IN THE EUROPEAN COURT OF HUMAN RIGHTS

(Case No. 41/1997/825/1031)

B E T W E E N:

IBRAHIM INCAL

Applicant

and

TURKEY

Respondent

WRITTEN COMMENTS SUBMITTED BY ARTICLE 19,THE INTERNATIONAL CENTRE AGAINST CENSORSHIP AND INTERIGHTS, THE INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN RIGHTS, PURSUANT TO RULE 37 OF THE RULES OF COURT

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22 December 1997

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I. INTRODUCTION

These written comments are submitted by INTERIGHTS, the International Centre for the Legal Protection of Human Rights, and ARTICLE 19, the International Centre Against Censorship, pursuant to the permission granted by the President of the Court in accordance with Rule 37, s.2 of the Rules of the Court, by letter dated 10 September 1997.[1]

The present comments draw substantially upon the statements of legal experts from nine democratic countries concerning laws relating to public order, incitement and hate speech. The countries surveyed are Australia, France, Germany, India, the Netherlands, South Africa, Spain, the United Kingdom and the United States. These statements of law are appended to these comments.

II. INTEREST OF ARTICLE 19 AND INTERIGHTS

ARTICLE 19 and INTERIGHTS are both established and well-recognised international human rights organisations, based in London. Both organisations are registered charities, independent of all ideologies and governments. ARTICLE 19 and INTERIGHTS have submitted joint written comments to the European Court of Human Rights on a number of occasions, recently, for example, in the *Goodwin v. United Kingdom*[2] and *Wingrove v. United Kingdom*[3] cases.

ARTICLE 19 campaigns against censorship in all its forms and to promote greater freedom of expression and access to information. ARTICLE 19 takes its name and mandate from the nineteenth article of the Universal Declaration of Human Rights which proclaims the right to freedom of opinion and expression in terms similar to those found at Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. ARTICLE 19 promotes freedom of expression and access to information in a variety of ways including through reporting, dissemination, education, legal assistance, standard-setting exercises and assisting international human rights bodies, including courts.

INTERIGHTS works to promote the effective use of international human rights standards and legal procedures. It provides legal representation in select cases before international human rights fora, advises on legal rights and remedies under international human rights law, and assists lawyers and non-governmental organisations in the preparation of cases before international, regional and domestic tribunals.

III. FACTUAL BACKGROUND

The applicant in this case challenges his 1993 conviction under the Turkish Penal Code for his involvement in the intended distribution of certain pamphlets.

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[1] INTERIGHTS and ARTICLE 19 gratefully acknowledge the assistance of Dr. Fionnuala Ni Aolain of the Faculty of Law, Hebrew University, in the preparation of these comments.

[2] 27 March 1996, App. No. 17488/90.

[3] 25 November 1996, App. No. 17419/90.

At the time of the facts in issue, the applicant was a member of the Council of the local Izmir branch of the HEP, a national pro-Kurdish party represented by a number of deputies in the Turkish National Assembly.[4] In July 1992, in response to restrictions on street vendors imposed by the Mayor of Izmir the Council informed the Prefect of Izmir of its intention to distribute 10 000 copies of a pamphlet. The pamphlet claimed that the restrictions on street vendors were part of a larger plan to drive the Kurds back to their region and called on "patriots and democrats" to organise themselves into local committees to resist these moves.

In response, the Court of National Security ordered the seizure of the pamphlets, which the HEP representatives duly delivered to the police before distribution. The applicant and a number of other HEP representatives were charged, and ultimately convicted by the Court of National Security, with incitement to hatred based on origin, contrary to Article 312 of the Turkish Penal Code. An appeal court confirmed the applicant's conviction and sentence of 6 months and 2 days' imprisonment and a fine. On 6 July 1993, the applicant launched a petition before the European Commission on Human Rights. A Report by the Commission rendered on 25 February 1997 was unanimous in finding, *inter alia*, a breach of Article 10.

IV. ISSUES ADDRESSED IN THESE COMMENTS

The issues to be addressed in these comments relate solely to the applicant's claims under Article 10.

