



**University of
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Department of Law

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Critically analyse the following statement, which is often attributed to Voltaire - "I disapprove of what you say, but I will defend to the death your right to say it."

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Critically analyse the following statement, which is often attributed to Voltaire - "I disapprove of what you say, but I will defend to the death your right to say it."

In critically analysing the above statement, this essay will consider the extent to which freedom of expression (speech) should be tolerated, and whether this right should be treated as absolute or not.

The above statement which is often attributed to Voltaire can be explained to mean; until we are able to guarantee to the enemies of freedom the rights which they are ardent to abuse, we are no better than them. Consequently, we fail to prove to those we oppose the real meaning of what we stand for¹.

However, does this mean freedom of expression must be guaranteed to all, at all times and under all conditions no matter what is being said as Voltaire seems to suggest?

The European Court of Human Rights has stated that, "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man..."²

According to the Universal Declaration of Human Rights, freedom of expression is "the right of every individual to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"³. Similarly, freedom of expression is guaranteed by several other international conventions such as the European Convention on Human Rights (Article 10) against state suppression.

Unlike the 18th century when Evelyn Beatrice Hall summarised Voltaire's beliefs with the above statement⁴, the fast changing phase of today's society which includes widespread

¹ Mark Cooray, *Freedom of Speech and Expression* (1997)
<<http://www.ourcivilisation.com/cooray/rights/chap6.htm#6.1>> accessed 21 October, 2013

² Handyside v. United Kingdom, 7 December 1976, Application No. 5493/72, 1 EHRR 737, 49

³ Universal Declaration of Human Rights, art 19

⁴ S. G. Tallentyre, *The Friends of Voltaire* (Kessinger Publishing LLC, 2010) 176

extremist views and disparage of persons (Hate Speech) has made it more necessary for governments to place limitations on freedom of speech.

The existence of several other equally important rights such as 'Right to Privacy', Right to Liberty and Security' which often clash with freedom of speech makes it difficult to see how Voltaire could possibly assume that freedom of speech ought to be absolute.

As Liam Gearon puts it "Whether ancient Greek or early Christian, Reformation or Enlightenment, Nazi totalitarianism or communistic dictatorship of the proletariat, or contemporary democratic and right-centred libertarian governance in the UN era, each age defines and limits the extent of its liberty; and, in turn, its capacity for freedom of expression according to currently dominant systems of governance"⁵

Today's liberal democratic dispensation strives to achieve a fair balance between the right of people to freely express themselves and the rights of others not to be harmed. Therefore, it has been widely argued that "a free speech principle need not entail absolute protection of freedom of expression. Most proponents of strong free speech guarantees concede that its exercise may properly be restricted in some circumstances, for example, when it is likely to lead to imminent violence"⁶

In light of the above, it can be said that the principle of free speech in today's liberal society operates under certain restrictions. It is not absolute and the extent to which free speech can be exercised very much depend on what is being said.

To Voltaire, what really mattered was the right to say something, and not what was being said. He could disapprove of what was being said and yet did not see any point in restricting one's right to say it. The question of; at what point could one's right to free speech be restricted would have more likely received the answer, at "NO" point from Voltaire, considering the above statement.

⁵ Liam Gearon, *Freedom of Expression and Human Rights* (Sussex Academic Press 2006) 142

⁶ Eric Barendt, *Freedom of Speech* (2nd edition, Oxford University Press 2005) 7

Just like Voltaire's declaration, John Stuart Mill who was a strong defender of free speech also argued that any doctrine should be allowed the light of day no matter how immoral it may come across to everyone else⁷. And that such freedom should not be denied to any subject so that we have "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological"⁸

Despite the above, Mill recognised the need to have restriction on free speech at certain times, this, Voltaire seems to disregard. Under Mill's now usually referred to as the 'Harm Principle' he argued that limitation should be placed on free expression under certain circumstances. According to him," 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"⁹

Closely related to above, Joel Feinberg wrote in 'Offense to Others' that the harm principle does not provide sufficient protection against the wrongful behaviours of others. Therefore, the harm principle should be replaced by the offense principle, which he defines as "It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end"¹⁰.

Feinberg felt that the law should be able to prohibit certain expressions on the grounds that they are very offensive and not only harmful. By offensive, he suggested both objective and subjective elements such as shame, disgust, anxiety and embarrassment.

Arguably, in an attempt to prevent harm to others as far as free speech is concerned, liberal democratic societies like Great Britain, America, Canada and several others have placed limitations, though inconsistent, on free speech. This can be seen to be far from what

⁷ John Stuart Mill, *On Liberty*, (Indianapolis: Hackett Publishing 1978) 15

⁸ John (n 7) 11.

⁹ John (n 7) 9.

