosecution amounts to a criminal interpretation of artistic works. Lwanga²⁶, a commissioner at the NCIC, explained that when the Commission was set up, the first task was to define what entails hate speech vis-à-vis the need to maintain people's right to freedom of expression. The songs²⁷ in question, which have been condemned even by Kenyatta's own party, are indeed laced with allusions "this is year of the hyena", "stop chasing the wind, Awgambo", "when a man is seated he sees further than a boy on top of a tree". That might be lost on those unfamiliar with Kikuyu culture. But some of the lyrics are less obscure. There are frequent derisive references to the fact that Luo men, unlike their Kikuyu counterparts, are generally uncircumcised, a condition one song links to "mental immaturity." According to Kenya Human Right Commission's Chesoni²⁸, the failure to prosecute means the crimes will continue. There is a direct link between impunity and the behaviour of politicians who want to create an atmosphere of violence. People say, so and so got away with it and I can as well. Lwanga²⁹ noted that the tendency to politicize prosecution of hate speech is a real threat. Whenever prominent individuals are linked to incidents of hate crime, there is a tendency for their supporters to claim that the cases are inspired more by political affiliation than by specific acts.

India

Freedom of speech and expression is protected by Article 19(1) of the Constitution of India. But under Article 19(2) reasonable restrictions can be imposed on freedom of speech, the sovereignty and expression in the interest of the integrity of the State and the security of the State, public order,

²⁴ http://www.cohesion.or.ke/images/downloads/national_cohesion_and_integration_act_2008.

²⁵ *Supra* n.20 p7. Halarke Horn of Africa Analyst at the International Crisis Group

²⁶ *Ibid.*

²⁷ Another song suggests that Kenyatta should kill Luo Presidential rival Raila Odinga, the current Prime Minister, "an uncircumcised man who wants to push you there [the Hague] and take over your wife and all your wealth" for his alleged role in bringing about the ICC prosecutions.

²⁸ Mute also noted that despite the high-profile names currently linked to hate speech, the country's legal system has a poor track record of holding powerful officials to account. He said: "You can only talk about deterrence when you have had successful prosecutions, but we have no track record at all in punishing high-level crime," We must ask whether the various institutions have the will to investigate and prosecute hate speech. As it is now, cases that have not been properly investigated are taken to court and are dismissed for lack of proper evidence.

²⁹ *Supra* n.22 p7.

decency or morality. Political parties seem to be indulging in the same hate speech, communal politicking and calculations that work to polarise the electorate and garner votes. Hate speech in India is monitored by a number of laws in India. These are under the Indian Penal Code³⁰ in Sections 153(A), 153(B), 295, 295A, 298, 505(1), 505(2), the Code of Criminal Procedure³¹ (Section 95) and Representation of the People Act³² (Section 123(A) and 123(B)). The Constitution of India guarantees freedom of expression, but with reasonable restricts. Unenviably, it is the job of India's Election Commission to ensure that during the elections, the campaigning adheres to a strict Model Code of Conduct. Unsurprisingly, the first point in the EC's rules (Model Code of Conduct) is that "no party or candidate shall include in any activity which may aggravate existing differences or create mutual hatred or cause tension between different castes and communities, religious or linguistic. The third point states that there shall be no appeal to caste or communal feelings for securing votes. Mosques, churches, temples or other places of worship shall not be used as forum for election propaganda"³³. This election season, the EC has armed itself to take on the menace of hate speeches. It has directed all its State chief electoral officers to closely monitor campaigns on a daily basis that include video recording of all campaigns. Only with factual evidence in hand can any official file a First Information Report (FIR), and a copy of the Model Code of Conduct is given along with all written permissions to hold rallies and public meetings.

