

Protecting Voices, Preventing Harm: Legal Challenges in Online Freedom of Speech

Introduction

Éamon De Valera takes off his glasses, carefully folds the arms, and sets the pair of glasses down upon the latest draft of the Irish Constitution. He and his compatriots are justifiably proud of their role in crafting such an august document and outlining the rights and responsibilities it enshrines; rights such as freedom of speech.

History saw these men deciding what values were to be kept at the heart of Irish law and Irish life. However, these laws were enacted before the advent of portable, instant communication, and the principles that were used to formulate these laws were bound by the technological limitations of their time. Societal advancements have surpassed what our past law makers could have predicted.

For me, to explore the legal challenges in online freedom of speech was to wander into foreign territory - a journey I was happy to make, given my personal connection to the topic. As a mixed-race woman in an immigrant family, my voice is often targeted, and my freedom of speech is often threatened. This essay provided me the opportunity and motivation to research how the law can simultaneously protect voices and prevent harm. My research raised questions.

In particular, are the principles that guided De Valera's approach to protecting freedom of speech sufficient to simultaneously protect and restrict modern speech capabilities?

My contention is no.

Current legal precedent cannot address the unprecedented capabilities of modern technology. We attempt to legislate our unfettered ability to influence vast audiences using law that was written before coloured television. Éamon De Valera could not have foreseen such disruptive and divisive technologies as Twitter and Facebook. However, had he somehow caught a glimpse of Ireland's future, or the average teen's TikTok page for that matter, I'm sure he would agree that legal challenges in online speech call for change.

Development

What is freedom of speech?

The Irish Constitution, enacted in 1937, explicitly protects freedom of speech under Article 40.6, which guarantees the right to express opinions freely, subject to public order and morality. The organs of public opinions it identifies are the radio, the press, and cinema. The glaring omission of the internet strikes me instantly. Further, case law such as *Murphy vs IRTC* [1999] interprets 40.6.1 as a freedom of political expression, specifically public activity in a democracy. Notably, this interpretation does not encompass online activity.

Standing in the city centre and blaring racist slurs through a megaphone is obviously not protected speech, and any such speaker would be swiftly handled. Posting racist slurs on a public Instagram blog for potentially millions of followers to see, however, goes unprevented by law.

Why?

The *Murphy vs IRTC* case was concerned with the influencing of public opinion over radio. This case is referenced as a freedom of speech case, but even this instance was constrained by the technical limitations of radio as a medium. The internet suffers no such limitations. Most modern efforts to curtail online speech focus less on freedom of speech itself and more on moderating harmful content, such as the Online Safety and Media Regulation Bill of 2022. This bill relates to proliferation of harmful content like cyberbullying, but not about production of content, and as such it puts the onus on platforms to remove content but does not hold liable the creators of objectionable content. While it does take steps toward a safer online environment, it does not protect the voices of marginalized users. Allowing aggression to be generated online unprevented will have a chilling effect on minority

communities, and for that reason it is vital that regulatory bills such as these go further to protect diverse viewpoints and free thought.

The Constitution states that the publication or utterance of seditious or indecent matter is a punishable offence. Would Facebook and Twitter posts legally qualify as the publication of indecent matter? I searched for the answer, but this activity is not explicitly covered in the Irish Constitution, nor was I able to find any case law. The line between public and private speech has never been more blurred than it is today, and the very thing that blurs it is the vast capability of our modern technology. For example, does the algorithm that populates my feed constitute public activity? Does online conversation wherein conspiracy theories such as Pizzagate are shared constitute political expression? The answer is: we don't know. No case law or legislative precedent accounts for reposting or viral sharing. This lack of clarity allows harm by not holding users accountable for any indecency they propagate. In the case of Pizzagate, an armed individual, Edgar Maddison Welch, entered a pizzeria and discharged firearms and was held liable for those actions. He spent four years in prison for endangering the public, although he only was spurred to do so by online conspiracy speculation. The online posters who had instigated this incident, on the other hand, were never charged with any wrongdoing. When interviewed, Welch said, "I came to D.C. with the intent of helping people I believed were in dire need of assistance. It was never my intention to harm or frighten innocent lives, but I realize now just how foolish and reckless my decision was." Unrestricted and unmoderated online activity can lead to real-world, physical harm.

In fact, earlier this same year the Hope and Courage Collective (HCC), an Irish organization that campaigns against hate speech, called for the Irish government to more tightly regulate online speech. This was in response to Meta revising its hateful conduct policy and lifting restrictions against certain speech, thereby allowing users to spread lies under the guise of political content without the presence of Facebook's independent fact-checking programme. We've already seen how the Constitution ensures freedom of speech is subject to public order and morality. No rational reader could possibly construe Meta allowing users to deny the existence of the LGBTQ+ community as in accordance with the public morality. Yet there is no legislation, case law, or precedent under current law that would protect vulnerable voices online.

Can a voice whose very existence is not protected ever be heard?

Executive director of the HCC, Edel McGinley, echoed my thoughts when she said: "This move [to lift restrictions] will limit the space where democratic ideals like freedom of expression, truth-telling, and safety can exist online... Asking companies to do the right thing will never work - we need democratic regulation."

Conclusion

It is undeniable that online freedom of speech poses many legal challenges. Current legislation, written for a bygone era, is not equipped to handle modern challenges despite having served us so well for so long. I hope contemporary lawmakers can craft equally robust legislation around online freedom of speech, in keeping with our long history of strong legality. In researching this paper, I was shocked to learn we depend today on law written decades before the mobile phone's existence. When human technology advances at such startlingly swift rates, it's impressive that our laws have operated for as long as they have. However, it has become evident that the law needs to accommodate for legal challenges in online freedom of speech. It is important to protect everyone's voice online because diversity of thought enriches our society, and in order to provide an environment where diversity of thought can thrive, it is crucial that legislation prevents activity that seeks to silence free voices.

Reflection

The thing I enjoyed most about this essay was the research process. This essay made me think about how interpretation plays such an important role in the application of law. Reading through case notes made me realize that the way the law is written is not always the way the law is interpreted. This realization has fuelled an interest in me about law as a whole. Now that I can present this finished essay, I can say that this competition has turned the law into something I can honestly admire, and perhaps even pursue in my future. As an immigrant and a member of a minority, it has become glaringly obvious to me that my voice is absolutely necessary in the interpretation of law. As such, I am now motivated to involve myself in both legal and political fields in my day-to-day life as I move through the TY programme. If more young people like myself follow in Gráinne O'Neill's example, I genuinely think we can develop a society where voices are protected while harm is simultaneously prevented. As this is the Gráinne O'Neill essay competition, I felt it only right to read about her. In becoming more acquainted with her story, I realized that her loss truly was a profound blow to Irish society, Irish courts in particular. I can only aspire to grow into the type of woman whose passion, dedication, and love for her career inspires future generations - the type of woman Gráinne O'Neill was.

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