Module 9

NATIONAL SECURITY

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

MEDIA DEFENCE

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MODULE 9

NATIONAL SECURITY

- **"National security" is a common justifications offered by states for limiting freedom of expression by journalists, bloggers, and media organs. However, it has the potential to be relied upon to quell dissent and cover up state abuses.**
- **National security legislation can have wide-reaching implications for media freedom and can be abused in ways that effectively avoid constitutional checks and balances.**
- **The Johannesburg and the Tshwane Principles, alongside the Siracusa Principles, provide guidance on the extent of the national security limitation in relation to media freedom and access to information although they only constitute non-binding international law.**
- **Recent instances of terrorism have caused international decision-makers to seek to better define terrorist activities in order to ensure that limitations of fundamental rights based on combatting terrorism are properly prescribed by law.**
- **There is a strong presumption that prior restraints on freedom of expression, even where imposed to protect national security, represent a breach of guarantees of this right, for example as set out in the precedent by the United States Supreme Court in the *Pentagon Papers* case.**

INTRODUCTION[1]

"National security" is a common justification offered by states for limiting freedom of expression by journalists, bloggers, and media organs. It is a legitimate ground for restricting freedom of expression in the International Covenant on Civil and Political Rights (ICCPR)[2].

Exceptionally, the right to freedom of expression can be partly suspended — a process known as *derogation* — in the case of a state of emergency due to a grave, imminent security threat. However, national security is often relied upon for illegitimate reasons, such as to quell dissent or to cover up state abuses.

This module examines how national security is treated under international and regional human rights law as a ground for limiting freedom of expression.

[1] This module should be read in conjunction with Richard Carver 'Training Manual on International and Comparative Media and Freedom of Expression Law at pp 76-86 (accessible here: https://www.mediadefence.org/resource-hub/resources/media-defence-training-manual-on-international-and-comparative-media-and-freedom-of-expression-law/)

[2] International Covenant on Civil and Political Rights (1966) at articles 19, 21 and 22 (accessible at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx).

THE DEROGATION PROCESS UNDER INTERNATIONAL

Most of the key human rights instruments allow a temporary derogation from certain human rights obligations in situations of national emergency. For example, article 4 of the ICCPR states:

> "In a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[3]

Article 4 then proceeds to list a number of articles that may not be derogated from, even in times of public emergency. These include the rights not to be enslaved or tortured, and the right to freedom of opinion. It does not, however, include the right to freedom of expression.

The United Nations Human Rights Committee (UNHRCtte) has devoted two of its General Comments to explaining, in detail, the meaning of article 4 and the procedure and scope of derogation. The more recent of these, General Comment No. 29, can be taken as an authoritative interpretation of derogation during states of emergency. There are a number of key points to note:

- The state of emergency must be publicly proclaimed according to domestic legal requirements, and should also be accompanied by notification to other State Parties via the UN Secretary General or other body that serves as the technical secretariat of the treaty, explaining why it is necessary.[4]
- The situation leading to derogation must be "a public emergency which threatens the life of the nation."[5] In terms of General Comment No. 29, the threshold of threatening "the life of the nation" is a high one, and the UNHRCttee has been highly critical of derogations that have taken place in situations that appear to fall short of the article 4 requirements.[6]
- The UNHRCtte emphasises the importance of the principle that derogations should be limited "to the extent strictly required by the exigencies of the situation."[7] Even in instances where some form of derogation may be warranted, it should be limited to what is strictly required and necessary in the circumstances.

LIMITING MEDIA FREEDOM ON GROUNDS OF NATIONAL SECURITY

International law only allows the right to freedom of expression to be limited on grounds of national security where this is explicitly provided by law and the restriction is necessary and proportionate in an open and democratic society. In practice, however, national security is one of the most problematic areas of interference with media freedom.

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[3] ICCPR above n 2 at article 4.
[4] United Nations Human Rights Council, 'General Comment No. 29, states of emergency (article 4)' at para. 2 (2001) (accessible at: https://digitallibrary.un.org/record/451555?ln=en).
[5] *Id.*
[6] *Id.* at para. 3.
[7] *Id.* at para. 4.