As a result, many leaders have been censured by the EC for their alleged hate speeches during the campaign. The BJP's Amit Shah was briefly banned by the EC for his campaign speech in the riot affected State of Uttar Pradesh, that, Shah had said that the general election, especially in western UP, is one of honour, it is an opportunity to take revenge and to teach a lesson to people who have committed injustice. He has apologized for his comments. Azam Khan, a leader from the Samajwadi Party, was banned from public rallies by the EC after he insinuated in a campaign speech that the 1999 Kargil War with Pakistan had been won by India on account of Muslim soldiers in the Army. The EC called both these speeches, highly provocative (speeches) which have the impact of aggravating existing differences or create mutual hatred between different communities³⁴. Other politicians have jumped on the bandwagon as well. Most recently, the Vishwa Hindu Parishad's Praveen Togadia has been reported as making a speech targeting Muslims who have bought properties in Hindu neighborhoods thus: "If he does not relent, go with stones, tyres and tomatoes to his office. There is nothing wrong in it. I have done it in the past and Muslims have lost both property and money."³⁵

There was also the case of Imran Masood of the Congress who threatened to "chop into pieces" BJP Prime Ministerial candidate Narendra Modi a remark that forced Congress's senior leader Rahul Gandhi to cancel his rally³⁶ in the same area following the controversy that erupted. There is Modi supporter Giriraj Singh who has said that people opposed to Modi will be driven out of India and they should go to Pakistan. In South India, Telangana Rashtra Samithi (TRS) President K Chandrasekhar Rao termed both TDP and YSR Congress (YSRCP) as 'Andhra parties' and urged the people of Telangana to shut them out of the region. The Election Commission has directed district officials to present the video footage of his speeches at public meetings, in order to determine punishment³⁷. Gupta³⁸ has published a piece ominously titled "Secularism is Dead," but instead appeals to the reader to have faith in Indian democracy far beyond what some petty communal politicians might allow. The fact that the BJP's Prime Ministerial candidate is inextricably linked in public consciousness to

³⁰ 1927.

³¹ 1973. An Act to consolidate and amend the law relating to Criminal Procedure. The Act contains 484 sections, 2 schedules and 56 forms. The sections are divided into 37 chapters.

³² 1951. It is an Act of Parliament to provide for the conduct of elections of the Houses of Parliament and to the Houses of the Legislature of each State.

³³ *Supra* n.33 p10.

³⁴ *Ibid.*

³⁵ *Supra* n.33.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Editor of the national paper, The Indian Express.

communal riots in his home state of Gujarat has only compounded speeches over and above what people believe is the communal politics of the BJP that stands for the Hindu majority of India. In contrast, many believe that by playing to minority politics, the Congress indulges in a different kind of communal politics. And then there are countless regional parties, creating constituencies along various caste and regional fissures.

Japan

Japanese law covers threats and slander, but it does not apply to hate speech against general groups of people.³⁹ Japan became a member of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination in 1995. Article 4 of the Convention sets forth provisions calling for the criminalization of hate speech. But the Japanese government has suspended the provisions, saying actions to spread or promote the idea of racial discrimination have not been taken in Japan to such an extent that legal action is necessary. The Foreign Ministry says that this assessment remains unchanged.⁴⁰ In May 2013, the United Nations Committee on Economic, Social and Cultural Rights⁴¹ (CESCR) warned the Japanese government that it needs to take measures to curb hate speech against so-called "comfort women", or Asian women forced into sexual slavery by the Japanese military during World War II. The committee's recommendation called for the Japanese government to better educate Japanese society on the plight of women who were forced into sexual slavery to prevent stigmatization, and to take necessary measures to repair the lasting effects of exploitation, including addressing their right to compensation.⁴² In 2013, following demonstrations, parades, and comments posted on the Internet threatening violence against foreign residents of Japan, especially Koreans, there are concerns that hate speech is a growing problem in Japan.⁴³

Prime Minister Abe and Justice Minister Tanoak expressed concerns about the rise in hate speech, saying that it goes completely against the nation's dignity, but so far have stopped short of proposing any legal action against protesters⁴⁴. On 22 September 2013 around 2,000 people participated in the March on Tokyo for Freedom campaigning against recent hate speech marches. Participants called on the Japanese government to sincerely adhere to the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁵. On 25 September 2013 a new organization, "An international network overcoming hate speech and racism" (Norikoenet), that is opposed to hate speech against ethnic Koreans and other minorities in Japan was launched.⁴⁶ On 7 October 2013, in a rare ruling on racial discrimination against ethnic Koreans, a Japanese court ordered an anti-Korean group, Zaitokukai, to stop hate speech protests against a Korean school in Kyoto and pay the school 12.26 million yen (\$126,400 U.S.) in compensation for protests that took place in 2009 and 2010.⁴⁷ A United Nations panel urged Japan to ban hate speech.⁴⁸

United States of America

The protection of civil rights was not written into the original Constitution but was added two years later with the Bill of Rights, implemented as several amendments to the Constitution. The First Amendment, ratified December 15, 1791, states that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech,

³⁹ T. Nockleby, (2000), 'Hate Speech' in L Levy and K Karst ed. *Encyclopedia of the American Constitution*, vol. 3 (Detroit: Macmillan Reference US 2nd ed) pp. 1277-1279.

