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Can we say what we want?

The French satirical paper *Charlie-Hebdo* has just been acquitted of publicly insulting Muslims by reprinting the notorious Danish cartoons featuring the Prophet. Influential Islamic groups had sued it for inciting hatred. Is free speech really in danger worldwide?

This article was first published in [Le Monde diplomatique](#) (English language edition) 4/2007.

The understanding and practices of freedom of expression are being challenged in the twenty-first century. Some of the controversies of the past year or so that have drawn worldwide attention have included the row over Danish cartoons seen as anti-Muslim, the imprisonment of a British historian in Austria for Holocaust denial, and disputes over a French law forbidding denial of the Armenian genocide.

These debates are not new: the suppression of competing views and dissent, and of anything deemed immoral, heretical, or offensive, has dominated social, religious, and political history. These have returned to the fore in response to the stimuli of the communication revolution and of the events of 9/11. The global reach of most of our messages, including the culturally and politically specific, has rendered all expressions and their controls a prize worth fighting for, even to the death. Does this imply that stronger restrictions on freedom of expression should be established?

Freedom of expression, including the right to access to information, is a fundamental human right, central to achieving individual freedoms and real democracy. It increases the knowledge base and participation within a society and can also secure external checks on state accountability.

Yet freedom of expression is not absolute. The extent to which expression ought to be protected or censored has been the object of many impassionate debates. Few argue that freedom of expression is absolute and suffers no limits. But the line between what is permissible and what is not is always contested. Unlike many others, this right depends on its context and its definition is mostly left to the discretion of states.

Under international human rights standards, the right to freedom of expression may be restricted in order to protect the rights or reputation of others and national security, public order, or public health or morals, and provided it is necessary in a democratic society to do so and it is done by law. This formulation is found in both the International Covenant on Civil and Political Rights under article 19, and in the European Convention on Human Rights.

Free to decide

This is the basis for restrictions on freedom of expression, such as laws on defamation, national security, or blasphemy. The formulation is vague enough to leave states free to decide how they should restrict freedom of expression — to protect the right of others or national security.

But some degrees of consistency and protection have developed over time. Most important is a three-part test established by the European Court. All three parts must be met: any restriction must have a legitimate aim, be imposed in a democratic framework, and be necessary in a democratic society. The word "necessary" must be taken literally; it cannot just be "useful" or "reasonable".

International law does impose one clear positive duty upon states, in article 20 of the UN Covenant on Civil and Political Rights: the prohibition on war propaganda and on hate speech. But there is no agreed definition of what these terms mean in international law.

There are different regional or national approaches to hate speech. The United States approach protects it unless it actually incites violence and will likely give rise to imminent violence. This is a stringent standard: even speech advocating violence and filled with racial insults will be protected unless violence is likely to occur almost immediately. By contrast, France and Germany have strict restrictions forbidding hate speech, based on article 20.

The cartoons row

Blasphemy causes controversy; consider the publication of Salman Rushdie's novel, *The Satanic Verses*, in 1989 and the fatwa issued against the author by Ayatollah Khomeini; or the murder of the Dutch filmmaker Theo van Gogh in November 2004.

In September 2005 the Danish newspaper *Jyllands-Posten* published a series of cartoons including one showing the prophet Muhammad with a bomb on his turban. There were immediate protests; in February 2006 they spread, with widespread riots and violence (some lethal) in the Middle East, a boycott of Danish goods, and attacks on Danish embassies. Media and human rights organizations in the West rushed to defend what they saw as freedom of expression threatened by obscurantism. The cartoons were also republished elsewhere.

The incident is not yet over. This February a legal action was brought by two influential Islamic groups against the French satirical weekly *Charlie-Hebdo* for "public insults against a group of people because they belong to a religion" — it had republished some of the cartoons. It was acquitted on 22 March.

The context of these protests included the wars in Iraq and Afghanistan, the perceived western double standards and global lack of respect for Muslims, the growing intolerance towards Muslims in western countries, 9/11, and the London and Madrid bombings. The cartoons row exemplified in many ways the state of the relationship between the Middle East and the West, playing out in the realm of freedom of expression. Contest was expressed through public demonstrations and violence, and also, with far greater force, through Internet and satellite television.

Governments reacted to the row differently. Many in Europe called on their media to act responsibly, whatever that meant; others insisted that freedom of

expression was an essential liberty. Some insisted that offence to religion constituted a legitimate concern, and religious believers ought to be protected against it¹. The row did not lead to the passing of new blasphemy laws. But there have been many examples of communities taking matters into their own hands, and of states seeking to appease mob violence through ad hoc repressive measures, including censorship and imprisonment.

Journalists and editors in the Muslim world who had reproduced the cartoons were arrested and their publications banned or suspended. In Yemen, the licenses of three independent newspapers, the *Yemen Observer*, *Rai al-A'am*, and *Al-Hurriya*, were cancelled and their editors imprisoned. In Jordan, the editors of *Shihan* and *Al-Mihwar* were arrested for publishing the cartoons, and then freed on bail. *Shams* newspaper in Saudi Arabia was suspended after printing some of the cartoons. In Malaysia, the authorities ordered the suspension of the *Sarawak Tribune*.

