

## **Internet Censorship and Freedom of Expression: A Critical Appraisal of the Regulation of Hate Speech on the Internet\***

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### **1 0 Introduction**

One of the most contemporary issues facing the world today especially in the area of cyberspace is the regulation of hate speech which has been widespread on the Internet without infringing on the long established fundamental right to freedom of expression and without causing what has come to be known as Internet censorship. This paper shall inform the discourse as to whether regulation of hate speech on the Internet suppresses the right to freedom of expression and thereby results into censorship on the Internet. The conceptual and normative let alone the philosophical underpinnings relating to the regulation of hate speech on the

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\* This paper is dedicated to Professor Shigenori Matsui of the Faculty of Law, University of British Columbia, Vancouver, Canada.

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Internet shall be discussed alongside the major tenets of free speech/freedom of expression.<sup>1</sup> How to strike a balance between freedom of expression and regulation of hate speech on the Internet in order to avoid internet censorship forms the underlying thesis in this paper and is core to the discussion. The debate shall be limited to whether regulation of the Internet (including regulation of hate speech) should be kept to the minimum in order to empower individuals to make up their own minds on important issues which increases the likelihood that they will become active participants in democracy as opposed to regulation of the Internet which may result into total curtailment of freedom of expression on the Internet and thereby create Internet censorship. The paper shall discuss the extent to which the government(s) should be allowed to ban hate speech on the Internet, without necessarily infringing the right to freedom of expression and causing Internet censorship.

## **2.0 Background to the Paper**

The Internet is every where and the Internet is the new blessing to mankind to reach out to everyone in the world and to foster easy communication amongst the people of the world. However, the Internet which was initially seen as a blessing to mankind has turned out to be a curse to the very mankind it sought to save from the hassles of communication in this era of globalization. Though originally lauded and praised as a wonderful medium of communication and the epitome of freedom of expression, the Internet as a medium of communication has produced increased tensions especially in relation to the hate speech, defamation, indecent speech, and pornography among others. In this paper, I will in the interest of space and relevance to the topic under study restrict my discussion to hate speech on the Internet. The Internet provides purveyors of hate materials with a new method of distribution, and has left some questioning whether current laws are obsolete. Hate groups around the world have embraced the potential of the Internet, with the current estimates (as of 2002) being well over 1,000 hate sites online per Professor Geist.<sup>2</sup> The legal approaches to hate speech vary very considerably in real space, and those differences are reflected online. For example, the hate speech law in Canada varies from that of the United States or the European Union. Since the Internet is global and is borderless, having different laws in the different jurisdictions to apply to one and the same thing (the Internet) presents difficulties to regulation of hate speech on the of the Internet. This further brings about the problem of agreeing on the boundaries of hate speech to be restricted/regulated. The differences between Canada and the United States shall also be highlighted and the rationale underlying this difference will be given. Other parts of the world where Internet usage is very limited (and thus the absence of any meaningful laws relating to Internet governance) such as Africa and a larger part of Asia will be

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<sup>1</sup> Nowak, M., *'U.N. Covenant on Civil and Political Rights CCPR Commentary'*, N.P. Engel, 2<sup>nd</sup> Revised Ed., 2005.

<sup>2</sup> Geist M., *Internet Law in Canada*, Captus Press, Ontario, Canada, Third Edition, 2002,p.170.

discussed clearly bringing out the implications this has to the regulation of hate speech on the Internet at the global level since internet is borderless. There are divergent views in relation to the efforts to regulate use of the Internet with differing theories that the regulation of the Internet may not necessarily restrict hate speech but will only serve as Internet censorship and a threat to freedom of expression which represents a clear and present danger to the robust political debate on the Internet. The Internet has been heralded as the novel medium of communication to be used for the exchange of ideas to advance the goal of combating bias and prejudice.

### **3.0 Freedom of Expression on the Internet**

#### **3.1 Introduction**

The modern roots of freedom of expression may be found in the struggle for the freedom of speech for legislators during the 17<sup>th</sup> century.<sup>3</sup> Sweden-Finland was one of the forerunners of giving legal guarantees to the freedom of speech in the 18<sup>th</sup> century. The 1766 Freedom of Print Decree of Sweden-Finland included the most highly developed protections for free expression in Europe.<sup>4</sup> In the liberal democracy, freedom of opinion and expression serves both the personal autonomy and self-realization of the individual and guarantees the democratic process of the society. A free responsible citizen is protected from any outside intervention in order to enable him/her to form and express his/her opinions without any outside threat or coercion. Freedom of expression and opinion is a typical "first generation" human right with very classical individual emphasis.<sup>5</sup>

#### **3.2 Relevant Provisions on the Right to Freedom of Expression in International Human Rights Instruments**

The UN Charter<sup>6</sup> obliges all Member States in the promoting and encouraging respect for human rights and for fundamental freedoms. These human rights are well spelt out in the Universal Declaration of Human Rights.<sup>7</sup> At the apex of international human rights instruments lies the Universal Declaration of Human Rights of 1948. Its provisions dealing expressly with freedom of expression are set out in Art 19, which states:

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<sup>3</sup> As early as 1688, the English Bill of Rights provided 'that the freedom of speech and debate or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament'.

