Introduction

1.1 INCITEMENT TO HATRED IN A GLOBALIZED WORLD

Globalization has had clear and direct effects on the proliferation of incitement to hatred. One of the most important features of the globalized context of incitement is mass global migration. The unprecedented rise in immigration flows during the last four decades has made most modern societies – especially in the West – more racially, religiously, and culturally diverse and, consequently, has created the global challenge of managing diversity. In the period from 1980 to 2019, the total number of international migrants increased by 172 per cent worldwide.¹ The number of international migrants worldwide rose by 18 million in the period between 1970 and 1980, 27 million in 1980–1990, 54 million in 1990–2000, 64 million in 2000–2010, and 58 million in 2010–2019.² The migration flows have been mostly Westwards. For example, on 1 January 2018, the number of people residing in EU Member States with citizenship of a non-member country was 22.3 million.³ In 2016, 26.3 per cent of the Australian population had been born overseas.⁴ In 2018, the number of people residing in the United States who were not US citizens at birth was 44.7 million.⁵

The increasingly multicultural fabric of modern societies has provided fertile ground for social anxieties and the escalation of prejudices predicated on ethnic, national, or religious divides, thus exacerbating the potential harms of hate speech.⁶

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Intolerance of diversity – or resistance to multiculturalism – under the guise of defending national identity or combating illegal immigration has frequently taken the form of negative stereotyping, profiling, stigmatizing, and demonization of minority and migrant groups. This intolerance has created an environment conducive to hate speech involving incitement to discrimination, violence, and prejudicial attitudes towards groups different from the identities constructed as us or someone like us. There has also been a resurgence of political parties with racist and xenophobic agendas and rhetoric that promotes or incites hatred, discrimination, and intolerance towards ethnic and religious minorities. Such political parties have exploited identity politics to exacerbate sectarian and religious tensions by criticizing the impact of mass immigration on national cultures and economic conditions; this was particularly evident following the financial crisis of 2008 and the subsequent adoption of policies of fiscal austerity by governments across the world.

The need to respect cultural diversity has started to feature in arguments about free speech and its limits, especially with regard to speech that spreads, incites, promotes, or justifies hatred based on intolerance. Setting clear boundaries between highly charged public debates on national identity and immigration, on the one hand, and hate speech, on the other, has become increasingly important in maintaining a peaceful coexistence within multicultural societies. However, setting these boundaries is a difficult and controversial exercise. It calls for rethinking, and perhaps reconfiguring, long-standing assumptions about liberal democracies. More specifically, it calls into question the capacity of liberal democracies to meet the challenge of diversity by functioning as multicultural or pluralist democracies, in normative rather than merely descriptive terms.

These disconcerting developments have taken place in tandem with the global war on terrorism, following the events of 11 September 2001. Counter-terrorism measures have become associated with a growing tendency to stigmatize and negatively stereotype specific minorities and immigrants, who have also been subjected to racial and religious profiling. A number of recent studies have shown

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8 See, for example, country monitoring reports of the European Commission against Racism and Intolerance, available at www.coe.int/t/dghl/monitoring/ecri/default_en.asp.
a temporal relationship between widely publicized terrorist events and more localized incidents of hate.\textsuperscript{13} These terrorist events have, in a number of cases, triggered prejudice or even physical attacks by the members of the ‘victimized’ group against members of the group who are perceived to share an identity with the alleged perpetrator(s).\textsuperscript{14} Another significant feature of the contemporary context for hate speech is the proliferation of global information and communication technologies (ICT), which have provided easily accessible and far-reaching platforms for the dissemination of identity-based prejudices and hostilities. As a result, the proliferation of hate speech in recent years has increasingly acquired a transnational nature; the sheer number of incidents and their negative repercussions have been compounded by the speed and convenience with which information can be spread and accessed, and its wide geographic reach, unfettered by national borders.\textsuperscript{15}

Extremist individuals and organizations have successfully exploited the internet to foment hatred within a worldwide audience in ways that were not previously possible; it has become a powerful platform for extremists, creating a ‘rising tide of electronic hate’.\textsuperscript{16} Cyber (or online) hate, as a global phenomenon, refers to the use of electronic communications to express hateful comments, insults, or discriminatory remarks about a person or group of persons based on their identity.\textsuperscript{17} The number of websites promoting hate speech on the internet has grown exponentially in the last few years. Furthermore, hateful rhetoric continues to spread via social media and online forums. With the advent of social networking sites such as Facebook and Twitter, used by hundreds of millions of people around the world, and the recent explosion in mobile computing, new and influential avenues and hubs for the diffusion of identity-based prejudices and hostilities have developed.\textsuperscript{18} Thus, hate has flourished within the online space on a global scale.\textsuperscript{19}
Cyber hate has created more nuanced and complex forms of harm which go beyond traditional conceptions of ‘offline’ harm.\textsuperscript{20} The prevalence of online hatred may even affect the ability of targeted individuals or groups to fully access the internet and its benefits.\textsuperscript{21} The scope and nature of harms caused by the proliferation of cyber hate has initiated debates on the need to establish new ways of regulating online activity.

