

Module 6
HATE SPEECH

*Modules on Litigating
Freedom of Expression
and Digital Rights
in South and South East
Asia*



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MODULE 6

HATE SPEECH

- Certain types of speech, known as hate speech, are prohibited by international law.
- It is important to draw a clear distinction between speech that is offensive or even racist, and yet protected under international guarantees of freedom of expression, and speech which constitutes impermissible hate speech that should legitimately be restricted.
- Regulating hate speech can be particularly difficult in the online context.
- International law requires states to ban hate speech which intentionally incites to violence, hatred or discrimination, but not that actual harm results.
- The biggest danger with hate speech is that vagueness in defining its meaning may allow such laws to be used as tools to stifle legitimate criticism or political speech.
- Incitement to genocide is often treated as a special case of hate speech, although care is also needed here to ensure that any restrictions are narrow and legitimate.

INTRODUCTION

Despite the importance of freedom of expression, not all speech is protected under international law, and some limited forms of speech are required to be prohibited by states. Article 20 of the International Covenant on Civil and Political Rights ([ICCPR](#)) provides that:

- (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."

In addition, article 4(a) of the [International Convention on the Elimination of All Forms of Racial Discrimination](#) requires that the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, shall be declared an offence that is punishable by law.

Hate speech provisions under international law distinguish between three categories of speech: that which should be restricted, that which may be restricted; and that which is lawful and subject to

protection, according to the severity of the speech in question. Hate speech regulations vary significantly by jurisdiction, particularly in how they define what constitutes hate speech.

There is a need for clear and narrowly circumscribed definitions of what is meant by the term “hate speech”, or objective criteria that can be applied. Over-regulation of hate speech can violate the right to freedom of expression, while under-regulation may lead to intimidation, harassment or violence against minorities and protected groups.

Importantly, hate speech should not be conflated with offensive speech, as the right to freedom of expression includes speech that is robust, critical, or that causes shock or offence.¹ Hate speech is perhaps the topic that creates the most disagreement among defenders of freedom of expression, as defining the line between offensive but protected speech and hate speech can be extremely difficult.

As a general principle, no one should be penalised for statements that are true. Furthermore, the right of journalists to communicate information and ideas to the public should be respected, including when they are reporting on racism and intolerance, and prior censorship should be applied, if at all, only in the most limited circumstances. Finally, any sanctions for hate speech should be in strict conformity with the principle of proportionality.

There are some distinctions between hate speech online and offline that may require consideration,² although laws generally do not distinguish between the two:

- Content is more easily posted online without due consideration or thought. Online hate speech cases need to distinguish between poorly considered statements posted hastily online, and an actual threat that is part of an intentional campaign of hatred.
- Once something is online, it can be difficult (or impossible) to get it off entirely. Hate speech posted online can persist in different formats across multiple different platforms, which can make it difficult to address.
- Online content is frequently posted anonymously, which presents an additional challenge to dealing with hate speech online.
- The internet has transnational reach, which raises cross-jurisdictional complications in terms of legal mechanisms for combatting hate speech and even definitions of it.

WAS “HATE SPEECH” INTENDED TO INCITE?

Hate speech that is intended to incite hostility, discrimination or violence is a type of expression that international law mandates must be restricted. Therefore, a key factor when dealing with hate speech cases is the requirement for there to have been an *intention* to incite hatred.

¹ Media Defence, ‘Training manual on digital rights and freedom of expression online, at p 57 (2020) (accessible at: <https://www.mediadefence.org/resource-hub/resources/media-defence-training-manual-on-digital-rights-and-freedom-of-expression-online/>).

² Media Defence, ‘Training manual on digital rights and freedom of expression online, at p 57 (2020) (accessible at: <https://www.mediadefence.org/resource-hub/resources/media-defence-training-manual-on-digital-rights-and-freedom-of-expression-online/>).