<sup>4</sup> Kortteinen J, *et al*, 'Article 19', in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights*, 1999, Kluwer, 393-415, at p.394.

<sup>5</sup> *Ibid*.

<sup>6</sup> art.1(3).

<sup>7</sup> On 10 December 1948, the UN General Assembly adopted the UDHR as an Instrument of "a common standard of achievement." Though not binding, many scholars, however, believe that the Declaration has over the years acquired a binding character.

“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”.

The right to freedom of opinion and expression as proclaimed in article 19 of the UDHR constitutes a cornerstone of democratic society. This is the reason why many human rights instruments adopted by the UN bodies since 1948 elaborate principles set out in this article.

According to paragraphs 1 and 2 of article 19 of the 1966 International Covenant on Civil and Political Rights (CCPR), everyone shall have the right to hold opinions without interference and to freedom of expression. The latter right includes freedom to seek, receive and impart information and ideas of all kinds, through any media (*including the Internet*) and regardless of frontiers (*without limitation to jurisdiction or borders*). Unlike article 19 of the UDHR, article 19(3) of the CCPR expressly allows for restrictions and limitations upon the freedom of expression. According to paragraph 3, the exercise of the rights provided for in paragraph 2 carries with it special duties and responsibilities and may therefore be subjected to certain restrictions. These limitations doubtlessly draw on article 29(1) of the UDHR, and they presumably include the duty to present information and news truthfully, accurately and impartially. On the other hand, these limitations shall only be such as provided by law and are necessary: a) for the respect of the rights or reputations of others; b) for the protection of national security or of public order (*ordre public*); or c) for public health or morals.

While article 29(3) of the UDHR contains a general provision that the rights and freedoms defined by it may in no case be exercised contrary to the purposes and principles of the United Nations, the rights laid down in article 19 of the CCPR are further restricted by article 20, according to which any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement of discrimination, hostility or violence shall be prohibited by law.<sup>8</sup>

Principle 2 of the Siracusa Principles obliges member states to restrict freedom of expression only when the threat is so big and the ban on freedom of expression is intended to secure the territory against the external source/or internal threat. Using this principle, a government would then be able to ban freedom of expression in any media (*including the Internet*) basing on the likely effects of hate speech which the government can comfortably call a threat to its national security.

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<sup>8</sup> See the Siracusa and Johannesburg Principles on National Security, freedom of Expression and Access to Information which provides under Principle 1.2 that any restriction on expression or information that a government seeks to justify on grounds of national security must have genuine purpose and demonstrate effect of protecting a legitimate national security interest.

Discrimination with regard to freedom of expression is prohibited in all circumstances according to Principle 3. Expression may be punished if it is intended to incite imminent violence, or is likely to incite such violence, or if there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.<sup>9</sup>

Special studies done by the UN on the *Right to Freedom of Opinion and Expression* clarify the distinction between these two freedoms and consider the freedom of opinion as more or less absolute right. The freedom to express an opinion is still under certain limitations.<sup>10</sup> As one of democracy's most cherished rights, the right of free speech is at the foundation of the rights enjoyed by citizens in a free society.

As Prof. Geist observes:

“Contrary to popular belief, however, it is not an absolute right, as all countries establish some limitations to free speech. Certain limitations, such as criminal speech consisting of death threats or defamatory speech, are relatively unconventional. Other forms such as hate speech or obscenity, are subject to differing rules in different countries. At the one end of the spectrum, the United States has adopted perhaps the most permissive free speech legal framework, with even the most hateful material enjoying constitutional protection. By contrast, Canada and many European countries have set limitations on hate speech, rendering certain forms illegal.”<sup>11</sup>

Given the free flow of information on the Internet, these differing approaches to speech regulation assume a heightened level of importance, since speech legal in one jurisdiction may be illegal in a neighboring jurisdiction, even though the material is readily available in both places via the Internet. An understanding of the different approaches to speech regulation is therefore essential within the context of Internet law, since a harmonized International legal framework for much of the controversial speech is highly unlikely.<sup>12</sup> I will later in this paper canvass several international approaches to Internet speech regulation ranging from the North American (United States/Canada) perspectives to the EU perspective which is more similar to the Canadian North American approach in relation to Canada as opposed to the US. Other advanced jurisdiction such as the Asian Pacific i.e. Australia and Japan will also be highlighted.