Furthermore, globalization, both in its physical dimension (as manifested in international migration) and its virtual dimension (as manifested in digital technology) has provided a new international structure that can transform local hate speech incidents into global crises with geopolitical implications.\textsuperscript{22} National governments’ responses towards specific hate speech incidents now have an international impact. This new dynamic is perhaps best exemplified by the Danish cartoon controversy; in 2005, caricatures of Prophet Muhammad were published in a relatively obscure publication in Denmark, setting off a major international crisis with wide-ranging and serious repercussions, including loss of lives in several different countries. ‘The Innocence of Muslims’, an amateurish and low-budget short film uploaded on YouTube in 2012 which denigrated and insulted Prophet Muhammad, triggered a similar crisis, with violent protests erupting on a global scale. In 2015, twelve people were murdered at the offices of the French satirical newspaper Charlie Hebdo, following publication of controversial depictions of Prophet Muhammad which echoed the earlier Danish cartoons. These crises can no longer be regarded as isolated incidents; they have triggered extreme incidents of hate-motivated violence affecting entire religious or national groups and have incited retaliatory violence between communities. Thus, hate speech now has the potential to fuel political tensions between states in addition to seriously endangering the social cohesion of many societies. Although cases of religious offence have existed historically, they were predominantly local or national affairs, whereas such cases now have the potential to escalate into global crises.

Against the background of these troubling developments, hardly a day passes without heated debate somewhere in the world regarding hate speech regulation. The question of how to determine where freedom of expression ends and incitement to hatred begins has taken on great significance and become the subject of considerable confusion. The subject of regulating incitement to hatred has resurfaced with renewed urgency, not just within political and scholarly circles, but also in wider public discourse. The globalized context of hate speech has brought into question
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not just how hate is being globalized but, more specifically, how international human rights law (IHRL) should respond to this phenomenon. Most pertinently, it has called into question whether the scope of legitimate restrictions on freedom of speech within IHRL ought to be reconsidered or further developed to address hate speech.

The international norm prohibiting incitement to discrimination, hostility, or violence, which was incorporated into the International Covenant on Civil and Political Rights (ICCPR) in 1966, triggered little debate or interest until the twenty-first century. Only recently, with the additional challenges posed by globalization, has this norm attracted significant attention within the international community and assumed a prominent position within the multilateral human rights agenda. In particular, the norm has become the focus of much polarization and confrontation between Western and Islamic UN member states, regarding its exact interpretation. A major issue in these debates is whether recent changes in the scale and nature of hate speech challenges require a new balance to be struck between states’ international obligations to prohibit incitement to hatred, on the one hand, and freedom of expression, on the other.

1.2 The Right to Protection from Incitement to Discrimination, Hostility or Violence

There are provisions relevant to incitement in three different instruments of IHRL: the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and ICCPR. This section is concerned mainly with the ICCPR, in particular Article 20(2) as it embodies the most comprehensive concept of the international norm prohibiting incitement within IHRL, but first it is necessary to say a little about the relevant provisions of the two other instruments.

Article 7 of the UDHR obliges states to provide protection against incitement to discrimination. Such prohibition is thus integral to the definition of the right to equality and the right to non-discrimination. The Article provides protection only against one category of harms resulting from incitement which is discrimination. It does not address the other harms of incitement that Article 20(2) proscribes; which are hostility and violence.

Article 4 of ICERD obliges state parties to declare the following offences punishable by law: the dissemination and promotion of ideas based on racial superiority or hatred, incitement to racial discrimination, and incitement to and acts of racially motivated violence. Furthermore, the Article obliges states to legally prohibit the provision of assistance to racist activities and the establishment of organizations that promote and incite racial discrimination. The Article is restricted only to the racial ground of incitement and does not address the other two grounds of incitement that Article 20(2) addresses which are the religious and national grounds. The ICERD
imposes wider restrictions on racist speech than the ICCPR as it does not only oblige states to prohibit incitement to racial discrimination and violence; it also prohibits the mere dissemination and promotion of ideas based on racial superiority or hatred.