One difficulty is the tendency on the part of many governments to assume that it is legitimate to curb all public discussion on national security issues. Yet, according to international standards, expressions may only be lawfully restricted if they threaten actual damage to national security and if the restriction is necessary and proportionate to countering this threat.

In *Mat Shuhaimi bin Shafiei v. Malaysia*,[8] the Federal Court of Malaysia (the highest appellate court) ruled that a legislative provision criminalising sedition was unconstitutional after finding it to be a disproportionate restriction on freedom of expression and inconsistent with a constitutional guarantee of equality under the law. The sedition provision under review provided that the intention of the perpetrator was irrelevant.[9] The Court found this departure from general criminal law practice to constitute a disproportionate restriction on freedom of expression, noting that even more "socially abhorrent and heinous crimes" included, at a minimum, a rebuttable presumption that shifted the burden to the accused to disprove intent, as opposed to wholly displacing *mens rea* and creating a strict liability regime.[10]

The Johannesburg Principles

In 1995, a group of international experts met to discuss the Johannesburg Principles on Freedom of Expression and National Security.[11] Although non-binding, these principles are frequently cited (notably by the UN Special Rapporteur on freedom of expression) as a progressive summary of standards in this area. The Johannesburg Principles address the circumstances in which the right to freedom of expression might legitimately be limited on national security grounds, while also underlining the importance of the media, and freedom of expression and information, in ensuring accountability in the realm of national security.

In 2013, a group of civil society organisations from across the globe — including some who were involved in the drafting of the Johannesburg Principles — published an updated version, focusing on access to information, known as the 'Tshwane Principles.'[12] The Tshwane Principles state that:[13]

- Governments may legitimately withhold information in some narrowly defined areas, such as defence plans, weapons development, and the operations and sources used by intelligence services.

[8] Rayan Sivil No. W-01(A)-115-04/2015 (2016), (accessible at: https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/11/Mat-Shuhaimi-Shafiei-v-Kerajaan-Malaysia-Judgment-CoA.pdf).
[9] *Id.* at para 30.
[10] *Id.* at para 40.
[11] Article 19: Global Campaign for Free Expression, 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information,' (1996) (accessible at: https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf).
[12]Open Society Justice Initiative, 'Understanding the Global Principles on National Security and the Right to Information' (2013) (accessible at: https://fas.org/sgp/library/tshwane-und.pdf).
[13] Open Society Justice Initiative, 'The Tshwane Principles on National Security and the Right to Information: An Overview in 15 Points' (accessible at: https://www.justiceinitiative.org/publications/tshwane-principles-national-security-and-right-information-overview-15-points#:~:text=Related%20Work-,The%20Tshwane%20Principles%20on%20National%20Security%20and%20the%20Right%20to,and%20national%20law%20and%20practices).

- Information about serious human rights violations may not be classified or withheld on national security grounds.
- People who disclose wrongdoing or other information of public interest (whistleblowers and the media) should be protected from any type of retaliation, provided they acted in good faith and followed applicable procedures.
- Disclosure requirements apply to all public entities, including the security sector and intelligence authorities.

Although the principles do not constitute binding international law, they were developed with wide consultation and have broad consensus; for example, they have been welcomed by all four of the special experts on freedom of expression — for the UN, the Organisation of American States (OAS), and the African Union (AU), and the Organisation for Security and Cooperation in Europe's (OSCE) expert on freedom of the media.[14]

THE SCOPE OF NATIONAL SECURITY

"Freedom of expression" and "national security" are very often seen as principles or interests that are inevitably opposed to each other. Governments often invoke national security as a rationale for restricting freedom of expression, particularly media freedom. Yet national security remains a genuine public good — and without it, media freedom would be scarcely possible. On the other hand, governments are seldom inclined to recognise that media freedom may actually be a means to ensure better national security by exposing abuses in the security sector.

The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (Siracusa Principles) define a legitimate national security interest as one that aims "to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."[15] Subsequent articles indicate that a national security limitation "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order."

