

FREEDOM OF EXPRESSION AND INCITEMENT TO GROUP HATRED

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The present expert workshop is devoted to “the prohibition of incitement to national, racial or religious hatred.” It is one of the events organized by the Office of the High Commissioner for Human Rights, in various regions of the world, on freedom of expression and the prohibition of incitement to hatred, with the aim “to enhance the understanding of how this prohibition has been implemented in countries of the different regions with a view to ultimately facilitate better protection against hate speech while also reinforcing freedom of expression.” It constitutes a follow-up of the expert seminar which met in 2008, in Geneva, and discussed articles 19 and 20 of the ICCPR with regard to freedom of expression and incitement to hatred, to which I submitted a paper on “Incitement to hate crimes and religious hatred”. The specific subject of my paper was analogies and parallels to be drawn from situations where the State or the international community limit freedom of expression to provide protection against incitement to, or advocacy of, some hate crimes and the applicability of such limitations to advocacy of religious hatred.¹ The seminar took place against the background of “underlying human rights concerned behind ‘defamation of religion’”, as expressed in the Concept Paper on the expert meeting.

This year’s workshop, on “the prohibition of incitement to national, racial or religious hatred”, is wider in its objective but narrower in its geographic reach, dealing only with the Asia-Pacific region, a world in itself. The participating experts received useful information in the “Study on the prohibition of incitement to national, racial or religious hatred: Lessons from the Asia Pacific Region”, authored by a group headed by Professor Vitit Muntarbhorn. This region, where human rights have deep roots and the major world religions originated, comprises some 60 countries and territories, heterogeneous and characterized by complex political, economic, social, cultural and legal contexts, as

¹ For the Seminar, see: http://www2.ohchr.org/english/issues/opinion/articles_19_20_iccpr/docs/compilation_conference_room_papers.pdf. My own paper was Conference Room Paper#12.

the Study indicates. Profound differences exist between states such as, for instance, China or Australia, Saudi Arabia or Israel, Japan or India, Afghanistan or New Zealand, and many others, from all the mentioned viewpoints, and this makes of course very difficult any attempt to discuss the subject of this seminar on a broad geographical basis. Relevant legislation exists, also at the constitutional and criminal law levels, but not always is it reflected in real life. Some archaic or anachronistic laws, concerning blasphemy for instance, are still in effect.

It is against such a variety of situations and ways of life that we have to examine basic issues of the tension between freedom of expression and incitement to, mainly, religious and racial hatred or hostility, as well as in some cases discrimination or persecution grounded in such attitudes. In my submission I shall concentrate on the basic principles governing in general the clash between freedom of expression and incitement to group hatred.² Those principles are considered as universal in the West but in the geographic area to which this workshop is devoted that universality is questioned in more than one country, as we can learn from reports of United Nations bodies monitoring the implementation of human rights instruments, particularly the ICCPR, the Convention on Racial Discrimination and the 1981 Declaration on Freedom of Religion.

I would like to stress the merits of the shift, from emphasis on the issue described as “defamation of religions” in earlier meetings, to the much more general, less controversial and much more congruent, from a legal point of view, approach based on the clash and need of striking a balance between freedom of expression, as the general rule, and curbing incitement to racial or religious incitement in the terms of Articles 19 and 20 of the ICCPR, Article III of the Convention on Genocide, and Article 4 of the Convention on Racial Discrimination. Such a balance can only be the outcome of treaty law, domestic legislation and judicial practices at all levels. This is certainly more difficult in the region to which this meeting is devoted, for many reasons, among them in many cases the absence of regional instruments reflecting the global ones, the

² I have dealt with that clash and the legal context related to it in “Religion, Secular Beliefs and Human Rights” (2006), “Group Rights and Discrimination in International Law” (2003), and “The UN Convention on the Elimination of All Forms of Racial Discrimination” (1980), all published by Nijhoff (Brill),

lack of a tradition of adequate domestic legislation with a similar orientation, and the absence or inexistence of regional judicial or quasi-judicial institutions for the protection of human rights, likely to provide remedies to individuals in case of violation of his/her fundamental freedoms, usually by the individual's government or authorities.

Resolution 16/13, on Freedom of Religion or Belief, adopted by the Human Rights Council without a vote on 24 March 2011,³ reflects the mentioned shift. It emphasizes that freedom of religion or belief and freedom of expression are interdependent, interrelated and mutually enforcing, and urges States to take all necessary action “to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by intolerance based on religion or belief, as well as any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, with particular regard to members of religious minorities in all parts of the world.” While dealing, for obvious reasons, only with religion or belief as the source of the evils to be opposed, the resolution takes note of the criticism caused by the emphasis on the controversial notion of “defamation of religion.”