The [Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,³ compiled by a meeting of experts coordinated by the United Nations Office of the High Commissioner for Human Rights (OHCHR), proposes a six-part threshold test to establish whether expression rises to the threshold of being criminal. One of these is intent: “advocacy” and “incitement” are required, rather than mere distribution or circulation. Article 20 of the [ICCPR](#) also requires intent, as signalled by the word ‘advocacy’. Negligence and recklessness therefore do not rise to the standard of hate speech.

A prime example of this distinction is the case of [Jersild v Denmark](#) decided by the European Court of Human Rights (ECtHR). Jersild was a television journalist who made a documentary featuring interviews with members of a racist, neo-Nazi gang. He was prosecuted and convicted for propagating hate speech. However, the ECtHR found that the journalist's intent was to make a serious social inquiry exposing the views of the racist gangs, not to promote their views. There was a clear public interest in the media playing such a role:

"Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern... The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."⁴

Building counter-narratives as a response to hate speech

According to the United Nations Educational, Scientific and Cultural Organization ([UNESCO](#)), non-legal methods of countering hate speech are as important as legal proscriptions. One such measure is building a counter-narrative by promoting greater media and information literacy as a structural response to hate speech online:

“Given young people's increasing exposure to social media, information about how to identify and react to hate speech may become increasingly important. It is particularly important that anti-hate speech modules are incorporated in those countries where the actual risk of widespread violence is highest. There is also a need to include in such programmes, modules that reflect on identity, so that young people can recognise attempts to manipulate their emotions in favour of hatred, and be empowered to advance their individual right to be their own masters of who they are and wish to become.”⁵

³ Office of the High Commissioner for Human Rights (OHCHR), ‘Freedom of expression vs incitement to hatred: OHCHR and the Rabat Plan of Action’, (2012) (accessible at: <https://www.ohchr.org/en/issues/freedomofexpression/articles19-20/pages/index.aspx>).

⁴ European Court of Human Rights, Application No. 15890/89, (1994) para. 33-35 (accessible at: <http://hudoc.echr.coe.int/eng?i=001-57891>).

⁵ UNESCO, Iginio Gagliardone et al, ‘Countering online hate speech’ at p 58 (accessible at: <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>).

MUST VIOLENCE OR HATRED ACTUALLY RESULT?

Another tenet of the Rabat Plan of Action threshold test is the likelihood and imminence of harm.⁶ Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for it to amount to a crime. Nevertheless, some degree of risk of resulting harm must be identified. This means that courts will have to determine that there was a reasonable probability that the speech would succeed in inciting violence, discrimination or hostility against the target group. Courts in different jurisdictions have differed on just how likely the harm needs to be to constitute a criminal act.

For example, in *Devgan v. Union of India*,⁷ the Supreme Court of India interpreted sections 295A and 505 of the Penal Code, which proscribe “deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs” and “statements conducing to public mischief”, including “Statements creating or promoting enmity, hatred or ill-will between classes”, as well as section 153A, which prohibits promoting “enmity between different groups on grounds of religion, race, place of birth, residence, language etc. and doing acts prejudicial to the maintenance of harmony.” The Court provided the following guidance regarding the required likelihood of actual harm resulting from speech:

[55]: “Sometimes, difficulty may arise and the courts ... would have to exercise discernment and caution in deciding whether the ‘content’ is a political or policy comment, or creates or spreads hatred against the targeted community ... The ‘content’ should reflect hate which tends to vilify, humiliate and incite hatred or violence against the target group based upon identity of the group beyond and besides the subject matter.”

...