Other states successfully lobbied for the inclusion in the preamble to the General Assembly resolution establishing the new UN Human Rights Council of a paragraph emphasizing that "NGOS, religious bodies, and the media have an important role to play in promoting tolerance, respect for, and freedom of religion and belief."

Insulting religion?

The criminalization of blasphemy is a reality in a majority of countries², although many established democracies rarely use these legal provisions. In Britain there have been only two prosecutions for blasphemy since 1923; Norway's last case was in 1936 and Denmark's 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, fearing that even well-meaning censors would be tempted to favour one religion over another: also because it "is not the business of government to suppress real or imagined attacks upon a particular religious doctrine"³.

By contrast, the European Court of Human Rights has found blasphemy laws to be within the parameters of what is "necessary in a democratic society". It considers state authorities better able than an international judge to give an opinion on the necessity of a restriction intended to protect those whose deepest feelings and convictions would be seriously offended⁴. Many human rights and freedom of expression organizations, including Article 19, differ from the European Court's line of reasoning.

Blasphemy laws tend to be abused worldwide, violating the right to practice the religion of choice and targeting religious minorities. There is no evidence that the right to freedom of religion, as understood internationally, is better protected with blasphemy laws. Freedom of religion is not about respecting religion but about respecting people's right to practice the religion of their choice. The European Court of Human Rights has ruled that the right to freedom of religion does not mean that states have to enact laws that protect believers from offence or insult⁵.

International law has stressed that freedom of expression is applicable to information or ideas that are favourably received, and equally to those that offend, shock, or disturb. In the absence of a specific intention to promote hatred, censorship measures against newspapers that printed the cartoons were

not legitimate. The cartoons were offensive to many, but offence and blasphemy should not be threshold standards for curtailing freedom of expression.

Denying the Holocaust

The arrest of David Irving, the historian who denied the Holocaust, in Austria in November 2005 further confused the question of protected and criminal speech. Holocaust denial laws proliferated in Europe from the 1990s on. In November 2006, the French National Assembly passed, by a vote of 106 to 19, a draft law that would make it an offence to deny the existence of the 1915 Armenian genocide; the offence was punishable by five years in prison and a \$56,400 fine. This year Germany announced that it would push for an EU-wide ban on denying the Holocaust.

Whether these are responses to genuine prospects of incitement to genocide is debatable⁶. They are, rather, political statements of principle, in the first place against anti-Semitism. But existing hate speech regulations should be enough to set boundaries and common values.

The impact of a total ban on denial of the Holocaust or any other genocide or historical event is problematic. It goes beyond established international law; it elevates a historical event to the status of dogma and prohibits a category of statement regardless of the context or impact. This is particularly true of the French Armenian genocide draft law which would muzzle any dissenting or controversial research and publications, create taboos, and reinforce an atmosphere that discouraged research.

Prosecutions under Holocaust denial laws actually augment the appeal of revisionist historians, providing them with high-powered platforms and casting them as dissidents against the established order, thus denying the democratic state the moral high ground it ought to occupy. Irving's conviction in Austria gave him a level of international prominence he had not previously enjoyed and made him a martyr in the eyes of his followers⁷.

Governments can use such laws to stifle critics. In Rwanda, charges of "negationism" (meaning denial of the genocide of the Tutsis) are frequently made against perceived opponents and critics of the government, including Rwanda's only independent newspaper.

There is a difficulty over defining precisely what constitutes Holocaust denial, one of the requirements under international law for any restriction on freedom of expression. Most such laws go beyond the key facts of history as recognized by leading courts, such as the existence of the gas chambers and genocide against the Jews.

The European Court of Human Rights found France in breach of its obligation to respect freedom of expression when it convicted French citizens François Lehideux and Jacques Isorni, who had contested the legitimacy of the judgment that had been passed on the Second World War era French leader, Marshal Pétain, for his collusion with the Nazis. The court specifically noted that the statements form "part of the efforts that every country must make to debate its own history openly and dispassionately. The court reiterates in that connection that 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"⁸.

Where instances of Holocaust or genocide denial do wilfully incite racial hatred, general hate speech laws can be used to prosecute the perpetrators.

Paradox over Turkey

On the same day last October that the French parliament passed its draft bill on the Armenian genocide, the Turkish author Orhan Pamuk received the Nobel Prize for literature. The award celebrated his literary work and also honoured him as a staunch defender of freedom of expression. The two events collided. One celebrated freedom of expression and brought us closer to open debates over our past and possible reconciliations. The other locked us into dogmatic interpretations, further away from appeasement and common understanding.

Earlier last year Pamuk was put on trial for insulting "Turkishness" under article 301 of the Turkish penal code, which prohibits a range of criticisms. Although the charges were eventually dropped, many writers and journalists in Turkey still face similar charges. Pamuk's case and many others rest on statements or publications explicitly or implicitly recognizing the 1915 Armenian genocide, which is a major taboo under Turkish law and political culture.

