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A Contextual Approach for Freedom of Speech: The Case of Academic Sphere

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Abstract

This paper will be an effort to argue freedom of speech and speech legislations by a distinction between general social spheres and academic spheres, especially universities in a context-based approach. Within public sphere, the regulation of hate speech is might be more justifiable for specific reasons that is related with the character of public sphere. On the other hand, the universities are the places where the boundaries of mainstream laws and morality are always being tested. This feature of universities should be the essential places where we can open everything to scrutiny which requires a certain character that allows coping with offensive and controversial remarks going against our beliefs and opinions. However, contemporary trend in universities, in the name of expanding hate speech regulations, works against the ideals of academic spheres in several ways, mostly in denying to give a platform to controversial speakers. This creates a

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contrast that is worth a discussion between the ideals of academic spheres and the practices that hold sway through the actions increasing pressure on free speech within that sphere.

Keywords: Freedom of speech, hate speech, academy, no-platforming

İfade Özgürlüğü İçin Bağlamsal Bir Yaklaşım: Akademik Alan Örneği

Özet

Bu makale, genel kamusal alanlar ile akademik alanlar, özellikle üniversiteler arasında bir ayrım yaparak, ifade özgürlüğü ve ifadeye dair yasalara bağlamsal bir yaklaşım getirme girişimi olacaktır. Genel kamusal alanda, nefret söyleminin düzenlenmesi, kamusal alanın karakteriyle ilgili belirli nedenlerle daha meşru olabilir. Öte yandan üniversiteler, ana akım yasaların ve ahlakın sınırlarının her zaman sınındığı yerlerdir. Üniversitelerin bu özelliği, inanç ve görüşlerimize aykırı, saldırgan ve tartışmalı açıklamalarla başa çıkmayı sağlayan belirli bir karakter gerektiren ve her şeyi incelemeye açabileceğimiz temel yerler olmalıdır. Fakat, üniversitelerdeki çağdaş eğilim, nefret söylemi düzenlemelerini genişletme adına, çoğunlukla tartışmalı konuşmacılara platform vermeyi reddetmek suretiyle, akademik alanların ideallerine çeşitli şekillerde aykırıdır. Bu durum, akademik ortamların idealleri ile bu ortamlarda ifade özgürlüğü üzerindeki baskıyı artıran eylemler aracılığıyla hüküm süren uygulamalar arasında tartışmaya değer bir karşıtlık yaratır.

Anahtar Kelimeler: İfade özgürlüğü, nefret söylemi, akademi, no-platforming

Introduction

Freedom of speech and the concept of hate speech are of the popular topics attracting scholarly debate. As societies become more pluralistic in terms of communities of various cultures inhabiting, many governments have grown more concerned about the right lines against hate speech and its legislation. Academic institutions share similar concerns as being the stage where most of controversies tend to revolve around free speech more than any other public sphere. The free speech issues in academic sphere mainly take the forms of controversies about campus speech codes, no-platforming (cancelling or obstructing the events of some guest speakers) and some other types of student activism along with peer pressure in academy. Those who are in favour of more restriction on speech claim to take the stance mostly in the name of preventing hateful speech. On the other hand, the supposed ideals of academic enterprises are highly knit with the principle of freedom of speech, as it will be discussed later in the paper. This

creates a contrast that worth discussion between the ideals of academic stages and the practices hold sway through the actions increasing pressure on free speech within that stages.

