

ANTI-TERRORISM MEASURES AND HUMAN RIGHTS; FINDING A BALANCE

The US Austin Texas government website defines terrorism as the unlawful use of force or violence against persons or property to intimidate or coerce a government or its citizens to further certain political or social objectives¹. According to the OSCE², there is no set definition for terrorism. The definition by the Texas government comes close to terrorism as we know it.

There are several causes of terrorism including political and social reasons therefore it is not easy to predict when or where a terrorist organization may emerge. It is also not easy to combat and prevent terrorism without affecting the human rights of people. Nevertheless, the United Nations has made it clear that in combating and preventing terrorism, despite difficulties faced, states must **never** do away with or forget to uphold human rights. Regardless of the challenges faced, human rights must always be **prioritized**.

It is becoming clear that terrorism, and measures adopted to combat terrorist acts, are both influenced by and have a great impact on the enjoyment of economic, social and cultural rights, as well as on civil and political rights. The links between counter-terrorism measures and economic, social and cultural rights were highlighted by Member States through the adoption of the Global Counter-Terrorism Strategy and Plan of Action, by the General Assembly in resolution 60/288 and reaffirmed in resolution 62/272. Member States reaffirmed that the promotion and protection of all human rights for all, as well as respect for the rule of law are essential to all components of the Global Counter-Terrorism Strategy. They recognized that effective counter-terrorism measures and the protection of all human rights are not conflicting goals, but complementary and mutually reinforcing³.

¹ <https://www.austintexas.gov/faq/what-terrorism>

² Countering Terrorism, Protecting Human Rights: A Manual published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) OSCE/ODIHR 2007

³ Resolution adopted by the General Assembly on 17th December 2018, A/RES/73/174, 73rd session, Agenda Item 74(b) pg 2

All states present agreed⁴ that ignoring human rights can itself contribute to terrorism and provide conducive ground for the recruitment of terrorists. Acts such as “...prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance ...” could all contribute to promoting terrorism.

Human rights are governed and protected by several international and regional covenants that provide guidance to states in handling the human rights of their citizens and of foreigners such as the Universal Declaration of Human rights, the International Covenant on civil and political rights, the International covenant on economic, social and cultural rights, the American convention on human rights, the African charter on human and people’s rights and the European convention for the protection of human rights and fundamental freedoms. Many states have; as members of the United Nations⁵ and members of several covenants committed to protect human rights recognizing that it is a vital and important element of the fight against terrorism.

Despite several treaties and covenants providing guidance on the preservation of human rights in the fight against terrorism there are several questions that still remain unanswered and continue to create problems for states in the fight against terrorism. These issues arise especially when it comes to protecting the human rights of all parties that are sometimes in conflict such as the freedom of expression and freedom of religion. An analysis of efforts made to protect freedom of expression and to protect the public good especially shows how this problem usually plays out in international law.

Most recently the most controversial and heated debates have been around the extent to which freedom of expression can be limited for the public good especially with regard to the

⁴ Resolution adopted by the General Assembly on 17th December 2018, A/RES/73/174, 73rd session, Agenda Item 74(b)

⁵ Adoption of the United Nations Global Counter-Terrorism Strategy by the General Assembly, resolution 60/288

prevention of terrorism. The beheading of a French school teacher⁶ in October 2020 by an 18 year old Islamist terrorist brought this debate back to the forefront. School teacher Samuel Paty was attacked and beheaded by 18 year old Abdullakh Anzorov a Muslim Russian refugee living in France. Paty was attacked for showing his students two cartoons of Muhammad, one of which portrayed Muhammad naked during classes on freedom of expression. In the Sunni sects of Islam, any depiction of Muhammad is considered blasphemous. Paty was also accused of disseminating pornography because of the nude image of Muhammad that he is said to have showed his students. French president Emanuel macron said the incident was “a typical Islamist terrorist attack” and that “our compatriot was killed for teaching children freedom of speech” However, he later said that he did understand Muslim outrage over the cartoons.

The cartoons Paty showed his class were the same cartoons published by a French newspaper called Charlie Hebdo in 2012⁷ which led to the deadly shootings at the newspaper’s offices by terrorists in 2015.

