



**Strathmore University**

**Law School**

**SEXIST HATE SPEECH: A VIOLATION OF ARTICLE 9(1) ICCPR ON THE  
RIGHT TO SECURITY OF PERSON?**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore  
University Law School

By

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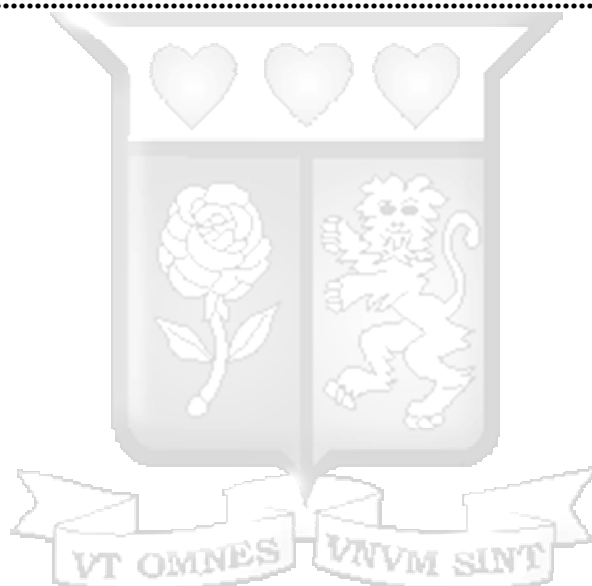
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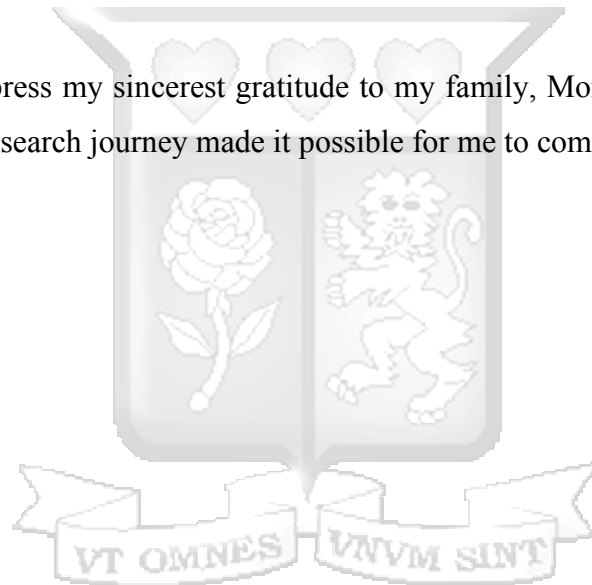
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## Dedication

*To all women and girls*



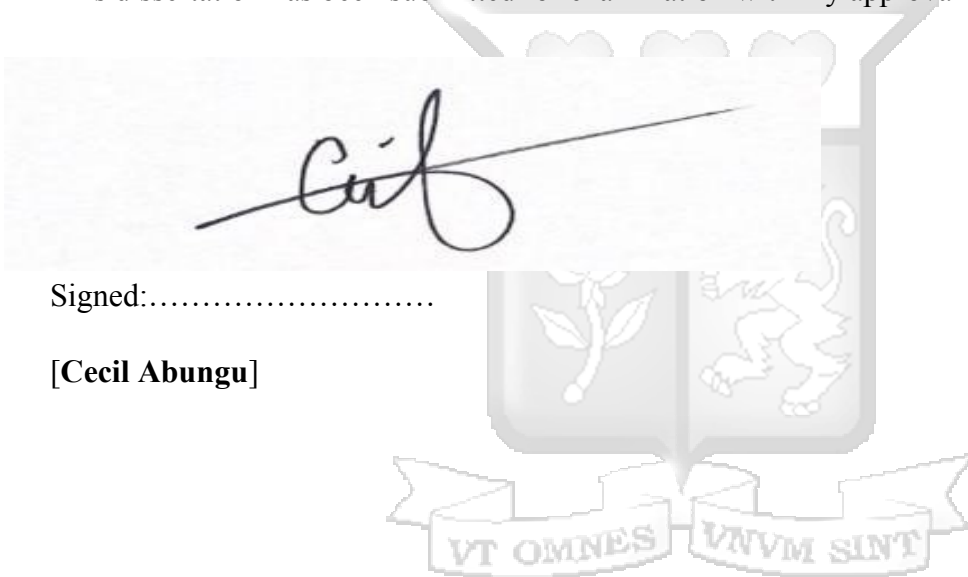
**Declaration**


I, **KIPTUM LETICIA JEBET**, do hereby declare that this is my original work and that to the best of my knowledge and belief, it has not in its entirety or in part, been submitted to any other university for a degree or a diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Dated: 26<sup>th</sup> February 2024 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

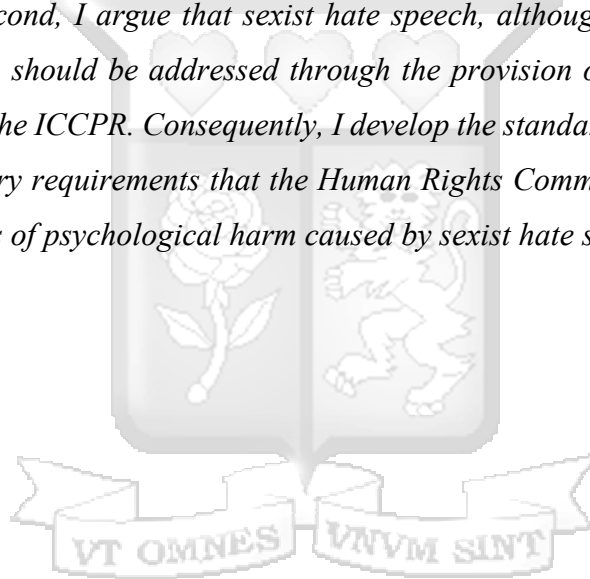


  
Signed: .....

[Cecil Abungu]

## Abstract

*Today, hate speech is one of the most important categories of anti-oppression debates; a great deal of energy has been devoted to identifying, characterizing and in some cases penalising hate speech. However, currently the Covenant on Civil and Political Rights (ICCPR) only responds to race, nationality, and religion. As a result, a clear emphasis on gender identity as a socially salient trait in relation to hate speech is lacking. Despite the seriousness of the emotional and psychological effects of sexist hate speech, some glaring gaps in the hate speech provision, Article 20 of the ICCPR, are observable. Figuring out how to address sexist hate speech within the ICCPR framework is therefore an important project. My aim in this project is twofold: First, I argue that sexist hate speech is violent speech that falls outside the scope of protected speech under Article 19 (2) of the ICCPR. Second, I argue that sexist hate speech, although not provided for under Article 20 of the ICCPR, should be addressed through the provision on the right to security of person in Article 9(1) of the ICCPR. Consequently, I develop the standard for psychological harm and outline the evidentiary requirements that the Human Rights Committee should be guided by when adjudicating claims of psychological harm caused by sexist hate speech.*



## List of Abbreviations

DSM	Diagnostic Statistical Manual
ECHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
PTSD	Posttraumatic-stress disorder
UDHR	Universal Declaration on Human Rights



## List of Cases

### Human Rights Committee

*Dissanayake v Sri Lanka*, Comm.No 1373/2005 (22 July 2008).

*Gauthier v Canada*, CCPR Comm.No 633/95 (7 April 1999).

*Jayalatha Jayawardena v Sri Lanka*, CCPR Comm.No.75/2000 (26 July 2002).

*Korneenko et al v Belarus*, Comm.No 1553/2007, (31 October 2006).

*Medjou Chani v Algeria*, CCPR Comm.No. 116/2013 (12 May 2016)

*Molina et al v Colombia*, CCPR Comm.No.114/ 2012 (22 September 2015).

*Samba Jalloh v Netherlands* CCPR Comm.No. 74/1998 (15 April 2002).

*Toonen v Australia* Comm.No 488/1992 (31 October 2006).

*Wackenheim v France*, CCPR Comm.No854/1999, (15 July 2002).

*Y v Canada*, CCPR Comm.No. 114/2013 (7 August 2015).

### United Kingdom

*Maynard v West Midlands Regional Health Authority* (1985) United Kingdom House of Lords.

*Victorian Railways Commissioner v Coultas* (1888) House of Lords United Kingdom.

### Scotland

*Donoghue v Stevenson* (1932) Court of Appeal in Scotland.

### Ireland

*Gray v Facebook*, (2019) High Court in Ireland.

*Murtagh v MOD* (2008) High Court in Ireland

### United States

*Abrams v United states* (1984) United States Supreme Court.

*New York City Transit Authority v State Division of Human Rights and Adrienne Nash* (1992),  
Court of Appeals of the State of New York United States.

*Rodriguez v Meta Platforms* (2022), US District Court for the Northern district of California.

*Steele v Title Realty Co* (1973) United States Court of Appeal.

### Canada

*Saadati v Moorhead* (2017) Supreme Court of Canada.

### Kenya

*Motaung v Samasource Kenya EPZ Limited t/a Sama and 2 others* (2023) eKLR.

## **List of Legal Instruments**

*The International Convention on Civil and Political Rights*, Rules of procedure of the Human Rights Committee, 4 January 2021, CCPR/C/Rev.12.

*Universal Declaration of Human Rights*, 10 December 1948 and Article 9, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

*The International Convention on Civil and Political Rights*, 19 December 1966, No.14668.



# 1.0. CHAPTER 1: INTRODUCTION

## 1.1 Background

Increasingly, human interaction today takes place on various social media platforms such as the Meta Inc Platforms which consist of Facebook and X formerly known as Twitter among others.<sup>1</sup> The use of these platforms has in various cases been associated with a negative impact on the mental health of its users.<sup>2</sup> These media platforms carry a variety of speech some of which is useful for the realization of the freedom of opinion and expression on one hand.<sup>3</sup> On the other hand, these platforms also carry speech that incites hatred towards some members of society.<sup>4</sup> Such speech is generally not considered protected speech. This project will focus specifically on sexist hate speech because this form of speech is violent in nature,<sup>5</sup> and often attacks the personhood of an individual, and in some cases cause psychological injury to individuals.<sup>6</sup>

Mental illnesses such as depression, anxiety, and bipolar disorder have become disturbingly common. According to the Global Burden of Disease study, around a billion people suffered from mental illnesses worldwide as of 2017,<sup>7</sup> with depression and anxiety related disorders as the leading conditions.<sup>8</sup> Over the last two decades, mental health trends have worsened with the World Health Organisation estimating that one person in every eight people lives with a mental illness.<sup>9</sup> Some studies conducted in the United States for instance, show that the number of cases of adolescents and young adults are generally concerning.<sup>10</sup> The timing of divergence in mental health trends between young adults and older generations roughly coincides with the wider

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<sup>1</sup> <https://about.meta.com/> on 17 December 2022.

<sup>2</sup> *Rodriguez v Meta Platforms* (2022), US District Court for the Northern district of California.

<sup>3</sup> Article 19(1), *International Convention on Civil and Political Rights*, 19 December, 1966, No.14668.

<sup>4</sup> UN Human Rights Committee: Concluding Observations: Georgia, 19 April 2002, 14.

<sup>5</sup> Richardson-self L, 'Woman-hating: On Misogyny, Sexism, and hate speech', 33, *Hypatia: Cambridge University Press*, 2, 2018,256.

<sup>6</sup> Best. P, Manktelow. R, Taylor. B 'Online Communication, Social Media and Adolescent Wellbeing: A Systematic Narrative Review', *Children and Young Services Review* 2014,12.

<sup>7</sup> Bragheiri L *et al*, 'social media and mental health', 112, 11, *The American Economic review*, 2022, 7.

<sup>8</sup> Spencer J *et al* 2018. 'Global, Regional, and National Incidence, Prevalence, and Years Lived with Disability for 354 Diseases and Injuries for 195 Countries and Territories, 1990–2017: A Systematic Analysis for the Global Burden of Disease Study 2017' 2018, 858.

<sup>9</sup> <https://www.who.int/news-room/fact-sheets/detail/mental-disorders> on 16<sup>th</sup> January 2024.