This paper will be an effort to argue for a context-based approach to freedom of speech and speech legislations. There are several attempts to give a context-based explanation, the most popular of which is to suggest that political speech should be more protected than other forms of speech (Sunstein, 1995, p. 130). What I will try to propose in this paper, is to make a distinction between general social spheres and academic spheres, especially universities. Within the public sphere, the regulation of hate speech is might be more justifiable for specific reasons that are related with the character of public sphere. The problem, which will be claimed, is on the academic sphere. It is not that there should not be a regulation on any type of hate speech, not that it must be totally without any restraint. The trend, more pressing recently, that is demanding restriction especially for university environment even more than public sphere, I will argue, is the concern. If it were claimed that there is a need for more regulation of speech, it could not be started by restricting the speech at academic level. To some extent, the universities are the places where the boundaries of mainstream laws and morality are always on trial. In this manner, I will discuss that why the restrictions of academic debates with an expanded interpretation of hate speech concept could be detrimental. To this end, I will take the issue with the confrontation with free speech ideals, the one that particularly important for academic enterprises, i.e. the argument from truth and discuss the contemporary outlook on the universities around this confrontation. At start, I will elaborate the concept of hate speech. Secondly, I will clarify J.S. Mill's ideas on justification of freedom of speech and its regulation, since his ideas provide the specific ground to connect the principle of freedom of speech to the ideals of academic enterprises. Later on, I will continue with the practices that undermines free speech in universities. Before the concluding remarks, I will mention the ideals of university in general.

Hate Speech and Its Regulation

According to Encyclopaedia Britannica, hate speech is “the speech or expression that denigrates a person or persons on the basis of (alleged) membership in a social group identified by attributes such as race, ethnicity, gender, sexual orientation, religion, age,

physical or mental disability, and others.” . Though there are varieties of the term, the core is the “the expressive dimension of identity-based envy, hostility, conflict, mistrust and oppression (Brown, 2017).” The connotation of the word “hate” is also misleading, at this point, as if the problem is only about the attitudes and emotions. The aspect we should talk about the restrictions should be the one about “more tangible forms of communication”, as Jeremy Waldron suggests (2010), but not the attitudes and emotions. In order to suggest a case of hate speech, it is first necessary to what ‘speech’ means in political and legal terms. ‘Speech’ in the broad sense includes expressions ranging from written word, videos, artworks, cartoons etc. A general agreement on what constitutes speech includes symbolic public acts as flag burning, wearing symbolic clothes into the category while excluding some forms of commercial speech, speculations etc. (Kendrick, 2017). “Tangible forms”, as Waldron called (2010), for the cases of hate speech are the ones such as the likes of racial epithets, offensive depictions of vulnerable religious or ethnic communities and amplifying hateful expressions against certain groups.

Another explanation of hate speech, which is given by Armenian-Turkish intellectual Sevan Nisanyan, also is helpful to clarify some points. Though not an official expert of the topic, he has become the center of a heated debate when he had been sentenced by the allegations for insulting the core values of a religion in his column. Later on, when he discussed the issue of hate speech in his personal blog , he defended his position with the following explanation: “What is criminal in hate speech is not the hate. People have the right to hate whatever and whoever they like. It may be ugly or unpleasant, or even a sin, but it is not a crime. What does make it a crime is when the speech actually leads to loss of life, limb or liberty on the part of the people it targets.” And in order for speech to lead those harms and thus become a hate speech, according to Nisanyan, it needs to lead an “abuse of a vulnerable person or group, or questions their basic civil rights, or invites violence against them.”

By this explanation, we understand it is the incitement factor and the actual probability of harm that is carried by certain speech act are what makes it “hate speech”. Both factors together make the speech gain the status of hate speech, along with the circumstances in which they are turned against vulnerable groups. These qualifications would denote a particular speech as an instance of hate speech, as the probability of harm is high as a consequence of that speech. In other words, the speech acts which would be

hate speech against group A, may not be hate speech when against group B. The distinction comes from the very context that defines the existence of a group in this or that society which determines their status in society. To put it simply, you cannot slander the general society, therefore regardless of the content, your speech cannot be hate speech.

Mill's Take on the Issue

In accordance with my intention to deal with the issue through its implications on academic sphere, I think it is important to make the dialectic between hate speech and freedom of speech more clear. To this end, it looks beneficial to inspect the views of J. S. Mill. In accordance with his utilitarian ethics, Mill suggests that competition of ideas is what develops the societies. He believes that what we call truth is not the whole-truth actually, but only half-truths, and we always need to discuss antagonistic ideas freely to derive more part of truth from each idea (Macleod, 2016).