Charlie Hebdo a French newspaper has always had controversy with regard to their content and tensions especially with Muslims. In 2006, the magazine published a cartoon that depicted Muhammad with a bomb. Muslims were offended by the image of Muhammad and felt too that it portrayed Muslims as terrorists as Mohammed is a revered prophet in Islam and considered a representative of Islam. There was wide spread outcry amongst Muslims in several states.

The cartoons were viewed by many Muslims as provocative in nature⁸ and French President at the time Jacques Chirac condemned “overt provocations” which could inflame passions. “Anything that can hurt the convictions of someone else, in particular religious convictions, should be avoided,” Chirac said.

⁶ Anthony Paone (16 October 2020) “For a teacher in France, a civics class was followed by a gruesome death” Reuters find comments in https://en.m.wikipedia.org/wiki/Charlie_Hebdo

⁷ “Charlie Hebdo publie des caricatures de Mahomet” BMFTV. Retrieved 19 September 2012 in Wikipedia https://en.m.wikipedia.org/wiki/Charlie_Hebdo

⁸ Culte Musulman et Islam de France, CFCM TV. 22 March 2007 find it in https://en.m.wikipedia.org/wiki/Charlie_Hebdo

However, the supporters of Hebdo thought different and argued that it was the exercise of freedom of expression and the right to criticize even religions. When the Grand Mosque and the Union of French Islamic organizations sued⁹ the magazine that published the cartoons 'Charlie Hebdo' saying the cartoons were racist in nature and labeled Muslims terrorists, The future French President at the time Nicholas Sarkozy sent a letter¹⁰ to court expressing his support for the ancient French tradition of satire and the magazine's right to criticize. Court held that the cartoons were not an attack on Islam but on Muslim terrorists and that the cartoon that depicted Mohammed with a bomb in his turban should be seen in the context of the magazine which attacked religious fundamentalism.

Scenarios like this show the importance of taking the challenge that courts and authorities face in upholding human rights and preventing terrorism.

It has been recognized that expression can lead to provocation of specific groups and lead to terrorist activity in the defense of one's origins and beliefs. On the other hand freedom of expression is a human right that should be protected from tyrants and from absolutism; people must remain free to criticize or to disagree with a principle or theory.

There is nothing wrong with stating one's misgivings concerning a religion, however using sacred persons and items revered in that religion can turn legitimate criticism in to provocation. To make fun of something that others hold dear, changes the purpose of the criticism and can very quickly turn in to a form of bullying and provocation. While protecting certain rights we must make sure that the rights of others too are protected as this can very well create breeding ground for terrorism.

True to this following the ruling, the magazine's office was attacked¹¹ and its website hacked. And several other attacks followed as the magazine continued undeterred to publish cartoons

⁹ Mosque of Paris v Val (2007)

¹⁰ "Caricatures: Le soutien de Sarkozy a Charlie Hebdo fache le CFCM". TF1 News. 15 December 2011. Archived from the original on 5 December 2011, retrieved from Wikipedia 29 December 2020 https://en.m.wikipedia.org/wiki/Charlie_Hebdo

¹¹ Boxel, James (2nd November 2011). "Firebomb attack on satirical French magazine". Financial Times. Retrieved 19 September 2012, find comments in Wikipedia https://en.m.wikipedia.org/wiki/Charlie_Hebdo

depicting Mohammed. Much as the attacks were not right and can never be condoned, there was in my view a grievance here that should have been addressed.

In a sense the attack on Mr. Paty was a resurfacing of this matter too. Both sides held legitimate concerns. The Muslims were worried that freedom of expression can be used to provoke them and to trample on their religious rights in the name of critical thought; it could also be used to create ground for discrimination against Muslims. Those in support of freedom of expression did express legitimate worries. What were the limits to terrorism, what were the limits to what could be considered provocation? If every timed criticism was meted out would it lead to an angry reaction from those offended by it?

It has been difficult to find a one size fits all solution to this. But International Law has tried as much as possible to cater for these interests through laws, conventions and case law a case in point, the provision for the right of freedom of expression.

The International Covenant on Civil and Political Rights with binding force provides for freedom of expression under Article 19 and states that

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.