Turning now to Article 20(2) of the ICCPR, it states that ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. The scope of the norm against incitement in this Article is broader than that of Article 7 of the UDHR and Article 4 of the ICERD. It proscribes incitement to three different categories of harms: (1) discrimination, (2) hostility, and (3) violence, and covers three grounds of incitement: (1) race, (2) nationality, and (3) religion.

Article 20(2) is a unique provision within the edifice of the ICCPR, standing out from the Covenant’s other Articles codifying human rights. The other Articles use terms such as ‘all persons’ and ‘everyone’ and oblige states to refrain from interfering with the exercise of specific rights. The Articles codifying human rights are subject to a general provision stipulating that states adopt laws only ‘as may be necessary’ to give effect to these rights. Limitations on the exercise of freedoms within the Covenant are of a permissive rather than prescriptive nature, authorizing states to impose such limitations (which must be enacted in law) at their discretion. However, Article 20(2) explicitly incorporates a positive obligation on states to enact laws prohibiting specific expressions, rather than merely authorizing them to enact such laws. Article 20(2) is the only Article in the ICCPR whose wording incorporates the phrase ‘shall be prohibited by law’.

Given the distinctive formulation of Article 20(2), a number of scholars and human rights experts have described it as an ‘unusual’, ‘cryptic’, ‘anomalous’, or even an ‘alien’ Article within the context of the ICCPR. They contend that the Article, unlike other substantive Articles of the Covenant, does not set forth or codify any specific human right but is only relevant insofar as it establishes an additional limitation on freedom of expression. Partsch, for instance, considers Article 20(2) to be ‘practically a fourth paragraph to Article 19’, which codifies the right to freedom of

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expression. Similarly, Nowak argues that Article 20(2) ‘may easily be included’ under Article 19(3) on the basis that the prohibition of advocacy of hatred is necessary for the respect of others’ rights and for the protection of public order. So, according to this argument, Article 20(2) of the Covenant is just lex specialis of Article 19(3). Article 19(3) of the ICCPR expressly states that the exercise of freedom of expression carries with it special duties and responsibilities. Pursuant to the Article, two limitative areas of restrictions on this freedom are permissible, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order or of public health or morals. Article 19(3) includes a clear three-part test by which the legitimacy of restrictions imposed on the exercise of freedom of expression may be assessed. Any restrictions imposed (1) must be provided by law, (2) must pursue a legitimate aim, and (3) are necessary to the legitimate aim and proportionate.

The reluctance to conceive of Article 20(2) as setting forth a human right – or even outright rejection of this proposition – might be explained not only by its distinctive drafting, but also by its grounding in the libertarian–individualist approach to human rights. As Chapter 2 will explain in detail, the recognition of the claim to be free from the harm of hate speech as a legal human right challenges the strictly libertarian–individualist approach to rights. Article 20(2) takes effect through limiting the legitimate range of expressions available to speakers who advocate hatred and recognizes group-based harms. The norm prohibiting incitement to discrimination, hostility, or violence differs from classical liberties as it reflects an understanding of rights that is not solely based on states’ obligations to refrain from certain actions infringing upon the liberties of individuals. Instead, the norm focuses on states’ duties to undertake positive measures to protect the liberty and equality of group members. The libertarian–individualist approach to rights expresses unease about recognizing an obligation on states to prohibit certain expressions as a human right norm.

Notably, as Chapter 3 will demonstrate, a number of Western states that voted in the UN against the incorporation of Article 20(2) into the ICCPR also viewed the


Article as not being cast in terms of a justiciable right, reflecting similar biases towards the strictly libertarian–individualist approach to rights.32 In a recent complaint before the HRCttee (Mohamed Rabbae, A.B.S and N.A. v. Netherlands33), the Netherlands argued that the Article ‘is cast not in the form of a human right, but as an obligation on States to put in place legislation prohibiting the conduct described. Other articles use terms such as “all persons” and “everyone”.34 The Netherlands further argued that if Article 20(2) is conceived as establishing a human right, this would necessarily mean acknowledging a human right to specific legislation, which is not acceptable.35

By these interpretations, Article 20(2) of the ICCPR serves a restrictive purpose and simply represents an additional limitation on freedom of expression, rather than establishing or codifying a specific human right or empowering individuals. Such assumptions largely explain the fact that the volume of literature on the norm prohibiting incitement to hatred within the context of IHRL remains particularly thin.36 The treatment of this norm in the existing literature has mostly been rather incidental, lacking the depth of reflective study accorded to most rights and freedoms codified in IHRL.

Conversely, this book contends that Article 20(2) codifies a separate and autonomous human right among the other rights codified in the Covenant. Despite the Article’s direct relevance to other rights, in particular freedom of expression, it sets forth an independent right which is right to protection from advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. The Article not only imposes an obligation on states to legislate against incitement to hatred but also codifies the right to protection from it.