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<sup>9</sup> It is upon this background that hate speech or incitement of violence as it is called in other jurisdictions in any media (including the Internet) is punished.

<sup>10</sup> UN Doc. E/CN.4/Sub.2//1990/11.

<sup>11</sup> Geist, M., *Supra*, p. 130.

<sup>12</sup> *Ibid.*

Not only have the principles laid down in article 19 of the UDHR of 1948 had effects on the elaboration of United Nations instruments, but the content of this article, in somewhat modified form, appears in many regional human rights instruments as well. Provisions concerning the freedom of information are included in article 10 of the European Convention on Human Rights (1950, ECHR), article IV of the American Declaration on the Rights and Duties of Man (1948), articles 13 and 14 of the American Convention on Human Rights (ACHR, 1969, in force in 1978), and article 9 of the African Charter on Human and Peoples' Rights (African Charter, 1981, in force in 1986).

According to article 10(1) of the ECHR, everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (including the Internet). Article 10(1) does not, however, prevent States from requiring the licensing of broadcast, television or cinema enterprises. In conformity with article 19 of the ICCPR, article 10 of the ECHR also permits certain restrictions of the freedom of information. As the exercise of freedoms set forth in article 10(1) carries with it duties and responsibilities according to article 10(2), they may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, *for the prevention of disorder of crime*, for the protection of health and morals, for the protection of the reputation or rights of others, for the preventing of disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The right to freedom of opinion and expression, including the freedom of information, is an absolute prerequisite for a democratic society. Under no circumstances should a person be imprisoned for expression of his views.<sup>13</sup> Article 19 of the CCPR maintains a clear distinction between freedom of opinion and freedom of expression. While the first right is subject to no restrictions, the freedom of expression is subject to certain restrictions, but only in keeping with the principles of legality and necessity.<sup>14</sup>

Thus, any interference with the right to freedom of expression as laid down in article 19 of the ICCPR, by imposing sanctions against participating in, or censoring, radio and television programs or content on the Internet would tantamount to Internet censorship which is a clear violation of freedom of expression on the Internet like any other medium of communication.

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<sup>13</sup> Unfortunately, such guarantees have not been given in all UN Member States. Through article 19 of the 1966 Covenant, the proclamations concerning the freedom of information in the UDHR have now, however, become part of a legally binding treaty for nearly 100 States.

<sup>14</sup> Kortteinen, J., *Supra*, p.410.

### **3.3.0 Rationale for Protection of Freedom of Expression on the Internet**

The Internet has been heralded as the modern medium of communication due to its borderless nature. The Internet has a wide publication and it is the best mode of communication worldwide now. Applicability of the notion of freedom of expression onto the Internet can be an interesting issue; with such questions as to whether there is such a right like freedom of expression on the Internet just like there is in other mediums of communication. The Canadian Charter of Rights and Freedoms (hereinafter CCRF), states that everyone has the fundamental right to freedom of expression including freedom of press and other media of communication.<sup>15</sup> The Canadian Charter right to freedom of expression is almost verbatim with art. 19 of the UDHR, art. 19 of the ICCPR, and art. 10 of the ECHR.

Democracy has always respected and cherished the fundamental importance of an individual. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect the fundamental right to freedom of expression which is core to any democratic and free society.<sup>16</sup> From the foregoing we can see that a central theme through the ages has been a strong desire to uphold the individuals right to freedom of expression irrespective of the medium of communication/expression. This prompts me to discuss the rationale for freedom of expression on the Internet.

The uninhibited exercise of the right to freedom of expression can allow it to play a crucial role in the furtherance of say anti-racism strategies which is often touted as being one of the main reasons to regulate/curtail freedom of expression the world over. Freedom of expression is considered a fundamental political freedom, and is zealously guarded in Western society/democracies.<sup>17</sup>

Freedom of expression on the Internet or in any other media, is very helpful in building a culture of tolerance to divergent views and acceptance of opposing ideas. It is also asserted that the best way to fight prejudices is through freedom of expression through which people of different cultures and backgrounds exchange views and ideas in a more human and tolerant way especially on the borderless

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<sup>15</sup> Article 2 paragraph b of the Canadian Charter of Rights and Freedoms. It can, therefore, be argued that the Internet is one of the other media of communication to which everyone enjoys the fundamental freedom of expression.