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As said, freedom of expression is the general norm, but it is not an absolute right and is not listed as one of the rights that cannot be derogated according to article 4 of the ICCPR. States may, and should, limit freedom of expression when it is abused by the advocacy of national, racial or religious hatred that constitutes incitement to 1) discrimination, 2) hostility or 3) violence. Unfortunately, such abuses are generally committed by state organs or agents, and therefore the existence of a democratic regime where the rule of law is respected is a precondition, not always present. While discrimination and violence are phenomena easily identifiable, the same cannot be said about incitement to hostility or hatred or likewise evils. For their identification, an apt and independent judiciary or specialized institutions are indispensable.

³ For its full text, A/HRC/RES/16/13.

A word must be said about the character of the victims. The victims are individuals or a group and in both cases it is not important to identify precisely if they are, or belong to, a specific national, racial or religious group. What matters is their self-perception as a defined group and if they are so seen by those who are inciting against them. There is judicial practice concerning that issue, also in the Asia-Pacific area.⁴ It is also supported by the joint origin of the UN instruments on racial discrimination and on religious intolerance in the early 60's.⁵ Consequently, no differences should be made between groups or individuals defined by religion, or race, or nationality, language, culture, color or other characteristics of the victim-group or individual. All are entitled to equal protection, without distinctions based on their specific group identity.

This does not mean that there are no differences between incitement to hostility on religious grounds and that on a racial basis. Such differences do exist. Three Special Rapporteurs, on freedom of religion, freedom of expression, and racism and related intolerance, in a joint submission to an expert workshop on Europe that took place earlier this year, cautioned against “confusion between a racist statement and an act of ‘defamation of religion.’”⁶ This is certainly correct. But it should not be an obstacle to grant the protection extended by article 4 of the Convention on Racial Discrimination to victims of racial hatred or hostility as well to victims of hatred or hostility grounded on religion. “Defamation of religions” is one thing; another is violence, discrimination or hostility resulting from incitement to such evils against human beings, individuals belonging either to an ethnic group or to a religious group, or to the entire group as such.. In both cases, incitement has to be stopped, and the analogical application of the rules contained in article 4 of the CERD should be applicable also to incitement against individuals or groups defined by religion. If, as originally planned by the General Assembly, only one instrument concerning both race and religion would have been adopted –it was not, for reasons that we can not discuss here- it would protect everyone,

⁴ See, for instance, *King-Ansell v. Police*, NZLR (1979), 531 ff., where the court stressed the importance of “ancestral ties” and “traditional and cultural values and beliefs” as prevailing upon the nature of the group.

⁵ For the history of the preparation of such instruments, see Natan Lerner, “Religion, Secular Beliefs and Human Rights”, *supra* note 2, p.28 ff.

⁶ See, OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred, Expert workshop on Europe, 9-10 February 2011, Vienna, Joint submission by Special Rapporteurs Heiner Bielefeldt, Frank La Rue and Githu Muigai.

every individual or group, “against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” according to article 20(2) of the ICCPR.”

Originally, when the United Nation’s attention was drawn to a series of anti-Semitic events in 1959-1960, the General Assembly, following resolutions of the respective bodies, condemned “all manifestations and practices of racial, religious and national hatred...” In the discussion on the implementation of the resolution, some States proposed to adopt a convention on racial discrimination alone; other States were in favor of adopting only a declaration; others favored a single instrument dealing with racial as well as religious discrimination. Finally, the General Assembly passed twin Resolutions 1780 and 1781 (XVII) asking to prepare declarations and draft conventions dealing separately with race and with religion. The developments are well known. While the documents on race were adopted swiftly, the Declaration on Religion was approved in 1981 and the draft Convention is pending, sine die.

The fact that, for obvious methodological reasons, the Convention on Race does not refer to religion, does not reasonably preclude the application, by analogy, of relevant provisions to religion-related discrimination or intolerance. A year after the Convention on Race, the ICCPR was adopted, and its Article 20 deals with advocacy to both racial or religious (or national) hatred. The Convention on Race strongly influenced ulterior developments. Its definition of discrimination and intolerance was followed by the Declaration on Religion. This, as well as the wording of the Convention on Genocide, and instruments dealing with its denial, defamation of collectivities and individuals belonging to them, and general legislation restricting freedom of expression when it affects fundamental liberties, supports the applicability by analogy of the Convention on Race to advocacy of religious hatred. The fact that victims belong to a racial or to a religious group should not lead to different treatment. Article 19 of the ICCPR speaks about “others.” Article III of the Genocide Convention does not distinguish between different motives of incitement. The European and American Convention on Human Rights also refer to “others.” The 1990 Paris Charter for a New Europe urges to “combat

all forms of racial and ethnic hatred, anti-Semitism, xenophobia, and discrimination against anyone, as well as persecution on religious or ideological grounds.”