The UN Special Rapporteur on Freedom of Expression has repeatedly limited the scope of a national security limitation in similar terms. For example:

> "For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation."[16]

In a similar vein, the Johannesburg Principles define a national security interest as being:

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[14] Open Society Justice Initiative above n 12.
[15] United Nations Economic and Social Council, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,' Principle 29 (1985) (accessible at: https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf).
[16] UN Special Rapporteur on Freedom of Expression, 'Report of the Special Rapporteur on the nature and scope of the right to freedom of opinion and expression, and restrictions and limitations to the right to freedom of expression,' (1995) (accessible at: https://www.ohchr.org/en/issues/freedomopinion/pages/annual.aspx).

> "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, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government."[17]

TERRORISM

Since the terror attacks in the United States on 11 September 2001, an important focus of security legislation has been on countering terrorism. In part, this reflects a genuine change in understanding the nature of threats to national security, seen also in the notion that terrorism or terrorist organisations are the objects of a "war." More generally, it serves as a rhetorical device whereby dissent — including critical media coverage — may be characterised as giving succour to terrorists.

The UN Security Council has required member states to take a number of steps to combat terrorism. One measure of particular relevance to the media is contained in Resolution 1624 of 2005, which was the first international instrument to address the issue of incitement to terrorism. The preamble to Resolution 1624 condemns "incitement to terrorist acts" and repudiates "attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts."[18]

Defining terrorism

One serious problem with legal restrictions on glorification (or even incitement) of terrorism is the lack of any commonly accepted definition of terrorism in international law. Early counter-terrorism treaties focused on the criminalisation of particular acts, such as hijacking aircraft, without using the term terrorism. Later treaties, such as the International Convention for the Suppression of Financing of Terrorism,[19] do offer a definition, although this has no binding character beyond parties to the treaty.

Many states, as well as entities such as the European Union, define terrorism by reference to certain organisations "listed" as terrorist entities. This may hold particular dangers for the media in reporting the opinions and activities of such organisations, which they have a right to do. In their 2008 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation,[20] the freedom of expression mandate-holders of the United Nations (UN), the African Commission on Human and Peoples' Rights (ACHPR), the Organisation for Security and Co-operation in Europe (OSCE), and the Organisation of American States (OAS) stated:

> "The public has a right to know about the perpetration of acts of terrorism, or attempts thereat, and the media should not be penalised for providing such information."[21]

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[17] Johannesburg Principles above n 11 at Principle 2(a).
[18] UN Security Council, Resolution 1624 of 2005, (2005) (accessible at: http://unscr.com/en/resolutions/1624).
[19] International Convention for the Suppression of Financing of Terrorism, article 2(1) (1999)
[20] (2008) (accessible at: https://www.osce.org/files/f/documents/4/b/35639.pdf).
[21] *Id.*

The United Nations Special Rapporteur (UNSR) on counter-terrorism and human rights has offered a definition of terrorism, based upon best practices worldwide, which focuses on the act of terror rather than the perpetrator:[22]

> "Terrorism means an action or attempted action where:
>
> 1. The action:
>   a. Constituted the intentional taking of hostages; or
>   b. Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
>   c. Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
> 2. The action is done or attempted with the intention of:
>   a. Provoking a state of terror in the general public or a segment of it; or
>   b. Compelling a Government or international organization to do or abstain from doing something; and
> 3. The action corresponds to:
>   a. The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
>   b. All elements of a serious crime defined by national law."

Sometimes expression on its own is deemed a threat to national security — and these situations are addressed under incitement. For more detail on incitement, see Module 6 of this series on Hate Speech.

Terrorism and internet shutdowns

General Comment No. 34 on the ICCPR states that the media plays an important role in informing the public about acts of terrorism, and it should be able to perform its legitimate functions and duties without hindrance.[23] While some governments argue that internet shutdowns are necessary to ban the spread of news about terrorist attacks to prevent panic or copycat attacks, the UNSR on freedom of expression has instead found that maintaining connectivity may mitigate public safety concerns and help restore public order.[24] Indeed, in their 2011 Joint Declaration on Freedom of Expression and the Internet[25], the freedom of expression mandate-holders stated:

> Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or

[22] UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, 'Statement by the Special Rapporteur on the promotion and protection of human rights while countering terrorism at the International Seminar Terrorism and human rights standards: Santiago de Chile, Chile' (2011) (accessible at: https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11737&LangID=E).
[23] UN Human Rights Council, 'General Comment no. 34 at para 46 (2011) (accessible at https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf).
[24] UN Human Rights Council, '2017 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' at para. 14 (2017) (accessible at: https://www.undocs.org/A/HRC/35/22).
[25] (2011) (accessible at: https://www.osce.org/files/f/documents/e/9/78309.pdf).

national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.[26]

PRESCRIBED BY LAW

If national security is to be used to limit freedom of expression, the restriction must not only address a legitimate national security interest but must also be prescribed by law. The exact meaning of this has been an issue in several national security-related cases.

