



**Freedom of speech and offence: why blasphemy laws
are not the appropriate response**

Dr. Agnes Callamard, Executive Director, ARTICLE 19

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*“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and **the advent of a world in which human beings shall enjoy freedom of speech and belief** and freedom from fear and want has been proclaimed as the highest aspiration of the common people, ...*

...

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Human rights are the foundation of human dignity, freedom, justice and peace. Behind each right, there is more often than not a history (and too often a present) of oppression. As such, they each play a role in the construction of our common humanity. But it is their togetherness that makes us all human. The 1948 Universal Declaration on Human Rights (UDHR) laid out equal rights for all people and three fundamental principles governing human rights: rights are universal, meaning that rights apply to everyone whoever or wherever that person is; inalienable, in that they precede state authority and are based on peoples' humanity; and indivisible in that all rights are of equal importance. The UDHR was also intended to provide a common framework and understanding across nations for preventing the religious, racial, political and sectarian strife which plagued humanity throughout its history, culminating in the Second World War. This idea is forcefully expressed in the preamble of the UDHR, cited above, which aspires to the advent of a world in which human beings shall enjoy freedom of speech and belief.

The first few months of 2006 have reminded us that few rights generate as much controversy or make for greater angst than does freedom of expression: the cartoons depicting the Prophet

Mohammed, the prosecution of David Irving, the controversy surrounding the Abu Ghraib and Basra photos: each does present very different legal, ethical and historical issues. But at the heart of the debates and attendant violence of the last months are core questions: What are this right's boundaries? What should be the breaking point? Where is the threshold whose crossing means the space occupied is no longer that of individual freedoms but that of criminal behaviour? Is so-called blasphemy such a breaking point, as many have argued in the wake of the cartoons' publication? Or is the boundary crossed only once – as ARTICLE 19 advocates – words and pictures can be deemed to incite their beholder to hatred?

1. The aspiration

ARTICLE 19 considers freedom of expression as a cornerstone right - one that enables other rights to be protected and exercised. The full enjoyment of the right to freedom of expression is central to achieving individual freedoms and developing democracy and plays a critical role in tackling the underlying causes of poverty¹. It makes electoral democracy meaningful and builds public trust in administration. Access to information strengthens mechanisms to hold governments accountable for their promises, obligations and actions. It not only increases the knowledge base and participation within a society but can also secure external checks on state accountability, and thus prevent corruption that thrives on secrecy and closed environments. Freedom of expression is also essential to the exercise of freedom of religion. And conversely, if people are not free to manifest their religion, there is no right to freedom of expression.

2. The restrictions

Yet, the right to freedom of expression, under international human rights law, may be restricted in order to protect, amongst others, *the rights of others, and public order, if it is "necessary in a democratic society" to do so and it is done by law*. This formulation is found in both the UN Covenant on Civil and Political Rights and in the European Convention on Human Rights. The protection of religious rights may fall under the 'rights of others' that may be protected. As far as freedom of religion is concerned, international human rights law imposes restrictions whose wording is also quite similar to freedom of expression language: *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*.

The European Court establishes a strict three-part test for the restriction of freedom of expression, and for a restriction to be legitimate, all three parts of the test must be met:

- (i) a restriction must indeed pursue the legitimate aim that it claims to pursue;
- (ii) the restriction must be imposed in a democratic framework (so, either by parliament or pursuant to powers granted by parliament); and
- (iii) the restriction must be "necessary in a democratic society". The word "necessary" must be taken quite literally and means that a restriction must not be merely "useful" or "reasonable".

Exactly what measures States impose to restrict freedom of expression is up to them, but the main parameter is that whatever they do has to be "**necessary in a democratic society**". This really is crucial.

¹ Catherine Pitt, Bridging the Human Rights and Development discourses: Is the Right to Freedom of Expression of use to Development?, dissertation, MSc in the faculty of Economics, LSE, London, 2005.

International law does impose, however, one clear positive duty upon states: as stated in Article 20(2) of the UN Covenant on Civil and Political Rights: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*" This is the only duty that States are under in the context of restricting freedom of expression.

3. Blasphemy laws

Fundamental to the protection of human rights are the principles of the inherent dignity and equality of all human beings and the obligation of all Member States of the United Nations to take measures to promote "universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion."² There is no denial that certain forms of expression can threaten the dignity of targeted individuals and create an environment in which the enjoyment of equality is not possible. For ARTICLE 19, such a risk may be provoked by expressions that are hateful – but not by those that are blasphemous or offensive.