⁴⁰ 'Foreign Correspondents Share Opinions On Japanese Hate Speech Marches' The Mainichi, July 10, 2013.

⁴¹ It is a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural rights.

⁴² 'No Place for Hate Speech' Japan Times, June 5, 2013.

⁴³ *Ibid.*

⁴⁴ E Johnston, 'Politicians Silent On Curbing Hate Speech' Japan Times, July 10, 2013.

⁴⁵ *Supra* n.5.

⁴⁶ Anti Hate Speech Group launched in Japan. The Mainichi, September 26, 2013.

⁴⁷ G Fujiwara 'Kyoto Court Bans Hate Speech around School for Ethnic Koreans', The Asahi Shimbun, October 7, 2013.

⁴⁸ S Kim, K JoongAng 'UN Group Urges Tokyo to Curb Hate Speech' Daily, May 24, 2013.

or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Although this section was considered only to apply to the federal congress (i.e. the legislative branch), the 14th Amendment, ratified on July 9, 1868, clarifies that this prohibition applies to laws of the States as well. Some State constitutions also have a free speech provision, most notably, California.⁴⁹ Some limits on expression were contemplated by the framers and have been read into the Constitution by the Supreme Court. In 1942, Justice Frank Murphy summarized it thus:

There are certain well-defined and limited classes of speech, the prevention and punishment of which have never been thought to raise a Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words – those which by their very utterances inflict injury or tend to incite an immediate breach of the peace.⁵⁰

Traditionally, however, if the speech did not fall within one of the above categorical exceptions, it was protected speech. In 1969, the Supreme Court protected a Ku Klux Klan member's racist speech and created the "imminent danger" test to permit hate speech. The court ruled in *Brandenburg v. Ohio*⁵¹ that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force, or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action.⁵² This test has been modified very little from its inception in 1969 and the formulation is still good law in the United States. Only speech that poses an imminent danger of unlawful action, where the speaker has the intention to incite such action and there is the likelihood that this will be the consequence of his or her speech, may be restricted and punished by that law.

In *R.A.V. v. City of St. Paul*⁵³, the issue of freedom to express hatred arose again when a gang of white people burned a cross in the front yard of a black family. The local ordinance in St. Paul, Minnesota, criminalized such racist and hate-filled expressions and the teenager was charged thereunder. Associate Justice Antonin Scalia, writing for the Supreme Court, held that the prohibition against hate speech was unconstitutional as it contravened the First Amendment. The Supreme Court struck down the ordinance. Scalia explicated the fighting words exception as follows that the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.⁵⁴ Because the hate speech ordinance was not concerned with the mode of expression, but with the content of expression, it was a violation of the freedom of speech. Thus, the Supreme Court embraced the idea that hate speech is permissible unless it will lead to imminent hate violence.⁵⁵ The opinion noted that this conduct, if proved, might well have violated various Minnesota laws against arson, criminal damage to property, among a number of others, none of which was charged, including threats to any person, not to only protected classes.

In 2011, the Supreme Court issued their ruling on *Snyder v. Phelps*⁵⁶, which concerned the right of the Westboro Baptist Church to protest with signs found offensive by many Americans. The issue presented was whether the 1st Amendment protected the expressions written on the signs. In an 8-1 decision the court sided with Phelps, the head of Westboro Baptist Church, thereby confirming their historically strong protection of hate speech, so long as it doesn't promote imminent violence. The Court explained

⁴⁹ See <<https://en.wikipedia.org/wiki/Hatespeech>> accessed on January 3, 2016.

⁵⁰ See *Chaplinsky v New Hampshire* [1942] 315 US 568,572.

⁵¹ [1969] 395 US 444 at 447.

⁵² *Ibid.*

⁵³ [1992] 505 US 377.