<sup>16</sup> Nowak M., *An Introduction to International Human Rights Regime*, Nijhoff, 2003.

<sup>17</sup> Section 2b of the CCRF gives every Canadian the fundamental right to freedom of expression. This clause is meant to protect citizens of Canada from censorship, defined here as the suppressing of opinions expressed through written word, theatrical performance, or artistic media, usually by the government.

Internet. The right to freedom of expression is a fundamental right that safeguards the exercise of all other rights and is a critical underpinning of democracy.<sup>18</sup>

John Stuart Mill identifies a number of reasons why it is morally important to protect freedom of expression. One reason is that freedom of expression is a freedom that intrinsically matters a lot to most people. It involves both the freedom to express our beliefs and values, and the freedom to be informed by the publicly expressed beliefs and values of others. A second reason that it is morally important to protect freedom of expression is that freedom of expression typically promotes the discovery of, and the respect for, the truth. The knowledge gained matters both in its own right and because it leads to better decisions and thus a better quality of life.<sup>19</sup> Although there are other reasons for the protection of freedom of expression, according to Stuart, these two establish the moral importance of such protection. The true value of freedom of expression lies in keeping true beliefs from becoming dogmatic. Since the personal is political, freedoms of thought and discussion are essential to the justification of one's beliefs and actions, because individuals are not cognitively self-sufficient.<sup>20</sup>

In those open ways, open and vigorous discussion with diverse interlocutors imposes the quality of one's deliberations. This being so, censorship, even of false belief, can rob both those whose speech is suppressed and their audience of resources that they need to justify their beliefs and actions. Thus, it is often wrong to censor even false beliefs.<sup>21</sup>

The deliberative rationale for freedom of thought and discussion or expression is a special case of a more general defense of basic liberties of thought and action Mill offers. A good human life is one that exercises one's higher capacities; a person's higher capacities include her deliberative capacities, in particular, capacities to form, revise, assess, select and implement her own plan of life.<sup>22</sup> A more robust rationale for various liberties of thought and action; they are important as

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<sup>18</sup> *Guardian Unlimited Comment*, Thursday February 2, 2006.

<sup>19</sup> Mill, John Stuart. *On Liberty* (1859).

<sup>20</sup> Scanlon, T.M., 'A Theory of Freedom of Expression', 1 *Philosopher & Public Affairs*, 1972, 204-26 and Ten, C.L., *Mill on Liberty*, Oxford Press, New York, 1980.

<sup>21</sup> Dworkin, G., 'Is More Choice Better than Less?' in *The Theory and Practice of Autonomy*, Cambridge Press, New York, 1988.

<sup>22</sup> The value of deliberative capacities, within Mill's brand of perfectionism, certainly provides the basis for criticizing some lives as shallow and undemanding, even when these lives are contented and successful in their own terms. But because capacities for practical deliberation can be realized and expressed equally or incomparably well in many different kinds of lifestyles, Mill can and does recognize very diverse kinds of valuable lives. We might say that Mill's brand of perfectionism respects *moderate pluralism* about the good, even though it rejects *content-neutrality* about the good. See Brink, *Mill's Deliberative Utilitarianism*, 79-80.

necessary conditions for exercising our deliberative capacities and so for producing the chief ingredients of human happiness.<sup>23</sup>

### 3.3.1 The Internet as a Platform for Cyber democracy

The Internet is the new medium through which democracy can be fostered: the Internet can generate places that facilitate interaction over time. Giving three reasons, Zatz, has heralded the cyberspace as a hall maker:

- "Cyberspace which has the heralded characteristic of erasure of *distance*. Cyberspace, like many communications and transportation technologies before it in significant ways eliminates and therefore equalizes distance which hitherto was a big barrier to effective communication a necessary prerequisite to the democratic process.
- *Adjacency*, except that there is no street to cross, the lack of direction and continuity in cyberspace means that there are no fixed places that lie between any other two; nor is the environment of one place affected much by any other. There are no neighbours in cyberspace and, therefore, no blockades, no loud noise bothering you from the disco next door, and no neighbour's tree dropping fruit on your side of the fence.
- *Fixity*, having built an information superhighway without sidewalks, we can still add them on without displacing either the roadway or the places abutting it."<sup>24</sup>

Then, this communications technology offers us the perfect medium of communication necessary for the proper functioning of the democratic process. The new era now requires that we take advantage of new technologies to embrace democracy. The Internet has the potential to create access (by the speakers) to a wide array of people because of its borderless nature. In a democratic society, underlying issues are best approached through two different routes i.e. the 'public forum' and the deliberative democracy.<sup>25</sup> On the speakers' side, the public forum doctrine thus creates a right of general access to heterogeneous citizens. On the listeners' side, the public forum creates not exactly a right but an opportunity, if perhaps an unwelcome one: shared exposure to diverse speakers with diverse views and complaints.<sup>26</sup>

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<sup>23</sup> These are very strong reasons to compel the protection of freedom of expression on the Internet one would think.