The distinct formulation of Article 20(2), as well as the fact that it shrinks the available zone for legitimate exercise of freedom of expression by speakers who advocate hatred, should not lead to the presumption that it does not set forth a right recognizable on its own terms. On the contrary, the protection of an independent right is what distinguishes the Article from the other provisions within the ICCPR that allow states to impose interest-based limitations on freedoms (such as paragraph 3 of Article 19). Under these other limitation provisions, states are granted discretionary power to apply limitations to the exercise of freedoms only as an option (i.e. these limitations are permissible, rather than mandatory, in nature). Conversely, the mandatory nature of states’ obligations under Article 20(2) is consistent with the declaration of an independent right. The interest in being against the harm of hate speech carves out an independent right.

Moreover, the Article was inserted in the section of the Covenant dealing with substantive rights. The norm prohibiting incitement to discrimination, hostility, or violence was not subsumed under the abuse of rights doctrine (Article 5) or merged with the limitations clause of Article 19.37 The autonomous presence of Article 20(2) in the Covenant’s text corresponds with its right-declaratory nature. This contrasts with the Covenant’s limitations provisions, which exist as sub-clauses within relevant Articles. Similar to other right-declaratory Articles of the Covenant, Article 20(2) also entails a negative claim vis-à-vis the state. Though it might appear prima facie as incorporating only a positive claim vis-à-vis the state to enact laws that prohibit the expressive acts described therein, Article 20(2) also obliges the state to refrain from engaging in advocacy of hatred constituting incitement to discrimination, hostility, or violence. Indeed, laws enacted pursuant to Article 20(2) should apply equally to private persons and state organs.38

The absolute prohibition of torture and slavery under Articles 7 and 8 of the ICCPR, respectively, have been widely acknowledged in the IHRL lexicon as duties upon states giving rise to rights to be free from torture and slavery, respectively. As with Article 20(2), neither of these Articles include the words ‘right’ or ‘freedom’.39 Correspondingly, the prohibition of advocacy of hatred that constitutes incitement to discrimination, hostility, or violence is the duty that gives rise to the right to protection from incitement to such harms. Such prohibition represents the right’s counterpart obligation or the corollary to a right to protection free from incitement to discrimination, hostility, or violence. It should also be noted that the protection against incitement pursuant to Article 7 of the UDHR is explicitly formulated as a right: ‘All are entitled . . . and against any incitement to such discrimination [my

37 Temperman, Religious Hatred, p. 81.
38 CCPR, General Comment no. 11 (Art. 20) (29 July 1983), para. 2; Nowak, U.N. Covenant on Civil and Political Rights, p. 475.
emphasis],’ thus establishing the right to protection free from incitement to discrimination.40

The right to protection from incitement to discrimination, hostility, or violence as codified by Article 20(2) of the ICCPR comes into direct contact with a wide range of freedoms and rights: life, equality, expression, religion, association, assembly, mental and physical integrity, and group rights. It facilitates and enhances the enjoyment of these rights and freedoms. Thus, the right to protection from incitement falls squarely under the ambit of rights that maximize the utility of freedoms, rather than those that maximize the range of freedoms.41

Multiple dualities are features of the right to protection from incitement; it guarantees freedom from being subjected to incitement in order to enhance equality through imposing restriction on the exercise of freedom of expression as a fundamental liberty. It pushes the boundaries between the individual, on the one hand, and the state, society, and groups, on the other. The right protects the personal aspects of an individual’s life, both the physical and psychological, and also embraces a highly public dimension in which the interests and identities of groups and society as a whole are involved. The principle affirmed in Article 5 of the ICCPR that ‘no one may engage in an activity aimed at destroying the rights of others’ provides the rationale for the right to protection from incitement, given that it prohibits the abuse of freedom of expression with the aim of enhancing the rights of others.42

The issue of determining valid justifications for recognizing specific claims as human rights has, however, been subject to extensive philosophical, legal, and political debates and remains widely contested. Traditionally, appeals have been made to natural law and the inherent dignity of human beings.43 Currently, an increasing number of theorists focus on grounding human rights in human interests.44 These theorists have suggested a wide range of interests, corresponding to different views of human life. However, there is limited agreement among them on the valid criteria for determining when an interest deserves recognition as – or is sufficiently important to necessitate the formulation of – a human right.45 Such debates need not be repeated here, as this book does not investigate, at the abstract

40 Temperman, Religious Hatred, p. 18.
41 Feldman uses these two categories to distinguish between negative rights and positive rights. David Feldman, Civil Liberties and Human Rights in England and Wales, 2nd ed. (Oxford University Press, 2002), p. 13.