



BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Criminal Content Restrictions

Centre for Law and Democracy
International Media Support (IMS)

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Freedom of expression is a foundational human right, but it is universally recognised that certain types of speech can be harmful and that some speech is so harmful that it should be criminally prohibited. Due to the severe nature of criminal prohibitions, however, extreme care must be taken to ensure that these restrictions are not applied in a manner which unduly restricts freedom of expression. Common problems with criminal restrictions on speech are that they are drafted in unduly vague terms or that they are overbroad in application.

National Security and Public Order

National security and public order are interests of the highest order and, when either is truly at risk, all human rights, and even democracy itself, may be at risk. It is thus accepted that, in appropriate circumstances, freedom of expression may be restricted to protect these two interests, and this is mentioned explicitly in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR). However, it is easy to succumb to the temptation to unduly limit free speech in the name of security, a risk that has emerged all the more strongly in the aftermath of the attacks of 11 September 2001 and the subsequent growth in global terrorism and other national security threats. As Benjamin Franklin once famously said, “People willing to trade their freedom for temporary security deserve neither and will lose both”.

A key problem with national security is the difficulty of defining it clearly, and the tendency of both laws and decision-makers in many countries to define it far too broadly. There is no clear definition of what constitutes ‘national security’ and even the *Global Principles on National Security and the Right to Information* (Tshwane Principles), the leading international statement in this area, eschewed definition. However, Principle 9 of the

Tshwane Principles provides a list of categories of information that might legitimately be withheld on grounds of national security, giving a good indication of the scope of the concept. The list includes such items as “defence plans, operations, and capabilities”, “production, capabilities, or use of weapons systems”, “measures to safeguard the territory of the state, critical infrastructure, or critical national institutions”, “the operations, sources, and methods of intelligence services”, and national security information provided by a foreign State.

It is clear from this that restrictions based on localised violence or ordinary criminal activities are not justifiable on the basis of national security. Instead, the threat must relate to defence capabilities such as weapons or intelligence to qualify.

In order to prevent abuse of national security and public order rules, international courts have applied three main principles. First, they have insisted that these concepts be defined appropriately narrowly. For example, in its 2011 General Comment No. 34, the UN Human Rights Committee (UNHRC) stated:

Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.

Second, they have insisted on a clear intent requirement for the threat to national security or public order. For example, the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, a precursor to the Tshwane Principles, state that expression may be punished as a threat to national security only if the State can demonstrate that “the expression is intended to incite imminent violence”.

Third, they have insisted on a very close nexus between the expression and the risk of harm. This is illustrated in Principle XIII(2) of the *Declaration of Principles on Freedom of Expression in Africa*:

Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

Together, these constraints help prevent States from abusing concerns about threats to national security to unduly restrict freedom of expression.

Hate Speech

Drawing the line between ideas and opinions that are offensive but protected under the right to freedom of expression and hate speech is difficult and often controversial. However, the dangers of hate speech are recognised in Article 20(2) of the ICCPR, which is the only provision in the ICCPR that actually requires States to prohibit certain speech, specifically, “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

It is clear that restrictions pursuant to Article 20(2) must still meet the three-part test imposed by Article 19(3). As the UNHRC said in General Comment No. 34:

The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that

is justified on the basis of article 20 must also comply with article 19, paragraph 3.

Article 20(2) is understood to incorporate four key elements for speech to qualify as hate speech: intent, incitement, to the proscribed results, and based on the listed grounds. The first condition means that only speech which is intended to incite to one of the proscribed results should qualify as hate speech. This has been clearly reaffirmed by international courts, such as the European Court of Human Rights (ECHR) in the case of *Jersild v. Denmark*. In that case, the speech, by a journalist, was intended to expose the existence of a racist subculture. It was, as a result, not considered to be hate speech and the restrictions imposed by Denmark were a breach of the applicant’s right to freedom of expression.

The second condition, incitement, means that there has to be a close and direct causal relationship between a statement and the proscribed result before the statement may legitimately be prohibited. Where a statement actually leads to one of the proscribed results, this is obviously a clear indication, but it is always possible that other factors were responsible. Context is very important here. Statements which may be unlikely to create hatred in a peaceful context may do so in a more unstable environment.

Third, the statement must incite to one of the proscribed results. These include violence, which is normally covered by more general prohibitions on incitement to crime, and discrimination, which is itself prohibited in many countries, but also hatred, as a state of mind (i.e. an opinion, which is itself actually protected under international law). The rationale for this is that society should not have to wait until hatred actually manifests itself in action before providing protection to potential victims.