In his famous work, *On Liberty*, (1978) here Mill provide a defence for basic liberties, first he focuses on the defence of freedom of speech. According to Brink (2018), Mill puts freedom of speech defence as a starting point because the general agreement over it can aid to justify other basic freedoms as well. In Chapter II, named "Of the Liberty of Thought and Discussion", Mill puts forward several arguments against censoring speech. First, he argues that opinion censored by authorities may be true. The authority denying an expression thinking that it is false is assuming they are infallible. According to Mill, only when there is a "complete liberty of contradicting and disproving our opinion" then we can think of conditions justifying for assuming truth. Since our judgments always prone to be fallible, we cannot take the risk of sacrificing the truth that we are not aware of by silencing an opinion. Secondly, even if the censored opinion is false in general; it might contain some part of truth. For that reason, for Mill, it is not logical to suppress opinions "since the general or prevailing opinion on any subject is rarely or never the whole truth. It is only by the collision of adverse opinions", he argues, that it is possible to approximate the whole of truth. Thirdly, when the true opinions go uncontested by other ideas that are censored, they will "be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds." The suppression of false or partly true opinions would strip established true opinions the chance of being tested and challenged, therefore creates the danger of turning them into "dead dogmas".

Consequently, as the fourth consideration, the true views will start to lose their vigor. The importance and value of them will face erosion, and they will not be able to serve society as in the past.

Of course, for Mill too, there should be exceptions to this freedom. For him, people have right to hold, express and publish any kind of ideas about anyone. However, people have no right to express those ideas in front of an angry crowd thinking alike with the same ideas, when they are also waiting for a chance to physically assault on their target (Kelly, n.d.). The well-known example of Mill's is about corn dealers. For him, it is acceptable to claim controversial or degrading opinions about some people such as corn dealers in printed material. Nevertheless, it is not acceptable to express the same opinions when an angry mob present in the scene who are very much ready to be provoked (1978, p. 53). Therefore, for Mill, it is also a matter of context. It is not 'what you said' but more like 'in what circumstances you say it'.

The reasoning while Mill being a staunch defender of free speech but also providing a ground for a regulation of it derives from his general principle about all types of freedom, the harm principle. According to that principle, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Macleod, 2016). For Mill, "harm" means "perceptible damage suffered against one's wishes . . . including physical injury not excepting death, forcible confinement, financial loss, damage to reputation, broken promises contractual or otherwise and so on" (Riley, 2015, p. 179). As Riley comments, "this view (of Mill) rules out society's interference with even very offensive actions or ways of living, of which the only effect on others is to cause 'mere dislike or distress'." (Riley, 2015, p. 98) For Mill, ideas and opinions loses their freedom to be expressed, in other words their immunity, only when it incites to concrete harmful acts. Only when such harm involved, then speech can be regulated by government.

About whether any speech should be free or restricted, it is clear that, for Mill, restriction is a kind of last resort, which should be applied when the circumstances of physical harms are imminent. Therefore, when applied to the instances of hate speech, it is reasonable to say that Mill's position is very permissive as long as there is no imminent risk of physical harm in the context, as in the famous case of 'corn dealers'.

Against Mill: More Restricting Approach

To some, the line where Mill draws the boundary for restriction is at the wrong place. On this side of the argument it is suggested (Matsuda, 1993) that many forms of expressions which include discriminatory remarks in any way should also be considered as hate speech and therefore to be subjected to regulation. Some recent trends, especially in some of the universities in the USA, are of this manner.

Contemporary trend in universities, in the name of expanding hate speech regulations, works mainly in several ways. These are speech conduct codes in campuses, curriculum re-arrangements and denying to give platform to controversial speakers regardless of their academic titles. It is more sensible, for our discussion in this paper, to focus on the actions that are sometimes called ‘no platforming’ or ‘de-platforming’, meaning to obstruct and deny speakers a stage in university campuses for their controversial opinions.

This practice of no-platforming or disinviting was begun in the UK campuses by National Union of Students in the 70s to prevent fascist National Front speakers to access to giving conferences in the universities (Smith, 2020). Protests of some members of the university by the claim that it would be “an endorsement” to give a platform to those led to its cancellation. Over time the Students Union campaign was applied to a wider range of speakers, covering a variety of unpopular views, including racist, anti-Semitic, misogynistic, Islamophobic, and transphobic views. This widening of scope, of course, should be understood as something in line with the expansion of identities and identity politics.