In order to find a violation of Article 10, the applicant must establish that there has been an "interference" with his or her rights. Where there has been such an interference, the burden of proof is upon the government to show that the interference was "prescribed by law", that it was "pursuant to a legitimate aim", and finally, that it was "necessary in a democratic society" in order to achieve that aim.

It is common ground here that the applicant's conviction constituted an interference with his rights. The interference was found by the Commission to have been prescribed by law.[5] The

[4] Izmir is a large city on Turkey's Aegean coast which lies outside the region to which Turkey's limited derogation applies; the derogation does not, in any case, apply to freedom of expression under Article 10.

[5] Notwithstanding this finding, it is respectfully submitted that the interference here was not "prescribed by law". This Court held in *Sunday Times v. the United Kingdom*, 26 April 1979, Series A, No. 30, para. 49, that in order to be prescribed by law, a restriction must be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." The test of prescribed by law thus requires both that the law in question is drafted with precision *and* that the conduct in question foreseeably falls within the ambit of that law. It is submitted that here, since the applicant's conduct simply was not capable of constituting the crime with which he was charged, there was no reasonable possibility of his foreseeing the consequences. The applicant accused the local government of taking actions that would have an adverse effect on the Kurdish population. He was therefore defending a racial minority, accusing the government of creating a racist atmosphere. He did not do so in terms that were racially or socially divisive, nor did he in any way disparage a particular race or social group. The applicant's actions therefore did not fall into the category of promoting hatred on the basis of group status. As a result, the restriction, as applied to the particular expression in issue, cannot be considered to have been prescribed

Commission found that the aim of the interference, safeguarding public law and order, was legitimate.

These comments address the issue of whether as a matter of law the interference was proportionate to the legitimate aim pursued and therefore "necessary in a democratic society" within the meaning of Article 10(2). While this Court has recognised a certain "margin of appreciation" enjoyed by states in the formulation of their laws, this margin is very limited in respect of laws which restrict political speech.[6] These comments seek to assist the Court in assessing the proportionality of the measures at issue by reviewing the relevant law and practice of nine democratic countries. These comments demonstrate that the pursuit of the same or similar objectives in other jurisdictions is possible without recourse to restrictions of comparable stringency to those in the present case.

Specifically, these comments address the legal framework governing expressions of a political nature which are critical of government and which are alleged to incite public disorder. This case raises questions under such laws because the applicant was prevented from distributing a pamphlet[7] that was highly critical of the actions of a local government body and was charged under a law found by the Commission to be aimed at safeguarding public law and order.

These comments demonstrate that, across the wide range of democracies surveyed, a prosecution such as the one here could not have succeeded. In the jurisdictions reviewed, speech critical of government is afforded wide latitude so that important qualifications and safeguards of free expression are applied in such cases. Under most public order laws speech would only be prohibited where two conditions are fulfilled. The first requirement is the existence of either a clear intent to cause a breach of the peace or a serious likelihood that one will ensue. The second requirement is that the speech at issue is likely to be the proximate cause of a grave disturbance.

V. OVERVIEW

Virtually all legal systems contain laws that impose some restrictions on freedom of expression for reasons of public order. Such restrictions in the nine jurisdictions surveyed here, inasmuch as they are relevant to the facts of the present application, can be roughly classified into two categories.

The first category includes those restrictions prohibiting expression which is critical of state institutions, such as restrictions contained in the common law or statute law forbidding seditious libel. Although crimes of this nature remain on the books in several of the jurisdictions

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by law.

[6] *Wingrove v. United Kingdom*, *supra*, note 3, para. 58.

[7] It should be underscored that this case involves a prior restraint, in addition to a criminal prosecution, and that this Court has held that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court." *The Observer and Guardian v. the United Kingdom (Spycatcher Case)*, Judgment of 26 November 1991, Series A, No. 216, para. 60.

surveyed, they are rarely if ever applied in practice. Also in this category are laws governing defamation of the government or public institutions. These laws, still in existence, are applied only with important constitutional qualifications and safeguards.