⁵⁴ *Ibid.*

⁵⁵ See *Wisconsin v Mitchell* [1993] 508 US 476

⁵⁶ [2011] 562 US 443.

that speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community or when it is a subject of general interest and of value and concern to the public.⁵⁷

In the 1980s and 1990s, more than 350 public universities adopted "speech codes" regulating discriminatory speech by faculty and students.⁵⁸ These codes have not fared well in the courts, where they are frequently overturned as violations of the First Amendment. Debate over restriction of "hate speech" in public universities has resurfaced with the adoption of anti-harassment codes covering discriminatory speech.⁵⁹

In 1992, Congress directed the National Telecommunications and Information Administration (NTIA) to examine the role of telecommunications, including broadcast radio and television, cable television, public access television, and computer bulletin boards, in advocating or encouraging violent acts and the commission of hate crimes against designated persons and groups. The NTIA study investigated speech that fostered a climate of hatred and prejudice in which hate crimes may occur.⁶⁰ The study failed to link telecommunication to hate crimes, but did find that "individuals have used telecommunications to disseminate messages of hate and bigotry to a wide audience." Its recommendation was that the best way to fight hate speech was through additional speech promoting tolerance, as opposed to government regulation. The exercise of freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, the interest of national security for the protection of the reputation or right of others".

6. Arguments on Hate Speech

The International Covenant on Civil and Political Rights⁶¹ (ICCPR), acceded to by the Nigerian Government in July 1993 states that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. The United Nations Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in Article 4 also provides for States to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin. The inherent dignity and equality of every individual is the foundational axiom of international human rights. It is, therefore, perhaps not surprising that international law condemns statements which deny the equality of all human beings. Article 20(2) of the ICCPR⁶² requires States to prohibit hate speech and states that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. There is little debate internationally that restrictions on hate speech can be justified. Nevertheless, Article 20(2) has proven highly controversial and is variously criticised as being overly restrictive of free speech or as not going far enough in the categories of hatred it covers.

Article 20(2) does not require States to prohibit all negative statements towards national groups, races or religions but, as soon as a statement *constitutes* incitement to discrimination, hostility or violence, it must be banned. Some States, notably the USA, have taken the view that only incitement which is intended to cause imminent violence justifies restricting such a fundamental right. One important motivation underlying this position is the fear that a broader ban on inciting "discrimination or hostility" will be abused by governments or will discourage citizens from engaging in legitimate democratic

⁵⁷ *Ibid.*

⁵⁸ Free Speech on Public College Campus < https://en.wikipedia.org/wiki/Hate_speech>accessed on January 3,2016.

⁵⁹ Harassment Policies in the University<https://en.wikipedia.org/wiki/Hate_speech>accessed on January 3,2016.

⁶⁰ Role of Telecommunications in Hate Crimes, Reports to Congress <https://en.wikipedia.org/wiki/Hate_speech>. Accessed on January 3, 2016.

⁶¹ Drafted 1954. Signed in December 10,1966 and came into force 1976.It is part of the International Bill of Human Rights and is monitored by the United Nations Human Rights Committee (a separate body to the United Nations Human Rights Council).

⁶² *Ibid.*

debate, for example on questions regarding religion and minorities. The United Nations Human Rights Committee meeting (UNHRCm)⁶³ has stated that there is no contradiction between the duty to adopt domestic legislation under Article 20(2) and the right to freedom of expression. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities. At the same time, the UNHRCm has stressed that restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In other words, domestic laws adopted pursuant to Article 20(2).