ARTICLE 19 recognises that reasonable restrictions on freedom of expression may be necessary or legitimate to prevent advocacy of hatred based on nationality, race, religion that constitutes incitement to discrimination, hostility or violence. The organisation does not extend such legitimate restrictions to offensive and blasphemous expressions.

States may, but are not required to, introduce legislation on blasphemy. Several established democracies still have blasphemy provisions on the books, although most of these are rarely, if ever, used. In the United Kingdom, for example, there have been only two prosecutions for blasphemy since 1923; Norway saw its last case in 1936 and Denmark in 1938. Other countries, including Sweden and Spain, have repealed their blasphemy laws. In the United States, the Supreme Court steadfastly strikes down any legislation prohibiting blasphemy, on the fear that even well-meaning censors would be tempted to favour one religion over another, as well as because it "is not the business of government ... to suppress real or imagined attacks upon a particular religious doctrine ..."³ In contrast, the European Court has found blasphemy laws to be within the parameters of what is "necessary in a democratic society". The main reason for such ruling is one that calls into question the normative courage of the court, at least as far as this question is concerned: it considers State authorities to be in a better position than the international judge to give an opinion on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended.

This is where ARTICLE 19 differs with the European Court of Human Rights and indeed with many laws and practices around the world. Our position is grounded on human rights, and in particular on the indivisibility of human rights – there cannot be a human rights justification to the existence and implementation of blasphemy laws.

First, ARTICLE 19 twenty years experience the world over has shown that the public good is better served by all-encompassing debate, even in harsh and offensive terms. From this standpoint, there is no evidence that these laws are indeed "necessary", but plenty demonstrating the opposite. Indeed, lessons from human history should dictate opposition to any attempts to stifle offensive or blasphemous speeches and discoveries. Freedom of expression is an "empowerment" right: It allows people to demand other rights - the right to health, to food, to a

² Article 55(c) of the Charter of the United Nations. See also Article 55 of the Charter.

³ *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 495, 504-05 (1952).

clean environment, to religion, etc. Curtailing this right on the basis of the possible offensive or blasphemous nature of an expression creates too great a risk to all freedoms for human rights gains that remain to be appropriately defined and justified. Indeed, as international human rights courts have stressed, the right to freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁴

Second, there is no actual evidence that the right to freedom of religion as understood under international standard is better served, or protected with or through blasphemy laws. Under international human rights law, freedom of religion, for instance, is not about respecting religion but about respecting people’s right to *practice* the religion of their choice. Do offensive statements threaten the ability of adherents to religions to exercise and express their own beliefs? This is highly doubtful. In a world where certain beliefs are recognised as more valid than others, what may befall their religion? The European Court of Human Rights has clearly ruled for instance that the right to freedom of religion does not impose a duty of States to enact laws that protect believers from insult or offence (*Choudhury v UK* In *Dubowska & Skup v Poland*,⁵ which concerned the publication in a newspaper of a picture of Jesus and Mary with a gas mask over their faces, the authorities had opened an investigation and examined all sorts of evidence, but decided not to take any further action. The Commission found that the publication in question had not prevented anyone from exercising their freedom of religion, and that the decision not to prosecute anyone did not, in itself, amount to a failure to protect the applicants’ rights.⁶

Third, we are also very concerned about abuse of blasphemy laws throughout the world. In those situations that ARTICLE 19 monitors, blasphemy laws, even when they in theory at least extend to all beliefs and not just to state religion, are used to violate peoples right to freedom of religion – religious minorities are particularly targeted.

Blasphemy laws are the anti-thesis of human rights. At a normative level, they establish a hierarchy of beliefs that betrays the common understanding and intentions of the international human rights framework. Blasphemy laws are the Servants of Power and the means for religious persecution; they censor, they create a climate of fears, and they stifle artistic creativity, academic research, scholarship and freedom. They may also lead to imprisonment and death – thus violating the most potent human rights of all - the right to mental and physical integrity, and the right to life.

4. Freedom of expression and the right to equality

Unlike blasphemy laws, hate speech laws, at least in theory, seek to meet an essential human rights objective: protecting the right to equality, the right to mental and physical integrity, the right to be free from discrimination, and ultimately the right to life, as hate speeches have too often been associated with ethnic cleansing, wars, and genocide. From this standpoint, hate speech regulations may constitute a legitimate and potentially necessary restriction to freedom of expression. Yet, they cannot constitute the sole or indeed central response to prejudices, racism,

⁴ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72 (European Court of Human Rights), para 49.