The second category, more relevant here, comprises restrictions on incitement. The present application specifically raises the question of incitement to public disturbance or breach of the peace, by which is meant acts which physically cause, or seriously threaten to cause, a disruption to society, particularly by violent means.

Laws which restrict expression for reasons of public order include a variety of what are usually referred to as hate speech laws. These laws restrict certain forms of expression which are likely to incite others to discrimination, hatred, hostility, violence or similar acts on the basis of social class, religion, race and so on. Mr. Incal was charged under precisely such a law, namely Article 312 of the Turkish Penal Code.

It is important to note that hate speech laws are passed to address two very different concerns. The first concern is that race hate speech might lead to public disturbances and violence; these laws find as their legitimate aim under Article 10 the "prevention of disorder". The second concern is motivated by a desire to promote respect for human dignity and equality of opportunity, and to eliminate discrimination; these laws have as their legitimate aim under Article 10 the protection of the "rights of others". Older laws tended to be motivated by the first concern, whereas the second concern has become dominant in later years, particularly after the coming into force of the International Convention on the Elimination of All Forms of Racial Discrimination in 1969. Section 5A of the former United Kingdom Public Order Act 1936,[8] inserted as an amendment in 1976, which prohibited speech likely to stir up racial hatred, was an example of the first type of law. An example of the second type is the Australian Anti-Discrimination Act 1997 of New South Wales which makes it an offence to incite hatred towards, serious contempt of or severe ridicule of a person on the ground of his or her race.

Hate speech laws do not necessarily identify their underlying concerns; frequently these laws have public order as well as human dignity and anti-discrimination objectives. In some countries different approaches are taken to restrictions on freedom of expression, depending on the underlying concern. In particular, given the premium often put on the promotion of equality and eradication of discrimination, some states are prepared to impose relatively significant restrictions on freedom of expression to achieve this goal. It is, however, quite clear, both from the facts and from the conclusions of the Commission, that the present application only relates to the public order aspect of hate speech laws and accordingly, it is important that only public order standards be applied.

In the application of public order laws in the jurisdictions surveyed, several important qualifications generally apply. Any restrictions on freedom of expression are tempered by strong constitutional guarantees that act as a counterweight to the charge of incitement to public disorder. This is particularly so in respect of expression which addresses government acts and issues of public interest. As such, most jurisdictions impose some sort of intent requirement

[8] This Act was revised in 1986 and reintroduced as the Public Order Act 1986.

when prosecuting incitement cases. Furthermore, a serious threat of grave public order is required, in particular a threat that arises directly from the speech in question. Finally, in all jurisdictions, the immediacy of the risk of violence or disturbance of the peace is also an important factor.

VI. NECESSARY IN A DEMOCRATIC SOCIETY

Introduction

This section addresses the question of the "necessity" of restrictions imposed upon expression, particularly political expression, for the purpose of safeguarding public order. It reviews the laws governing this area in the nine democracies surveyed.

Across these nine jurisdictions, the constitutional protection of free expression serves as a counter balance to criminal or civil sanctions for offences relating to speech that may threaten public order. In particular, political speech, even provocative political speech, is afforded special protection because of its unique role as guarantor of democracy.

This bedrock principle of free expression has been recognised eloquently in landmark judgments by this Court, which has stated: "[F]reedom of political debate is at the very core of the concept of a democratic society...."[9] National courts have also recognised the key importance of freedom of expression. In a landmark decision, the U.S. Supreme Court held:

> [The framers of the Constitution] recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[10]

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[9] *Lingens v. Austria*, 8 July 1986, Series A, No. 103, para. 42. See also for example *Castells v. Spain*, 23 April 1992, Series A, No. 236; *Thorgeirson v. Iceland*, 25 June 1992, Series A, No. 239; *Oberschlick v. Austria*, 23 May 1991, Series A, No. 204.