In addition, regional bodies have gone as far as to ask member states to make incitement to terrorism a crime. Incitement to terrorism can in this case apply too to publications that are

meant to provoke or cause a violent reaction from a section of the population. For example¹², although none of the universal terrorism-related conventions explicitly requires the prohibition of incitement to terrorism, the Council of Europe's Convention on the Prevention of Terrorism requires States parties to criminalize the unlawful and intentional public provocation to commit a terrorist offence, defining this as "...the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed" (art. 5 (1)). The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has expressed the view that this provision represents a best practice in defining the proscription of incitement to terrorism.

The Human rights council in 2009¹³ at the UN General Assembly meeting also recommended that when adopting exceptional counter-terrorism measures, including measures in the framework of states of emergency, in particular long-standing ones, States must pay particular attention to their impact on human rights, in particular economic, social and cultural rights. These can have a particularly damaging effect on vulnerable communities, including the potential risk of leading to radicalization.

Counter-terrorism measures must be adopted in compliance with the obligations of States under international human rights law, humanitarian law and refugee law. These measures must be adequate, proportionate, reasonable, non-discriminatory, non-arbitrary, effective and justified, and they must not overly affect the enjoyment of human rights, particularly of groups most vulnerable to human rights violations, such as indigenous people, minorities, migrants, women and children.

¹² Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No.32

¹³ Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Human Rights Council, Twelfth session, Agenda item 3, UN General Assembly A/HRC/12/22, 2 September 2009

In Europe, courts¹⁴, in assessing the interference with the freedom of expression have used the three-part test, which is also used in cases concerning Articles 8, 9 and 11 of the European Convention on Human Rights. According to Article 10, paragraph 2 of the Convention provides that, domestic authorities in any of the contracting states may interfere with the exercise of freedom of expression where three cumulative conditions are fulfilled:

1. the interference (meaning “formality”, “condition”, “restriction” or “penalty”) is prescribed by law;
2. the interference is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary;
3. The interference is necessary in a democratic society.

Despite these conditions being helpful they are still generalized and still create questions in individual cases as to how they should be applied as with other international laws on freedom of expression. This problem is faced around the globe by several countries when attempting to apply their own regional conventions or existing international law. European court decisions have helped to provide great examples and guidelines that can be followed when handling cases on freedom of expression.

A number of cases have provided guidelines on how to handle matters on freedom of expression and have shown what factors courts usually consider in determining whether the limitation of freedom of expression in specific cases was warranted¹⁵. Courts have considered several factors including the time, context and intended audience of the publication, amongst others. There is no one size fits all but this has greatly given guidance on specific matters.

¹⁴Cases got from Dominika Bychawska-siniarska, Protecting the Right to Freedom of Expression under the European Convention on Human Rights, A Handbook for Legal Practitioners, Council of Europe

¹⁵Ibid.,14

In the case of *Leroy v. France*¹⁶ for instance, in 2002, the French cartoonist was convicted of complicity in condoning terrorism because of a cartoon published in a Basque weekly newspaper, *Ekaitza*. The Court noted that the tragic events of 11 September 2001, which were at the origin of the impugned expression, had given rise to global chaos, and **that the issues raised on that occasion were subject to discussion as a matter of public interest**. However, the Court considered that the drawing was not limited to criticism of US imperialism, but supported and glorified the latter's violent destruction. It based its finding on the caption which accompanied the drawing and noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his **choice of language**, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims, as he had submitted his drawing on the day of the attacks and it was published on 13 September, with no precautions taken on his part as to the language used. In the Court's opinion, this factor – **the date of publication** – was such as to **increase the cartoonist's responsibility in his account of, and even support for, a tragic event**, whether considered from an artistic or a journalistic perspective. Also, the impact of such a message in a **politically sensitive region**, namely the Basque Country, was not to be overlooked. According to the Court, the cartoon had **provoked a certain public reaction capable of stirring up violence** and demonstrating **a plausible impact on public order** in the region.