<sup>24</sup> Zatz, N.D., 'Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment', 12 *Harvard Journal of Law and Technology*, 149.

<sup>25</sup> However, this is in the ideal, the Internet can have a backlash with a decline in the common experiences and a system of individualize filtering that might compromise the ideal. The understanding that lies behind the notion that a free society creates a set of public forums, providing speakers' access to a diverse people, and ensuring in the process that each of us hears a wide range of speakers, spanning many topics and opinions.

<sup>26</sup> Under the public forum doctrine increases the likelihood that people generally will be exposed to a wide variety of people and views. Under the public forum doctrine, speakers are thus permitted to

As Sunstein argues, the Internet is the modern technological environment that seems greater than streets and parks. He argues that the public forum should be expanded in the modern era from merely the traditional public forums to the mass media, including the Internet, which have been far more important than the streets and parks as arenas in which expressive activity occurs.<sup>27</sup>

Though heralded by many as the modern medium of communication, the Internet has several limitations as an instrument which may inhibit its proper use as a medium of exchange of ideas to replace the streets and parks. These constraints basically relate to the Internet itself as a technology and the jurisdiction within which it operates.

### **3.3.2 Limitations to Freedom of Expression on the Internet**

There are several limitations to freedom of expression on the Internet. Though touted by many as the new technological environment to promote cyber democracy and the freedom of expression, the Internet has several bottlenecks in relation to itself as a technology and the regulations governing it that may severely limit freedom of expression. The assumption that the Internet will be used as a tool for the promotion of democracy and freedom of expression are both premised on the assumption that the jurisdiction within which the Internet operates is fully democratic and cherishes some of the great societal and democratic values like the freedom of expression and ideas. This is not the case always, many jurisdictions, and actually a big part of the world especially the third world/least developed parts of the world like Africa and Asia; though very big continents with at least half of the total world population and land mass/human habitation are yet to fully embrace the democratic values and principles being espoused and cherished by their counterparts and contemporaries in the west.

This in itself sets a bad precedent and premise for the smooth operation of the Internet as a medium of cyber democracy and freedom of expression. Thus, whereas, the Internet can be indeed touted and heralded as the wonderful medium of communication for freedom of expression, that is only true as in as far as North America and North and Western Europe is concerned, otherwise, it can not be claimed to be true of the global hemisphere.

There is a lot of Internet censorship in Asia and Africa which is a major hindrance to cyber democracy and indeed a threat to freedom of expression. Major studies

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have access to particular audiences, and particular listeners can not easily avoid hearing complaints that are directed against them. In other words, listeners have a sharply limited power of self-insulation.

<sup>27</sup> Sunstein, C. R., "Chapter 2: An Analog and an Ideal." *Republic.com.*, Princeton, Princeton Press, 2001, 23-50, at p.28.

done on democratic governance and Internet governance on Asia and Africa paint a very gloomy picture: that the use of Internet as a medium of communication is far from taking off.<sup>28</sup> The Chinese government for example with a population of about 2 billion people uses a very strong Internet censorship regime.<sup>29</sup> In Africa, if I may take, the example of my home country Uganda, at the height of the February 2006 Presidential and Parliamentary Elections, the Government of Uganda banned Radio Katwe an Internet satellite TV and Radio for allegedly spreading malicious propaganda against the government through the Uganda Communication Council (UCC), the body mandated to regulate communication in Uganda including Information, Communication Technology (ICTs) like the Internet.<sup>30</sup>

Though the Internet can indeed be used as a major tool in the democratic process not only as a technologically friendly medium for the exchange of ideas/freedom of expression but also in key democratic exercises such as voting and say referenda, the Internet has a limited coverage of the global: not everyone has access to the Internet even here in the developed world say in North America. Still many of our people can not afford computers and yet even the computers in the public libraries which such people would use are not easily accessible. Without a computer, Internet usage is very limited. In places like Asia and Africa, Internet usage is still very low and the Internet connections and user fees are indeed prohibitively higher almost ten times higher than it is in the developed world. This type of scenario makes Internet use as a medium of cyber democracy and freedom of expression an illusion to the vast majority of the world population on the bigger continents of Asia and Africa.<sup>31</sup>