[67]: “Clauses (a) and (b) to sub-section (1) to Section 153A of the Penal Code use the words ‘promotes’ and ‘likely’ respectively. Similarly, Section 295-A uses the word ‘attempts’ and ... Section 505 uses the words ‘create or promote.’ Word ‘likely’ ... convey[s] the meaning, that the chance of the event occurring should be real and not fanciful or remote ... The standard of ‘not improbable’ is too weak and cannot be applied as it would infringe upon and fall foul of reasonable restriction and the test of proportionality... ‘Promote’ does not imply mere describing and narrating a fact, or giving opinion criticising the point of view or actions of another person – it requires that the speaker should actively incite the audience to cause public disorder. This active incitement can be gauged by the content of the speech, the context and surrounding circumstances, and the intent of the speaker. However, in case the speaker does not actively incite the descent into public disorder, and is merely pointing out why a certain person or group is behaving in a particular manner, what are their demands and their point of view, or when the speaker interviews such person or group, it would be a passive delivery of facts and opinions which may not amount to promotion.

[68]: “The word ‘attempt’, though used in Sections 153-A and 295-A of the Penal Code, has not been defined. However, there are judicial interpretations that an ‘attempt to constitute a crime’ is an act done or forming part of a series of acts which would constitute its actual commission but for an interruption. An attempt is short of actual causation of crime and more than mere preparation.”

⁶ OHCHR above n 3.

⁷ *Devgan v. Union of India*, Writ Petition NO. 160 of 2020, 2020 SCC OnLine SC 994 (2020) (accessible at: <https://indiankanoon.org/doc/179868451/>).

Online hate speech laws being used to stifle free speech

Many states are increasingly resorting to new online hate speech laws with the stated goal of curbing the flood of mis- and disinformation that has been amplified with the advent of the internet and especially social media. For example, in 2018, Bangladesh passed the Digital Security Act⁸ following sectarian violence fuelled by Facebook posts. However, many sections of this Act are worded in a vague and excessively broad manner, inconsistent with international standards on freedom of speech, including the requirements of legality and proportionality and necessity.⁹ For example, section 25(a) of the Act criminalises the transmission, publication or propagation through websites or other digital media “any data-information which he knows to be offensive, false or threatening in order to annoy, insult, humiliate or malign a person.”

Many online speech laws pose a risk to freedom of expression due to the following:

- Overly broad definitions of hate speech and disinformation.
- Vague provisions that allow for discretionary interpretation by law enforcers such as prosecutors and the police and enable the laws to be employed in a manner which is inconsistent with fundamental rights.
- Requiring internet intermediaries to police content.
- Providing for overly harsh and punitive penalties for violations.

THE DANGER OF VAGUENESS

The obvious danger in regulating hate speech is that vagueness in the definition of what constitutes a criminal speech act will be used to penalise expression that has neither the intent nor the realistic possibility of inciting hatred.

An example of a vague hate speech provision is section 298 of Singapore's Penal Code,¹⁰ which proscribes various acts undertaken with the intention of hurting others' feelings, as opposed to requiring incitement to discrimination, hostility or violence. This section reads: “Whoever, with deliberate intention of wounding the religious or racial feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, or causes any matter however represented to be seen or heard by that person, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.”

⁸ S.R.O. NO. 310-Law/2019 (accessible at: <https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf>).

⁹ For an overview, see Centre for Law and Democracy, ‘Bangladesh: Analysis of the Draft Digital Security Bill, (2018) (accessible at: <https://www.law-democracy.org/live/bangladesh-digital-security-bill-seriously-flawed/>).

¹⁰ Penal Code of 1871 (revised 2020) (accessible at: <https://sso.agc.gov.sg/act/pc1871>).

ADVOCACY OF GENOCIDE OR HOLOCAUST DENIAL: SPECIAL CASES?

Some commentators argue that the issues of advocacy of genocide or denial of the Holocaust constitute special cases within the debate on hate speech and incitement. According to the [1948 Genocide Convention](#), “direct and public incitement to commit genocide” is a punishable act,¹¹ following the role of the media in perpetuating hatred against Jewish people in Germany and advocating for their extermination.