Nowadays, no platforming is used not just to fight against open enemies of liberal democratic society, but to suppress credible positions that are widely accepted by reasonable, sincere, and informed people. If no platforming was still reserved for the groups like National Front, it might have been a reason to advocate it. But this is not the case today. Any kind of ideas or opinion that are thought offensive or distressful by some groups or unions of students could be cancelled on the basis of hate speech allegations and similar allegations. An institution working on the academic freedom and freedom of speech, The Foundation for Individual Rights in Education (FIRE) has reported 342 disinvitation campaigns, also known as de-platforming, against some speakers at American

colleges since 2000. Recent examples of people targeted for disinvitation by left-wing activists include former Secretary of State Madeline Albright, for war crimes, former New York Mayor Rudolph Giuliani, for anti-black racism, anti-FGM campaigner Ayaan Hirsi Ali, for Islamophobia, and Indian Prime Minister Narendra Modi, for human rights abuses. And also there are people targeted by right-wing activists or students, Angela Davis for anti-capitalist views, or Cornel West for criticism of Israel. So it comes from the both ways of political spectrum, from liberals to the conservatives.

At this point, it might be asked that whether those people or those talks are really doing an endorsement of hate. When they are examined in legal terms the campaigns against those speakers were not successful. In those cases, when brought over to the Supreme Court in the USA, the court was always ruled against de-platforming. Therefore, they were not qualified as hate speech in the legal sense. These are just several examples that could be given, but the point is clear and would be the same. What else is the same in those events is that a federal or the Supreme Court always ruled against the university for preventing it (Chemerinsky, 2017). As it is known The Supreme Court in line with the First Amendment declared that “public institutions cannot punish speech, or exclude speakers, on the grounds that it is hateful or deeply offensive. This includes public colleges and universities (Chemerinsky, 2017).”

After those examples can be given of de-platforming, I should continue with their argument. This trend is basically going around the argument that universities are not the places where the motto “there is no such thing as false idea” should prevail. Instead, as any other field requiring expertise which would make it possible to distinguish false ideas from true ones, the academy should be of that kind. For example, as we can neglect correcting or regulating wrong medical recommendation coming from a non-expert in a social context, we cannot neglect such mistaken information in medical schools or in the debates between medical experts, their argument goes. Therefore, we should be even more vigilant and precise for the regulation of speech in university campuses in order to prevent even the slightest breach of proper expressions. That is one of the conclusions of their argument.

We might also find another conclusion from their argument. According to that, we must have a presupposition in mind suggesting that we have already arrived at the right

conclusion in every debate or at least much of the right points. Because only then we could be able and eager to eliminate other options of ideas. This, I argue, is contradicting the very essence of the academic pursuit. Therefore, a policy of more demanding hate speech regulation in the universities cannot be built upon that and cannot be justifiable in that sense. An argument of more restrictive regulation is also problematic, it bases itself on the idea of offensiveness which is a very much subjective thing which changes through time, between different groups and so on. To crystallize the contrast between their argument and the purpose of the academic enterprises, we should remember what the universities stand for.

Universities and Speech Regulation

In this section, I will try to clarify why I think it is necessary to make a distinction when discussing hate speech regulations. The distinction, as I stated, is for interpretation the domain of academy for its peculiar essence and its requirements differentiated from other public areas. Interpretation for this case is of course more relevant for the USA, even though I think they are kind of universal values of universities.

One of the Founding Fathers of the USA, Thomas Jefferson, describes the university where “we are not afraid to follow truth, wherever it may lead, nor to tolerate error so long as reason is left free to combat it (Lasson, 1999, p. 41).” Harvard University President, back in the past, once declared that “universities have a special interest in upholding free speech. (...) Because their right to speak freely and the opportunity to enjoy an open forum for debate are so closely related to these central purposes, the university has a stake in free speech that goes beyond the interest of its members. Its integrity as an institution is bound up in the maintenance of this freedom, and each denial of the right to speak diminishes the university itself in some measure (Lasson, 1999).” Stanley Fish, who has spoken and written much about the topic of free speech and universities, seems to be sharing the ideals mentioned above. To him, also by referring to M. Oakeshott (*The Voice of Liberal Learning*, 1989), the university has its own values which is scholarly deliberation of the search for the truth. It is not instrumental to societies’ other ideals. More importantly, he thinks, being silenced in the academy does not mean an impediment to your speech but simply because it is not qualified enough (Brown University, 2016).

