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Freedom of speech and the Asia Pacific: does Charlie Hebdo go too far?

I. Introduction

- Freedom of speech is not an absolute right. It needs to be balanced and restricted. In many legal systems, there are laws that limit censorship, laws that protect reputation, trade secrets and intellectual property rights, laws that regulate advertisements and pornography, laws that set broadcasting standards, laws that enforce confidentiality agreements and laws that regulate political protests.
- This lecture focuses on the prohibition of speech that promotes hatred on religious and racial grounds. This limit of freedom of speech is often justified by racial harmony, an increasingly important social value to multiracial, multicultural and multi-religious nations.
- The United Nations estimated that around 60 million people are displaced and fleeing their own countries because of conflict, persecution and poverty. Racial harmony thus is critical to the global order in an inter-connected world.
- In the Asian region, racial harmony has long been considered fundamental to peace and good governance

II. Charlie Hebdo and the freedom of speech

- The proper limit of the freedom of speech is tested by the Charlie Hebdo incident. The newspaper published several cartoons about Mohammed that were offensive to Muslims. It is typical of Charlie Hebdo to satirise political subjects.
- The legal question the speaker would like to explore is whether cartoons such as those published by Charlie Hebdo and various controversial cartoonist should be protected by the notion of the freedom of speech or should it be restricted in the interest of racial and religious harmony
- France's law prohibits insults, incitement of hatred, discrimination or violence on the grounds of race or religion.
- In a 2007 case brought by the Grand Mosque of Paris against Philippe Val, the editor of Charlie Hebdo, the French court decided that a controversial cartoon depicting Mohammed wearing a bomb as his turban is valid under French law. The court said that the cartoon only insulted violent Muslims, and in a secularist and pluralist society like France, the respect of all religion goes hand in hand with the liberty to criticise any religion¹.
- One might, however, question the validity of such reasoning. The cartoon appears to link extremist terrorism with Islam, and suggests that all Muslims are prone to violence.
- The case nonetheless shows the French community's commitment to the protection of the freedom of speech and the freedom of press.

¹ See, for instance, "French cartoons editor acquitted", BBC, 22 March 2007. Available at: <http://news.bbc.co.uk/2/hi/europe/6479673.stm>

- The Charlie Hebdo killings divided the global response. While some argue that racial and religious hate speech should be restricted, some believe that there should be no prohibition on hate speech at all.
- At the political level, calls for the prohibition of hate speech appear to be growing. The UK Labour Party has called for the outlaw of language that is offensive to Muslims; Russia has passed laws to prohibit Nazi propaganda; the London declaration bans anti-Semitism; the organization of Islamic conference has recently called for the creation of global blasphemy laws; the Australian attorney general recently stated that he believes terrorist propaganda is the greatest threat against Australia. He advocated for further legislation and the monitoring of people who may advocate terrorism on social media sites.

III. Origins of freedom of speech

- The father of liberalism John Locke influenced the adoption of the freedom of speech in the 1st amendment of the American constitution. It is the first constitutional protection of this right and the freedom of speech is clearly seen as vital to democratic governance and the rule of law. The freedom of speech is subsequently adopted in the constitutions and legislations of many other nations.
- The common law courts have developed free speech jurisprudence on a case by case basis.
- The international community through the United Nations gave effect to the freedom of expression through the 1949 Universal Declaration of Human Rights. Subsequently in the 1966 International Covenant on Civil and Political Rights ("ICCPR") the freedom of expression was expanded. Article 19 of the ICCPR provides –

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 respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

- The general test for limiting freedom of speech is that the limitation has to be reasonable, necessary and proportionate as a means of achieving a legitimate objective.
- In addition, article 20 of the ICCPR provides –
 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.
- These words are given further weight in the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”). The ICERD condemns promotion of racial hatred and racial superiority. It is interesting to note, however, that when the ICERD is implemented into domestic legislations, it is seldom specifically mentioned that the ICERD aims to prohibit racial hatred as well as religious hatred.
- But most courts, at least within common law jurisdictions, have seen it in that way. Canada’s former Chief Justice Dickson stated that states have the obligation to prohibit racist propaganda that undermines the dignity and self-worth of target groups and contribute to the disharmony among racial, cultural and religious groups.
- Many countries have enacted and retained anti-blasphemy laws that prohibit speech that insults religion. There is no such provision in international law, but the international community will endorse such laws if it is necessary, proportionate, and reasonable and does not favor one religion over another.
- Blasphemy laws cannot be used to prevent criticism of religious leaders or commentaries on religious faith. Such laws, for example, is used in Pakistan to harass religious minorities in a way that clearly breaches article 20 of ICCPR.
- The Australian Human Rights Commission have advocated for the abolishment of Australia’s blasphemy law because it only protects the Christian religion but no others.

