

# Freedom of Expression and “Harmful Speech”

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# Outline

1. Introduction
2. IHRL Law: Articles 19 and 20 ICCPR
3. ECHR Law: Articles 10 and 17 ICCPR
4. Camden Principles

# 1. Introduction

- *What is and what is not prohibited* under human rights law?
- Incitement to hatred?
- Blasphemy/defamation of religions?
- Holocaust denial?

## 2. IHR law: (i) A20 ICCPR

- **Prohibition of Incitement**

### **Article 20**

1. Any propaganda for war shall be prohibited by law.
2. Any **advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.**

## (ii) HRC Interpretation

- Overlapping nature between Articles 19 and 20 ICCPR
  - HRC “Restrictions which may fall within the scope of Article 20 must also be permissible under Article 19 paragraph 3 which lays down the scope for determining whether restrictions are permissible” (Ross v Canada (1997))
  - Draft General Comment No 34 (2011) supports this; Article 20 is *lex specialis* with regard to Article 19

- Laws prohibiting denial of the Holocaust may comply with Article 19, it has also expressed a concern that such laws might be excessively broad and may be abused to unduly limit freedom of expression (JWT v Canada (1981))
- HRC decided a case concerning a denial of the existence of the Nazi gas chambers on the basis of Article 19: “the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism” and for this reason the prosecution was considered “necessary” within the balanced rights scheme of ICCPR (*Faurisson v France Communication* )

# 3. ECHR law (i) Articles 10 and 17 ECHR

- No equivalent of Article 20 ICCPR
- “hate speech” generally falls under Article 10 ECHR: restrictions must be provided by law, serve a prescribed legitimate aim and must be necessary in a democratic society
- Speech that “offends, shocks or disturbs” protected (Handyside v UK (1976))
- ECHR most extreme forms of expression and Holocaust-denial speech from the scope of Article 10 ECHR altogether, by relying on Article 17 ECHR (often used when clearly racist speech)
- Article 17 ECHR: ECHR rights may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights it proclaims, or at limiting them further than is provided for in the ECHR

## (ii) Interpretation: Race hate

- Context of a conviction for possessing leaflets for inciting racial discrimination with a view to distribution; party sought an ethnically homogenous population without racial mixing; leaflets called for “removal” of Surinamers, Turks and guest workers”; Dutch government argued Article 17; ECnHR agreed: otherwise “encourage discrimination prohibited by ECHR itself (*Glimmerveen v Netherlands* (1979))
- Neo-Nazi journalist convicted of an offence banning dissemination of anti-Semitic, argued Article 18 could not apply because he advocated democratic and legal means; ECnHR disagreed: interference with Article 10(2) legitimate for protection of rights of others, necessary in democratic society (*Kuhnen v Germany* (1988))



- *Norwood v UK* (2003): applicant had BNP poster in his window with photo of Twin Towers on fire and words: “Islam out of Britain – Protect the British People: convicted of a racially aggravated offence; ECtHR held: Article 17 removed protection of Article 10 for this kind of expression: “a general vehement attack against a group, linking the group as a whole with a grave act of terrorism, is incompatible with the values [of ECHR] notably tolerance, social peace and non-discrimination

- Is it really racial or religious hate speech?
- Convicted Marxist TU official attacked government for using anti-terrorist measures to attack Kurdish refugees, but not advocate violence in retaliation; ECtHR though racial and other tensions present, article was strong political invective not hate speech (*Ceylan v Turkey* (1999))
- Engagement in lively public debate on television (eg to criticise Turkish institutions from an Islamic perspective) not “hate speech”

# (iii) Interpretation of ECHR: blasphemy

- ECHR accepted an exemption to freedom of expression based on the protection of the religious feelings of believers
- *Otto-Preminger Institute v Austria* (1995) Austria's censorship of a satirical film that mocked Christian religious beliefs was upheld by the Court, which based its decision on the absence of a European consensus on the regulation of religious speech
- *Wingrove v UK* (1996): deferred to the state in relation to a video "Visions of Ecstasy" which was said to constitute blasphemy "a wider margin of appreciation is generally available to Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals, or especially, religion"
- *IA v Turkey* (2005) No violation in the case of a conviction for blasphemy for the publication of novel, *Forbidden Phrases*, which contained a section on the Prophet Muhammad

- ECtHR: no competence to decide application by Moroccan nationals complaining under Articles 9 (freedom of religion or belief), 14 (right to non-discrimination), 10 and 17 that they had been discriminated against by Denmark through the publication of what they considered offensive caricatures of the Prophet Muhammad
- An opportunity to revisit problematic case law lost?

# (vi) ECHR Interpretation: Exposing Racism

- Issue: reproduction of racist statements by media in reporting activities of racists
- Balance: (1) freedom of dissemination of information/right to information; (2) protection of rights of racial minorities
- *Jersild v Denmark* (1993): Applicant compiled a tv documentary about openly racist youths in Copenhagen, “Greenjacks”, in which foreign workers and black people were called “niggers”, “animals”; youths convicted of offence of disseminating racist statements; applicant convicted for having assisted; argued violation of Article 10
  - Split 12/7 ECtHR decision that violation and sentence was disproportionate to aim of protecting rights of others

- Held: Media can report on activities of racists, but there are certain grounds – take care to maintain distance, ensure does not suggest endorsement of racist’s views
- Factors into consideration by majority in Jersild:
  - Unique function of press as watchdog, impart ideas of public interest
  - News reporting including interviews one of most important means to achieve this
  - Punishment of journalist would seriously hamper contribution of press to discussion of matters of public interest
  - On facts, interview exposed, analysed and explained youths, frustrated by their situation, criminal records, violent attitudes
  - Interview was for well informed audience and aims were journalistic not racist

# 4. Comparative perspectives

- Canada: Article 20(2) ICCPR in constitutional law
- USA: used 1<sup>st</sup> amendment to protect expression by government on grounds because of its content alone
  - Collin Smith (1978): local ordinance banning assemblies that would incite ethnic, religious or racial group (to prevent Neo-Nazi party marching through Chicago) struck down
  - Laws against cross burning (Klu Klux Klan method of asserting racial superiority and threatening black people) problematic
    - RAV v St of St Paul (1992): local ordinance criminalizing cross-burning which could cause “anger alarm or resentment in others on the basis of race, color, creed, religion or gender” unconstitutional
    - Virginia v Black (2003): upheld offence which require intent to intimidate without reference to characteristics of particular victims; created an imminent risk of violence

# 4. Camden Principles

- Drafting context
- **On hate speech:** Principle 12: All states should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. National legal systems should make clear that:
  - Hostility refers to intense and irrational emotions of opprobrium, enmity and detestation towards the target group
  - Advocacy is to be understood as requiring an intention to promote hatred publicly towards target group
  - Incitement refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups
  - The promotion, by different communities, of a positive sense of group identity does not constitute hate speech



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- **On genocide denial:** States should prohibit the condoning or denying of the crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12 (1)
- **On blasphemy:** States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12(1)
- **On remedies:** States should ensure that persons who have suffered actual damages as a result of hate speech as defined by Principle 12(1), have a right to an effective remedy, including a civil remedy for damages
- **On positive action:** promotion, by different communities, of a positive sense of group identity does not constitute hate speech