The General Comment 22 (48) adopted in 1993 by the Human Rights Committee clearly determined that Article 20 of the ICCPR, fully compatible with freedom of expression, is applicable to racial and religious hatred. In a former General Comment, 11(19), the Committee declared that state parties are obliged to enact laws prohibiting advocacy of national, racial or religious hatred. Any distinction in the application of measures intended to protect individuals or communities from incitement to hatred seems to be wrong in principle.

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As indicated, incitement to hostility or hatred is mainly the sphere in which legal difficulties are frequent. Violence is adequately described in most criminal law systems, and discrimination is a clear-cut phenomenon properly defined in Article 1(1) of the Convention on Racial Discrimination, in terms followed more or less literally by most international texts dealing with discrimination . It refers broadly to any “distinction, exclusion, restriction or preference” based on the motive which is determined by the area covered by the instrument, namely race, religion, sex or any other quality protected by law, provided it has the “purpose” or “effect” of hurting the exercise, on an equalitarian footing, of the human rights so protected. The 1981 Declaration on Freedom of Religion or Belief created certain problems as a consequence of an inconsistent use of the terms “discrimination”, which has a precise legal meaning under human rights law, and “intolerance”, which has not, and is more related to notions such as “hostility” or “hatred” requiring clarification to facilitate a correct interpretation of Article 20 of the ICCPR⁷.

⁷ For the discussion on this not only semantic or terminological issue, see Chapter 3 of my book mentioned in footnote 5.

“Hatred”, “hostility”, “bias”⁸, “prejudice”, “hate” are all notions belonging to the inner sphere and they are of no interest to the law as long as they do not lead to a conduct, behavior, or expression likely to have social consequences the law has to prevent, avoid or, in some instances, repress or punish, as in the case of hate crimes, defined as “criminal acts with a bias motive.”⁹ Such expressions are those prohibited by Article 20 of the ICCPR and Article 4 of the ICERD. Some States, of a rather strict tradition of freedom of speech or expression, object to the limitations established to those articles. Some have entered reservations to that effect when ratifying the respective treaties.

As I have concluded in my former submission to the Geneva expert seminar, the rule is freedom of expression. This freedom is not absolute but is of utmost importance as a basic human right in itself as well as for its instrumental role in ensuring the respect for all human rights. Article 19 permits certain restrictions and should be read in conjunction with Article 20 of the Covenant. There should not be a difference in the treatment of incitement to national, racial or religious hatred. Article 4 of CERD and Article III of the Convention on Genocide are here relevant. Denial legislation applies to groups in which ethnicity and religion overlap, as well as to victims –groups or individuals- belonging to only one of these categories.

The Study on the prohibition of incitement to national, racial or religious hatred in the Asia Pacific Region prepared by Professor Muntarbhorn and his colleagues points out the challenges emanating from the heterogeneity of the Asia Pacific Region, from the fact that there is no regional Convention establishing an adequate human rights protection system, and from the small number of countries that have set up national human rights commissions and/or ombudspersons or other institutions for analogous purposes – 20 out of 60 countries have done it. Still, there are gradual and increasing inputs supportive of human rights by legislative action, including Constitutions.¹⁰ The Study refers to the

⁸ “Bias” is the term that the authors of HATE CRIME LAWS, published in 2009 by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) prefers instead of “hate” or the above mentioned terms. “Bias has a broader meaning than hate, and a bias motive only requires some form of prejudice on account of a personal characteristic” (see page 18).

⁹ Ibid., page 16.

¹⁰ See, Study on the prohibition of incitement to national, racial or religious hatred: Lessons from the Asia Pacific Region, p. 2.

impact of problems of national security, the proliferation of anti-blasphemy laws, and the lack of ratification by some Asia-Pacific countries of the main relevant international instruments as additional obstacles.

It seems necessary to understand that in such an heterogeneous and geographically and demographically wide region it is difficult to identify patterns of legislation, adjudication and behavior that respond to a clear cut trend. It is also difficult to judge the extent to which principles on the interaction between freedom of expression and incitement to group hatred prevailing in Europe and America have also found their way into the Asia-Pacific world and its legal systems. But the theoretical discussion on how to deal with that interaction is also present in this area, in different degrees according to the respective legal traditions and solutions.

In conclusion, to summarize my views: Despite the political, socio-economic, cultural and religious diversity prevailing in the Asia-Pacific area, freedom of expression should be the rule, as in any other region of the world. It is not an absolute rule, and it admits exceptions, indispensable in some cases, among them in order to prevent incitement to racial, religious or national hatred, as provided for in Articles 19 and 20 of the ICCPR, Article III of the Convention on Genocide, Article 4 of the CERD, and as declared by the Human Rights Committee in its relevant General Comments. Victims of acts motivated by hatred or hostility grounded on race or on religion are entitled to equal protection by the law. This protection should be extended to racial or religious groups and to individuals belonging to such groups.