In *Wingrove v. the United Kingdom*¹⁷, the British Board of Film Classification refused to give a classification certificate to a video work entitled *Visions of Ecstasy*. The film depicted a youthful actress dressed as a nun – intended to represent St Teresa of Avila, the sixteenth century Carmelite nun and founder of many convents – who had experienced powerful ecstatic visions of Jesus Christ. The Commission concluded that the British Board of Film Classification's refusal of a classification certificate was unnecessary in a democratic society to protect against insult to religious feelings. In the Commission's view, **the context** of prior restraint meant that

¹⁶ *Leroy v France* 36109/03 ECHR [2008], also in *Ibid.*,14

¹⁷ *Wingrove v The United Kingdom*, 19/1995/525/611, Council I of Europe: European Court of Human Rights, 25 November 1996, available at: <https://www.refworld.org/cases,ECHR,3ae6b6900.html> [accessed 28 December 2020] also in *Ibid.*,14

particularly compelling reasons were needed to justify restriction “based on speculation by the competent authorities that a section of the population might be outraged.” It was relevant that it was not a feature film and **would not be on display to the general public**; and that the board could have restricted circulation to those over 18.

The Court overturned the Commission’s decision in this case. It felt itself unable to rule that the offence of blasphemy violated Article 10. It decided that: whereas there is little scope under Article 10 para.2 ...for restrictions on political speech or on debate of questions of public interest,... a wider margin of appreciation is generally available to the 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.**

In *Jersild v. Denmark*¹⁸, the fact that an interview containing racist statements was carried in a serious news program was significant since **the program was designed to inform a serious audience about events in the community or from abroad.**

In *Couderc and Hachette Filipacchi Associes v. France*¹⁹, the Court found that articles describing an extra-marital child of Prince Albert Grimaldi, due to their **tone appeared to be measured and non-sensationalist** and therefore were granted protection under Article 10.

In *Open door and Dublin well woman v Ireland*²⁰ The use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression. Opinions expressed in strong or exaggerated language are also protected; the extent of protection depends on the context and the aim of the criticism.

The criteria emboldened here highlight some useful pointers that can be considered when dealing with sensitive material including those concerning religion.

¹⁸ *Jersild v Denmark* 15890/89 ECHR 20 OCT 1994 also in *Ibid.*,14

¹⁹ *Coudec and Hachette Filipacchi Associes v France* [2015] ECHR 992 (10 November 2015), also in *Ibid.*,14

²⁰ *Open Door and Dublin Well Woman v Ireland*, 64/1991/316/387-388, Council of Europe: ECHR, 23 September 1992 also in *Ibid.*,14

Despite the generalized nature of international law as it stands right now, court decisions have provided a lot of clarity on specific matters and have also shed light on the areas of debate and the areas that require serious thought and conclusive discussion.

In addition to the above cases, there are cases²¹ that have especially helped to establish a clear pattern and trajectory for future decisions in international law concerning freedom of expression. With the help of these cases, the debate is no longer ambiguous with regard to the right of freedom of expression and the areas of contention more defined. The trajectory of the cases shows development in thought and appreciation of the issues on the table. It gives hope that all parties involved when it comes to the issue of freedom of expression and religious or moral matters may soon at the very least agree on certain principles that must always be upheld and kept in mind.

In *Wingrove v the United Kingdom*²² decided that: whereas there is little scope under Article 10 para.2 of the European Convention on Human Rights...for restrictions on political speech or on debate of questions of public interest,...a wider margin of appreciation is generally available to the 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.

Judge Lohmus highlighted the need for caution. He rightly observed in a dissenting opinion that: the Court makes distinctions within Article 10...when applying its doctrine on the States' margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation.

In this judgment, the court recognized the need for the right to religion to be respected. Too little restriction on freedom of expression may infringe on freedom of religion and affect the rights of others to identify with their beliefs and to be protected from persecution because of it.

²¹ Ibid.,14

²² *Wingrove v The United Kingdom*, 19/1995/525/611, Council I of Europe: European Court of Human Rights, 25 November 1996, available at: <https://www.refworld.org/cases,ECHR,3ae6b6900.html> [accessed 28 December 2020] also in Ibid.,14

There have been signs of shift of attitude within the Court in respect of artistic freedom and the wide margin of appreciation left to states²³. In *I.A. v. Turkey*²⁴ In the Court's judgment, the majority followed the reasoning in the *Wingrove* case. It allowed Turkey a wide margin of appreciation because "believers may legitimately feel themselves to be the object of unwarranted and offensive attacks" and there was a pressing social need to provide "protection against offensive attacks on matters regarded as sacred by Muslims." But the powerful joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert referred to the passage in *Handy* side that recognized that Article 10 of the European Convention on Human Rights protects information and ideas that "shock, offend or disturb the State or any sector of the population". They stated that "these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court" and that "a democratic society is not a theocratic society". The dissenting judges were not persuaded by the precedent in the *Wingrove* case, concluding that "the time has perhaps come to 'revisit' this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press"

The case of *IA v Turkey* showed the reservations that many have towards a blanket restriction on freedom of speech especially when it comes to matters like religion. It showed the worry others have that their own rights may be infringed upon, namely the freedom to criticize and to disagree with principles they don't believe in. In short their freedom of religion too, freedom of association, and freedom of expression amongst others.