<sup>10</sup> Twenge M *et al*, 'Age, Period, and Cohort Trends in Mood Disorder Indicators and Suicide Related Outcomes in Nationally representative Dataset, 2005 -2017', 128 *Journal of Abnormal Psychology* 3, 2019, 186.

adoption of social media. In fact, some scholars have hypothesised the two phenomena might be related.<sup>11</sup>

The psychological harm caused by harmful online speech manifests in many different forms. In some cases, the negative speech causes anxiety disorders. The Diagnostic and Statistical Manual of Mental Disorders manual (DSM-5) describes anxiety disorders to include disorders that share features of excessive fear and anxiety related behavioural disturbances. Fear is the emotional response to real or perceived imminent threat whereas anxiety is anticipation of future threat.<sup>12</sup> In more severe cases, people exposed to such negative online speech may suffer from trauma and stressor related disorders. These disorders are those in which exposure to a traumatic or stressful event is expressly listed as a diagnostic criterion.<sup>13</sup>

The more commonly reported form of trauma and stressor related disorder is posttraumatic stress disorder (PTSD) which has in several cases been reported and the claims presented before various domestic courts, for instance, the case of *Gray v Facebook Inc*,<sup>14</sup> decided in Ireland, as well as the case of *Daniel Motaung v Sama*, a case reported in Kenya.<sup>15</sup> In other cases, the psychological harm results in a psychosomatic disorder which simply put is a psychological condition which involves a concurrent occurrence of physical symptoms.<sup>16</sup> This psychological harm is a violation of the non-derogable right to security of persons.<sup>17</sup>

The right to liberty and security of person is entrenched in international human rights law.<sup>18</sup> Article 3 of the Universal Declaration of Human Rights (UDHR) states that every individual has the right to liberty and security of person. This is the first substantive right that is protected by the UDHR, a clear signifier of the level of importance tied to Article 9 (1) of the International Convention on Civil and Political Rights (ICCPR).<sup>19</sup> The right to Liberty is concerned with the freedom from

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<sup>11</sup> Twenge M et al, 'Age, Period, and Cohort Trends in Mood Disorder Indicators and Suicide Related Outcomes in Nationally representative Dataset, 2005 -2017', 185.

<sup>12</sup> American Psychiatric Association, 5<sup>th</sup> ed Diagnostic and Statistical Manual of Mental Disorders, 2013, 189.

<sup>13</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 265.

<sup>14</sup> *Gray v Facebook*, (2019) High Court in Ireland.

<sup>15</sup> *Motaung v Samasource Kenya EPZ Limited t/a Sama and 2 others* (2023) eKLR.

<sup>16</sup> <https://my.clevelandclinic.org/health/diseases/21521-psychosomatic-disorder> On 19 December 2022.

<sup>17</sup> Human Rights Committee, General Comment No. 31 on 'Article 2: The nature of the general legal obligation imposed on state parties to the covenant', 29 March 2004, 10.

<sup>18</sup> Article 3, *Universal Declaration of Human Rights*, 10 December 1948 and Article 9, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

<sup>19</sup> Human Rights Committee, General Comment No 35 on 'Article 9: Liberty and security of person' 16 December 2014, 2.

confinement of the body, in cases of arrest or detention.<sup>20</sup> Whereas, the security of persons as interpreted in Human Rights Committee's General Comment 35, concerns the freedom from injury to both the body and mind whether or not confined.<sup>21</sup>

Looking at the United Nations Human Rights Committee's (herein HRC) decisions touching on Article 9 (1) of the ICCPR, the trend is that most decisions coming out of the HRC have been centred on the right to liberty which is only the first limb of Article 9 (1).<sup>22</sup> A minority of the cases have touched on the security of person limb. Up until the most recently reported case on Article 9(1), only the case of *Jayalatha Jayawardena v Sri Lanka* touches on the right to security of person, in that it concerned fear due to a threat to the life of the claimant.<sup>23</sup> The majority of the reported cases focus on the right to liberty coupled with other rights guaranteed the ICCPR for example, the case of *Medjoub Chani v Algeria* concerned the freedom from arbitrary arrest, the freedom from torture, inhuman and degrading treatment, and the right to security of person.<sup>24</sup> This trend is perhaps tied to the understanding of the right to security of the person as being auxiliary to the right to liberty, the substantive right.

## 1.2 Statement of problem

The approach taken by the HRC for a long time when interpreting Article 9 (1) of the ICCPR has differed in theory and in practice. This is because, in practice, the HRC seems to generally regard the right to liberty as the substantive right while the right to security of person is treated as an auxiliary to the right to liberty. Additionally, where the HRC has dealt with the right to security, focus seems to be on the physical dimension of this right while side lining the psychological dimension of the right, despite the recognition of the two dimensions as equally legitimate in the interpretation of Article 9(1) of ICCPR provided in General Comment No.35.

Moreover, even where the HRC seems to have dealt with cases touching on the psychological dimension, a closer look at the case reveals that there is in fact some form of physical harm tied to the psychological harm suffered by the claimant. In such cases the physical harm either precedes

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<sup>20</sup> *Wackenheim v France*, CCPR Comm.No854/1999, (15 July 2002) 6.3.

<sup>21</sup> Human Rights Committee, General Comment No 35, 3.

<sup>22</sup> *Medjou Chani v Algeria*, CCPR Comm.No. 116/2013 (12 May 2016), *Molina et al v Colombia*, CCPR Comm.No.114/ 2012 (22 September 2015), *Y v Canada*, CCPR Comm.No. 114/2013 (7 August 2015), *Samba Jalloh v Netherlands* CCPR Comm.No. 74/1998 (15 April 2002).

<sup>23</sup> *Jayalatha Jayawardena v Sri Lanka*, CCPR Comm.No.75/2000 (26 July 2002).

<sup>24</sup> *Medjou Chani v Algeria*, CCPR.

the psychological harm or the physical harm manifests as a result of the psychological harm mostly in the form of psychosomatic illnesses. Following this pattern interpretation could lead to a situation whereby victims of a purely mental harm are left without redress. This study will assess whether some forms of online sexist speech violate the psychological dimension of the right to security of person under Article 9 (1) of the International Convention on Civil and Political Rights (ICCPR).

### **1.3 Research questions**

1. Why should sexist hate speech be limited?
2. How does sexist hate speech relate with the psychological dimension of Article 9 (1) of the ICCPR?
3. What is the best approach in determining the standard of mental harm to be applied when adjudicating claims of violation of the right to security of persons and why?

### **1.4 Research objectives**

1. To assess the utility of limiting sexist hate speech.
2. To investigate whether sexist hate speech violates the psychological dimension of the right to security under Article 9 (1) of the ICCPR.
3. To determine the standard of mental harm to be applied when adjudicating claims of violation of the right to security of persons.

### **1.5 Hypothesis**

My hypothesis is that online sexist hate speech violates the psychological dimension of the right to security of person under Article 9(1) of the ICCPR. Article 9 (1) of the ICCPR contains two autonomous rights, the right to liberty and the right to security of person concerned with freedom from physical or psychological injury. Article 20 of the ICCPR is the provision prohibiting different forms of hate speech. It prohibits any propaganda for war, and advocacy of national, racial, or religious hatred that constitutes to incitement to violence, discrimination, or hostility. Based on the wording of Article 20 of the Covenant and the interpretation of this provision by the HRC, the committee seems to only address hate speech based on race, nationality, or religion. This practice is unsatisfactory in so far as it fails to protect a particularly vulnerable group of individuals

who encounter hate speech because of their gender. To bridge this gap, Article 9(1) of the ICCPR can be useful in addressing sexist hate speech claims to the extent that victims of sexist hate speech can claim that they have suffered physical or psychological injury which violates their rights under Article 9 (1) of the ICCPR.

## **1.6 Justification**

This project will be particularly useful to the United Nations HRC whose mandate is interpreting the provisions of the ICCPR and monitoring its implementation, in so far as it will serve as a guide for a broader interpretation of Article 9 (1). A broader interpretation of this provision is necessary as it will extend protection to people who have suffered purely psychological harm as a result of sexist hate speech which is not provided for under the hate speech provision, Article 20 of the ICCPR. Additionally, this project will be relevant in the policy making space, in the social media industry. It will guide social media platform policy makers develop policy surrounding the regulation of negative speech by identifying various forms of speech and the resultant harm they cause. Lastly, other researchers working on issues around free speech and free media in the Human Rights space will also benefit from this project as it seeks to bridge the gap in the existing legal knowledge on the utility of the right to security of person and sexist hate speech. Lastly, this project will illustrate the interplay between law and psychology.

## **1.7 Conceptual framework: Severity of psychological injury is commensurate to physical injury**

This concept depicts psychological harm as being comparable to physical harm in the sense that the degree and extent of suffering experienced by an individual is almost equal. As such, cases of psychological injury should be accorded the same level of importance as is the case for physical injury.

For purposes of this project, mental harm means impairment of a person's mental condition,<sup>25</sup> while pure mental harm means mental harm that is not a consequence of any other physical injury.<sup>26</sup> Psychological harm being commensurate to physical harm simply means that PTSD, a form of mental harm, is a legitimate harm similar to a broken leg and should therefore be regarded

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<sup>25</sup> <https://dictionary.cambridge.org/example/english/mental-harm> on 1 February 2023.

<sup>26</sup> [https://treasury.gov.au/sites/default/files/2019-03/R2002-001\\_MentalHarm.pdf](https://treasury.gov.au/sites/default/files/2019-03/R2002-001_MentalHarm.pdf) on 19 February 2024, 136.

in the same way. This is because studies show that similar to physical injuries, psychological injuries can take equally long to heal,<sup>27</sup> be resistant to treatment,<sup>28</sup> and can impair normal functioning just as much as or even more than physical injuries.<sup>29</sup> Therefore, there is no real reason as to why the two forms of injury should be treated differently.

Viewing mental harms from this perspective would require moving away from the legal double standard with respect to physical and psychological injuries. For instance, in cases of negligence, plaintiffs can almost always be awarded damages for a physical harm that causes some mental suffering arising out of negligence. On the contrary, damages for purely psychological injury arising out of negligent conduct is hardly recoverable.<sup>30</sup> Only in limited circumstances such as in wrongful death cases can damages be awarded for psychological harm.<sup>31</sup> Additionally, to recover damages for the intentional infliction of emotional distress where there is no physical injury, the standard is set higher, such that the plaintiff must prove that the defendant's behaviour must be extreme and outrageous conduct.<sup>32</sup>

Noteworthy is the fact that various criticisms can be levelled against this concept. The first major criticism of this approach is tied to the difficulty in diagnosing mental disorders. In this regard, the first challenge is the fact that the diagnostic manual used in diagnosing mental disorders, DSM-5, was not created for the legal environment.<sup>33</sup> From a medical perspective, the conditions used as markers for the diagnosis are usually dimensional, meaning they may be a series of clinically important symptoms which may be used to make a final diagnosis.<sup>34</sup> Adjudicators seeking a categorical yes or no answer to the presence of the of a recognised condition can therefore easily mis-apply the diagnostic criteria.

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<sup>27</sup> Kellezi B et al, 'The Impact of psychological factors on recovery from injury: A multicentre cohort study', *National Library of Medicine*, 2016, 855.

<sup>28</sup> <https://www.apa.org/monitor/2009/02/jn> on 1 February 2023.

<sup>29</sup> Kellezi B et al, 'The Impact of psychological factors on recovery from injury: a multicentre cohort study', *National Library of Medicine*, 2016, 856.

<sup>30</sup> *Pleasant Glade v Schubert* (2008) Texas Supreme Court United States; Laura Schubert sought compensation for mental anguish, emotional distress, PTSD, depression, and a suicide attempt that she suffered after an exorcism conducted in a church youth group meeting. The jury in the trial court awarded her 300,000 for pain and suffering, lost earning capacity and medical expenses. The Texas Supreme Court reversed and threw out the award.

<sup>31</sup> *Victorian Railways Commissioner v Coultas* (1888) House of Lords United Kingdom.

<sup>32</sup> *Victorian Railways Commissioner v Coultas* (1888) House of Lords United Kingdom.

<sup>33</sup> Orr R, 'Problems with English Law and Psychiatric Injury', *The society of Legal Scholars*, (2016) 8.

<sup>34</sup> Grayson D, 'Can categorical and dimensional views of psychiatric illness be distinguished?' *The British Journal of Psychiatry*, 151, 1987, 355.