[10] *New York Times v. Sullivan*, 376 U.S. 254 (1964), p. 270, quoting *Whitney v. California*, 274 U.S. 357 (1927), pp. 375-6. In that case the issue was the constitutional standard to be applied in a defamation suit of a government official. In holding that the First Amendment requires "clear and convincing proof" of "actual malice" on the part of the speaker of the alleged defamation, the Court (per Brennan J.) noted the similar issues raised by the great controversy over the Sedition Act of 1798. That statute made publication a crime, punishable by a $5,000 fine and five years in prison, of "false, scandalous or malicious" writings against the government "with intent to defame ... or to bring them ... into contempt or disrepute; or to excite against them ... the hatred of the good people of the United States." Recalling Madison's famous statement that the Constitution created a form of government under which "the people, not the government, possess the absolute sovereignty," the Court noted at 276 that although the

In *Hector v. Attorney General of Antigua and Barbuda*, the Judicial Committee of the Privy Council considered the compatibility of a public order law provision with the Constitutional guarantee of free expression, a guarantee which, it should be noted, mirrors the terms of Article 10 of the ECHR. The provision at issue made it an offence to publish statements "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." In that seminal judgment the Privy Council struck down the law, holding:

> In a free and democratic society it is almost too obvious to need stating that those who hold public office in government and who are responsible for the public administration must always be open to criticism. Any attempt to stifle such criticism amounts to political censorship of the most insidious and objectionable kind.[11]

In recognising such strong protection for the freedom of political debate, the Courts in *Lingens*, *Sullivan*, and *Hector* have protected controversial, repugnant and even highly provocative speech. In the jurisdictions surveyed, laws protect provocative political speech first by applying important constitutional qualifications to laws restricting criticism of state institutions, like sedition and criminal defamation, and second by imposing strict requirements in public order cases.

1. Expressions Critical of State Institutions

In many jurisdictions, laws restricting speech critical of government, such as seditious libel laws, have fallen into disuse. In Australia, there has not been a prosecution under the seditious libel laws for over 50 years. There have been no important cases in the Netherlands involving this sort of crime since 1916. In the United Kingdom, the last prosecution for sedition was in 1947. In Germany there have been very few criminal prosecutions under the relevant laws in recent years. In the United States such laws would certainly be found to breach the constitutional guarantee of freedom of speech.

In all of the jurisdictions surveyed, strict constitutional qualifications are imposed on prosecutions in the area of speech critical of government. In South Africa, the courts interpreted sedition as requiring an inducement to take up arms. In *R.v. Roux*, the accused had been convicted of printing "scandalous and dishonouring words" against the King, which included reference to the King as an imperialist and oppressor. In overturning the conviction, the appeal court held that the words could not be construed as "an incitement to taking up arms against the King or as inducing a mutiny or insurrection whereby the welfare of the King and the state (*res publica*) is placed in jeopardy."[12]

South African courts have also dealt with the issue of whether a highly charged environment

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Sedition Act was never challenged in Court, "the attack upon its validity has carried the day in the court of history."

[11] [1990] 2 AC 312, p. 315.

[12] [1936] AD 271, p. 280.

may render otherwise innocuous expression a threat to public order. Where the threat posed by the expression is due at least in part to circumstances for which the government is responsible, South African courts have implied that the government cannot rely on the situation it has created to proscribe otherwise valid expression. This is particularly the case where other, perhaps less inflammatory avenues for promoting change have been cut off. In *R. v. Roux*, the Court stated: "[I]f the language is unnecessarily strong, we must remember that the natives of Durban have no voice or vote in the passing of those laws or in the government of the country, and that they can only protest against what may be regarded by them as grievances."[13]

In many instances an actual threat to public safety is required. For example, in Germany, the impugned expression must pose a concrete danger to respect for the state or its constitutional principles although a risk to the very existence of the state is not necessary. Culpability is only possible where the final steps have been taken to publicise the material, for example by posting it. In addition, courts have imposed a strict intent requirement, necessitating a showing of the speaker's intention to lend support to efforts against the state or the constitution. In the Netherlands, a mere threat to the nation's safety is not enough; it must be reasonable to assume that the feared consequences would in fact occur.[14] In India, criticism of public measures or contempt of government action, however strongly worded, is permissible. It is only where expressions concerning government incite people to violence or have a clear and present tendency to create public disorder that they may be criminalised.[15]