¹⁰ Joel Feinberg, *Harm to Others* (Oxford University Press 1987) 1

See also; Susan Easton, *The Problem of Pornography: Regulation and the Right to Free Speech* (NY: Routledge 1994)

Voltaire's idea of freedom of speech was (without any restriction), yet as mentioned above, the diversity of today's socio-political societies make it absolutely necessary.

Over the years, free speech has been attacked with strong restrictive legislations and conventions in attempts to control 'Hate Speech', 'Pornography' and settling its frequent clash with other civil and political rights. Without any contention, it is safe to say that the 'identity of absoluteness' which Voltaire attached to free speech hardly exist.

All international conventions such as the Universal Declaration for Human Rights (UDHR), International Covenant for Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR), American Convention on Human Rights and the African Charter on Human and Peoples Rights place necessary limitations on freedom of speech. However, recognising the extreme importance of free speech, these conventions try to safeguard free speech from arbitrary restriction by proposing a "three-part test" which must be met before a restriction can be legitimate

Article 19(3) of the International Convention On Civil And Political Rights (ICCPR) clearly states that freedom of expression can be limited when it conflicts with the rights or reputations of others, national security, public order, public health and morals.

Even though there is no clear consistency in judicial rulings, all courts in the countries that have ratified the above conventions and several others not listed are under strict obligation to apply the three-part test when adjudicating cases in relation to freedom of speech (expression).

The first part of the three part test stipulates that the restriction to be placed on freedom of speech (expression) be prescribed by law. And the second requires that the restriction must be in force to serve a legitimate purpose. Lastly, any restriction on free speech must be "necessary in a democratic society" ¹¹

Over the years, the European Court of Human Rights has provided a range of guiding jurisprudence which shows that freedom of speech is no way absolute and can be restricted. This guide has made it clear that, when assessing restrictions on free speech, we are not

¹¹ See Mukong v. Cameroon, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee)

faced with "a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted"¹².

Even though it has been argued that the current "test for determining whether there has been an Article 10 violation of the Convention is flawed because it allows the Court to uphold arbitrary and excessive restrictions of artistic expression"¹³, the need for a restriction on freedom of speech is undeniable¹⁴.

As a well established principle, the European Court of Human Rights condemns all forms of 'hate speech' and does not accord such speeches with any protection under Article 10. In supporting restriction on freedom of speech at needed times, the court ruled in *Erbakan v Turkey* that Article 10 does not protect "concrete words constituting hate speech that might be offensive to individuals or groups"¹⁵.

Also, in *Jersild v Denmark*, the European Court of Human Rights made it clear that "Article 10 should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN"¹⁶. Insisting on the fact that freedom of expression (speech) is by no means absolute, the court has mentioned that "remarks aimed at inciting racial hatred in society or propagating the idea of a superior race can not claim any protection under Article 10 of the Convention"¹⁷.

¹² *The Sunday Times v United Kingdom* (1979–80) 2 EHRR 245

¹³ Michelle Rosenberg, 'Drawing outside the lines: the European Court of Human Rights' interpretive limitation of the freedom of artistic expression and the role of religion' [2012] 19 (1) *Southwestern journal of international law* 207,209
<<http://heinonline.org.ezproxy3.lib.le.ac.uk/HOL/Page?handle=hein.journals/sjlta19&collection=journals&page=207#215>> accessed 2 November 2013

¹⁴ Toby Mende, 'Restricting Freedom of Expression: Standards and Principles' Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression < <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> accessed 1 November 2013

¹⁵ *Erkan v Turkey* (App no 12091/03) [2006] ECHR 12091/03

¹⁶ *Jersild v Denmark* (Application 15890/89) (1994) 19 EHRR 1

¹⁷ *Aksoy v Turkey* (Application 21987/93) (1996) 23 EHRR 553, 1 BHRC 625

Despite the fact that freedom of speech remains a fundamental human right in the eyes of the European Court of Human Rights, the court has shown in its rulings over the years that it can be legitimately restricted. The fact that “litigation surrounding freedom of speech contributed significantly to the overall development of European jurisprudence throughout the 1960s”¹⁸ shows how important and controversial free speech is.

It is not only within the European Jurisprudence that freedom of speech is not absolute, contrary to Voltaire’s assumption. For instance, in the United States of America, the language of the First Amendment¹⁹ is absolute, however qualified in application.

It must be mentioned that just like Voltaire, certain U.S Supreme Court judges have held the view that free speech should be absolute in application, just as the First Amendment prescribes. According to Judith Wagner Decew who wrote in the ‘Social Philosophy and Policy’ journal;

Justice Hugo Black, who served on the Supreme Court from 1937 to 1971, became an eloquent advocate of the strong view that First Amendment rights are “absolute,” and that the charge to Congress to make “no law” abridging free speech means exactly that: make no such law. In contrast, Justices Felix Frankfurter and John Harlan, both of whom sat on the Court during Black’s tenure, and Justice Lewis Powell, who was appointed as Black’s replacement, are all associated with the rival view that absolute rules are too rigid and that First Amendment interpretation requires a candid weighing and balancing of competing interests²⁰.