Likewise, in Rwanda the media played a crucial role during the genocide in drumming up hatred and distributing propaganda, which led to the first prosecutions at the International Criminal Tribunal for Rwanda (ICTR) for “direct and public incitement to commit genocide.” In the same way as hate speech, incitement to genocide was defined as an inchoate crime, meaning it is not necessary for genocide to have actually occurred for the crime to have been committed, but it did require intent.

The most notable case brought against journalists at the ICTR was *Nahimana et al*, known as the Media Trial.¹² Two of the respondents were the founders of a radio station that broadcast anti-Tutsi propaganda before the genocide and the names and licence plate numbers of intended victims during the genocide.¹³ They were convicted, among other things, of persecution, one of the acts which makes up crimes against humanity, for disseminating hate speech.¹⁴

The [Rome Statute](#) establishing the International Criminal Court also establishes the crime of incitement to genocide.¹⁵

The genocide of the Jews in Nazi-occupied Europe was such a formative event in the creation of the European human rights system that Holocaust denial — claiming that the genocide did not occur — is an offence in several countries and is treated in a particular fashion within the jurisprudence of the European Court of Human Rights.¹⁶ These decisions reflect the particularly sensitive issue of the historical memory of the Holocaust in many European countries and the application of the European Court of Human Rights’ ‘margin of appreciation’ doctrine, whereby Council of Europe member states are afforded some discretion on certain issues. However, from a principled perspective, Holocaust denial prohibitions raise human rights concerns. First, they may be considered discriminatory in that they single out a single genocide. Second, should engaging in revisionism amount to hate speech in a given context, it is unclear why dedicated genocide denial laws would be necessary to prosecute these offences instead of applying general hate speech provisions. And, should revisionism not amount to hate speech, it is very questionable whether it should be prohibited at all.

¹¹ United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Resolution 260 (III) (1948), Art. 3.(accessible at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf).

¹² International Criminal Tribunal for Rwanda, Case No. ICTR-99-52-T, (2003) (accessible at: <https://unictr.irmct.org/en/cases/ictr-99-52>).

¹³ Media Defence above n. 2.

¹⁴ Note 12, para. 1072.

¹⁵ International Criminal Court, ‘Rome Statute of the International Criminal Court’ at articles 6, 25 and 33 (2002) (accessible at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>).

¹⁶ For example, see the case of *Garaudy v. France*, Application No. 65831/01 (2003) at the ECtHR.

The growth of social media platforms has raised new concerns about the proliferation of incitement to genocide and other forms of hate speech. Facebook has come under criticism for its role in allegedly fuelling the spread of hateful content against the Rohingya minority in Myanmar through its failure to take sufficiently effective measures to remove hateful posts, a situation partially caused by the company's having had insufficient numbers of moderators and fact-checkers familiar with the situation in Myanmar and proficient in Burmese.¹⁷ Another concern is Facebook's alleged role in amplifying hate speech through its algorithms, which prioritise sensational content.¹⁸ Facebook's role in the violence against the Rohingya was referenced in a report by a UN Human Rights Council-authorized fact finding mission on Myanmar:

74. The role of social media is significant. Facebook has been a useful instrument for those seeking to spread hate, in a context where, for most users, Facebook is the Internet. Although improved in recent months, the response of Facebook has been slow and ineffective. The extent to which Facebook posts and messages have led to real-world discrimination and violence must be independently and thoroughly examined. The mission regrets that Facebook is unable to provide country-specific data about the spread of hate speech on its platform, which is imperative to assess the adequacy of its response.¹⁹

Facebook's role may come under judicial scrutiny because of class action filed in the US against Meta and a letter of notice filed in the United Kingdom by Rohingya refugees.²⁰

DEFAMATION OF RELIGIONS

Many states in South and Southeast Asia have laws prohibiting defamation of religions, and many also have the crime of blasphemy. For example, Sri Lanka's Penal Code prohibits certain expressions which harm the 'religious feelings' of others.²¹ In Indonesia it is prohibited to promote atheism or any religion other than the six enumerated under domestic law.²² Some countries have implemented particularly harsh penalties for the crimes of blasphemy and defamation of religion, including death. For example, in Pakistan, blasphemy is a capital offence.²³

