

## Striking the right balance

**Agnès Callamard**

*Scores of nations have introduced laws that impact negatively on human rights since 9/11, while hostility towards communities linked to terrorists has increased*

The events of 11 September 2001, and the subsequent so-called war on terror, triggered a number of human rights setbacks. Over the past four years ARTICLE 19, the global campaign for free expression, has monitored worldwide the growth in anti-terrorist legislation and state secrecy laws, increasing use of defamation laws, media censorship, self-censorship, and media biases. The UN Special Rapporteur on Freedom of Expression noted that several states responded to the events of 11 September by adopting laws which have negative implications for certain rights, including freedom of expression.

ARTICLE 19 has also recorded growing hostility towards minority groups, or communities deemed to be associated with ‘terrorism’ throughout the Caucasus, Western Eurasia, Western, Central and Southern Europe as well as in Latin America and Asia. In parts of Africa, hate speech and hate media have also resurfaced. The UN Special Rapporteur on Contemporary Forms of Racism has said recently that the legitimate struggle against terrorism has led to new forms of racial discrimination. He particularly highlighted the encroachment across all continents of racist and xenophobic political platforms, and their gradual, covert assimilation by democratic parties. As a result, he said, racist and xenophobic discourse was becoming more acceptable and this posed grave threats to democracy.

This trend has been accompanied by the intellectual legitimisation of racism and xenophobia, not only in the media but also in works of literature. ARTICLE 19 has also noted with increasing concern instances of community-based censorship, often through the use of mob violence – for example the enforced cancellation of the play *Behzti (Dishonour)* in the UK in 2004. Artistic free expression (whether or not from within a community) is being targeted by members and gate keepers of the community, on the grounds that it is offensive or insulting. At its worst, intolerance of artistic free expression has resulted in the killing of the artist, as in the case of the murder of Dutch artist Theo van Gogh. These incidents raise a central question: should people in a diverse, multicultural society be protected from offence and insult in the name of religion or culture, curtailing free speech where necessary?

The right to freedom of expression is well-established in international law, which also requires that states refrain from interfering with this right unless the interference is necessary to protect a legitimate interest, and is provided by law. At the same time, international law requires states to prohibit the advocacy of any national, racial or religious hatred. Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) states: any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Freedom of expression, in practice, can be limited in the name of prohibiting the incitement of hatred only if there is a close nexus between the expression in question and the risk of harm, and when the risk is imminent. Intent must be shown and the anticipated danger should not be remote or conjectural and the expression concerned should be

intrinsically dangerous to the public interest. Furthermore, the state should ensure that the restriction imposed is the least restrictive means possible for protecting the interest threatened. In other words, international law calls for a careful balance to be struck between protecting the right to freedom of expression on the one hand, and prohibiting advocacy for hatred on grounds of nationality, race, and religion on the other.

Countries abiding by international or regional standards (eg Europe, Africa, and the Americas) may interpret them differently. Nowhere is it clearer than in the European Union, where countries have approached and dealt with hate groups and hate speech in very different ways. For instance, France and Germany have taken a much more prohibitive approach to hate speech (eg with regard to Holocaust denial, or incitement to religious hatred) than the United Kingdom. The American approach, on the other hand, protects hate speech unless the speech actually incites to violence and the speech is likely to give rise to *imminent* violence. This is a very stringent standard indeed; as a general matter at least, even the most virulent racist speech, even speech advocating violence and filled with racial insult and slurs, will be protected unless it can be shown that violence is likely to occur virtually immediately.

The relative effectiveness of these various approaches is difficult to assess. Yet, as the events in November 2005 in France demonstrate, the existence of fairly stringent hate speech legislations has not prevented young people in disenfranchised communities from rioting and by so doing demonstrating the failures of the French system to uphold the right to equality. Similarly, the (relative) absence of hate speech legislation does not mean that discrimination has been eradicated, or that freedom of expression is fully and completely protected, as the situation in the US underlines.

Evidence gathered by Article 19 over the years does raise serious concerns, however, about the negative impact of hate speech court rulings on freedom of expression. In Russia, for instance, Article 19 has witnessed the use of legislation prohibiting the incitement of religious hatred to suppress critical and dissenting voices in the arts world. On the face of it, Russian law is in line with international requirements. The Russian Constitution protects the right to freedom of expression, freedom of religion and the principle of non-discrimination, and it prohibits the incitement of 'religious strife'. Article 282 of the Criminal Code criminalises the incitement of hatred on grounds of religion. Yet, in practice, Article 282 is rarely applied in attacks against religious minorities by ultra-nationalist, neo-Nazi and anti-Semitic groups, instances where it could justifiably be used to safeguard democracy, while it has been used against artists. This suggests selective implementation of the legislation, contrary to the requirement set out in Council of Europe recommendation that prosecutions be based on 'objective criteria'.

The guarantee of freedom of expression requires that hate speech laws are carefully drafted. The need for care is highlighted by the fact that the laws are sometimes used by states against the very minorities they are designed to protect. In some cases, they are even used to restrict minorities from promoting their culture and identity, or from expressing concern about discrimination against them by the majority. Turkey frequently uses Article 312 of the Penal Code – which provides for up to three years' imprisonment for anybody who 'incites hatred based on class, race religion, or religious sect, or incites hatred between different regions' – against those who espouse Kurdish nationalism or even express pride in Kurdish culture. In Central Asia, hate speech laws are used to repress all forms of Islamist movements, including those that have publicly

stated that they are committed to non-violence, such as Hizb-ut-Tahrir. There is no evidence that censoring or banning such groups has any impact on their existence or rising influence. In fact, most evidence testifies to the fact that criminalising such groups too often results in their radicalisation. Penalising the expression of their ideas does not reduce the problem or make the proponents of such ideas disappear. On the contrary, hate speech legislation in such cases constitutes a blunt instrument, a double-edged sword 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 to equality.

The right to freedom of opinion and expression is a fundamental right which safeguards the exercise of all other rights and is a critical underpinning of democracy. It is, as stated by the European Court of Human Rights, ‘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”.’

Equally 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’. There is no denying that certain forms of hateful expression can threaten the dignity of targeted individuals and create an environment in which the enjoyment of equality is not possible. ARTICLE 19 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. All these depend on respect in practice for the right to freedom of expression. The media also has a crucial role to play in preventing and counteracting discrimination.

ARTICLE 19 recognises that reasonable restrictions on freedom of expression may be necessary or legitimate to prevent advocacy of hatred based on nationality, race or religion which leads to incitement to discrimination, hostility or violence. We insist 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, from which our organisation takes its name. According to this, an interference with freedom of expression is only legitimate if: it is provided by law, pursues a legitimate aim, and 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;
- prior censorship should not be used as a tool against hate speech;
- care should 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.

Restrictions must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise, even harshly and unreasonably, belief systems, opinions, and institutions, as long as this does not amount to advocating hatred against an individual.

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