As we discussed in the section of Millian freedom of speech, speaking freely is the very condition, which justifies us in searching the truth in ideas. Mill thinks that assuming infallibility is an objection for approximating to truth and development of societies. He suggests that if an opinion is right but still kept away from discussion, then we are depriving ourselves of more true ideas. And if wrong, we would be able to have more reasons to believe that our ideas are more reliable than others. That is why for Mill, the best thing is to let everyone have their say (Kelly, n.d.). As Lasson suggests, “this is especially true in the public university arena”. This is why, according to him, “the Supreme Court has underscored the importance of safeguarding academic freedom for the ‘marketplace of ideas’” (1999, p. 42). Therefore, it is even more important to be vigilant about the violations to the First Amendment, which includes the insurance of freedom of speech, by mistaken expansionist approach to the speech regulations.

Robert Post on the other side of my argument, joining debate in an online article, argues that usual free speech principles should not apply on campus because universities should observe their educational services; therefore, they are justified not giving platforms to those who are not serving this service (Post, 2017). My point is that it should be the other way around. I think it is justifiable to have a regulation on speech by the reason of preventing an incitement and provocation. But the universities are the places where to have at least some provocation. Just like those who argue for regulation and no-platforming for controversial speakers think that there are some views, which are better than the others, it is the same for those who are at the other hand.

Conclusion

As Lasson argues “an administration's (of a university) unsupported apprehension of a campus disturbance, or its fear of offending student groups or the community at large, are inadequate bases for refusing to allow recognized student groups to invite controversial outside speakers on campus” (1999, p. 90). This is, I argue, what is in line with Mill’s ideal of freedom of speech as a tool to approximate truth. Therefore, universities must be the places where we be always careful about the arbitrariness of boundaries. As it is argued (Hylton, 1996, p. 45), recent trend shows that some groups are at the battle on where to draw boundaries of speech regulation. The problem is that they are doing it not just for securing a ground for their self-expression, but also denying the

same ground to those who think otherwise. It has turned, unfortunately, to be an exclusionary character in that sense.

In any occasion of a controversial conference, for example, if there is no grounded and justified possibility of incitement by the speaker, then there cannot be possibility to appeal to harm principle. Therefore, there would be ground for hate speech to advocate a no platforming or any other type of interruption. So first, these speeches which are being de-platformed are not qualified as hate speech. We clearly see that from the decisions taken by the Supreme Court or other courts in those cases. Secondly, after the application of stretched interpretation of hate speech by including in it the concept of offensiveness, then de-platforming is not compatible with the purpose for academic sphere. The universities are the essential places where we can open everything to scrutiny and debate regardless of their compliance with legal and moral codes. They are the places to give stage unpopular or even irritating ideas to interrogate them. To have an expanding interpretation of hate speech first would be a stretched and aggressive use of the term. Hate speech is a crime on the condition that it would lead to violence, not simply unpleasant or controversial expressions. Secondly, this stretching would only be detrimental to pursuit of knowledge and truth. If those who in favor of more regulation care that the feelings of oppressed people may get hurt, they should also care about their attempts that may have result in the opposite end and may impede any better solutions for those oppressed people that might come out from the open discussion. To protect the value of free speech we should be alert to any misinterpretation of regulation to speech and should always remember the qualification of “the circumstances in which the ideas are expressed” for being alerted to protect the ideals of academic pursuits.

The consistency and sincerity, in this case of us, requires creating real possibilities to reach the truth of any matter. For Mill, “He who knows only his own side of the case, knows little of that.(...) if he is equally unable to refute the reasons on the opposite side, if he does not so much as know what they are, he has no ground for preferring either opinion”(1978 chp. II). We cannot know whether our opinion is more preferable, if we do not create an equal chance to listen to even views that sound horrendous to us at first glance.

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