In the developed world, the changing role of general access in cyberspace can not be ignored. One of the basic functions of the public forum doctrine in the cyber democracy debate is to provide mass access to the general public. Speakers seeking general access, hoping to sway public opinion or support a particular candidate or referendum on an election ballot, can use the Internet to reach these people simultaneously.<sup>32</sup>

The existing bottlenecks to the use of cyberspace in the promotion of democracy greatly hamper the smooth running of the Internet as the major medium of cyber democracy and freedom of expression leaving us to our mostly ancient ways of

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<sup>28</sup> [http://network.idrc.ca/acacia/ev-113431-201-1-DO\\_TOPIC.html](http://network.idrc.ca/acacia/ev-113431-201-1-DO_TOPIC.html) accessed 18.12.2007.

<sup>29</sup> [http://en.wikipedia.org/wiki/China\\_Page](http://en.wikipedia.org/wiki/China_Page) accessed 18.12.2007.

<sup>30</sup> See the *New Vision*, 21<sup>st</sup> February, 2006 at <http://www.newvision.co.ug/D/8/13/483221>. This just serves as an iceberg of how the repressive regimes in the less democratic societies in Asia and Africa are far from embracing the Internet as being part of the democratic process.

<sup>31</sup> [http://network.idrc.ca/en/ev-6091-201-1-DO\\_TOPIC.html](http://network.idrc.ca/en/ev-6091-201-1-DO_TOPIC.html) accessed 18.12.2007. Though it is now possible to vote on the Internet through for example vote.com, with limited Internet access this is not possible.

<sup>32</sup> Zatz, *Supra*, para. 201.

freedom of expression and democracy especially the streets and parks. However, even if the Internet were to be free of any restrictions in the form of censorship and limited access as is the case in Asia and Africa, the cyberspace if used as a medium for the promotion of cyber democracy and freedom of expression and its attendant limitations: it would mean that in the event of future breakdown of cyberspace (which is not a far fetched idea), democracy too would suffer a similar fate since the two would be intertwined and interwoven.<sup>33</sup> This would surely be a very dangerous trend the world over: it is thus advisable that we keep other avenues for the promotion of democracy and the much cherished right to freedom of expression such as the streets and parks, which are technology free or at least use very limited technology so that even in the event of a technological breakdown (which would be enough to kill cyber democracy and freedom of expression on the Internet), we would still have other mediums through which to access the public and practice our democracy and the right to freedom of expression.

#### **4.0 Justifications for Regulation of Hate Speech on the Internet**

Freedom of expression on the Internet if misused can indeed be disastrous. The borderless nature of the Internet and the mask of anonymity which the Internet bestows upon its users can indeed be a wonderful avenue for the spread of harmful propaganda and most especially the dangerous hate speech.

Hate speech is defined in the Additional Protocol to the Convention on Cyber crime, concerning the criminalization of acts of a racist and xenophobic nature committed through the compute systems as:

“racist and xenophobic material” means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.”<sup>34</sup>

For mainly the above reasons and the others, here below, governments the world over have sought to regulate hate speech especially through the censorship of the content on the Internet, increased Internet Service Provider (ISP) liability and total criminalization of all content that falls within the definition of hate speech.

It is important to note that there are significant differences in dealing with the question of hate speech or what has come to be known as incitement of violence especially in the African context between say North America (with the United

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<sup>33</sup> *Ibid.*

<sup>34</sup> See Article 2 paragraph 1 of the Additional Protocol. This Protocol is a Council of Europe document.

States taking a very liberal approach to hate speech while Canada has taken a somewhat hard stance similar to that taken by the European Union on hate speech) and the EU. The reasons that account for the differences are largely historical and cultural.<sup>35</sup>

One of the major justifications for regulation of hate speech on the Internet is the harm principle. The State has not only the power but also the responsibility to prevent harm to members of its society.<sup>36</sup>

Hate speech too is inconsistent with the underlying values of liberal democracy to brand some citizens as inferior on the grounds of say race, colour, descent or national or ethnic origin or religion if used as a pretext for any of these factors. The EU for example, obliges a member State to take appropriate measures not limited to adopt such legislation and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally and without right, the following conduct:

Distributing, or otherwise making available, racist and xenophobia material to the public through computer system.<sup>37</sup>

The dangers and risks posed by hate speech to any society, helps the society to determine proper limits of free expression; so as not to harm itself or members. The liberty of the individual must thus be limited; he/she must not make himself a nuisance to the other members of society and wrack havoc onto the society unabated.

