



## The Soviet Origins of Hate-Speech Laws

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Should Nazis have the right to free speech? Adolf Hitler's Germany, obviously, had no liberty of expression. Must freedom of speech allow for the toleration of an intolerant minority? The question has been answered in different ways in various countries. Germany places significant limits on neo-Nazi speech and assembly. The United States permits such speech.

But this was no more pressing a question than when international human rights treaties were being drafted at the end of the Second World War.

The geopolitical and ideological circumstances of half a century stamped themselves on those treaties— circumstances which are rarely understood when academics, lawyers or commentators try to impose the precepts of the treaties onto domestic politics. This is no more so than with freedom of speech. Concepts like hate speech, racial vilification, and group defamation were



conceived in significantly different political environments to our own.

Yet rarely is the actual content or justification for the rights enumerated in those treaties challenged. In contemporary debate over human rights, it is remarkable how unexamined and unquestioned the treaties actually are.

The unquestioned dominance of human rights treaties on our understanding of individual rights has had a number of problematic effects. It has changed how we think about rights. The natural rights tradition explored in this volume has, at its heart, a central concept of moral autonomy by the individual. Natural rights can be secured through the state, but they exist prior to the state: states are only formed in order to maintain those rights. Natural rights are general. Rather than specifying what specific protections an individual is entitled to, natural rights suggest that anything that encroaches on their moral autonomy should be frowned upon.

International human rights law however is specific, enumerated, and comprehensive. These declarations, covenants, and treaties cover everything from the right to marry, to the right for individuals with a disability to access vocational rehabilitation. Rather than positing general moral principles, international human rights laws simply list all the things that the drafters believe are worthy. There is no distinction between negative rights and positive rights—thus, human rights law confuses protection against state action with demands that states act. Allowing an individual to marry the person of their choice unmolested by the government is very different to the requirement that individuals with disability receive support for vocational rehabilitation, which, however worthy, requires governments to tax other citizens to provide.

This confusion is particularly apparent when human rights law tackles freedom of speech and expression.

Article 19 of the United Nations' 1948 Universal Declaration of Human Rights states unequivocally that 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Yet the Universal Declaration of Human Rights does not impose any obligations on states. It was not a treaty—simply a 'declaration'.

Dissatisfaction with the Universal Declaration's purpose led to the International Covenant on Civil and Political Rights. Adopted in 1966 by the United Nations, it, too, made a bold statement on behalf of freedom of speech in Article 19: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.' The power of that statement was drained by the following: speech should be subject to restrictions to 'respect of the rights or reputations of others', or 'the protection of national security or of public order ... or of public health or morals.' The final phrase 'for the protection of ... public health or morals' carves out a potentially enormous scope for limitations on freedom of expression.

Yet the caveats went further than that. Article 20 sets the stage of a major new class of prohibited

speech in Western liberal democracies. 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' With Article 20, freedom of expression is completely defanged. Incitement to violence has always been a standard limit on speech, but never contingent on being sourced from 'natural, racial or religious hatred'. Nor does incitement to 'discrimination' or 'hostility' have any foundation in the history or theory of freedom of speech.

These restraints were conceived entirely by the drafters of the covenant—the start of a new limit on freedom of speech which protected against discrimination, hatred or hostility. But we must not take them at face value. The concept of 'hate speech' (and the concepts which are drawn from it, such as group defamation) was deliberately and explicitly political. Article 20 has its origins in a clash between two worldviews—that held by Western capitalist countries which supported individual rights and liberties, and that held by the Communist bloc, which did not.

Communism's claim that the state could represent the masses was closely related to Rousseau's conception of the 'general will', and the ideological justifications for limiting censorship were obvious to communist leaders of the twentieth century. Proto-communist states were intolerant of dissent. The temporary Anabaptist takeover of Münster in the sixteenth century was characterised by forced religious conversion and expulsion.

So, true to prior form and theory, twentieth century communist states immediately cracked down on freedom of speech. No political system based on Marx's ideas could tolerate dissent.

In Russia, the liberal revolution of February 1917 declared a general freedom of the press, allowing any speech except that which dealt with military matters in the ongoing Great War.

The Bolshevik revolution in October quickly eliminated this liberty. On the day of the October revolution itself, the Petrograd Military Revolutionary Committee shut down a major liberal newspaper and confiscated its equipment. Two days later, twenty conservative and liberal papers were suppressed. A decree signed by Lenin declared that 'the bourgeois press is one of the mightiest weapons of the bourgeoisie'. His decree was described as temporary, but draconian restrictions on freedom of speech lasted until the collapse of the Soviet Union. 'Why should freedom of speech and freedom of the press be allowed?' asked Lenin. A government 'would not allow opposition by lethal weapons. Ideas are much more fatal than guns.' A 1923 memo gave the scope of reasons that books and newspapers could be banned, which was to include:

Those treating the Soviet power and communism in a decidedly hostile manner ...  
putting over ideologies alien and hostile to the proletariat ... books of idealistic  
persuasion ... children's literature containing elements of bourgeois moral and lauding  
old conditions of life ... writings by counterrevolutionary authors ... writings by authors  
perished in the struggle against the Soviet power ... Russian literature brought out by  
religious societies regardless to their content.

The 1936 constitution of the Soviet Union guaranteed freedom of speech and freedom of the

press, 'in order to strengthen the socialist system'.