This January, Hrant Dink, a Turkish journalist of Armenian descent, was murdered in front of his office, apparently by an extreme nationalist. He was the editor of the bilingual weekly *Agos* and an insightful commentator on Armenian–Turkish relations. In October 2005 he had been convicted under article 301 and received a six–month suspended sentence. In the month before his murder he had criticized the French bill on the denial of the Armenian genocide: "We should not be a pawn for the irrational attitude between the two states. I am being sued in Turkey, because I said that there was genocide, which is my own belief. But I will go to France to protest against this madness and violate the new French law, if I see it necessary, and I will commit the crime to be prosecuted there"⁹.

Glorifying terrorism?

Since 9/11, countries including Australia, Morocco, Algeria, Tunisia, Thailand, Malaysia, the Philippines, Britain, the US, Turkey, Russia, Jordan, and Egypt have brought in new legislation to toughen their anti–terror regimes. Despite criticism from NGOs and UN human rights bodies that anti–terror laws are over–used, more are planned.

A broad definition of terrorism has been adopted in many countries. The Russian Federation introduced a definition of extremism that includes criticism of public officials. This is an example of what has become a frequent feature of new anti–terrorist legislation: it extends the coverage of counter–terrorism regulations to an ever–wider range of groups and activities, including forms of protest that ought to be covered under ordinary public order laws.

The UN Human Rights Committee has criticized the US for extending its anti–terror laws to include conduct that implies political dissent; it may be unlawful but cannot be classified as terrorist.

Less democratic regimes, including Uzbekistan, China, Nigeria, Jordan, Ethiopia, and Nepal, have used anti–terror laws to clamp down on peaceful protesters, political dissidents, or the media.

Another worrying aspect of the new anti-terrorist legislation in force in Britain, Denmark, Spain, and France is that it criminalizes the glorification of terrorism, provocation or indirect incitement. In January, 34 countries signed the Council of Europe Convention on Terrorism, which proposes a similar line.

Such offences are so broadly and vaguely worded that they are likely to invite excessive interference with freedom of association, expression, and the media. They also effectively criminalize incitement that might lead to extremist activity or the possibility of violence¹⁰. Yet, it is fundamental to the guarantee of freedom of expression that any restriction for the purpose of national security, including prevention of terrorism, is closely linked to the prevention of imminent violence.

This is at the core of the Johannesburg principles, which have gradually been accepted and cited as the definitive standards for the protection of freedom of expression in the context of national security laws¹¹. The principles restrict legitimate national security interests to those whose purpose and effect can be defined as to "protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force" from an internal or an external threat.

Experience shows that restrictions on freedom of expression rarely protect us from abuses, extremism, or racism. They are usually and effectively used to muzzle opposition and dissenting voices, silence minorities, and reinforce the dominant political, social, and moral discourse and ideology. Freedom of expression is to be celebrated. It is not about protecting the voices of the powerful or of the consensus: it is there to protect and defend diversity of interpretations, opinions, and research.

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¹ In the year before the cartoons, there were incidents of religious-led censorship in Britain: performances of a play, *Behzti* (Dishonour), were cancelled in December 2004 because of fear of violence from members of the Sikh community. In January 2005, 45.000 Evangelical Christians emailed the BBC to try to prevent the showing of *Jerry Springer -- the Opera*.

² Based on The International Committee for the defence of Salman Rushdie and his publishers, "The Crime of Blasphemy", Article 19, London 1989; Agnes Callamard, "Freedom of speech and offence: why blasphemy laws are not the appropriate response", in *Equal Voices*, European Monitoring Centre on Racism and Xenophobia, Issue 18, June 2006.

³ *Joseph Burstyn, Inc v Wilson* (1952).

⁴ See court rulings over two films in *Otto-Preminger-Institut v Austria*, 20 September 1994; *Wingrove v United Kingdom*, 25 November 1996.

⁵ *Dubowska & Skup v Poland*, 18 April 1997 (European Commission of Human Rights). It concerned the publication in a newspaper of a picture of Jesus and Mary with gas masks over their faces. The Commission found that it had not prevented anyone from exercising their freedom of religion.

⁶ Human Rights Watch.

- ⁷ In Britain, which does not have a Holocaust denial law, Irving had already been thoroughly discredited when he unsuccessfully sued historian Deborah Lipstadt in 1998 for describing him as a Holocaust denier.
- ⁸ *Lehideux and Isorni v France*. The events preceded France's Holocaust denial law but fall within its scope.
- ⁹ "Over 50,000 March in Istanbul in Funeral Procession for Slain Turkish–Armenian Editor Hrant Dink", *Democracy Now*, 23 January 2007.
- ¹⁰ For a review of some of these laws, consult www.article19.org/publications/global-issues/security-agendas.html.
- ¹¹ Article 19, "The Johannesburg principles on national security, freedom of expression and access to information," London, 1996.

Published 2007–04–27

Original in English

First published in *Le Monde diplomatique* (English language edition) 4/2007

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