This is perhaps the reason why some adjudicators have extended some leeway to expert witnesses regarding the extent to which they frame their testimony within the diagnostic criteria to deal with this challenge. Adjudicators seem to place a greater importance to the wealth of experience and clinical diagnostic expertise as opposed to Formulaic categorisations.<sup>35</sup> This approach of using the diagnostic criteria as a guide, but not necessarily conclusive criteria,<sup>36</sup> creates the risk of the persuasiveness of the expert being the determining factor for the outcome of the case.

Considering the opportunities and challenges associated with the use of this concept, this study should be viewed from the lens of mental harm is being commensurate to physical harm, such that the Human Rights Committee's interpretation of Article 9(1) should be such that it firstly regards the right to liberty and the right to security of person as two independent rights. Secondly, when dealing with the right to security of person, physical and psychological dimensions should be viewed separately and as being capable of violation either individually or collectively.

## 1.8 Literature review

Previous studies in Human Rights law have focused on debating the need to impose the Common Law duty of care on social media intermediaries to remove harmful content from their platforms at the domestic level to protect the rights of individuals.

Writing specifically within the context of the United Kingdom and the Online Safety bill (OSB), Professor Lorna Woods<sup>37</sup> and William Perrin, for example, argue that social media platforms should be subject to a statutory duty of care,<sup>38</sup> granted, social media platforms are online public spaces that are in need of regulation given the high level of risk of harm and the severity of actual harm that may be occasioned on the users.<sup>39</sup> Scholars belonging to this camp are of the opinion that incorporating platform responsibility for online public spaces enables protection from online hazards.<sup>40</sup>

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<sup>35</sup> *Murtagh v MOD* (2008) High Court in Ireland.

<sup>36</sup> R Orr, Problems with English Law, and Psychiatric Injury, 8.

<sup>37</sup> Woods L, 'The duty of care in the online harms white paper', 11 *Journal of media law*, 2019, 3.

<sup>38</sup> *Donoghue v Stevenson* (1932) Court of Appeal in Scotland. A duty of care is a legal obligation owed by one person to another to ensure that the latter does not suffer any reasonably foreseeable harm or loss as a result of the former's act or omission.

<sup>39</sup> Woods L, 'The duty of care in the online harms white paper' 3.

<sup>40</sup> Price L, 'Platform responsibility for online harms: towards a duty of care for online hazards', vol 13 *Journal of media law* 2, 2022, 3.

On the contrary, some have argued that a social media duty of care is not a feasible solution to online harm since the definition of harm and the types of harm in the (OSB) remain vague,<sup>41</sup> thus increasing the likelihood of causing collateral damage to legitimate speech. Victoria Nash<sup>42</sup> and Damian Tambini<sup>43</sup> agree that the blurred lines between Legal but harmful content weakens the case for social media regulations. The problematic distinction coupled with the hefty sanctions has the likelihood of resulting in a chilling effect on the freedom of expression on online platforms.

At the global level, the Right to security of person Gerald Neuman<sup>44</sup> states that, the right to security of person places an obligation on states to take appropriate measures in response to death threats against persons in the public sphere – including social media platforms – and generally, to protect citizens from foreseeable threats to life or bodily harm. He further notes that states ought to pay particularly close attention to patterns of various forms of harm, among them, Violence against women.<sup>45</sup>

### **1.8.1: On the limits of free speech and the importance of these limits**

Freedom of expression is vital to an individual's ability to convey opinions, convictions, and beliefs. In some instances, the state may limit freedom of expression in order to advance broader societal goals specifically provided for in law, such as national security, public order, public health and public morals as provided for expressly in Article 19 (3) ICCPR for instance.<sup>46</sup>

While there is a wide consensus as to the necessity of limiting speech in these specified instances, there is some disagreement as to the justification approaches used. The common justificatory approach applied in most European Jurisdictions as well as treaty bodies such as the United Nations HRC is the proportionality test.<sup>47</sup> Francisco J Urbina notes that it entails looking at whether the limitation of a right can be justified by gains in some other interest of value.<sup>48</sup>, Barry

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<sup>41</sup> Sterrie M, 'The 'epidemic' of fake news: Should social media sites such as Facebook have a duty of care for fake news and misinformation content on their sites?', *Bristol Law Review*, 2021, 144.

<sup>42</sup> Nash V, 'Revise and resubmit? Reviewing the 2019 Online Harms white paper', 11 *Journal of media Law*, vol 1, 2019, 8.

<sup>43</sup> Tambini D, 'The differentiated duty of care: A response to the Online harms White paper', *Journal of Media Law*, 2019, 28.

<sup>44</sup> UN special rapporteur for the right to liberty and security of person.

<sup>45</sup> Human Rights Committee, General Comment No. 31, 7.

<sup>46</sup> Article 19(3) ICCPR.

<sup>47</sup> Gunatilleke G, 'Justifying limitations on the freedom of speech', *Human Rights Review*, 2020, 94.

<sup>48</sup> Urbina J, 'Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning'', 27 *Canadian Journal of Law & Jurisprudence*, 1, 2014, 173.

Tremblay, and Aharon Barak all agree that the first of the four limbs in the test is that the state must pursue an aim that serves a compelling or legitimate interest, also termed as the normative requirement.<sup>49</sup>

Second is the suitability test espoused by Yutaka Arai-Takahashi.<sup>50</sup> This requires a rational nexus between the specific measure used and the legitimate interest. Third is the necessity test, under which the measure must be necessary to advancing or preventing setbacks to the legitimate aim to be achieved. The last limb is the proportionality standard which according to Aharon Barak it requires a balancing of benefits gained by the public and the harm caused to the right.<sup>51</sup> To this Julian Rivers adds that there needs to be a net gain when the limitation of the right is weighed against the level to which the interest is advanced.<sup>52</sup>

On the contrary, some scholars such as Gehan Gunatilleke disagree with the proportionality test as a justificatory means for limiting the freedom of expression because the test often fails to recognise the inherent value of the freedom of expression.<sup>53</sup> Kai Moller points that this weakness is well demonstrated in cases where a court or tribunal glosses over the first three limbs and focuses on the balancing stage in its legal analysis.<sup>54</sup> These scholars instead rely on the rights-based approaches advocated for by Ronald Dworkin and John Rawls to justify the limitation of a right.<sup>55</sup> Unlike the typical proportionality test, the rights based approach does not place freedom of expression at the same normative plane as the collective interests - national security, public order, public health and public morals – thus, does not undermine its peremptory value.<sup>56</sup>

### **1.8.2: On the interpretation of the right to security of person**

The right to security of person is a right whose interpretation has been subject to debate on whether it exists as an autonomous right or a right that is tied to the right to liberty. The Human Rights

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<sup>49</sup> Barak A ‘Constitutional rights as principles: On the structure and domain of constitutional justice’ 2 *International Journal of Constitutional Law* 3, 2004, 593, Tremblay B, ‘An egalitarian defense of proportionality-based balancing’ 12 *International Journal of Constitutional Law* 4, 2014, 865.

<sup>50</sup> Arai-Takahashi Y, ‘Scrupulous but Dynamic’—the Freedom of Expression and the Principle of Proportionality under European Community Law’, *Yearbook of European Law*, 2006, 32.

<sup>51</sup> Barak A, ‘Proportionality: Constitutional rights and their limitations’, *Cambridge University Press*, 2012, 340.

<sup>52</sup> Rivers J, ‘Proportionality and Variable Intensity of Review’ *Cambridge Law Journal*, 65, 2006, 181.

<sup>53</sup> Gunatilleke G, ‘Justifying limitations on the freedom of speech’, 96.

<sup>54</sup> Moller K, ‘Constructing the Proportionality Test: An Emerging Global Conversation, in Lazarus L, McCrudden C and Bowles N (eds) *Reasoning Rights: ‘Comparative Judicial Engagement’*, Hart Publishing, London 2014, 34.

<sup>55</sup> Gunatilleke G, ‘Justifying limitations on the freedom of speech’, 96.

<sup>56</sup> Gunatilleke G, ‘Justifying limitations on the freedom of speech,’ 96.

Committee has in different cases interpreted this right differently. Within the context of the ICCPR, the entirety of Article 9 deals with the right to liberty, with a simple mention of the right to security. This suggests that the right to security may only arise after there is loss of liberty.<sup>57</sup> However, in other instances, the Human Rights Committee has interpreted the right to personal security autonomously to effectively secure the guarantees of the ICCPR,<sup>58</sup> with the specific content of the right being bodily and mental integrity.<sup>59</sup>

In the context of the European Convention on Human Rights (herein ECHR), Rhonda Powell posits that in the interpretation of the right to security of person in Article 5, the European Court of Human Rights (herein the Strasbourg Court) and the European Commission of Human Rights have followed three approaches. The first suggests that security of persons manifests in the procedural mechanisms through which liberty is protected. This is centred on the idea that security in itself has minimal content it ought therefore to be applied as a matter of procedure relating to the deprivation of the right to liberty rather than a substantive right in and of itself.<sup>60</sup>

The second is that security of person is not limited to Article 5 but also occurs in the discourse of other rights guaranteed in the convention, particularly Articles 3 and 8; the freedom from torture, inhuman and degrading treatment and the right of respect for private life and family respectively. This interpretation points to the fact that any number of values may be secured, not just liberty.<sup>61</sup> The last, and more radical approach, Angus Campbell argues that the development of the doctrine of positive obligations could be thought as a way of securing the rights protected in the ECHR.<sup>62</sup>

### ***Contribution***

So far, literature on harmful online speech has mostly focused on debating whether a duty of care ought to be imposed on Social Media Intermediaries, proposing various tests to be applied by treaty bodies when assessing the limitation of free speech, and debating on the correct approach to interpreting the right to liberty and security of person. My study will therefore be a useful

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<sup>57</sup> Taylor P, A Commentary on the International Convention on Civil and Political Rights, 'Article 9: Liberty and Security' *Cambridge University press*, 2020, 246.

<sup>58</sup> Taylor P, 'A Commentary on the International Convention on Civil and Political Rights', 246.

<sup>59</sup> Human Rights Committee, General Comment No 35, 2.

<sup>60</sup> Powell R, 'The Right to Security of person in the European Court of Human Rights Jurisprudence', 6.

<sup>61</sup> Powell R, The Right to Security of person in the European Court of Human Rights Jurisprudence, 1.

<sup>62</sup> Campbell A, 'Positive obligations under the ECHR: Deprivation of Liberty by private actors', *Edinburgh Law review*, 2006, 399 – 412.

contribution through its prescriptive arguments (that sexist hate speech violates the psychological dimension of Article 9(1) of the ICCPR, and the standard for adjudicating such claims). This study will also be useful in so far as it will show the usefulness of Article 9(1) in addressing sexist hate speech that is not expressly provided for under article 20 of the ICCPR which is the hate speech provision.

## **1.9 Methodology**

On the methodology of sources, this project will generally utilise primary sources such as, treaty provisions of the ICCPR and the ECHR, UN General Comments as well as travaux preparatoires. Secondary sources such as books, book chapters, journal articles, commission reports, civil society reports, cases, committee communications and credible blog posts will also be used. The research carried out will be qualitative research that is desk-based. In arriving at the specific claims to be made, the project will apply inductive reasoning in some cases while applying deductive reasoning in others, mostly applying the doctrinal method and the critical analysis.

Regarding the objective of assessing the limits of free speech and the purpose for the limitation, this paper adopts a philosophical approach to understand the ethical questions that necessitate limitation of free speech pursuant to a given objective or in favour of another fundamental right. To do this, this project will rely on primary sources such as the ICCPR and the United Nations General Comment No. 34 on the freedom of opinion and expression to understand the treaty provisions surrounding the limitation of free speech. Secondary sources such as chapters in a book, journal articles will also be reviewed to find the philosophical answer to the question on the limitation of free speech.

The final chapter will use inductive reasoning coupled up with a critical approach in investigating whether sexist hate speech sexist violates the psychological dimension of the right to security under Article 9 (1) of the ICCPR. It will rely on secondary sources such as journal articles, UN Special Rapporteur reports, Civil society reports, cases, and book chapters to ultimately conclude that the abovementioned form of speech violates article 9(1) of the ICCPR.