In a number of jurisdictions, criminal defamation laws still exist which restrict expression critical of government or of public figures closely associated with the state. Criminal defamation laws are strictly limited by constitutional guarantees of freedom of expression. For example, in Spain, only serious defamation may be prosecuted as criminal. "Serious" implies the existence of an actual threat to public order; truth or an absence of malice in respect of factually erroneous material, is a complete defence. In the Netherlands, although it is a crime to defame certain public bodies, there has never been a prosecution for defaming a public authority as such.

To conclude, although criminal laws prohibiting expression which is highly critical of certain key state institutions exist, in several jurisdictions they have been dormant for many years. This disuse reflects the fact that they are no longer considered necessary or appropriate. The criminal defamation laws that are still used are applied with important qualifications, of which the most relevant here is the requirement of a concrete, as opposed to theoretical or remote, risk of actual violence.

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[13] *Ibid.*, pp. 283-4. It is worth noting that the HEP was formally closed down in 1993 and that those deemed sympathetic to the Kurdish cause, including the HEP, have been subjected to persistent and well-documented harassment. See for example U.S. State Department Country Reports, detailing "mystery killings" of Kurdish sympathisers in 1992 and 1993. Country Reports on Human Rights Practices for 1992 and 1993 (1993/1994, Washington, US Government Printing Office), pp. 932 and 1087-8. See also Amnesty International Reports 1993 and 1994 (1993/1994, London, Amnesty International Publications), pp. 296-7 and 290-1 respectively.

[14] See Supreme Court, 6 November 1916, NJ 1916, 1223.

[15] *Kedar Nath v. State of Bihar* AIR (1962) SC 955 at 968 and 969; *S. Rangarajan v. P.J. Ram*, (1989) 2 SCR 204, p. 226.

2. Incitement to Public Disorder

Laws designed to prevent breaches of public order are common to virtually all legal systems. In some jurisdictions, incitement to offences that breach the peace is governed by the same laws that prohibit incitement to crime generally. In other jurisdictions, separate public order laws exist. Similarly, some countries have specific legislative provisions relating to incitement to a breach of the peace on the basis of racial hatred whereas others include this possibility in a more general public order or incitement law.

These laws share three basic characteristics, all of which distinguish them from the Turkish law at issue. First, they generally have strong intent requirements. Second, they require a serious threat of grave public disorder. Third, they require that there be a close proximate link between the speech and the threat of actual disturbance.

2.1 Intent

In all of the jurisdictions surveyed, the law imposes some sort of requirement of intentional conduct in the criminalisation of incitement to public disorder and racial hostility.

2.1.1 Common Law Countries

In Australia, a specific criminal intent is explicitly required by the various state criminal laws governing incitement to racial hatred. Such a requirement may even be held by the courts to be necessary in criminal statutes which do not contain an explicit intent provision.[16] In the United Kingdom, sedition, which covers both attacks on the constitution and incitement to public disorder, requires intent. A law in India concerning insults to religion or religious beliefs has been held not to cover "insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention."[17]

In South Africa, even prior to the new democratic Constitution with its strong protection for freedom of expression and open political debate, the courts held that the absence of actual intent to promote feelings of hostility constituted a complete defence, even where, objectively viewed, the words in question would have had the proscribed effect. In *R. v. Nkatlo*, during the early years of Apartheid, the Court said:

> [I]n applying the test that a person is to be presumed to intend the natural and probable consequences of his acts, the courts must be astute to see that the inference of intention to promote feelings of hostility is the only inference which can be reasonably drawn. If the language used is reasonably capable of another explanation, the inference of intent cannot be drawn.[18]

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[16] See *Wagga Wagga Aboriginal Action Group and ors v. Eldridge*, (1995) EOC 92701.