Equally, why should haters or promoters of hate speech be held high above the society they expose to risk through their reckless actions? The victims of hate speech desire more support and help than may be the right to freedom of expression by the haters on the Internet.<sup>38</sup>

Restrictions on freedom of expression through the regulation of hate speech on the Internet must be formulated in a way that makes clear its sole purpose is to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism. The right to freedom of expression implies that it should be possible to scrutinize, openly debate, and criticize, even harshly and unreasonably,

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<sup>35</sup> Europe with a horrible history of the holocaust has been tough on any actions on the Internet or in its society that tends towards genocide or the much dreaded holocaust, and Canada, being an extremely heterogeneous Nation with many immigrants especially from Europe and Asia, not surprisingly has legislation similar to that of the EU on hate speech. On the other hand, the US has no history of holocaust and it can not be said to be having as many immigrants as Canada does.

<sup>36</sup> <http://plato.stanford.edu/entries/freedom-speech/> accessed 10.29.2007.

<sup>37</sup> See Article 3 paragraph 1 on dissemination of racist and xenophobic material through computer systems of the Council of Europe Additional Protocol, *Supra*.

<sup>38</sup> See for example the Stanford University Discriminatory Harassment Provisions.

belief systems, opinions, and institutions, as long as this does not amount to advocating hatred against an individual.<sup>39</sup>

Though regulation of hate speech on the Internet has been condemned by certain circles as being a threat to freedom of expression, and cyber democracy, both the potential and actual threat posed by hate speech on the Internet to any society can not be ignored nor be underestimated. It is true, Internet regulation has the potential to inadvertently result into Internet censorship, but also the risk hate speech or the unregulated Internet exposes to its society members is magnanimous.

#### **4.1 Other Jurisdictions like the EU and Africa and Lessons for North America**

The EU, like Canada, has succumbed to Talmudic interferences; with the former having a fragile history of violence resulting from hate speech whereas the latter has an extremely heterogeneous society which is a very fertile ground for the cultural of intolerance, a good course for violence. In the EU, it is now an agreed position that the European Commission has a duty to protect shared European values such as the broad consensus that hate speech rules should also apply to the Internet.<sup>40</sup>

Canada through the Criminal Code of Canada (CCC), criminally punishes anyone who promotes genocide, incites hatred of an identifiable group in a public place, or promotes hatred and any body found guilty of such an offence will be imprisoned for two to five years.<sup>41</sup>

The Internet provides haters with a new method of distribution of their hate speech or materials. Hate groups around the world have embraced the potential of the Internet, with current estimates of over 2000 hate sites online. Canada uses both the CCC and the CCRF to address these challenges. This came into play in the *R. v. Keegstra* case<sup>42</sup> in which the Supreme Court of Canada faced with a teacher indicted for spreading hate speech among his pupils had to deliberate on S. 319 (2) of the CCC and also the CCRF of the teacher to freedom of expression and also academic freedom in S.2 b of the Charter. The teacher was found guilty of hate speech under the CCC and punished accordingly.

In *Zundel v. Canada* (Attorney General)<sup>43</sup> in which the complainants alleged that Mr. Zundel was violating s.13 of the Canada Human Rights Act (CHRA), R.S.C.

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<sup>39</sup> See Guardian Unlimited Comment, *Supra*.

<sup>40</sup> <http://www.nationalvanguard.org/printer.php?id=6245> accessed 10.03.2007.

<sup>41</sup> See S. 15 of the CCC for example.

<sup>42</sup> [1990] 3 S.C.R. 697.

<sup>43</sup> 67 C.R.R. (2d) 54(F.C.T.D. 1999).

1985, c. H-6 by causing hate messages to be communicated through computer website known as the "Zundelsite", which can readily be accessed through the Internet the USA/California and Canada claiming that the figures in the holocaust had been greatly exaggerated to draw sympathy for the Jews. The Complainants objected to the website arguing that it is likely to draw hatred to the minority Jewish community in North America. This case is also a landmark on the controversial issue of spread of hate speech through the computer/Internet, though the case was later determined on the basis of the Anti-Terrorism Act of Canada.

The issue of transmission of hate messages through telephone has also been dealt with in the case of *Sabina Citron and Canadian Human Rights Commission v. Zundel, Canadian Human Rights Tribunal*<sup>44</sup>, which discussed the transmission of data or communication on the Internet operating over a telephone network. The respondents were ordered to stop their communication which allowed the spread of hate speech and discrimination contrary to s.13 (1) of the CHRA.