Lastly, in setting the standard of mental harm to be used in adjudicating claims of violation of 9 (1) this project will utilise the doctrinal approach in setting the threshold of harm for online mental harms as trauma. It will do so by referring to secondary sources such as scholarly articles on the

topic and the DSM–5 manual which indicates the diagnostic criteria for trauma as well as the markers for its diagnosis. A critical analysis will be used inductively to arrive at trauma as the ideal standard of mental illness as opposed to anxiety or any other mental illness

## **1.10 Chapter breakdown**

Chapter one is the introductory chapter to this project. It details the research questions and objectives, conceptual framework, the justification for the study, among others, therefore, it is the foundational chapter upon which the subsequent chapters will be built upon.

Chapter two will assess the limits of free speech and the purpose for limiting free speech. It will do so with the aim of arriving at the conclusion that in certain circumstances, it becomes necessary to protect the rights of others by limiting the freedom of speech but only in specific instances provided by law.

Chapter three will investigate whether sexist hate speech violates the psychological dimension of the right to security of person under Article 9 (1) of the ICCPR.

Chapter four makes the prescriptive claim that the standard of harm to be used when adjudicating claims where sexist hate speech violates Article 9(1) of the ICCPR should be trauma. It will then seek to demonstrate how to apply the standard established in chapter four by prescribing a guide for indicators that the HRC should use in determining that trauma has occurred as well as the body of evidence that the HRC should rely on in deciding such claims.

Lastly, chapter five gives the conclusions of this project together with the author's recommendations.

## **2.0. CHAPTER 2: EXPLORING THE RATIONALES FOR PROTECTING FREE SPEECH AND THE LIMITS OF FREEDOM OF EXPRESSION**

### **2.1 Introduction**

This Chapter will discuss the rationales for protecting free speech as well as the limits of free speech. In doing so, the chapter will present two approaches that seek to justify free speech, first is the consequentialist approach and the second being the deontological approach together with the arguments stemming from these schools of thought. Thereafter, the chapter will offer the antithesis to the free speech argument which expounds on the limits to free speech based on the harm principle. This chapter will also discuss the various interpretations scholars have attempted to give, and comment albeit briefly on the impracticability of applying the offence principle. Ultimately, this chapter seeks to clearly establish that based on the reformulation of the notion of harm, speech that causes either direct or indirect harm, that may be physical or non-physical should be limited because it constitutes harm.

### **2.2. Rationales for protecting free speech**

The reasoning behind various justifications for protecting free speech can be categorized into two schools of thought, the first being the consequentialist and the second the deontological school of thought.

#### **2.2.1. The consequentialist approach**

A consequentialist approach to free speech justifies the protection of free speech due to the instrumental value of free speech and not because of its intrinsic value.<sup>63</sup> Essentially, this approach to protection of free speech views speech as a means to an end rather than an end in itself. The defining characteristics of consequentialist theory of free expression are firstly, an emphasis on the social interest of free expression as opposed to the individual value. Second, this view considers free expression as a means to an end rather than an end in itself. Lastly, it focuses on the effects of free speech on the society at large and not the effects on the speaker.<sup>64</sup> This approach is rooted in

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<sup>63</sup> Goldberg E, 'Free speech consequentialism', 116 *Columbia Law Review*, 5, 2016, 689.

<sup>64</sup> Oster J, *Media Freedom as a Fundamental Right*, Cambridge University press, Cambridge, 2015, 14.

the idea of civic republicanism whose main proponents were initially Aristotle and Plato and later passionately advocated for by Jean-Jacques Rousseau.<sup>65</sup>

Civic republicanism refers to citizens who view themselves as free and equal members of a co-operative, self-governing community who are primarily oriented towards the public good.<sup>66</sup> Society is understood as a subject in its own right - a collective body - rather than the sum of all persons.<sup>67</sup> It places some emphasis on the value of civic self-organisation such that human rights have a binding character for a political community but only as elements of their own consciously appropriated tradition. It does not emphasise on individual autonomy, but political autonomy and as a result free expression serves to carry out popular sovereignty and to contribute to the common good.<sup>68</sup>

### **(i) The democracy argument**

A free speech rationale that flows directly from the civic republicanism school of thought is the democracy argument. This argument is founded on the idea that, for citizens to be adequately knowledgeable, there must be absolute freedom of democratic deliberation and the free flow of information and ideas for issues of political importance.<sup>69</sup> Freedom of political debate is at the core of democracy and must therefore be afforded the strongest protection possible.<sup>70</sup> In any democratic society, the actions of the state must be subject to scrutiny by the not only the legislature and judiciary, but also the press and the citizenry.<sup>71</sup>

The nexus between Rousseau's expression of civic republicanism and the democracy argument has been put forth by Hans Kelsen who stated that 'a subject is politically free only insofar as his individual will is in harmony with the collective or general will expressed in the social order.'<sup>72</sup>

The will of the community in a democracy is created through discussions between the minority

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<sup>65</sup> Habermas J, *Between Facts and Norms*, MIT Press, Massachusetts, 1998, 267.

<sup>66</sup> Oster, *Media Freedom as a Fundamental Right*, 14.

<sup>67</sup> <https://iupress.istanbul.edu.tr/en/journal/iusd/article/durkheimin-toplumu-bir-ozne-toplumsal-bir-nesne-olarak-kavramsallastirma-cabasi> on 30 December 2023.

<sup>68</sup> Oster, *Media Freedom as a Fundamental Right*, 14-15.

<sup>69</sup> Oster, *Media Freedom as a Fundamental Right*, 15.

<sup>70</sup> Gunatilleke, 'Justifying limitations on the freedom of speech,'91.

<sup>71</sup> Oster, *Media Freedom as a Fundamental Right*, 155.

<sup>72</sup> Kelsen H, *General Theory of law and State*, Russel and Russel, New York, 1961, 285.

and the majority where arguments for or against certain regulations are put forward either in parliament or through other vehicles of public opinion such as newspapers, books, among others.<sup>73</sup>

This democracy argument has been developed further into the public discourse argument that recognizes the positive effect of free speech on the discussions of matters of public interest beyond casting votes. This view moves away from the old-fashioned between public and private power divide and recognises that increasingly, private institutions wield a lot of power and are also capable of influencing the lives of people as well as the formation of public opinion.<sup>74</sup>

### **(ii) The truth argument**

Closely linked to the democracy argument is the truth argument. According to this view, freedom of expression is necessary for the advancement of knowledge and the search for truth. This argument was formulated by John Milton who was of the view that truth and falsehood should both be allowed to grapple in the field, to properly show the strength of the truth.<sup>75</sup> Later, John Stuart Mill emphasised that the conventional knowledge of any society is never complete. This is because, conflicting doctrines often share some truth; and the contrary opinion is needed to give part of the remainder of the truth, of which the received doctrine embodies only in part.<sup>76</sup> As such, the argument from truth protects freedom of expression because truth is best achieved, and falsehood best suppressed when they face each other through free expression. In this context, truth is understood as the factual information as well as value judgements in terms of the most convincing idea.<sup>77</sup>

Enter the theory of the marketplace of ideas. This theory provides that a society arrives at the truth or 'the best idea' by allowing everyone to engage in public debate and ultimately, the market forces select the ideas that are most beneficial to the society.<sup>78</sup> On this, Justice Holmes explains that the best test of truth is the power of the thought to get itself accepted in the competitive market.<sup>79</sup>

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<sup>73</sup> Kelsen, *General Theory of law and State*, 287-288.

<sup>74</sup> Schauer F, *Free Speech: A Philosophical Inquiry*, Cambridge University Press, Cambridge, 1982, 1303-1304.

<sup>75</sup> Oster, *Media Freedom as a Fundamental Right*, 16.

<sup>76</sup> Mill J, *On Liberty*, New York, London and felling-on-Tyne: The Walter Scott Publishing Company, 1869, 85.

<sup>77</sup> Oster, *Media Freedom as a Fundamental Right*, 16.

<sup>78</sup> Volokh E, In defence of the marketplace of ideas/Search for truth as a Theory of free Speech protection, 97 *Virginia Law Review*, 2011, 596.

<sup>79</sup> *Abrams v United states* (1984) United States Supreme Court.

### 2.2.2. The deontological approach

The consequentialist civic republicanism can be contrasted with the deontological concept of liberal individualism whose main proponents are John Locke and to some degree Immanuel Kant.<sup>80</sup> This approach prioritises individual self-determination and regards individual liberties not as a means to an end but as ends in themselves.<sup>81</sup> As a result, freedom of speech should be considered valuable not because of what it does for a person but because it is an essential element of a person's individual autonomy. Communication is crucial to dignity, self-fulfilment and self-realisation as such, individuals should be able to express themselves.<sup>82</sup> This view unlike the consequentialist view is focused on the speaker and not the speakers impact on society.

### 2.3. Practical approaches to protecting free speech

The question of how speech ought to be protected dates back to the debate between Plato and the Rhetoricians or (Sophists) on knowledge and perception and thus the purpose of speech. Sophists argue that there is no objective truth and antecedent knowledge. In line with this view, Protagoras, one of the leading Sophists expressed his view that there is no such thing as objective truth and objectively right or wrong conduct, rather, there exists a relativity of values and convictions.<sup>83</sup> On the contrary, Plato advocates for an objective approach which considers doctrines based on their social impact.<sup>84</sup> This debate laid the ground work for the ongoing debate on the purpose of free speech and consequently the extent to which free speech should be protected.

Sophists argue that factual claims or opinions should prevail but only in so far as they have been presented through the most rhetorical and argumentative means. From this argument, a link between Sophists and the 'marketplace of ideas' theory can be discerned as follows; The marketplace of ideas theory is founded on scepticism that an absolute truth does not exist or at least, one can never be certain that the truth has been found.<sup>85</sup> This argument closely resembles the Protagorean claim that there is no objective right or wrong conduct, rather, conduct that is

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<sup>80</sup> Oster, *Media Freedom as a Fundamental Right*, 17.

<sup>81</sup> Schauer, *Free Speech: A Philosophical Inquiry*, 60.

<sup>82</sup> Wragg P, Mills dead dogma: The value of truth to free speech, *Public Law*, 2013, 363.

<sup>83</sup> Oster, *Media Freedom as a Fundamental Right*, 21.

<sup>84</sup> Russel B, *History of Western Philosophy*, Routledge, New York, 2004, 84.

<sup>85</sup> Schauer, *Free Speech: A Philosophical Inquiry*, 24-25.

profitable or useful. As such, truth is only assessed based on the strength of the ideas and opinions in the intellectual marketplace.<sup>86</sup>

Different from the Sophist approach, the objectivist platonic approach to free speech assesses speech based on its impact on society. Here, considerations such as the contribution of free speech to a democratic society, to the marketplace of ideas or to finding the truth is immaterial. Speech is protected only if, and in so far as it contributes to finding the truth or the ‘best ideas’ for society in general.<sup>87</sup> The objectivist approach to free speech thereby presupposes the possibility of knowledge and certainty.

## 2.4 Restrictions to free speech

The right to freedom of speech guaranteed under Article 19 of the ICCPR is not an absolute right.<sup>88</sup> It may be limited on various grounds provided under subclause (3) of Article 19. This provision lists the permissible grounds for limiting free speech as follows: for the respect of the rights and reputations of others, protection of national security or public order, public health, and public morals.<sup>89</sup> These grounds for limitation of free speech trace their origins from the harm principle coined by John Stuart Mill which states that “... the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”<sup>90</sup> The harm principle simply put states that free speech is protected unless it causes direct harm.<sup>91</sup>

The harm principle as a justification for limiting free speech is often contrasted with Joel Finberg’s offence principle. The basic idea is that the harm principle sets the bar too high and that instead, we can legitimately prohibit some forms of expression because they are offensive. The offence principle is a difficult standard to apply as it sets the bar too low such that almost every action may be restricted because it is offensive but not necessarily because the action is violent in any way.<sup>92</sup> This is especially so because many people take offense due to an overly sensitive disposition, or

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<sup>86</sup> Schauer, *Free Speech: A Philosophical Inquiry*, 20.

<sup>87</sup> Oster, *Media Freedom as a Fundamental Right*, 22.

<sup>88</sup> Article 19(1) International Convention on Civil and Political Rights.