¹⁸ Jean-François Flauss, ‘The European Court of Human Rights and the Freedom of Expression’ [2009] 84(3) Indiana Law Journal 810,813
<<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1124&context=ilj>>
accessed 28 October 2013

¹⁹ U.S Constitution < http://www.law.cornell.edu/constitution/first_amendment >

²⁰ Judith Wagner Decew, ‘Free Speech and Offensive Expression’ [2004] 21 (2) *Social Philosophy and Policy*
<<http://journals.cambridge.org.ezproxy3.lib.le.ac.uk/action/displayFulltext?type=1&fid=226350&jid=SOY&volumeId=21&issueId=02&aid=226348&bodyId=&membershipNumber=&societyETOCSession=>> accessed 3 November, 2013

Though the First Amendment clearly prohibits the Federal government from tempering with the right of free speech, the U.S Supreme Court has over the years interpreted the First Amendment as a non-absolute right. The Court has permitted free speech to be limited or not given a protection in the interest of national security, when it is used in relation to pornography, incitement of imminent violent and even when free speech frustrates the “government interests”²¹.

Over the year’s the U.S Court has “decided that the First Amendment provides no protection to obscenity, child pornography, or speech that constitutes advocacy of the use of force or of law violation ... where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²²

When it comes to obscenity, not only is the First Amendment by no way absolute, it is denied any sort of protection without regard to if it is harmful to others or not. The U.S Supreme court noted in Roth v. United States that, at the time the First Amendment was drafted, obscenity “was outside the protection intended for speech and press”²³.

Apart from obscenity, the interpretation of the First Amendment gives no free speech protection to child pornography. Beyond that, it has been held that, there is no constitutional right to possess child pornography even in the privacy of one’s own home²⁴

Within the US jurisprudence, free speech is not only limited in the above circumstances. Depending on what is being said (content based restriction), free speech can legitimately be restricted. According to the U.S Supreme Court, any sort of advocacy “directed to inciting or

²¹ United States v. O'Brien 391 U.S. 367 (1968)

²² Henry Cohen, ‘Freedom of Speech and Press: Exceptions to the First Amendment’ CRS Report for Congress Prepared for Members and Committees of Congress
< <http://www.fas.org/sgp/crs/misc/95-815.pdf>> accessed 3 November 2013

²³ Roth v. United States 354 U.S. 476, 483 (1957)

²⁴ Osborne v. Ohio 495 U.S. 103 (1990) See also; Chaplinsky v. New Hampshire 315 US 568 (1942) where the Supreme Court very clearly insisted that “obscenity” fell outside First Amendment protection, together with profanity, libellous speech and “fighting words”

producing imminent lawless action and is likely to incite or produce such action”²⁵ is not protected by free speech.

As Justice Holmes once said, “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used ... create a clear and present danger”²⁶

Even though ‘Hate Speech’ receives full protection under the First Amendment²⁷ in the United States of America, when such a speech is intended to incite or produce imminent violence, it can be legally restricted. The U.S has a peculiar notion that the most effective way of combating hate speech is not through restriction, suppression or making it illegal but by promoting tolerance, truthful and counter-intelligent speech.

In conclusion, both the European jurisdiction and the inter-America systems as shown above vigorously appreciate the extreme importance of free speech in a democratic society. Nevertheless, both jurisdictions recognise the need for free speech to be restricted under certain circumstances, contrary to Voltaire’s assertion.

Even though the European jurisdiction and the inter-America systems agree on necessary restrictions and for that matter do not treat free speech as absolute, the inter-America systems headed by the U.S Supreme court are more reluctant in restricting free speech. Despite the fact that the wording of the First Amendment portrays free speech as absolute, it only succeeds as far as making sure its restriction is carefully scrutinized when it comes to its application.

As the analysis indicates, free speech without doubt remains one of the most sensitive rights, but legislations and caselaws have shown that it does not enjoy absolute immunity from restrictions necessary in a democratic society. Therefore, Voltaire’s belief that free speech should be absolute does not reflect what it is in today’s democratic society.

²⁵ Brandenburg v. Ohio 395 U.S. 444 (1969)

²⁶ Schenck v. United States 249 U.S. 47, 52 (1919)

²⁷ See Snyder v. Phelps 131 S. Ct. 1207, 1220 (2011) where an anti- American and an anti-gay protests near soldiers’ funeral were found to be protected under the First Amendment

However, the special importance Voltaire attached to free speech resonates well with today's society, especially among the judiciary, legal scholars and free speech proponents.

Surely, free speech is by no means absolute but it ranks exceptionally higher on the ladder of important, compared to other human rights.

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