[17] *Ramji Lal v. State of U.P.*, AIR 1957 SC 620, p. 623; *Shiv Ram Dass v. Udasi Chakarvarti*, (1954) Pun 1020 (Full Bench); *Rodrigues,* (1962) 2 Cr. LJ 564; *T. Parameswaran v. Dist Collectorate*, AIR 1988 Ker 175, p. 182; *Lalai Singh v. State of Uttar Pradesh*, (1971) Cr. LJ 1773.

[18] 1950 (1) SA 26 (C), pp. 30-1.

In that case the appellant had been convicted of promoting racial hostility on the basis of a number of comments made at an African National Congress meeting, including the following: "[T]he only hope we have to change affairs is by a revolution and a revolution means bloodshed." The court held: "Language of this kind is liable to promote feelings of hostility between Europeans and Natives but I do not think that it leads necessarily to an inference of an intention to promote such feelings. It is at least as possible that the accused was weighing up the dangers in the present situation and issuing a warning of the dangers in the future."[19]

2.1.2 Civil Law Countries

Typical intent requirements in the civil law jurisdictions surveyed exist in the Netherlands and Germany. In the Netherlands, the term 'incitement to', contained in the provision of the criminal code concerning incitement to the commission of criminal offences or violent acts against public authorities, includes the notion of aim or intent. There can be no punishment without the requisite intent. Under German laws concerning incitement to commit a criminal offence and incitement to hatred, the speaker must have the intent to incite others. It is not sufficient that the objective content of the writings may be understood as an incitement.

2.2 Causal Link Between the Expression and the Threat of Disturbance

In all of the jurisdictions surveyed, the law requires a certain degree of causal proximity between an expression and the feared outcome before the former may be criminalised. It may be noted that many of these countries have significant racial or ethnic minorities and, in several of these, this has been the cause, to varying degrees, of violent incidents. Cases and commentators suggest that the causal link must be strong to overcome the presumption that expression, particularly where political in nature, is protected as a fundamental human right.

2.2.1 Common Law Countries

The Indian jurisprudence has clearly established that a very close link between an expression and the threat of disturbance is necessary before the expression may be prohibited. For example, in *S. Rangarajan v. P.J. Ram*, the Supreme Court stated:

> Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.[20]

[19] *Id*. at 36.

[20] [1989](2) SCR 204, p. 226.

No criminal prosecution has ever been reported under the Australian race hate provisions and there have been no prosecutions for sedition for over 50 years. It is thus difficult to determine with any accuracy what standard of causality courts would be likely to require in the context of an alleged threat to public order. The language of the race hate laws of various Australian states, all in any case very narrow in scope, suggests a requirement of reasonably apprehended harm. The High Court recently held that there is an implied right to freedom of political discussion in the Australian Constitution, which does not otherwise include a bill of rights.

In the United Kingdom, as in Australia, prosecutions for expressions which may incite public disturbances are now extremely rare. There has been no prosecution for sedition since 1947. Prosecutions for incitement to racial hatred are also rare and most of these are unrelated to public order problems.[21] This offence requires either an intention to stir up hatred or a likelihood that such hatred will ensue. Although violence as such is not absolutely required, the requirement of the consent of the Attorney-General means that prosecutions are only taken in the most serious cases akin to violence or its incitement.[22]

In the United States the principles protecting free expression in the context of criminal statutes forbidding incitement to public disorder are very clear. First, restrictions on expression before publication or distribution, prior restraint, are in practice never permitted.[23] Second, in justifying any punishment imposed to prevent a breach of the peace or to maintain order, the government must demonstrate a close causal nexus between the speech and any risk to peace or order. The Supreme Court held in *Brandenburg v. Ohio* that:

> [T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[24]

In that case the issue was the constitutional validity of a conviction for stating at a rally that if the government "continues to suppress the white, Caucasian race, it's possible that there may have to be some revengeance [sic] taken."[25] Under *Brandenburg*, then, a statute or government act seeking to punish political dissent - even speech that advocates unlawful violence - will only be permissible where the threat of lawlessness constitutes incitement to such action as opposed to mere advocacy of such action, and only where the threat of lawlessness is imminent.