¹⁷ See Letter of Notice from McCue Jury & Partners to Meta on behalf of the Rohingya community living in the United Kingdom and Bangladesh (2021) (accessible at: <https://rohingya-data.s3.amazonaws.com/attachments/ckwunsg221v4vgjr2r34oysu6-roh-00352-fac-cor-ipc-2021-12-06-letter-of-notice-vf-26.pdf>).

¹⁸ Id. See also Global Witness, 'Algorithm of harm: Facebook amplified Myanmar military propaganda following coup' (2021) (accessible at: <https://www.globalwitness.org/en/campaigns/digital-threats/algorithm-harm-facebook-amplified-myanmar-military-propaganda-following-coup/>).

¹⁹ UN Human Rights Council, 'Report of the independent international fact-finding mission on Myanmar', A/HRC/39/64 (2018) (accessible at: <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/reportofthemyanmar-ffm>).

²⁰ Ram Eachambadi, Jurist, 'US and UK Rohingya refugees sue Facebook alleging dissemination of "hateful and dangerous misinformation"' (2021) (accessible at: <https://www.jurist.org/news/2021/12/us-and-uk-rohingya-refugees-sue-facebook-alleging-dissemination-of-hateful-and-dangerous-misinformation/>).

²¹ End Blasphemy Laws, 'Sri Lanka' (2021) (accessible at: <https://end-blasphemy-laws.org/countries/asia-central-southern-and-south-eastern/sri-lanka/>).

²² End Blasphemy Laws, 'Indonesia' (2020) (accessible at: <https://end-blasphemy-laws.org/countries/asia-central-southern-and-south-eastern/indonesia/>).

²³ End Blasphemy Laws, 'Pakistan' (2020) (accessible at: <https://end-blasphemy-laws.org/countries/asia-central-southern-and-south-eastern/pakistan/>).

These laws represent a breach of the right to freedom of expression. [General Comment 34](#) states that:²⁴

"Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."

Many other countries have abolished the offence of blasphemy in recent years, for example the United Kingdom in 2008,²⁵ Denmark in 2017,²⁶ and Canada in 2018.²⁷

CONCLUSION

Hate speech is a highly contentious issue in South and Southeast Asia, dividing the community of freedom of expression defenders on where the line should be drawn between protecting speech that is harmful to minority groups and enabling important dissent and criticism. The challenges of dealing with hate speech are particularly salient in online hate speech cases, where the notion of intent can be complicated and remedies harder to implement. Defamation of religions and blasphemy laws should be removed from criminal statutes. While prohibitions on incitement to particularly tragic past events such as genocides are legitimate, there are questions as to whether prohibitions on merely denying genocides, or specific prohibitions on denial of the Holocaust, are justified.

²⁴ UN Human Rights Council, 'General Comment No. 34 at p 12 (2011) (accessible at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>).

²⁵ Media Defence, 'Training Manual on International and Comparative Media and Freedom of Expression Law', Richard Carver, (2020) (accessible at: <https://www.mediadefence.org/resource-hub/resources/media-defence-training-manual-on-international-and-comparative-media-and-freedom-of-expression-law/>).

²⁶ The Guardian, 'Denmark scraps 334-year old blasphemy law' (2017) (accessible at: <https://www.theguardian.com/world/2017/jun/02/denmark-scraps-334-year-old-blasphemy-law>).

²⁷ Global News Wire, 'Repeal of Canada's Blasphemy Law Applauded by National Secularist Organization' (2018) (accessible at: <https://www.globenewswire.com/news-release/2018/12/14/1667079/0/en/Repeal-of-Canada-s-Blasphemy-Law-Aplauded-by-National-Secularist-Organization.html>).