<sup>89</sup> Article 19 (3) International Convention on Civil and Political Rights.

<sup>90</sup> Turner P, ‘Harm and Mill’s Harm Principle’, *The University of Chicago Press*, 2014, 299.

<sup>91</sup> Mill D, ‘Free Speech’, *Stanford Encyclopaedia of Philosophy*, 2017, 5, - <https://plato.stanford.edu/entries/freedom-speech/> on 17<sup>th</sup> October 2023.

<sup>92</sup> Mill D, ‘Free Speech’, *Stanford Encyclopaedia of Philosophy*, 2017, 7, - <https://plato.stanford.edu/entries/freedom-speech/> on 17<sup>th</sup> October 2023.

because of bigotry and justified prejudice.<sup>93</sup> Taking this approach would have a chilling effect on free speech. As such, the harm principle would be the appropriate basis for limiting free speech as a balanced definition of what constitutes harm can provide a reasonable standard.

#### **2.4.1. Emerging interpretations of “harm” in the harm principle**

Mill’s harm principle has been heavily criticized for lack of a clear definition of what constitutes harm as he merely uses the term harm to mean generally bad consequences.<sup>94</sup> To bridge this gap, scholars have attempted to interpret the harm principle to clearly define the limits of what does or does not constitute harm. One of such an attempt is the “rights-violation view” and the other is the perceptible damage view.

##### ***i. Rights-violation view***

It interprets the harm principle to mean that society may interfere with one’s freedom if the action complained of meets the threshold of threatening someone else’s rights. Therefore, society may not interfere with an individual's rights even when the action would lead to more bad than good outcomes, or if society is of the opinion that some interference would ultimately be beneficial.<sup>95</sup> Some of the major proponents of this view are David Brink and Wendy Donner who both agree that for Mill, an action must actually violate or threaten imminent violation of the rights of others.<sup>96</sup> A version of Brink and Donner’s account is defended by another group of scholars such as Alan Fuschs and Daniel Jacobson.<sup>97</sup> Article 19 (3) of the ICCPR is in line with this view as sub clause (a) of this provision states that free speech may be limited where it is necessary to protect the rights or reputations of others.<sup>98</sup>

This view is driven by at least two considerations the first being that if the notion of harm is not limited to mean instances of violation of rights, then the harm principle cannot function to protect the liberties of individuals as it was designed to. The second consideration is that Mill’s account

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<sup>93</sup>Mill D, ‘Free Speech’, *Stanford Encyclopaedia of Philosophy*, 2017, 7, - <https://plato.stanford.edu/entries/freedom-speech/> on 17<sup>th</sup> October 2023.

<sup>94</sup> Turner P, “Harm” and Mill’s Harm Principle, 301.

<sup>95</sup> Turner P, “Harm” and Mill’s Harm Principle, 302.

<sup>96</sup> Brink D.O, ‘Mills Deliberative Utilitarianism’, *Philosophy, and public affairs* 21 1992, 85, Donner W, *Autonomy, tradition and the enforcement of morality*, in Mills: On Liberty, Cambridge University Press, Cambridge, 2009, 161.

<sup>97</sup> Fuschs A. E. ‘Mill’s Theory of correct action’, in *The Blackwell guide to Mills Utilitarianism*, (ed.) Henry West, Blackwell, Malden MA, 2006, 147-150. Jacobson D. Mill on Liberty, speech and the free society, *Philosophy and Public Affairs* 29, 2000, 302.

<sup>98</sup> Article 19 (3) (a) International Convention on Civil and Political Rights.

of justice, rights, and appropriateness of punishment restricts sanctions to instances of violation of rights.<sup>99</sup> Scholars such as Piers Turner,<sup>100</sup> Ben Saunders,<sup>101</sup> and Melina Bell all tend to reject the first consideration of Mill's harm principle that takes a narrow reading of what constitutes harm. They all argue in favour of an expansive conception of the notion of harm beyond the rights violation view.

Bell argues that harm should be expanded beyond the traditional view of tangible concrete harms to also include structural harms such as systemic oppression and epistemic injustice.<sup>102</sup> Broadening the notion of harm even further.<sup>103</sup> Saunders proposes a reformulation of the harm principle to include more subtle and indirect forms of harm as he acknowledges that certain actions like discrimination and systemic inequalities which although not coercive, undermine the well-being of individuals. He also proposes a shift from the traditional direct physical harm requirement towards an inclusion of non-physical harm such as psychological harm, social harm, and structural harm.<sup>104</sup>

I tend to align myself with this school of thought. This is because taking hate speech as an example, studies have shown that beyond physical harm that may be occasioned where hate speech incites physical violence against a given group, often targets also suffer psychological harm.<sup>105</sup> Additionally, when hate speech does not rise to the level of incitement to violence, targets of hate speech suffer purely psychological harm. This then makes it necessary to have a broader understanding of harm to include non-physical harm to avoid a situation where victims of purely psychological harm slip through the cracks.

## *ii. Perceptible damage view*

The second view is the influential and fairly unrestricted conception of harm proposed by Jonathan Riley. He argues that for Mill, "harm" means perceptible damage suffered against one's wishes including physical injury, forcible confinement, financial loss, damage to reputation, broken

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<sup>99</sup> Fuschs, 'Mill's Theory of correct action', 149-151.

<sup>100</sup> Turner P, "Harm" and Mill's Harm Principle, 319-326.

<sup>101</sup> Saunders B, Reformulating Mill's harm principle, 125 Mind, 500, Oxford University Press, 2016, 1015-1016.

<sup>102</sup> Bell M, 'John Stuart Mill's Harm Principle and free speech: Expanding the notion of harm', 33, *Utilitas: Cambridge University Press*, 2, 2021, 167-173.

<sup>103</sup> Bell M, 'John Stuart Mill's Harm Principle and free speech: Expanding the notion of harm', 167-173.

<sup>104</sup> Saunders B, Reformulating Mill's harm principle, 1017-1018.

<sup>105</sup> Paradies Y, Ben J, Denson N, Elias A, Priest N, 10 Pieterse A, 'Racism as a Determinant of health: A systematic review and meta-analysis', *Plos One*, 2015, 24.

promises among others.<sup>106</sup> Riley unequivocally states that this view excludes the emotional effects on other's feelings not caused by some perceptible violation such as those earlier listed thereby restricting interference with very offensive action or ways of living that would cause mere dislike or distress.<sup>107</sup> Despite its virtues, this view faces several objections the main one being that he overlooks a critical distinction between the opinions we often have of others' actions which do not diminish our own wellbeing and the real emotional distress caused by others' actions.<sup>108</sup>

#### **2.4.2. Limitations to the freedom of speech within the ICCPR**

Article 19 (3) together with article 20 of the ICCPR provide the grounds upon which the free speech may be limited.

##### **i. Limitation of free speech under Article 19 (3) ICCPR**

This provision gives specific conditions under which freedom of speech may be limited. It states that the right to free speech may only be restricted where it is provided by law and is necessary: for respect for the rights and reputations of others or for the protection of national security or of public order, or of public health or morals.<sup>109</sup> These restrictions ought to be applied only for the reasons for which they were prescribed and must be directly related to the need on which they are founded upon.<sup>110</sup>

##### **a. The limitation must be provided by law**

Law has been interpreted to include laws of parliamentary privilege<sup>111</sup> and laws of contempt of court.<sup>112</sup> Given the nature of the right to free speech, the ICCPR excludes traditional, religious or any other customary law as sources of law for purposes of legitimate restrictions.<sup>113</sup> For a norm to be characterised as a law, it must provide sufficient guidance to enable an individual to distinguish between forms of expression restricted from those that are allowed.<sup>114</sup> These laws must be in line with the ICCPR's non-discrimination provisions<sup>115</sup> and must provide for penalties that are

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<sup>106</sup> Riley J, *Mill on liberty*, Routledge, London, 1998, 98.

<sup>107</sup> Riley, *Mill on liberty*, 179.

<sup>108</sup> Turner P, "Harm" and Mill's Harm Principle, 310.

<sup>109</sup> Article 19 (3) International Convention on Civil and Political Rights.

<sup>110</sup> *CCPR General Comment No 34, Article 19: freedoms of opinion and expression*, 12 September 2011, 8.

<sup>111</sup> *Gauthier v Canada*, CCPR Comm.No 633/95 (7 April 1999).

<sup>112</sup> *Dissanayake v Sri Lanka*, Comm.No 1373/2005 (22 July 2008).

<sup>113</sup> *CCPR General Comment 34*, 6.

<sup>114</sup> *CCPR General comment 34*, 7.

<sup>115</sup> *Toonen v Australia* Comm.No 488/1992 (31 October 2006).

compatible with other provisions of the ICCPR.<sup>116</sup> The burden of proving that a limitation to the freedom of expression generally lies with the State party.<sup>117</sup>

***b. The limitation must be based on legitimate grounds***

There are two recognised grounds for limitation under Article 19 (3). The first is that limitations may be to ensure respect for the rights and reputations of others.<sup>118</sup> The term ‘rights’ refers to human rights as recognised in the ICCPR and other international human rights law instruments in general. ‘Others’ means other persons individually, or as members of a community. The second legitimate ground is for the protection of national security, public order, public health, or public morals.<sup>119</sup> To maintain public order, it may be permissible to regulate speech making in a public place. Contempt of court proceedings in relation to some forms of expression may be permitted however, it must be shown that the proceedings and the penalty imposed are within the courts power to maintain orderly proceedings.<sup>120</sup>

The concept of morals and consequently the limitations is derived from social, philosophical, and religious traditions. For purposes of protecting morals, they must be based on principles derived from different traditions. The limitation must be from the perspective of universality of human rights and the principle of non-discrimination.<sup>121</sup>

***c. The limitation must be necessary and proportionate***

In general comment No. 27, the HRC observed four things. That ‘restrictive measures ought to conform to the principle of proportionality; be appropriate to achieve the intended objective, be the least restrictive measure among the measures that can achieve the intended objective and must be proportionate to the protected interest.<sup>122</sup>

**ii. Limitation of free speech under Article 20 of the ICCPR**

Article 20 states that ‘any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by

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<sup>116</sup> *CCPR General comment 34*, 7.

<sup>117</sup> *Korneenko et al v Belarus*, Comm.No 1553/2007, (31 October 2006).

<sup>118</sup> Article 19 (3)(a) International Convention on Civil and Political Rights.

<sup>119</sup> Article 19 (3)(b) International Convention on Civil and Political Rights.

<sup>120</sup> *CCPR General comment 34*, 8.

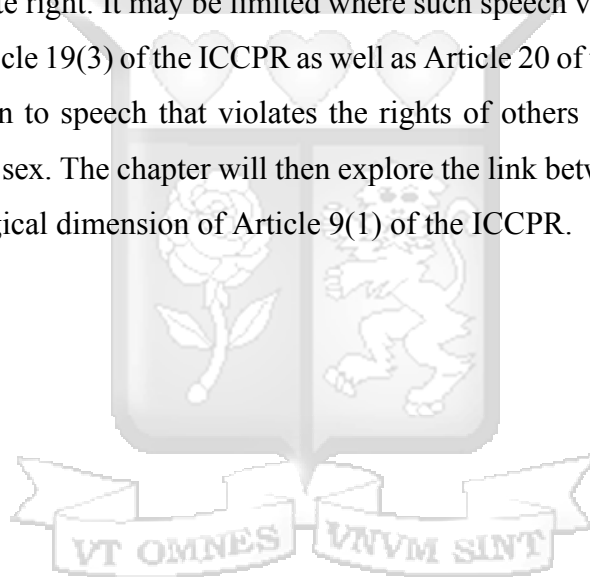
<sup>121</sup> *CCPR General comment 34*, 8.

<sup>122</sup> *CCPR General Comment 27: Article 12 Freedom of Movement* (2 November 1999) 14.

law. In relation to war, paragraph 1 of Article 20 extends to all forms of propaganda that threaten or result in acts of aggression or a breach of peace. Paragraph 2 of Article 20 prohibits advocacy of national, racial, or religious hatred that constitutes incitement to hostility, violence, or discrimination.<sup>123</sup> The HRC does not define what constitutes incitement presumably to give State parties deference to define incitement as they see fit for their respective contexts. What is interesting to note is that Article 20 makes no mention of incitement to hatred on the basis of sex.