IV. An Asian approach to the protection of freedom of speech

- The speaker wish to explore China, Indonesia, Malaysia, Singapore and Australia’s approach to the protection of freedom of speech, in particular how these jurisdictions might respond to the cartoons that spark the Charlie Hebdo killings.
- This question is worth exploring because of the exceptionalist approach to human rights within the Asian region. Unlike Europe, Africa, Latin America and the Arab nations, there is no regional charter of human rights nor is that any commission or regional courts to develop a regional human rights jurisprudence.
- The closest agreement that amounts to a human rights declaration in the Asian region is the ASEAN Human Rights Declaration (“ASEAN” Declaration). Article 23 of the Declaration provides –

23. Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.

- What is unusual about the ASEAN Declaration is that it has also set out a rather broad limitation on human rights through article 7, which provides that the regional context and in particular the social, cultural, historical and religious background of a nation are legitimate reasons for the limitation of human rights:

[...] the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

- We are not sure how the ASEAN Declaration is going to play out. For one thing, the ASEAN Declaration has been much criticized and is not legally binding.
- But the Universal Declaration of Human Rights is not legally binding as well, and is aimed, and succeeded, at creating a normative order for the protection of human rights.
- The speaker believes that the ASEAN Declaration is a significant step forward for the region to collaborate and agree upon the core principles of human rights despite the wide exceptions.
- Constitutions, legislations, and jurisprudence developed by the court tell a very small story as to exactly how human rights are given effect in a country, because human rights depend very much on the cultural and normative expectations of communities. The best way to understand how human rights play out is to observe at a local level.
- As a generalization, Asian countries almost uniformly protect freedom of speech on a constitutional level, but there are often broad restrictions on free speech justified on the interest of state. Sedition law, for instance, is used to control political speech.

V. Charlie Hebdo in Asia

- Were the Charlie Hebdo cartoons to be published in Asia, China, Hong Kong and Australia are likely to ask if the cartoons are discriminatory on the grounds of race or religion, whilst many SE Asian countries, in part China as well, are likely to prosecute on the basis of laws that prohibits religious insults and protects national security and harmonious relations.
- Hong Kong prohibits racial abuse through the Race Discrimination Ordinance ("RDO"), though the RDO is not used very often and it is not entirely clear if it applies to religious discrimination. The Equal Opportunities Commission's website states that religion is not a race under the RDO. This position is the exact opposite

of that taken up by many other jurisdiction where racial discrimination is seen as including religious discrimination.

- Indonesia's constitution guarantees the right to express opinions subject to respect of the rights of others and considerations of morality, public order and security in a democratic society. But to insult a major religion would attract a 5 year prison term under Indonesian law. The chief editor of the Jakarta Post was prosecuted last year under Indonesia's blasphemy laws for publishing a cartoon that mocked the Islamic State (ISIS)².
- Under the constitutions of Malaysia and Singapore, the freedom of speech is guaranteed. At the same time sedition tendencies that are prejudicial to the state is criminalized. Under their respective Sedition Acts, Malaysia and Singapore prohibit speech that promotes the feelings of ill will and religious hostility between races and classes of a population. The sedition provisions are rarely invoked in Singapore but are quite frequently employed in Malaysia. For example, the cartoonist Zunar was prosecuted for publishing a cartoon that criticized the sodomy trails of opposition leader Anwar Ibrahim³.
- The Chinese constitution protects the freedom of speech and the freedom of press, so long as it does not infringe the interests of the state, the collective, or the freedom and rights of others. Anti-discrimination laws apply to ethnic groups but not religion. The primary focus seems to be national security, and it is on the basis of national security that speech that incites ethnic tension is prohibited.

VI. Charlie Hebdo in Australia

- Australia, interestingly, has no formal protection for the freedom of speech. But it is at least arguable that it has stronger practical protection for the freedom of speech in the day to day lives of most Australians. It is not the constitutional or legislative protections that are important, but rather the normative culture within the community that insist the freedom of speech and other freedoms are protected. Australia is almost entirely alone among other common law systems in that it has no express constitutional protection for most human rights. The one exception is that there are provisions for religious freedom in Australia but the purpose of that provision was to prevent any religion from ever being establish in Australia rather that to protect an individual's right to religion. There is also the right to vote and the right to be compensated if one's property is taken by the government. Moreover, Australia does not have any human rights legislation, hence most of the human rights treaties that Australia is a party to has never been implemented into domestic laws,

² See, for instance, "*Indonesian news editor accused of blasphemy over Isis cartoon*", the Guardian, 12 Dec 2014. Available at: <http://www.theguardian.com/world/2014/dec/12/indonesian-news-editor-accused-blasphemy-isis-cartoon>

³ See, for instance, "*Malaysian cartoonist Zunar arrested for criticising Anwar Ibrahim ruling*". The Guardian. 11 Feb 2015. Available at: <http://www.theguardian.com/world/2015/feb/11/malaysian-cartoonist-zunar-arrested-for-criticising-anwar-ibrahim-ruling>.