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[21] See Bindman, G., "Incitement to Racial Hatred in the United Kingdom: Have We Got the Law We Need?" in Coliver, S., ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (1992, ARTICLE 19 and Human Rights Centre, University of Essex), pp. 259-260.

[22] There were only 15 prosecutions for promoting racial hatred between April 1987 and May 1994 and most, as noted above, were to prevent discrimination instead of public disturbance. This may be contrasted with the Home Office's estimate of 70,000 racially motivated attacks each year in the early 1990s.

[23] See, for example, *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

[24] 395 U.S. 444, 447 (1969).

[25] *Ibid.*, p. 446.

Under the U.S. Constitution, *more* speech is the preferred answer to noxious speech. While U.S. courts recognise that permitting unfettered political dissent poses certain risks to maintaining public order, the solution is to prohibit speech only where the danger it poses is imminent. The case law has made it clear that the risk must be of an almost instantaneous unlawful act. For example, in one case the defendant stated that if he were drafted, the first person he would get in his "sights" would be the President. This was held to be insufficiently immediate to justify a restriction.[26] In *Whitney v. California* the Supreme Court held that "no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for discussion. If there be time to expose through discussion the falsehoods and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."[27]

U.S. Courts have not had frequent occasion to review statutes that proscribe speech that instigates racial, religious or ethnic hatred. The Supreme Court, however, has recently had one such case. In *R.A.V. v. City of St. Paul*,[28] the Court struck down a statute prohibiting the placement of certain symbols by one who knows or has reasonable ground to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender". The Court held that even assuming the statute only covered expression that "tends to incite an immediate breach of the peace" it should be struck down on the grounds that it imposed an impermissible "content based" restriction which disallowed certain speech because of the viewpoint expressed.[29]

In apartheid South Africa, incitement to public disturbance was covered by the general prohibition on incitement to crime. The requirements of this offence have been narrowly construed. In *S. v. Nathie*, the appellant was charged with inciting offences against the Group Areas Act in the context of protests against the removal of Indians from certain areas. The appellant stated, *inter alia*: "I want to declare that to remain silent in the face of persecution is an act of supreme cowardice. Basic laws of human behaviour require us to stand and fight against injustice and inhumanity." The Court rejected the state's claim of incitement to crime, holding that since the passage in question did not contain "any unequivocal direction to the listeners to refuse to obey removal orders" it did not contravene the law.[30]

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[26] See *Hess v. Indiana*, 414 U.S. 105 (1973).

[27] 274 U.S. 357, 377 (1931).

[28] 505 U.S. 377 (1982).

[29] In 1952, the Supreme Court upheld a conviction under a statute criminalizing "group defamation" of the black race. In *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Court held that the government could proscribe false statements of fact about particular groups (in contrast to Article 312 of the Turkish Penal Code, which is not concerned with the falsity of speech). However, it is widely agreed that *Beauharnais* is no longer good law in light of *Sullivan* and other cases limiting defamation actions under First Amendment principles as well as the *R.A.V.* case. See for instance Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988), at 926-27 and Nadine Strossen "Balancing the Rights of Freedom of Expression and Equality: A Civil Liberties Approach to Hate Speech on Campus" in *Striking a Balance, supra.*, note 21.

[30] [1964](3) SA 588 (A), p. 595 A-D.

2.2.2 Civil Law Countries

In France, incitement is covered primarily under the rubric of administrative law which grants the police the power to take direct action to prevent a threat to public order. It is significant that these powers, which are subject to court review, have very rarely been used to restrict expression. Restrictive measures are permitted where a grave and urgent threat to public order arises specifically from the publication. The measures can be justified only if no other means exist by which the threat can be contained and they must in any case be necessary, carefully adapted to the specific circumstances and proportionate to the threat. In no case will absolute measures be acceptable since these can never be proportionate. Thus, for example, a restriction on distribution of a publication can only be justified if limited in both scope and time.