## 2.5 Conclusion

In conclusion, free speech is an important right as it allows an individual to achieve self-actualisation and allows democracies to effectively function as discussed in the chapter. However, this right is not an absolute right. It may be limited where such speech violates the rights of others as provided for under Article 19(3) of the ICCPR as well as Article 20 of the ICCPR. The following chapter will narrow down to speech that violates the rights of others by discriminating against them on the basis of their sex. The chapter will then explore the link between some forms of sexist speech and the psychological dimension of Article 9(1) of the ICCPR.



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<sup>123</sup> *CCPR General Comment 11: Article 20 Prohibition of Propaganda for War and Inciting National or religious Hatred* (29 July 1983) 1.

### **3.0 CHAPTER 3: EXPLORING THE INTERCONNECTIONS BETWEEN SEXIST HATE SPEECH AND THE PSYCHOLOGICAL DIMENSION OF ARTICLE 9(1) OF THE ICCPR.**

#### **3.1. Introduction**

This chapter will demonstrate the nexus between sexist hate speech the psychological dimension of Article 9(1) of the ICCPR. In doing so it will carefully distinguish mere sexist speech from sexist hate speech to establish that sexist hate speech is violent and as such, it must be limited in light of the harm principle. This chapter will also demonstrate that sexist hate speech and misogyny are the same phenomenon in so far as both forms of speech are violent and distinguish them from sexist speech which lacks the element of violence. Lastly, this chapter will argue that sexist hate speech causes psychological harm to those it targets inevitably violating their right to security of person.

#### **3.2. Sexism, sexist hate speech and misogyny distinctively defined**

It is necessary to distinguish mere sexist speech from sexist hate speech and misogynistic speech for purposes of determining the limits of speech that disproportionately targets women in light of the harm such speech causes. There exist five identified faces of oppression presented by Iris Young. These are: exploitation, marginalisation, powerlessness, cultural imperialism, and violence.<sup>124</sup> This project will focus specifically on violence as it is directly connected to one of the instances where speech may be limited legitimately, i.e. when it incites violence against a particular identified group.<sup>125</sup>

Oppressive violence is systematic such that it targets individuals due to their belonging to a group rather than who they are as individuals or randomly. This covers physical violence, harassment, intimidation, and ridicule all aimed at degrading, humiliating or stigmatizing people belonging to the targeted group.<sup>126</sup> For instance, Mary is targeted as Mary qua woman, disabled, or black but not as Mary qua Mary. Taking violence as the metric for limitation, this project will group speech targeting women as follows: on one hand sexist speech as oppressive but non-violent speech that

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<sup>124</sup> Young I, *Justice and the Politics of Difference*, Princeton University Press, Princeton, 1990, 53.

<sup>125</sup> Article 20(2) International Convention on Civil and Political Rights.

<sup>126</sup> Richardson-self L, 'Woman-hating: On Misogyny, Sexism, and hate speech', 258.

is not prohibited. On the other hand, sexist hate speech and misogynistic speech are oppressive and violent speech which is prohibited.

### **3.2.1. Sexist speech as oppressive speech that lacks the element of violence**

Sexism as defined in the Merriam Webster dictionary refers to prejudice or discrimination based on sex or the behaviour, conditions, or attitudes that foster stereotypes of social roles based on sex.<sup>127</sup> It is important to note the absence of the element of violence in this definition.

To paint a good picture of what sexist speech looks like, consider this example. Tom, an adult man, refers to all women as girls without conscious reflection on why he does it, and he does so without any ill intent. Tom's action implies the inferior status of women to men consequently giving men an upper hand in various situations. Lynne Tyrell argues that the use of the term "girl" when referring to an adult woman performs as status function by denying the adult woman her adulthood.<sup>128</sup> It also gives a basis for the rationalization of paternalistic behaviour such as viewing a woman as incapable of making serious decisions or paying her less than her male counterparts both of which "undercut the full expression of her autonomy".<sup>129</sup>

While this can be seen to be oppressive by creating a hierarchy that subordinates women to men, it does not convey hostility or coerce violent behaviour. Thus, sexist speech would be an inappropriate standard by which speech is limited as it sets the bar too low to include speech that is offensive to a person perhaps due to their overly sensitive disposition thereby posing the risk of limiting free speech beyond the necessary limits.<sup>130</sup>

### **3.2.2. Misogyny and sexist hate speech as oppressive speech that is violent**

The Merriam Webster dictionary defines misogyny as hatred of women and its etymology is the Ancient Greek word 'mīsoḡuniā' which means hatred towards women.<sup>131</sup> Over time, misogyny has morphed and taken various shapes, ranging from: male privilege, patriarchy, gender discrimination, sexual harassment, belittling women, to sexual objectification. Of relevance to this

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<sup>127</sup> <https://www.merriam-webster.com/dictionary/sexism> on 10 February 2024.

<sup>128</sup> Tyrell L. 'Pornographic subordination: How pornography silences women', in *On feminist ethics and politics*, (ed.) Claudia Card, University of Kansas press, Lawrence, 1999, 193.

<sup>129</sup> Tyrell L. 'Pornographic subordination: How pornography silences women', 193.

<sup>130</sup> Mill D, 'Free Speech', *Stanford Encyclopaedia of Philosophy*, 2017, 7, <https://plato.stanford.edu/entries/freedom-speech/> on 27<sup>th</sup> October 2023.

<sup>131</sup> <https://www.merriam-webster.com/dictionary/misogyny> on 10 February 2024.

project is violence against women.<sup>132</sup> Having hate as its defining characteristic, the author in this project is of the view that misogyny is hate speech targeting women. However, for purposes of this project, the author refers to the broader term, sexist hate speech that would include misogynistic speech as a sub-category.

Enter hate speech. While there is no unanimously accepted definition of hate speech, scholars such as Lilian Donna and Louise Richardson-self have identified some common characteristics within the hate speech literature that is helpful in identifying hate speech. The first common characteristic is that hate speech is often hostile to those it targets. Secondly, hate speech often does something to the targets; this could be to: silence, disparage, malign, humiliate, intimidate, vilify, degrade, persecute, discriminate, or incite violence.<sup>133</sup> Lastly, hate speech typically understood as conduct that targets historically disadvantaged groups, based on immutable characteristics common to a particular group. These immutable characteristics include race, religion, sexual orientation, disability, age, and gender.<sup>134</sup> Sexist hate speech is therefore hate speech targeting groups in *toto* or individual members of a group due to their gender for instance, women.

Based on the five faces of oppression earlier outlined, it is clear that sexist hate speech oppresses women through violence which include the more benign instances of harassment, intimidation or ridicule which degrade, humiliate, and stigmatizes members of this group.<sup>135</sup>

### **3.3 The harm occasioned by sexist hate speech**

Women are disproportionately targeted by online violence and as a result suffer serious consequences of this violence disproportionately.<sup>136</sup> This is especially true in instances of intersectionality between sex and other immutable undesirable characteristics such as race.<sup>137</sup> The harms that victims suffer can be broadly categorized as: first, private health harms which refers to physical or psychological injury. Second, relational harms which affect the relationships a person has, and those they can develop and maintain with others be it intimate, personal, and arms-length

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<sup>132</sup> Srivatsava K, Chaudhury S, Bhat P, Sahu S, 'Misogyny, feminism, and sexual harassment', *Industrial Psychiatry Journal*, 2017, 1.

<sup>133</sup> Lillian D, A thorn by any other name: Sexist discourse as hate speech, *Discourse and Society*, 2007, 731.

<sup>134</sup> Richardson-self L, 'Woman-hating: On Misogyny, Sexism, and hate speech', 256.

<sup>135</sup> Richardson-self L, 'Woman-hating: On Misogyny, Sexism, and hate speech', 260.

<sup>136</sup> UNGA, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/ HRC/38/47, 18 June 2018, 7.

<sup>137</sup> Siegel A, 'Online hate speech', *Cambridge University Press*, 2020, 65.

relationships.<sup>138</sup> Lastly, is dignitary harms which is often telling of social division as well as the social hierarchy that is founded on the gendered notions of status and personhood.<sup>139</sup>

This chapter will focus specifically on the first categorization of harms, private health with a bias towards psychological injury. This is because, ultimately, the aim of this project is to show that sexist hates speech causes psychological injury that amounts to a violation of the psychological dimension of the right to security of person of the targeted individuals or groups.

Online acts of gendered violence against women may cause a high degree of psychological suffering, due to the scale – number of people that can contribute to this violence as well as the people that would be victims of these acts of violence – and repeated nature of these occurrences.<sup>140</sup> The victims often suffer a range of psychological conditions ranging from anxiety disorders, trauma and stressor related disorders and communal fear.<sup>141</sup> In some extreme cases survivors display suicidal tendencies.<sup>142</sup>

Scientific data demonstrating that hate speech often has negative effects to the victim's psychological wellbeing exists. This project will primarily rely on these existing empirical studies as secondary sources for this study due to the author's limitations of time and being a social scientist, the lack of skill to conduct scientific medical research. John Park in his recent study presents a set of credible data which tries to eliminate other confounding variables in data that would otherwise be responsible for the psychological illness. Data on health harms caused by hate speech in general provides inductive support for the health harms caused by sexist hate speech because sexist hate speech is a sub-category within the broader category of hate speech.

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<sup>138</sup> Tjon L and Ruijter A, Conceptualizing the tortious harm of sexist and racist speech -Conceptualising the tortuous harms of sexist and racist hate speech, *European Law Open*, Cambridge University Press, 2023, 10.

<sup>139</sup> Tjon L and Ruijter A, Conceptualizing the tortious harm of sexist and racist speech -Conceptualising the tortuous harms of sexist and racist hate speech, 21.

<sup>140</sup> UNGA, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, 7.

<sup>141</sup> Siegel A, 'Online hate speech', *Cambridge University Press*, 2020, 68, --  
<https://www.cambridge.org/core/books/social-media-and-democracy/online-hate-speech/28D1CF2E6D81712A6F1409ED32808BF1> On 22 November 2023.

<sup>142</sup> UNGA, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, 7.

### 3.3.1. Existing unsatisfactory data on health harms caused by hate speech

Park begins by responding to the existing body of scholarship on using health harms to advocate for limiting hate speech. He does so by commenting on Richard Delgado's work,<sup>143</sup> and thereafter, Melina Bell.<sup>144</sup> For Delgado's work, Park attributes the lack of rigorous empirical data to the fact that hate speech and discrimination were still budding fields at the time.<sup>145</sup> In the case of Bell's study, the major drawback was that she cites people like Ford et al and Lewis and Van Dyke whose studies were cross-sectional rather than longitudinal.<sup>146</sup> Longitudinal studies are studies that employ continuous or repeated measures to follow individuals over prolonged periods, often years or decades. This kind of research is considered useful for evaluating cause-and-effect relationships between risk factors and development of disease. On the other hand, cross-sectional studies analyse different variables simultaneously, but gives no information as to how time affects the variables.<sup>147</sup>

Bell's study was able to eliminate some confounding variables such as socio-economic status, health behaviours, and access to care as factors causing mental and physical health problems but was not successful in weeding out other factors such as place of birth and level of education as causative factors.<sup>148</sup> This makes it more probable that such maladies are caused by discrimination. However, this is not enough to make a valid argument that discrimination and hate speech cause these illnesses.

### 3.3.2. Empirical evidence on hate speech and health

Hate speech is under the umbrella of discrimination which is the broader category thereby implying that hate speech is a type of discrimination.<sup>149</sup> This essentially means that replicated negative health outcomes found for varying forms of discrimination can provide inductive support that they will also apply to instances of hate speech including sexist hate speech.<sup>150</sup> Inductive reasoning has an element of probability such that a generalized conclusion is inferred from

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<sup>143</sup> Park J, 'The mental and physical argument against hate speech', 9 *Journal of Cognition and Neuroethics* 1, 2023,17.

<sup>144</sup> Bell M, John Stuart Mill's Harm Principle and free speech: Expanding the notion of harm, 169.

<sup>145</sup> Park J, 'The mental and physical argument against hate speech', 17.

<sup>146</sup> Park J, 'The mental and physical argument against hate speech', 18.