- Australia has created a regime for the protection of human rights that is essentially administrative and parliamentary rather than constitutional and legislative. The protection of human rights lie in the parliament. The problem of that arrangement is that if all major parties agree upon a legislation that infringes upon human rights, courts are bound to apply that legislation because of parliamentary sovereignty. There are no benchmark against which a lawyer can go to court and say “What about the bill of rights or the constitutional provision?”
- However there has been a tendency to rely on the common law. The Australian high court has implied a right to freedom of political communication. But the freedom of political communication is not entirely equivalent to the full right of the freedom of expression. For one thing, the freedom of political communication is rooted in the right to vote in Australia’s constitution.
- While the freedom of speech is implied and protected by the common law principle of legality in Australia, parliament can always override that freedom by enacting laws that are clear and unambiguous. The Australian parliament have recently passed laws that restrict the freedom of speech. Several of them are promoted by the rise of global terrorism.
- Australia has had an unprecedented debate on the context of the Racial Discrimination Act (“RDA”). In 1995, the then government introduced a new section: the notorious section 18C and 18D. Section 18C(1) provides that provides -
 - (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- And section 18D outlines the exemptions of section 18C:
 - Section 18C does not render unlawful anything said or done reasonably and in good faith:
 - (a) in the performance, exhibition or distribution of an artistic work; or
 - (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
 - (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.
- Section 18C and 18D were introduced at the express request of the Jewish, Italian, Greek, Vietnamese and Chinese community following a report of the Law Reform Commission on multiculturalism. The amendment is supposed to reflect the deep concern within the Australian community that there needs to be some form of protection against racial hate speech.

- The law is rarely prosecuted. One may see the provision as one of the rare legislative protection of the freedom of speech that comes in a negative with the exceptions set out in 18D.
- Reforms were promoted by the case *Eatock v Bolt* [2011] FCA 1103, (2011) 197 FCR 261. Andrew Bolt, a famous news commentator, was found by the Federal Court of Australia to have acted unlawfully in reporting that fair skin aboriginals have abused their identity as aboriginals in obtaining welfare benefits and grants. The court found Bolt breached section 18C and that exemptions under section 18D and the freedom of expression would not exonerate Bolt from a successful prosecution. Bolt could not enjoy the benefits of free speech because he did not act reasonably nor did he act in good faith. His report was neither fair nor journalistically accurate. In other words, his freedom of speech was restricted because his journalism was considered by the court as an abuse of that right.
- The Media see the decision as an attack on the freedom of press and political commentary. The newly elected government declare during its election campaign that it would repeal section 18C. The public and the political response is unprecedented and highly divisive. The prime minister and the attorney general stated that the speech was insulting and offensive, but the prosecution put the threshold too low, and that Austrians have no right to be protected against mere insult or attack.
- The Australian Human Rights Commission plays an important role in the repeal and reform process because the commission has a clear idea of the importance of the statutory provisions. One of the main function of the commission is to handle complains, and handling complains allows the commission to understand what is troubling ordinary Australians in terms of their human rights.
- 10 – 15% of the complaints handled by the commission concern racial and religious abuse in public places, such as the workplace, shopping centres and public transport.
- In *Coleman v Power* [2004] HCA 38, (2004) 220 CLR 1, the former Chief Justice Gleeson gave an hypothetical example of a mother who took her children to the park was exposed to insult, threats and abuses because of the status as immigrants. He asked, at paragraph 32: "Why should the family's right to the quiet enjoyment of a public place necessarily be regarded as subordinate to the abusers' right to free expression of what might generously be described as a political opinion? The answer necessarily involves striking a balance between competing interests, both of which may properly be described as rights or freedoms." This has been the opinion of Australian courts, invariably supporting artistic and journalistic works even when they are insulting and offensive.
- In practice, however, it is not easy to strike that balance. Man Haron Monis, the man behind the recent Sydney hostage crisis, was known to the authorities for his strong religious views. Manos objected to Australia's involvement in the war in

Afghanistan, and had written offensive letters to the families of Australians who was killed in the war. He was charged and convicted. In his appeal to the Australian High Court, the judges were divided in 3-3 as to whether his letters were so offensive that they should attract the censorship of the law. This case demonstrates that even the finest legal minds in Australia are unable to agree upon a legal standard on the question.

- When the Australian government sought to amend and appeal section 18C of the RDA, the Australian Human Right Commission suggested that words that are more precious, such as vilification, can be adopted to instigate a higher threshold. This proposal was, rather extraordinarily, rejected by the Australian. Australians asserted that section 18C is absolutely vital and underpins the multi-cultural nation. The public response was respected by the government and the proposal to amend and appeal the RAC was withdrawn.
- It shows that core human rights and freedoms depend on the community's expectation and commitment to those principles. The community must normatively accept human rights provisions if they are to be effectively maintained.

VII. Conclusion

- Would the Charlie Hebdo cartoons be protected on the basis of freedom of speech in the Asian region? The cartoon would probably not survive the various religion laws that prohibits insults on religious and racial harmony. Expressions that are deeply offensive on religious and racial grounds would be prosecuted in the Asian region.
- For Australia, the cartoon would probably be found to be deliberately offensive and does not constitute fair comment. But it is more likely that section 18D of the RAC would protect artistic freedom so long as it is produced in good faith.
- The Asian region should work together, possibly through instruments such as the ASEAN declaration, to establish a regional human rights jurisprudence.
- Education and cultural commitment to human rights is also vital.