Fourth, the statement must incite to hatred on the basis of nationality, race or religion, although this has been extended to other similar grounds, based on the idea of historical disadvantage and immutability, such as ethnicity or sexual

orientation, in some other contexts. However, speech attacking political opponents on policy grounds, for example, could never qualify as hate speech. This also means that speech which targets ideas (however harshly or unfairly) would normally be protected, while speech which attacks individuals based on their race or religion might cross the line.

A number of additional conditions for hate speech legislation were set out in a 2001 Joint Statement by the special international mandates on freedom of expression:

- no one should be penalised for statements which are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

Obscenity

Obscenity is a relatively unclear area in terms of restrictions on freedom of expression under international law, in part because while statements which are offensive to some people are protected, States also have the power to limit freedom of expression in the interest of public morals, subject to the three-part test (see Briefing Note 2).

Obscenity is also very difficult to define and there is no universally applicable standard. At the same time, the UNHRC noted in General Comment No. 34 that this notion cannot be used to impose values derived from one tradition on others:

The Committee observed in general comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions;

consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination

At the same time, both international and domestic courts have often recognised that questions of morality are closely tied to national and local cultures and traditions.

Blasphemy

The right to practice one’s religion is a human right protected by Article 18 of the ICCPR and the UNHRC has made it clear that this applies to atheistic as well as theistic beliefs. The intersection of this right with Article 19 (which protects freedom of expression) and Article 20 (which requires States to prohibit hate speech) necessitates a careful balancing around speech which relates to religious matters.

Blasphemy laws which go beyond prohibiting the incitement to discrimination, hostility or violence against adherents to a particular religious belief and apply to the denigration of that religion’s beliefs or symbols are no longer regarded as legitimate under international law. As the UNHRC stated in its 2011 General Comment No. 34:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.

Consistently with this, a number of established democracies have repealed their blasphemy laws entirely while those that have kept them rarely enforce them.

There are a number of problems with laws which protect religious tenets and beliefs, as opposed to individuals. In a democracy, differing ideas, including those relating to religion, should

compete through open debate rather than fiat. This is particularly true where a religion has political influence, whether directly or indirectly. If a party's platform includes institutionalised religious ideas, it is clearly undemocratic to insulate these ideas from criticism or debate. Another problem with blasphemy laws is that they are unable to accommodate situations where religious beliefs are directly contradictory, such as belief systems which believe in a single deity or multiple deities or no deity. In addition, blasphemy laws are often discriminatory since they tend only to protect the majority religion or only to be applied in that way. Indeed, in practice blasphemy laws are often used to repress religious minorities, dissenting believers or atheists.

Administration of Justice

It is well established under international law that court hearings should be open to the public. Article 14(1) of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

At the same time, it is of the greatest importance to safeguard the authority and particularly the

impartiality of the administration of justice. This may include prohibiting certain kinds of expressions, such as lying to the court or intimidating witnesses. While the media generally have a right to report on legal cases, and indeed there is a strong public interest in ensuring that the public are informed about ongoing developments, as Article 14(1) makes clear, there may be circumstances where media reporting may be limited, for example to protect the identity of children or victims.

The question of whether freedom of expression may be restricted to safeguard the authority of the judicial system is more controversial. In their 2002 Joint Declaration, the special international mandates on freedom of expression stated: "Special restrictions on commenting on courts and judges cannot be justified; the judiciary play a key public role and, as such, must be subject to open public scrutiny." In *R. v. Koptyo*, the Ontario Court of Appeal noted eloquently the reasons for this:

As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy.... The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need to sustain unnecessary barriers to complaints about their operations or decisions.

Despite this, in many countries unreasonably strict limits are posed on the criticism that may be directed towards courts and judges. The only legitimate interest that could need protection here is the willingness of the public to continue to use the courts as the ultimate arbiters of disputes, which is very rarely at risk.

FURTHER READING

- ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality*, 2009: <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>
- Amnesty International, *Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination*, 2012: <http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/RacistHateSpeech/AmnestyInternational.pdf>
- Open Society Foundations, *Global Principles on National Security and the Right to Information*, 2013: <http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>
- Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred*, 2006: http://www.concernedhistorians.org/content_files/file/TO/239.pdf