In *Shreya Singhal v. Union of India*,[27] the Supreme Court of India considered a constitutional challenge against section 66A of the Information Technology Act of 2000 by two women who had been arrested and charged under that section for Facebook comments in which they criticised the closure of Mumbai for a general strike (*bandh*) following the death of a political leader. Section 66A prohibited *inter alia* sending via a computer or other communications device information that is 'grossly offensive' or 'menacing', as well "information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device". The Court found the law to be overbroad and too vague to pass constitutional muster, reasoning as follows:

> In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.[28]

The Court found that the law was inconsistent with freedom of expression as guaranteed under Article 19 of the Indian Constitution and invalidated Section 66A in its entirety.[29]

The analysis of the Supreme Court in this case was similar to the analysis under international human rights law of whether a restriction on freedom of expression meets the tripartite test contained in Article 19(3) of the ICCPR. In cases of vague and overbroad provisions, as in *Shreya Singhal v. Union of India*, restrictions would fail to meet the requirement of being provided by law. The UN Human Rights Committee has found that:

> For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[30]

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[26] Adopted 1 June 2011.
[27] Writ Petition (Criminal) No.167 of 2012 (2015) (accessible at: https://indiankanoon.org/doc/110813550/).
[28] *Id.* at para. 83.
[29] *Id.* at paras. 98 and 119.
[30] UN Human Rights Comittee, 'General Comment no. 34', UN Doc CCPR/C/GC/34 (2011) at para. 25 (accessible at https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf).

Overbroad restrictions on national security grounds will likely also fail the requirement of proportionality, which is part of the requirement that restrictions be 'necessary' to protect a legitimate interest, such as national security.[31]

NECESSARY IN A DEMOCRATIC SOCIETY

Most cases involving national security restrictions tend to be decided based on necessity or proportionality. One area where restrictions may be deemed unjustifiable is if they are overbroad. Various courts have found that the burden is on the government to show that a restriction on freedom of expression is necessary and proportionate. Courts have also insisted that there must be a close nexus between the restricted expression and an actual risk of harm to national security or public order.

In *Tholal and Mahmood v. Maldives*,[32] the UN Human Rights Committee (UNHRCtte) considered an individual complaint from two citizens of the Maldives. The authors of the complaint were two of the commissioners on the Maldives Human Rights Commission, which had drafted a report on the human rights situation in the Maldives for consideration during the UN Human Rights Council's Universal Periodic Review of the Maldives.[33] The report that had, among other things, called into question the "independence, transparency, impartiality, competence, consistency and accessibility" of the Maldives' judiciary and suggested that the Supreme Court had weakened the powers of lower courts and exercised control over the judiciary.[34] Following the publication of the report, the Supreme Court of the Maldives initiated *suo moto* proceedings against the authors, alleging 20 unlawful acts, including acts against national security.[35] Ultimately, the Court ruled that the authors had violated the Constitution and Judicature Act after finding that they had "deliberately attempted to undermine the independence of the judiciary and the Constitution of the Maldives, and had encouraged acts that damage the Maldives' independence, sovereignty, constitutional system, peace and order."[36] The Court ordered the Commission to follow an 11-point set of guidelines in future operations.[37]

In considering the complaint, the UNHRCtte did not evaluate the truthfulness of the allegations in the Commission's human rights report. The UNHRCtte reasoned that, even if one were to assume the Supreme Court's allegations against the authors and order imposing guidelines for the Commission's future actions were provided by law and pursued a legitimate purpose, they nonetheless failed to meet the requirement of proportionality which was required for any restriction on freedom of expression.[38] In the proportionality analysis, the Committee relied on several factors, including the wide-ranging nature of the allegations and the impact they would have on the ability of the Commission to fulfil its mandate of raising human rights concerns, holding that the restriction did "not represent the least-intrusive instrument among those which might achieve their function of protecting peace and security".[39]