In Germany, written materials are treated differently from other forms of expression. Criminal sanctions may apply to the former only after public distribution. This criterion is met only if the final steps required for distribution have been taken although it is not technically necessary that the material actually reach the public (this might be the case, for example, if the material was intercepted by the police after it had been mailed). In addition, where the goal of the restriction is the maintenance of public order, as opposed to the elimination of discrimination, written materials must fulfil the additional criterion of inducing others to commit violent or arbitrary actions. Non-written expressions may only be restricted where they are likely to disturb the peace. "Likely" requires a concrete threat of a disturbance as determined by a reasonable and objective evaluation. The presence of groups in society who are prone to react violently to the impugned expression may be taken into account in making this evaluation.

In the Netherlands, the jurisprudence on this matter is very sparse, indicating reluctance on the part of the authorities to bring prosecutions. A 1916 case makes it clear that expression cannot be restricted on the basis of mere threats; it must be reasonable to assume that the disturbance would in fact occur.[31] A 1967 case gives some indication of the sort of detail that is required before a prosecution will ensue. That case, which resulted in a conviction, involved a letter containing, *inter alia*, incitement to disturb municipal council meetings with a description of the particulars of the meetings and also of ways in which those meetings could be disrupted. In the Netherlands, strong anti-discrimination laws exist but their purpose is to protect the rights of others and they are not relevant here.

In Spain, incitement to disruption of public order is covered by the same rules as incitement or provocation generally. Only expressions that directly induce the commission of an offence may be prosecuted. The courts have interpreted this to include only clear statements that expressly request the audience to commit a public order offence. In general, incitement to crime is punishable only where the crime is actually perpetrated; rebellion and sedition are among those crimes to which incitement is punishable regardless of whether the crime is committed.

2.2.3 Summary

[31] See Supreme Court, 6 November 1916, NJ 1916, 1223.

Despite relatively limited jurisprudence from most of the jurisdictions surveyed, it is clear that legislatures and courts have imposed strict limits on restrictions on freedom of expression for reasons of public order. Although legal regimes vary from country to country, a number of limitations are found in the countries surveyed. First, the threat of a public disturbance must be serious. This implies that the risk is concrete rather than abstract or theoretical and that the disturbance, if it took place, would be grave. Further, the threat must arise directly from the expression. Where the expression is only a contributing factor, a restriction will be far harder to justify. In some jurisdictions, this means that only clear directions to commit a public order offence, including details as to the manner in which such a crime might be committed, may be prosecuted. Second, there must be a close temporal link between the expression and the threatened disturbance. Where the risk is of a future disturbance, the requisite link between the expression and this risk is insufficient to justify a restriction on freedom of expression.[32]

VII. CONCLUSION

It has been demonstrated in these comments that a restriction on freedom of expression such as the one at issue here would not have been upheld in any of the nine democracies surveyed. In these jurisdictions, two important requirements would act to bar such a conviction. First, constitutional free expression guarantees require that political speech, and speech critical of government, be given wide latitude. Second, expression alleged to incite a threat to public order can only be prosecuted in the narrow circumstances that the speech at issue is intended and/or likely to directly incite an immediate and serious breach of the peace.

The fact that the restriction on freedom of expression in issue here would not be upheld in any of the jurisdictions surveyed implies that legislators and courts in those countries would not consider it to be "necessary in a democratic society" or "proportionate". The unacceptability of the restriction in all of the countries surveyed suggests that it would be difficult to justify in other jurisdictions. This is particularly so in view of both the very narrow margin of appreciation this Court has consistently held applies to restrictions on political expression and the core importance of political debate.

[32] It may be noted that in the present application, the pamphlet was not even distributed because the HEP had voluntarily brought it to the attention of the authorities. There was thus no question of a sufficient causal link between the expression in issue and the threat of a public disturbance since no threat had actually been created. As such, even assuming *arguendo* that the seizure of the pamphlet was justified, in no jurisdiction surveyed would the subsequent prosecution of the Applicant have been upheld.