

## **Expert Workshop for the Americas**

### **The prohibition of incitement to national, racial or religious hatred**

*Comments by Sir Clare K Roberts, QC.*

I congratulate the Office of the United Nations High Commissioner for Human rights for taking this initiative of bringing this matter of prohibition of incitement to hatred to the fore in the different parts of the world . The background paper, A Study on the Prohibition of Incitement to Hatred in the Americas by Eduardo Bertoni and his team was very useful as a leitmotif to this important seminar. The focus on Article 20 of the International Covenant on Civil and Political Rights and the analysis of the current state of legislation , case law and public policies relating to the prohibition of incitement to hatred in the countries of the region will inform the debate and stand us in good stead.

In the background paper it is noted that there is a dearth of judicial authority dealing with the prohibition of incitement to hatred and violence in the Caribbean. In Antigua and Barbuda the Privy Council (the last court of appeal of Antigua and Barbuda) looked at legislation which attempted to curb freedom of expression under the guise of concern for public safety.

An insight into how the judiciary approaches the issue of permitted limit to freedom of expression is provided in the case of Leonard Hector v Attorney General of Antigua and Barbuda et Al (PC Case No 32 of 1988) where the editor of an Antiguan newspaper was charged in respect of an article he published with an offence under the Public Order Act 1972

(mentioned in the Bertoni paper) as amended by the Public Order (Amendment) Act 1976. The particular section under which he was charged provided as follows –

Notwithstanding the provisions of any other law any person who

- (a) in any public place or at any public meeting makes any false statement; or
- (b) prints or distributes any false statement which is likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five hundred dollars or to a term of imprisonment not exceeding six months.

The constitution of Antigua as it related to the case provides -

"3. Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations; colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) ...

(b) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and

(c) ...

the provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

12.(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.

(2) For the purposes of this section the said freedom includes the freedom to hold

(3) For the purposes of this section expression may be oral or written or by codes, signals, signs or symbols and includes recordings, broadcasts (whether on radio or television), printed publications, photographs (whether still or moving), drawings, carvings and sculptures or any other means of artistic expression.

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required -

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings and proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of Parliament and the courts, or regulating telephony, posts, broadcasting or other means of communication, public entertainments, public shows; or

(b) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

Their Lordships made the very incisive observation in this case –

“In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to politically censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism leveled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponent would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalizes statements likely to undermine public confidence in the conduct of public affairs with the outmost suspicion.

In this case their Lordships upheld the decision of the High Court and overturned the reasoning of the Eastern Caribbean Court of Appeal. They ruled that the section of the Public Order Act was unconstitutional and quashed the criminal proceedings accordingly.

It is clear that the legislative provision was not only unconstitutional but it did not meet international standards. In that case the Lord Justices had to provide an answer to the question of where does public interest and public safety begin and where does freedom of expression end. In dealing with hate speech, the question will be. “Where does hate speech begin and freedom of expression end”. Where is that dividing line? Under most Caribbean jurisdictions it is ultimately for the Courts to decide.

Comment on Regional Initiative – Draft Convention Against Racism and all forms of Discrimination

Afford me to look at the regional attempt to draft a convention to prevent, penalize, and eradicate racism and all forms of discrimination. As one who participated in the process (as Rapporteur for Afro Descendants and against racism at the Inter-American Commission on Human Rights) the initiative of Antigua and Barbuda and other states to save the draft from being diluted by all the other forms of discrimination is welcomed. Racial discrimination is easily the most prevalent and pernicious form of discrimination in the region. Racial discrimination is deep rooted and affects millions of inhabitants who have over hundreds of years been neglected or ill treated. The focus should therefore continue to be racial discrimination otherwise at the end of the exercise, the expectation of millions would not have been met.

The other reason why it is important to continue to pursue the drafting of the anti-racism convention is the process itself. The process forces States of the region to look within to assess their laws and policies and practices in this regard and to make adjustments to meet international standards.

Trinidad and Tobago and Guyana

In both Trinidad and Tobago and Guyana there exist large populations of both African Descendants and Indian descendants.

The Guyanese population is characterized by its ethnic diversity. It is generally estimated that Guyanese of East Indian descent constitute 51 percent of the total population. Guyanese wholly of African descent make up 31 percent of the population. Those listed as of mixed ancestry constitute 12 percent. Since the mixed-ancestry category comprised individuals of partial African ancestry who were usually included in the Afro-Guyanese community, the Afro-Guyanese population in effect constitutes 42 percent of the total population. The remainder of the population is composed of Amerindians (4 percent) and persons of European or Asian descent (3 percent).

It is estimated that Trinidad and Tobago consists of Indians - 40.3 and Africans -39.6 %. It is therefore necessary to be acutely aware of the matter of hate speech tending to stir up violence. Trinidad and Tobago prides itself as a model of racial harmony.

One can therefore understand that the States of Guyana and Trinidad and Tobago would be nervous about the propagation of hate speech relating to racism. Such speech could be the match that kindle the unwanted explosion of racial violence and disharmony. At the same time the States must not use prohibition of hate speech as an excuse for "political censorship of the most insidious and objectionable kind". – In Guyana the telecommunication licence of a opposition candidate was suspended for six months for remarks made on his station – it so happens that general elections will be held within this six months period.

#### Talk Show Format

In the Caribbean the talk show format has become very popular. In nearly every country the populace is being given the opportunity of airing their views on different topics. In some

quarters complaint is made about the "tone" of the speakers. Others complain about the expressions being "quite distasteful" but more serious complaints are also made where speakers come very close to incitement to violence. The challenge will be to maintain freedom of expression while at the same time not being the vehicle for persons to vent hate speech. In a word be sure not to throw out the baby with the bath water.

### Social Network

The social networks are also media for the free expression of ideas and information. However here too this should not provide the avenue for hate speech. The Arab Spring and the very recent London riots provide evidence of the power of social networks to organize, communicate and raise awareness in the face of state repression and Internet censorship.

In Trinidad the Attorney General recently made a statement advocating state Internet monitoring of its citizens after a teenager confessed to using the Internet to threaten the Prime Minister of Trinidad and Tobago. Using very coarse language, the teenager put herself on YouTube and criticized the Trinidad Prime Minister for imposing a state of emergency on what are called "hotspots" in Trinidad and Tobago. Unfortunately her speech including what was a clear threat of injury to the Prime Minister.