The UNHRCm has dealt with a number of cases in the area of hate speech. In *J.R.T. and the W.G. Party v. Canada*⁶⁴, the applicant complained that a Canadian court order forbidding him from operating an anti-Semitic telephone service violated his right to freedom of expression. The service allowed members of the public to dial in and listen to tape-recorded messages warning them, for example, of “the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.” The UNHRCm found the application inadmissible, principally because the opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit. The case of *Faurisson v. France*⁶⁵ concerned a historian who had been convicted and fined under France’s Gayssot Act, which, briefly put, makes it an offence to challenge the conclusions and the verdict of the Nuremberg Tribunal. Faurisson’s conviction was based on his statement in a magazine interview that: “I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication.” The UNHRCm did not analyse whether the Gayssot Act as such was justified on the basis of Article 20(2). It considered that the conviction was based on a sufficiently clear law. The Gayssot Act served a legitimate purpose, namely, to protect the rights of others, in this case the right of the Jewish community to live free from an atmosphere of anti-Semitism. The UNHRCm also accepted that the conviction had been ‘necessary, since information made available to the UNHRCm indicated that denial of the existence of the Holocaust had become a principal vehicle for anti-Semitism in France. Faurisson’s right to freedom of expression had consequently not been violated. The UNHRCm did note, however, that application of the Gayssot Act “may lead, under different conditions than the facts of the instant case” to a violation of Article 19. Indeed, free speech advocates have often criticised the Gayssot Act and other ‘holocaust denial’ laws as being illegitimate or counterproductive. The UNHRCm has so far never dealt with a communication complaining of a failure to implement the domestic hate speech legislation required by Article 20(2).

Besides the ICCPR, a number of other international instruments have a bearing on hate speech. Of particular relevance is Article 4 of CERD⁶⁶ which goes substantially further than Article 20(2) of the ICCPR and requires State parties, among other things, to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination. In contrast to the ICCPR, CERD requires the prohibition of racist speech even if it does not constitute incitement to discrimination, hostility or violence. The effect of Article 4 appears to be tempered a bit by its opening paragraph, which states that in adopting measures to implement its provisions, states should have “due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention,” which include freedom of expression.

⁶³ It is a body of 18 experts that meets three times for four week sessions at the United Nations headquarter, New York to consider the five yearly reports submitted by 162 United Nations member States on their compliance with ICCPR and individual petitions concerning 112 States Parties to the optional protocol.

⁶⁴ Communication No 104/1981, United Nations Doc CCPR.C/OP2 at 259 (1984).

⁶⁵ Communication No 550/1993 United Nations Doc. CCPR/C/58/D/550/1993.

⁶⁶ Committee on the Elimination of Racial Discrimination. It is a body of independent experts that monitor implementation of the Convention on the Elimination of All forms of Racial Discrimination by its State Parties.

Inevitably, however, these two requirements to prohibit all racist speech and to respect the right to freedom of expression as recognized under international law are considered by many to be in direct contradiction with one another. The international community is divided on the issue. Several States party to CERD including Australia, Austria, Belgium, France, Italy, Malta, Monaco, Switzerland, the United Kingdom and the United States have entered reservations to Article 4 or declared that they will interpret it in a particular way. Even members of the UN Committee on the Elimination of Racial Discrimination, which supervises the implementation of CERD in a similar manner as the UNHRCm oversees the ICCPR, have trouble agreeing on the meaning of Article 4. In a report to the UNHRCm, the Danish government described a case where a journalist had been convicted of hate speech by Danish Court after he included racist statements made by disaffected youths in a television programme. Whilst some members welcomed it 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 considered that in such cases the facts needed to be considered in relation to both rights. The journalist concerned subsequently appealed to the European Court of Human Rights (ECHR). The ECHR held that his conviction constituted an infringement of the right to freedom of expression, on the basis that the broadcast had clearly been designed to expose and analyse the attitude of racist youths, not to promote their point of view. It was a serious programme, intended for a well-informed audience, and made a valuable contribution to public debate.

In a 2001 Joint Statement, the UN, OSCE⁶⁷ and OAS⁶⁸ specially mandated on the right to freedom of expression set out a number of conditions which hate speech laws should respect. No one should be penalised for statements which are true, no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence, the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance, no one should be subject to prior censorship and any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

7. Conclusion

There is need for greater level of enforcement of the already existing laws. However, there should be a proper legal framework that holds political actors, advertisers, their agents and media organizations, and the general Nigerian populace responsible for hate speech and its consequences is necessary.

⁶⁷Organisation for Security and Cooperation in Europe. It is concerned with arms control and the promotion of human rights, freedom of the Press and fair elections. Its mandate also includes with early warning, conflict prevention, crisis management and post conflict resolution. It has its Secretariat at Vienna, Austria.

⁶⁸ Organisation of American States. It is an inter-continental organization founded on 30 April, 1948 for the purposes of regional solidarity and cooperation amongst its member States.