This was, like so much else about the Soviet constitution, entirely fictional. Censorship was pervasive and freedom of speech nonexistent. As the novelist Vasily Aksyonov wrote: 'what in the West is called Soviet censorship is nothing less than the Soviet air that one breathes'.

So when the Soviet bloc participated in the framing of the Universal Declaration on Human Rights in 1948, it was no surprise that it stridently opposed the blanket statement in support of freedom of speech. To the question of whether Nazis could have freedom of speech, their answer was resoundingly 'no'. Repeatedly during the drafting of the Declaration, the Soviet delegation proposed an amendment that 'freedom of speech and the press should not be used for the purposes of propagating fascism, aggression and for provoking hatred as between nations'. Simultaneously, the Soviets proposed a restriction on freedom of assembly to any organisation of a 'fascist or antidemocratic nature'.

The Soviet proposals were rejected, and the Declaration was adopted with the uncompromised Article 19. But it was abundantly clear what the Soviet delegation was seeking. The Soviet Union did not see fascism as a discrete political system, or as a socialist heresy, but as a variety of capitalism. In the view of Alexei Pavlov, the head of the delegation, 'Fascist elements [exist] in almost every European country except those with a people's democracy'—such as the Soviet Union. Pavlov wanted the Declaration to explicitly allow governments to suppress not only Nazi, but liberal capitalist speech as well. As one Canadian participant reflected, 'The term 'fascism' which had once had a definite meaning was now being blurred by the abuse of applying it to any person or idea which was not communist.' The debate, Western nations discovered, was becoming less about limiting one extreme form of speech—Nazi speech—and more about blessing whatever restrictions dictatorships wished to place on expression. Eleanor Roosevelt warned that the proposed restrictions were 'likely to be exploited by totalitarian States for the purpose of rendering the other articles null and void.'

One potential restraint on speech was, however, included within the Universal Declaration. Article 7, which says that all people are equal before the law, also states that people are entitled to protection 'against any incitement to ... discrimination.' This was a wording found in compromise—the Soviet Union sought to prohibit incitement, but the final formulation more vaguely protects against incitement. As one commentator has noted, 'the drafting history of the protection of the freedom of expression in the [declaration] does not leave any doubt that the dominant force behind the attempt to adopt an obligation to restrict [freedom of speech] under human rights law was the Soviet Union.' The British delegate summed up the position of most Western powers:

In the United Kingdom where human rights had certainly been respected as much as in any country, there had never been any need for legislation to compel the authorities to take action against incitement to discrimination. The force of public opinion had always proved sufficient to deal with any attempts at such incitement.

When nearly two decades later it came time to draft the binding International Covenant on Civil



and Political Rights, this was not the ascendant view. The Western countries proposed limiting restraints on speech to those that were an 'incitement to violence'. The Soviet Union proposed extending those restraints to 'incitement to hatred.' According to the Soviet-aligned Yugoslav delegation, it was necessary to 'suppress manifestations of hatred which, even without leading to violence, constituted a degradation of human dignity and a violation of human rights.'

Again, the Western powers objected. The Australian delegation argued 'people could not be legislated into morality.' This time, however, the West lost the UN vote, and an expansive version of Article 20 which banned 'incitement to discrimination, hostility or violence' was adopted.

The same occurred during the drafting of the International Convention for the Elimination of all Racial Discrimination. Here the restriction on freedom of speech is even more strident. All signatories must 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination.'

Again, this clause was driven by the Communist Bloc against the protest of Western powers. As the Columbian delegate argued, the statement,

is a throwback to the past . . . Punishing ideas, whatever they may be, is to aid and abet tyranny, and leads to the abuse of power . . . As far as we are concerned and as far as democracy is concerned, ideas should be fought with ideas and reasons; theories must be refuted by arguments and not by the scaffold, prison, exile, confiscation, or fines.

Once more the Western delegations which supported freedom of speech were outvoted. The adoption of international human rights law was an intellectual culture change from above. Suddenly, states were responsible for the elimination of intolerance and discrimination—an elimination which could not be accomplished without the coercive suppression of freedom of speech. The Soviet Union and other repressive nations—communist or otherwise—were perfectly used to doing so. For liberal democracies, particularly those coming from the English common law tradition, this was a major change in the way they were to understand the limits of free expression.

In 1948, as the Soviet Union was trying to place restrictions on speech in the Universal Declaration of Human Rights, the Gulag system held 2.2 million people. The year the International Covenant on Civil and Political Rights was approved by the United Nations, 1966, was the same year that two satirists, Andrei Sinyavsky and Yuli Daniel, were put on trial, sparking the late Soviet dissident movement. 'It is a sad reflection on Europe', writes the Danish human rights advocate Jacob Mchangama, 'that the increasing emphasis on criminalizing words that wound, offend, or hurt is the brainchild of the very totalitarian states with which Western European states were locked in an ideological battle during the Cold War.' The human rights movement to restrict hate speech and racial discrimination was an ideological power play by the Communist Bloc that was looking for human rights law to approve the suppression of political dissent. The adoption of hate speech restrictions was not intended to liberate minorities (as so many contemporary human rights advocates claim), but to restrain democrats.



In the decade following the two conventions, Western countries adopted their own forms of racial discrimination laws which prohibited, to varying degrees, 'hatred' or 'discrimination'. The United Kingdom, Canada, New Zealand, and Europe adopted prohibitions to protect racial or other groups. Of the major Western nations, only the United States now has no prohibition against hate speech.