What these two cases; *Wingrove v The United Kingdom* and *IA v Turkey* show is the need for tolerance, the need to protect the sacred beliefs of others but at the same time the need to protect the rights of every one to object and to criticize and express their views on things that they do not agree with.

²³ *Ibid.*,14

²⁴ *IA v Turkey*, 42571/98 [2005] ECHR 590 (13 September 2005) also in *Ibid.*,14

The case of *Otto-Preminger-Institut v Austria*²⁵ highlighted this very well and created good precedent for the principle of tolerance.

In *Otto-Preminger-Institut v. Austria* court held that; the right to respect for religious feelings is part of the right to freedom of thought, conscience and religion provided in Article 9 of the European Convention on Human Rights. Looking at the legitimacy of this aim, the Court held: those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9...to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. The respect for the religious feelings of believers as guaranteed in Article 9 ... can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10...in the present case must be in harmony with the logic of the Convention.

Further, the Court referred to the duty to avoid “expressions that are gratuitously offensive to others ... which ... **do not contribute to any form of public debate capable of furthering progress in human affairs**”

The dissenting judges too agreed that the need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted **if the behavior concerned reaches so high a level of abuse, and come so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.**

²⁵ *Otto-Preminger-Institut v Austria*, (13470/87) [1994] ECHR 26 (20 September 1994) also in *Ibid.*,14

...However, they noted that in this case ... the film was to have been shown to a paying audience in an “art cinema” which catered for a relatively small public with a taste for experimental films. It is therefore unlikely that the audience would have included persons not specifically interested in the film. This audience, moreover, had sufficient opportunity of being warned beforehand about the nature of the film.

...It appeared that there was little likelihood in the case of anyone being confronted with objectionable material unwittingly. Thus they dissented and reasonably so, on the basis that the applicant association acted responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film.

These arguments are very important and very relevant especially for the prevention of terrorism. They show too the potential for agreement, growth and organization that exists when attempting to uphold and protect human rights that seem to conflict. The debate in France this year concerning the fight against terrorism and the acceptable limits to freedom expression for instance does not have to be an endless clash. With measured, logical and systematic thought, stakeholders can by peaceful means agree on principles to be followed and relied on for future prevention of terrorism and protection of human rights in the country.

Everyone must always remember that attacks on the freedom of others can contribute to terrorism.

Attacks on the freedom to practice one’s religion can contribute to terrorism. The Human Rights Council at the UN General Assembly in 2009 stated that the social stigmatization of religious, ethnic, or political groups seen as supporting terrorism creates a culture of fear. This limits the enjoyment of economic, social and cultural rights of members of those groups. The ensuing discrimination in access to employment or housing especially impacts on vulnerable groups, such as migrants and minorities, and has a direct impact on escalating poverty. These conditions lead to anger in communities and create ripe ground for radicalization and recruitment in to terrorism.

In addition thought must be given to the people who do not identify with a religion too. Excessive restriction on their freedom of expression could result in the formation of hate groups and the feeling that their rights don't matter.

Identifying the conditions conducive to terrorism could help in formulating the measures to counter them, without creating adverse effects on the enjoyment of economic, social and cultural rights²⁶. Ultimately in the fight against terrorism and the protection of human rights all parties should be willing to sacrifice a little of their freedom and enjoyment if it will go a long way in establishing understanding and creating meaningful bonds and unity against terrorism. Parties should be willing to dialogue and to accommodate the needs of others, keeping in mind and protecting what is most important; fundamental rights.

²⁶ Human Rights Council, Protection of all Human Rights, Civil, Political, Economic, social and cultural rights, including the Right to Development, Twelfth Session, Agenda Item 3, UN General Assembly, A/HRC/12/22, 2 September, 2009