In the US, the *Commonwealth of Pennsylvania v. Alpha HQ* in the Court of Common Pleas of Berks County, Penn. Civil Action-Equity, 1998, threatening email through the Internet with discriminatory remarks was held to be violation of the law on hate speech.

However, the Supreme Court of the US, in the *Virginia v. Straka*<sup>45</sup> case held that cross-burning of hate speech would be intimidation. The Court then upheld the constitutionality of the prohibition against hate speech.

Europe and especially Germany and France due to their long time history of the holocaust, have very strong and prohibitive laws against hate speech. In the *UEJF and Licra v. Yahoo! Inc. France, Trib. Gr. Int Paris Case*<sup>46</sup> in which yahoo provided access to computer screens with Nazi objects, which is criminal under the article R. 645-2 of the French Penal Code; awards were awarded to the plaintiffs on the complaint of hate speech.

In Africa, the law is basically on incitement of violence as opposed to the hate speech. In say my County, Uganda, many politicians have been charged for incitement of violence under the Uganda Penal Code Act.<sup>47</sup> In the neighboring

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<sup>44</sup> T.D. 1/02, 2002/01/18.

<sup>45</sup> US Supr. Crt

<sup>46</sup> (22 May 2000).

<sup>47</sup> See the New vision Newspaper, 9 Sept. 2007. See the cases of *Uganda v. Betty Anywar, Hussein Kyanjo and Ken Lukyamuzi* is still on mention and the file number is CRT 403/07, *Uganda v. Erias Lukwago and Odongo Otto* is for further hearing on 4th/03/2008 and the file number is 430/07, on the recent developments in Uganda, there is a recent case involving

Rwanda, the Radio was used to incite violence leading to a major genocide in 1994 in which close to two million Tutsi and moderate Hutu died.<sup>48</sup>

It can thus be seen that the justifications for regulation of hate speech on the Internet vary from society to society, and people to people. What is clear, however is that the cultural history of a particular people let alone their composition; whether heterogeneous or homogeneous greatly influences the need or otherwise no need for such legislation. The EU (mostly Germany/France), African (mostly Uganda/Rwanda) and the divided North American examples (of a liberal US) versus a strong legislation on hate speech north of its border in Canada are glaringly clear examples.

## **5.0 Distinction between Internet Censorship and Regulation of the Internet**

One of the key debates of our times is the issue of Internet governance/regulation. The sober view is that the Internet if unregulated can lead to disastrous activities among which is hate speech which I have discussed in this paper. And that therefore, acts which would be illegal in our day to day lives should equally be illegal on the Internet as seen in the criminalization of hate speech on the Internet in the various jurisdictions looked at above. There are however wide spread well founded fears that this regulation of the Internet which is good for some of the reasons I have given above may actually result into Internet censorship which will in turn unfortunately erode all the achievements that have been gained through the Internet like cyber democracy and the freedom of expression on the Internet.

This is indeed a very big dilemma posing the question: should we regulate the Internet or leave it to anarchy?

This very controversial and disturbing question in the law of cyberspace can be answered by distinguishing Internet censorship from Internet regulation. In a sober world, the Internet should be regulated/governed in order not to breed anarchy on the Internet itself. However, regulating some of the activities on the Internet does not in itself result in Internet censorship. Though Internet hate speech ban may have a chilling effect on freedom of expression on the Internet, we can not have the Internet as a medium for the unabated spread of hate speech.

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Hon. Erias Lukwago on Incitement of Violence. i.e *Uganda v. Erias Lukwago* CRT no. 116/08 before the grade one magistrate of Buganda road court.

<sup>48</sup> The International Criminal Tribunal for Rwanda has tried cases like Akayesu, and Bilej in this respect and conviction have been given.

What seems clear therefore is that there is a strong need and desire to balance Internet speech with regulation; where Internet Speech is harmful to society then it should be regulated.

But total bans on the Internet sites for merely expressing opposing views to those of the government like in Asia and Africa like the ban of Radio Katwe in Uganda should be discouraged.

## **6.0 Ending Remarks**

As discussed in the paper, the Internet, though heralded as the modern medium of communication through which the entire world can be reached in a matter of seconds and which has demystified the hassles related with distance in the world, the same Internet that can be used for cyber democracy and freedom of expression can be very harmful and indeed kill through genocides and the spread of hate speech. It should therefore be regulated to the extent it is harmful and be unregulated to the extent it is not harmful and not be used by the governments to suppress opposing/divergent views. The clear cut between Internet censorship and regulation/governance has also been given in the paper.