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[31] *Id.* at para 34.
[32] Communication No. 3248/2018, UN Doc CCPR/C/130/D/3248/2018 (2021) (accessible : https://ccprcentre.org/files/decisions/G2106296_(1).docx).
[33] *Id.* at para 2.2.
[34] *Id.* at para. 2.3.
[35] *Id.* at paras. 2.4 and 8.3.
[36] *Id.* at para. 2.8.
[37] *Id.* at para 2.9.
[38] *Id.* at paras. 8.4-8.10.
[39] *Id.* at para. 8.9.

One challenge with national security restrictions is that they are often worded so broadly that they can be used to target legitimate criticisms of the government. The foundational importance of freedom of expression for democratic governance and accountability and perils of constraining political discourse were articulated by the Sri Lanka Supreme Court in the 1992 case *Perera v. The Attorney-General and Others*:

> Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes the expression of one's ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the press and propagation of ideas, this freedom is ensured by the freedom of circulation. The right of the people to hear is within the concept of freedom of speech. There must be untramelled [*sic*] publication of news and views and of the opinions of political parties which are critical of the actions of the government and expose its weaknesses. Debate on public issues should be uninhibited, robust and widely open and that may well include vehement, caustic and sometimes sharp attacks on government.[40]

PRIOR RESTRAINT IN NATIONAL SECURITY CASES

There is a general presumption in international law against prior restraint of freedom of expression on the basis that it is unnecessary and disproportionate, and has a chilling effect on the enjoyment of this right. The European Court of Human Rights has found that the "dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court", especially when applied to the press in view of the 'perishable' nature of news, which loses value when delayed.[41]

Principle 23 of the Johannesburg Principles provides: "Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country."[42] This recognises that in cases of national security there may sometimes, exceptionally, be a need to prevent the dissemination of information prior to publication, but only in the very most serious public emergencies.

This was also the question that the United States Supreme Court confronted in *New York Times Co. v United States*,[43] better known as the "Pentagon Papers" case. The government sought prior restraint on publication of a large number of documents — 47 volumes of them — labelled "top secret" and leaked from the Department of Defense.

The documents detailed the decision-making leading to the United States' involvement in the Vietnam war and the government sought to prevent publication because of alleged damage to national security and relations with other countries.

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[40] 1992 1 Sri L.R. (1992) at p. 202 (accessible at: https://www.lawnet.gov.lk/joseph-perera-alias-bruten-perera-v-the-attorney-general-and-others/).
[41] *Observer and Guardian v. United Kingdom*, Application No. 13585/88 (1991) at para. 60 (accessible at: http://hudoc.echr.coe.int/eng?i=001-57705).
[42] Johannesburg Principles, above at n. 11.
[43] United States Supreme Court, Case 403 US 713 (1971) (accessible at: https://www.law.cornell.edu/supremecourt/text/403/713).

In a brief judgment rejecting the request for prior restraint, the Court drew on earlier judgments to note that prior restraint can only be allowed in extreme circumstances:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" … The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."[44]

Individual opinions by the judges elaborated on this reasoning. For example, Justice Hugo Black argued:

> "The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security..."[45]

National security is also frequently relied upon as a reason for justifying an interference with access to the internet, which is another form of prior restraint. While this may, in appropriate circumstances, be legitimate, it also has the potential to be relied upon to quell dissent and cover up state abuses and is always disproportionate when applied to an entire geographic area through an internet shutdown. (For more on this, see Module 3 of this series on access to the internet.)

The covert nature of many national security laws, policies and practices, as well as the refusal by states to disclose complete information about threats to national security, tends to exacerbate this concern.

CONCLUSION

National security remains a common justification offered by states for limiting freedom of expression by journalists, bloggers, and media organs. However, it is often used not to protect security but to quell dissent and cover up state abuses. Increasingly, courts are limiting the scope of application of national security laws as they are often vague and drafted with a view to circumventing constitutional checks and balances. Activists, lawyers, and members of the media should, however, remain vigilant and test all national security-related laws for compliance with international law, including the Johannesburg, Tshwane and Siracusa Principles.

[44] *Id.*
[45] *Id.*