<sup>147</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4669300/#:~:text=Longitudinal%20studies%20employ%20continuous%20or%20time%E2%80%94often%20years%20or%20decades> – on 27<sup>th</sup> December 2023.

<sup>148</sup> Park J, 'The mental and physical argument against hate speech', 18.

<sup>149</sup> Park J, 'The mental and physical argument against hate speech', 20.

<sup>150</sup> Park J, 'The mental and physical argument against hate speech', 20.

particular instances, and a good inductive argument based on true premises will support a conclusion with a high degree of likelihood rather than absolute certainty.<sup>151</sup> In this case, if different forms of discrimination cause bad health outcomes, then the likelihood that hate speech would cause bad health outcomes increases.

Paradies et al conduct a meta-analysis of 333 published articles with a sample size of 309,687 participants across all studies. From this study, it was shown that experiencing racism - a form of discrimination- was associated with mental health issues such as depression, anxiety, posttraumatic stress disorder (PTSD) and suicidal ideation. They state that ‘...this meta-analysis indicates that racism is significantly related to poorer health...’<sup>152</sup> They also draw the causal conclusion that racism has long term effects on health that remain significant even with passage of time.<sup>153</sup> To inductively conclude that hate speech causes psychological harm, we can rely on this evidence from racist discrimination to conclude that hate speech will likely cause psychological harm to those it targets.

The general stress literature can be used to develop an alternative argument that hate speech causes psychological harm. Within psychological literature, it is uncontroversial that hate speech can be a stressful event causing the majority of those targeted by this kind of speech to feel stress.<sup>154</sup> The negative impact of chronic stress on mental and physical health is uncontroversial and well documented. For instance, the National Institute of mental health states:

‘... over time, continued strain on your body from stress may contribute to serious health problems such as heart disease... and other illnesses, including mental disorders such as depression and anxiety’.<sup>155</sup>

Damage to one’s health is certainly subjective. Factors like genetics, personality, childhood experiences such as early exposure to hate speech, and support networks such as having family or belonging to a religious support group weigh in on how one is affected by discrimination or hate speech. However, data still indicates that hate speech in general and other acts of discrimination

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<sup>151</sup> <https://www.merriam-webster.com/grammar/deduction-vs-induction-vs-abduction> on 7 January 2024.

<sup>152</sup> Paradies Y, Ben J, Denson N, Elias A, Priest N, 10 Pieterse A, ‘Racism as a Determinant of health: A systematic review and meta-analysis’, 24.

<sup>153</sup> Paradies Y, Ben J, Denson N, Elias A, Priest N, 10 Pieterse A, ‘Racism as a Determinant of health: A systematic review and meta-analysis’, 28.

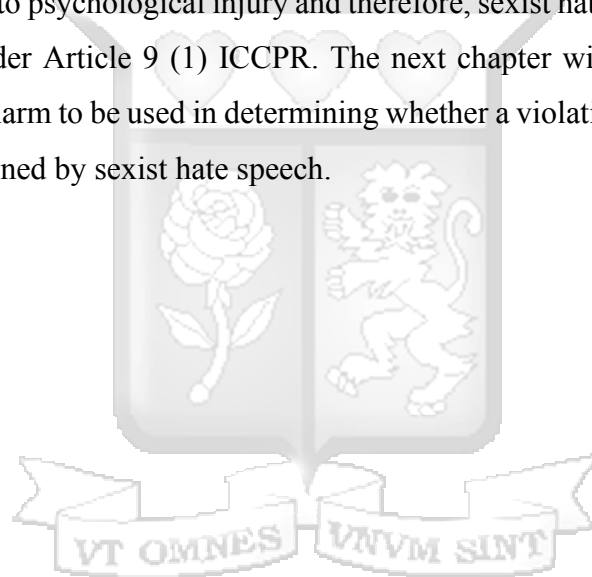
<sup>154</sup> Park J, ‘The mental and physical argument against hate speech’, 24.

<sup>155</sup> National Institute of Mental Health, 5 things you should know about stress 2020, on 2 January 2023.

are still statistically significant causal influences for certain negative health outcomes.<sup>156</sup> Given sexist hate speech is a form of hate speech that targets people based on sex, we can reasonably conclude that sexist hate speech will likely cause psychological injury to those targeted.

### **3.4. Conclusion**

In conclusion, this chapter has sought to distinguish sexism from sexist hate speech by arguing that the latter is violent speech that ought to be limited. Thereafter, the chapter discussed the health harms caused by hate speech in general. The argument here is that, by dint of sexist hate speech being a subcategory, then the hate speech data would provide inductive support for the health harms caused by sexist hate speech. Ultimately, this chapter has shown that scientific evidence has linked sexist hate speech to psychological injury and therefore, sexist hate speech violates the right to security of person under Article 9 (1) ICCPR. The next chapter will present the appropriate degree of psychological harm to be used in determining whether a violation of the right to personal security has been occasioned by sexist hate speech.



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<sup>156</sup> Park J, 'The mental and physical argument against hate speech', 25.

## **4.0. CHAPTER 4: ESTABLISHING THE APPROPRIATE STANDARD OF PSYCHOLOGICAL HARM FOR ASSESSING VIOLATIONS OF THE RIGHT TO SECURITY OF PERSON**

### **4.1. Introduction**

This chapter will present the appropriate standard of psychological harm to be used in determining whether a compensable violation of the right to personal security has been occasioned by sexist hate speech. In doing so, it will investigate the varying levels of psychological harm as recorded in the DSM-5 manual to suggest the best approach and give a justification for the chosen degree of psychological harm. This will be the standard that the HRC, which is the treaty body tasked with monitoring the implementation of the ICCPR and receiving complaints, should apply to ascertain that the threshold for compensable psychological harm has been met on account of sexist hate speech. This chapter will then conclude by providing the practical steps to be followed by the HRC before concluding that sexist hate speech violates the right to security of person under Article 9(1) of the ICCPR.

### **4.2. Determining the threshold for psychological injury that violates Article 9(1)**

As discussed in the preceding chapter, sexist hate speech tends to cause varying intensities of psychological harm. The level of harm that a target of this kind of speech suffers would depend on the individuals' coping mechanism when faced with hate speech. Additionally, factors such as genetics, personality, and experiencing trauma at an early age can be exacerbating factors.<sup>157</sup> The psychological injury caused by sexist hate speech often manifests in form of fear, anxiety, depression, and suicidal tendencies.<sup>158</sup> These mental conditions fall under broader categories of anxiety disorders, trauma-and stressor-related disorders, and depressive disorders as classified in the DSM-5. This section of the chapter will first discuss anxiety disorders together with depressive disorders and argue that they would not be an appropriate threshold given on one hand, anxiety disorders offer too low of a bar such that every case of sexist speech will be compensable while

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<sup>157</sup> Park J, 'The mental and physical argument against hate speech' 25.

<sup>158</sup> UNGA, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, 7.

on the other, depressive disorders is too high a bar that makes it practically impossible to successfully claim for compensation.

#### **4.2.1. Unsuitable thresholds for compensable psychological harm**

##### *i. Anxiety disorders*

Anxiety disorders include disorders that have features common to excessive fear and anxiety related behavioural disturbances.<sup>159</sup> Fear is the emotional response to real or perceived imminent threat while anxiety is the anticipation of a future threat. These two states tend to overlap but can be distinguished by the indicative symptoms.<sup>160</sup> Fear is associated with surges of autonomic arousals necessary for fight or flight, situations of danger, and escape situations. This can be contrasted with anxiety that is characterised by muscle tension, vigilance in anticipation of future danger, and cautious or avoidant behaviour.<sup>161</sup> Despite fear and anxiety being among the forms of psychological injury associated with hate speech in general,<sup>162</sup> this level of harm would not provide an appropriate threshold for determining that a compensable violation of the right to security of person has occurred. The reasoning here is that the symptoms associated with anxiety which are fear or worry, feeling irritable,<sup>163</sup> etcetera, would set the bar for psychological harm too low.

##### *ii. Depressive disorders*

Depressive disorders include disruptive mood dysregulation disorder, major depressive disorder, dysthymia, premenstrual dysphoric disorder, substance/medication induced depression among others.<sup>164</sup> During a depressive episode lasting at least two weeks, individuals experience persistent feelings of sadness or loss of interest, along with various symptoms such as poor concentration, excessive guilt, thoughts about dying and/or suicide and, and changes in sleep or appetite. The heightened risk of suicide is a significant concern for people with depression.<sup>165</sup> Depressive disorders would generally constitute a violation of the right to security of person because it causes

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<sup>159</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 189.

<sup>160</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 189.

<sup>161</sup> Stein D, 'The clinical characterization of the adult patient with an anxiety or related disorder aimed at personalization of management, September 2021, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8429350/> -- on 16 January 2024, 9.

<sup>162</sup> UNGA, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, 7

<sup>163</sup> <https://www.who.int/news-room/fact-sheets/detail/anxiety-disorders> -- on 16 January 2024.

<sup>164</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 155.

<sup>165</sup> <https://www.who.int/news-room/fact-sheets/detail/mental-disorders> on 15 January 2024.

serious psychological harm that would warrant compensation. However, this would not be an appropriate standard for compensable psychological harm given it relates to a high level of suffering with suicide being a risk and this would make it unnecessarily difficult to prove that a compensable psychological harm has occurred. It is important to note that individuals who suffer from depressive disorders due to exposure to sexist hate speech would still be able to claim compensation.

#### **4.2.2. The proposed threshold for compensable psychological harm**

##### ***Trauma-and stressor-related disorders***

These are disorders in which exposure to a traumatic or stressful event is expressly listed in the diagnostic criteria. These disorders include, reactive attachment disorder, disinhibited social engagement disorder, posttraumatic stress disorder (PTSD) and adjustment disorders. These disorders have a close relationship with anxiety disorders given the symptoms of psychological distress of this nature can be understood in the context of anxiety-or fear-based disorders. However, it has been established that individuals who have been exposed to a traumatic or stressful event display a phenotype whose prominent characteristics are anhedonia and dysphoric symptoms, externalizing angry and aggressive symptoms or dissociative symptoms.<sup>166</sup> Effectively, these characteristics serve as the point of distinction between anxiety – or fear-based symptoms and trauma-and stressor-related disorders.<sup>167</sup>

This project will focus solely on PTSD because from the forms of traumatic and stressor related disorders discussed above, it is the disorder commonly associated with exposure to hate speech as a traumatic event.<sup>168</sup> Additionally, PTSD is more prevalent in women than in men with women experiencing PTSD for a longer duration than their male counterparts. This increased risk of experiencing PTSD in women is tied to the greater risk of exposure to traumatic events such as rape and other forms of interpersonal violence.<sup>169</sup> Based on the above, PTSD would constitute an appropriate standard for a compensable violation of the right to security of person.

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<sup>166</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 265.

<sup>167</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 265.

<sup>168</sup> Psychological toll of hate speech: The role of acculturation stress in the effects of exposure to ethnic slurs on mental health among Ukrainian immigrants in Poland, <https://psycnet.apa.org/record/2022-23266-001>, on 16 January, 1.

<sup>169</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 278.

### **4.3. Evidentiary requirements to substantiate a claim of a violation of Article 9(1)**

The HRC requires that all claims brought before it be properly substantiated and where necessary, it may request for additional facts or evidence from the communicating party.<sup>170</sup> In proving a violation of Article 9 (1) a plaintiff would need to prove mental distress that meets the threshold of what is compensable mental harm, in this case in the form of a trauma-or stressor-related disorder. To describe how mental harm can be proven, the author borrows from Tort Law jurisprudence on proving mental harm caused by negligence. This is because over the years, domestic courts have significantly developed jurisprudence surrounding adjudicating tortious claims with cases such as *Saadati v Moorhead* indicating the utility of the DSM-5 in proving a recognised psychological injury.<sup>171</sup>

#### **4.3.1. Proving Mental distress**

A victim would also be required to prove that he has suffered distress due to the defendant's sexist hate speech. To do so, the plaintiff should adduce medical evidence. In the past, medical evidence has played a key role in almost all big mental distress cases such as *New York City Transit Authority v State Division of Human Rights and Adrienne* where damages worth 450,000 were awarded for mental anguish suffered due to discrimination on the basis of sex. In this case, the court accepted medical evidence and the testimony of the plaintiff.<sup>172</sup> In the absence of medical evidence, a victim must rely on circumstantial evidence to support his claim of mental distress. A victim's personal testimony describing his unfair treatment and his resultant feelings and evidence exhibiting their general demeanor is often the only evidence he can provide.<sup>173</sup>

Generally, A victim should also be required to prove that his distress was proximately caused by the defendant's discrimination.<sup>174</sup> Some jurisdictions require a victim of discrimination to show that the discrimination was not attributable to unusual personal sensitivity. Courts consider the sensitivity of the victims, citing previous experiences with discrimination or other predisposing

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<sup>170</sup>Rule 90 (1) (e), CCPR Rules of procedure of the Human Rights Committee, 4 January 2021, CCPR/C/Rev.12.