⁵ *Dubowska & Skup v Poland*, 18 April 1997, Application No. 33490/96 (European Commission of Human Rights).

⁶ *Id.*, para. 2.

and discrimination. The appropriate answer to hate speech is not just more speech – but also policies and actions to tackle the causes of inequality in all its forms and colours.

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(i) Carefully designed hate speech regulations

ARTICLE 19 insists that any so-called hate speech restriction on freedom of expression should be carefully designed to promote equality and protect against discrimination and, as with all such restrictions, should meet the three-part test set out in Article 19 of the ICCPR, according to which an interference with freedom of expression is only legitimate if:

- (a) it is provided by law;
- (b) it pursues a legitimate aim; and
- (c) it is “necessary in a democratic society”.

Specifically, any restriction should conform to the following:

- it should be clearly and narrowly defined;
- it should be applied by a body which is independent of political, commercial or other unwarranted influences, and in a manner which is neither arbitrary nor discriminatory, and which is subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal;
- no one should be penalised for statements which are true;
- no one should be criminally 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;
- care should therefore be taken to apply the least intrusive and restrictive measures, in recognition of the fact that there are various available measures some of which exert less of a chilling effect on freedom of expression than others; and
- any imposition of sanctions should be in strict conformity with the principle of proportionality, and criminal sanctions, in particular imprisonment, should be applied only as a last resort.⁷
- Restrictions must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, whether of a religious nature or not,⁸ from hostility, discrimination or violence, rather than to protect belief systems, religions, or institutions as such from criticism. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise, even harshly and unreasonably,⁹ belief systems, opinions, and institutions,

⁷ This list draws on the 2001 Joint Statement of the specialised mandates on freedom of expression.

⁸ Religion as used here is to be understood broadly and does not depend on formal State recognition.

⁹ The right to freedom of expression includes the right to make statements that ‘offend, shock or disturb’. See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

including religious ones,¹⁰ as long as this does not advocate hatred which incites to hostility, discrimination or violence against an individual.

(ii) Media self-regulation

ARTICLE 19 believes that independent media organisations, media enterprises and media workers have a moral and social obligation to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance, to combat intolerance and to ensure open public debate about matters of public concern. As far as Public Service Broadcasting is concerned, ARTICLE 19 is of the view that they have a legal obligation to play such a function.

There are many ways in which media can make a contribution to the fight against intolerance, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard;
- ensuring that a number of voices within communities are heard rather than representing communities as a monolithic bloc – communities themselves may practice censorship;
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.¹¹

(iii) Equality and anti-discrimination policies

ARTICLE 19 further believes that an effective response to vilifying expression requires a sustained commitment on the part of governments to promote equality of opportunity, to protect and promote linguistic, ethnic, cultural and religious rights, and to implement public education programmes about tolerance and pluralism. Restrictions on freedom of expression, in the first place blasphemy laws, constitutes a blunt instrument that too often amounts to political expediency rather than well thought-through strategies to tackle discrimination, prevent violence and protect the right to life and the right to equality.

Conclusion

¹⁰ ARTICLE 19 believes that blasphemy as a criminal offence should be abolished. Tolerance, understanding, acceptance and respect for the diversity of faiths and beliefs cannot be secured by the threat of criminal prosecution and punishment. This is becoming ever more relevant as our societies become more and more diverse.

¹¹ This list is based on the 2001 Joint Statement on Racism and Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

The events of the last months, in particular with regard to the so-called Danish cartoons, have placed freedom of expression at the heart of a global controversy and accompanying violence or threat of violence. What these events particularly highlighted is the grave shortcoming of leadership at all levels – global, national, community, sectoral – and its propensity to either escalate tensions and highlight divisions, or adopt politically expedient measures. Freedom of expression *and* freedom of belief have been the hostages, scapegoat, and victims of these developments – *together*. The world has witnessed increased intolerance to both what is wrongly perceived as a Western (secular and anti-Islam) value and to Islam itself. Appropriate and legitimate responses must be grounded on the common framework and understanding of human rights laid down by the UDHR and other international instruments – it requires to move away – more than ever – from any attempts to protect certain sets of rights without due consideration of others and their impact on others. More than ever, the search must be to strike the right balance.