<sup>171</sup> *Saadati v Moorhead* (2017) Supreme Court of Canada.

<sup>172</sup> *New York City Transit Authority v State Division of Human Rights and Adrienne Nash* (1992), Court of Appeals of the State of New York United States.

<sup>173</sup> Rennett H, 'Developing Tort standards for award of mental distress damages in statutory discrimination actions' 11 *University of Michigan Journal of Law Reform*, 1, 1997, 128.

<sup>174</sup>Rennett H, 'Developing Tort standards for award of mental distress damages in statutory discrimination actions' 129.

circumstances in augmenting the plaintiff's mental distress award.<sup>175</sup> Additionally, the plaintiff's evidentiary burden is not always consistently defined. The New York Court of Appeals in *Batavia Lodge No.196, Loyal order of Moose v New York State Div. of Human Rights* defined the standard as being that circumstantial testimony must persuade the factfinder that a reasonable person of average sensibilities could fairly be expected to suffer mental anguish from the defendant's actions.<sup>176</sup>

#### **4.3.2. Expanded roles for social scientists in the adjudication process**

Forensic psychologists are often called upon to help adjudicators understand the nature and extent of various psychological injuries and how these injuries would impact their lives. Some of the ways through which this is done is by having professionals as expert witnesses in various ways. The first is by using social science research in the courtroom. The *Price-Waterhouse v Hopkins* case recognised psychological and social research as an evidentiary basis for identifying cognitive approaches to gender and racial stereotyping.<sup>177</sup> Expert witness testimony drew on both laboratory and field research to describe the conditions that encourage stereotyping, indicators that reveal stereotyping, consequences of stereotyping for out-groups and feasible remedies to prevent the intrusion of stereotyping into decision making.<sup>178</sup>

The second approach would be using a professional as a witness when a plaintiff has sought medical attention or counselling services from them because of stress following the discriminatory incident. In this case, the counselor or therapist would be a factual witness rather than an expert witness.<sup>179</sup> Alternatively, a forensic mental health expert can be used. This expert witness would be especially helpful to an adjudicating body in allocating responsibility where the plaintiff is a thin skull plaintiff, or a crumbling skull plaintiff and plaintiffs with an eggshell psyche.<sup>180</sup>

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<sup>175</sup> *Steele v Title Realty Co* (1973) United States Court of Appeal.

<sup>176</sup> Rennett H, 'Developing Tort standards for award of mental distress damages in statutory discrimination actions' 129.

<sup>177</sup> *Price Waterhouse v Hopkins* (1989) Supreme Court of The United States.

<sup>178</sup> Heinrich L, 'The mental anguish and humiliation suffered by victims of housing discrimination' 26 *University of Illinois Chicago Law Review*, 1, 1992, 41-42.

<sup>179</sup> Heinrich L, 'The mental anguish and humiliation suffered by victims of housing', 43.

<sup>180</sup> Rennett H, 'Developing Tort standards for award of mental distress damages in statutory discrimination actions' 129.

The thin and crumbling skull doctrines although originally intended to apply to physical injury has over time been extended to apply to psychological injuries.<sup>181</sup> A thin skull plaintiff is a plaintiff who suffers from a pre-existing mental condition which is made worse by subsequent harm while the crumbling skull plaintiff is one who suffers from a pre-existing condition and whose condition would have naturally worsened.<sup>182</sup> An eggshell psyche plaintiff on the other hand is a plaintiff who has a history with trauma which makes them more susceptible to trauma.<sup>183</sup> A forensic mental health expert may be used where the adjudicators can identify indicators of trauma from the testimony of the plaintiff but would wish to ascertain that the plaintiff indeed suffers from trauma.<sup>184</sup>

#### **4.4. A practical example of how sexist hate speech can be situated as a violation of Article 9(1) of the ICCPR**

To prove their claim, a plaintiff would first have to prove that the speech directed towards them is sexist hate speech and therefore falling outside the scope of protected speech. To do so, the plaintiff must prove that the speech is hostile, that it attacks the personhood of its targets, and that it targets groups based on the immutable characteristics of sex. This is a three-part conjunctive test.

Thereafter, the plaintiff must demonstrate that the sexist hate speech caused psychological injury. This may be proven through medical evidence. Alternatively, a victim may adduce their testimony from which anhedonia or hedonic loss which is described as a loss of pleasure in everyday activities is usually of clinical and forensic importance. Anhedonia taken together with any of the symptoms listed under the DSM - 5 manual would warrant further clinical evaluation. Some of the symptoms listed in the DSM-5 are trouble sleeping, nightmares, trouble eating, avoidance of or change in social interactions, bouts of fearfulness among others. This DSM - 5 symptoms can be used as a checklist and may be supplemented with social science research to demonstrate the correlation between hate speech and psychological harm.

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<sup>181</sup> Khotus E, McCall S, The eggshell and crumbling skull Plaintiff: Psychological and legal considerations for assessment.

<sup>182</sup> <https://amjlaw.ca/2019/11/thin-skull-versus-crumbling-skull/> -- on 16 January 2024.

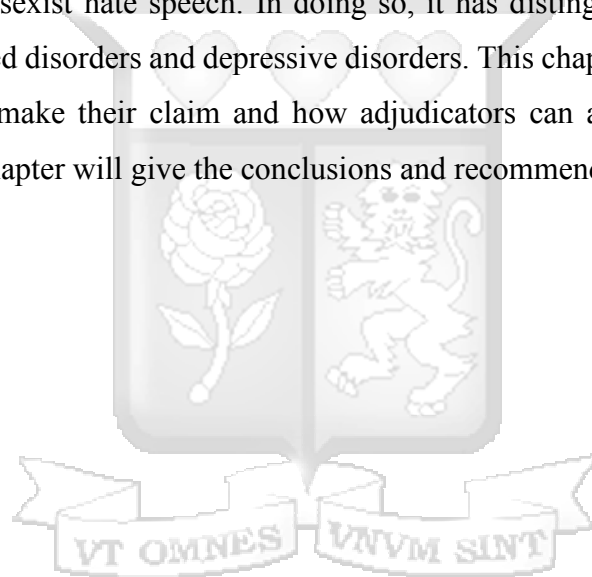
<sup>183</sup> Ikpeme R, 'An assessment of the "eggshell psyche" in simulated civil litigation' 6 Psychological Injury and Law 2, 2013, 144.

<sup>184</sup> Heinrich L, 'The mental anguish and humiliation suffered by victims of housing discrimination', 42.

The risk associated with taking this approach would be the likelihood of different psychiatrists reaching differing conclusions in their assessments of victims. This is however resolved by turning to the jurisprudence of English Courts in the *Maynard's case*, where it was stated that courts may accept evidence of an opinion genuinely held by a responsible body of professionals only if the evidence is held in good faith, logical, and reasonable. Difference of opinion held by a body of professionals is inconsequential to the outcome of any case where this evidence is adduced.<sup>185</sup>

#### **4.5. Conclusion**

In conclusion, this chapter has demonstrated that PTSD should be the appropriate standard of psychological harm to be used in determining whether a violation of the right to personal security has been occasioned by sexist hate speech. In doing so, it has distinguished anxiety disorders, trauma and stressor related disorders and depressive disorders. This chapter has also elaborated on how plaintiffs ought to make their claim and how adjudicators can ascertain the existence of trauma. The following chapter will give the conclusions and recommendations.



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<sup>185</sup> *Maynard v West Midlands Regional Health Authority* (1985) United Kingdom House of Lords.

## **5.0. CHAPTER 5: CONCLUSION**

### **5.1. Introduction**

This chapter presents the overall findings for the individual chapters of the project. In doing so, it will summarily answer the underlying research questions for each chapter and the level one question for the chapter in question. Finally, it will delve into the recommendations and conclude answering the main research question.

### **5.2. Summary of findings**

Chapter one was the foundational chapter to this project. It gave the background for this research, the statement of the problem, research questions and objectives, my hypothesis, the justification for my study, the conceptual framework, literature review, methodology and lastly, the chapter breakdown.

Chapter two investigated the rationales of free speech and the limits of free speech within the ICCPR to respond to the question on whether it is necessary to limit sexist hate speech. The chapter conclusion was that sexist hate speech is limited because it is violent speech that causes harm to those targeted by this it. This limitation of sexist hate speech although not provided for in the hate speech provision, Article 20, may be deduced from the general grounds for limitation of freedom of expression. The specific ground being where speech violates the rights of others. In this case, the right violated is the right to security of person under Article 9(1) of the ICCPR.

Chapter three sought to demonstrate the nexus between sexist hate speech and the psychological injury to ultimately prove that sexist hate speech violates the psychological dimension of the right to security of person. To do so, this chapter characterises sexist hate speech as violent speech and as such is distinct from mere sexist speech. The project then investigates existing meta-analysis from studies on the consequences of discrimination and hate speech in general both of which provide inductive support for the harm caused by sexist hate speech. This chapter also relies on evidence from studies on sexist hate speech. The evidence shows that sexist hate speech is linked to psychological harm in varying degrees. This ranges from more benign forms such as fear and anxiety to more serious cases such as PTSD and depression.

The aim of chapter four was to present the prescriptive claim for this project which is the standard for psychological harm that is compensable as well as the evidentiary requirements for successfully

proving such a claim. The author studied the different psychological injuries that have been linked to hate speech in three broad categorisations; that is anxiety disorders, depressive disorders and trauma and stressor related disorders. Ultimately, the appropriate standard for adjudicating claims of this nature was found to be where a target of sexist hate speech has suffered PTSD. On the evidentiary requirements, this project found that a claimant should adduce medical evidence. In the absence of medical evidence, a claimant may give their testimony which would be followed by a forensic psychiatric analysis. The project also noted that social science research is also helpful in proving a claim of psychological injury.

### **5.3. Recommendations**

This project identified a gap in the ICCPR treaty provision on hate speech. The gap is that Article 20 of the ICCPR and The General Comment No. 11 interpreting it, both fail to recognise sexist hate speech as a prohibited form of speech. In this regard, my recommendation is that the HRC should broaden the interpretation of what is considered hate speech to include sexist hate speech. This is particularly important because sexist hate speech falls outside the scope of protected speech in that it interferes with other protected rights such as the right to security of person, yet the prohibition of this form of speech is not provided by law. Implementing this recommendation will be a win for international human rights law since an express provision in law will be created. This means that victims of sexist hate speech who often fall through the cracks will be included and will be able to meet the first requirement for the limitation of a right.

The second recommendation is tied to the prescriptive claim made in chapter four of this project; having PTSD as the standard for psychological harm and using the DSM-5 as a practical guide for identification of PTSD symptoms. The author recommends that more research should be done on this to develop a manual founded on the DSM-5 requirements but tailored to the needs of the legal field. This research is especially important as there is need to address the stark difference between medical and legal practitioners in their respective methods of collecting and investigating evidence as well as the duration for observation before making a conclusive finding.

Lastly, is in line with the possibility of relying on Social Science research to prove psychological harm. The author recommends a collaboration between lawyers and social scientists in developing guidelines on the role of Social Science research in legal proceedings. It is important that these guidelines specify the minimum requirements for this kind of research including but not limited to

the average sample size, duration of study, and ethnical, racial, and socio-economic diversity represented by the selected sample size.

#### **5.4. Conclusion**

In conclusion, this project has found that sexist hate speech is violent speech that causes psychological injury to the targets of this kind of speech. As such, this speech violates the right to security of person under Article 9 of the ICCPR. This violation becomes compensable when the level of harm rises to PTSD which is the minimum threshold.



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