

Study on the prohibition of incitement to national, racial or religious hatred:
Lessons from the Asia Pacific Region

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A. Introduction:

The Asia-Pacific region covered by this study consists of some 60 countries and territories¹ stretching from the outer reaches of the Pacific ocean to the geographic ridges-and-bridges between Asia and Europe, from the smallest island nations with vast expanses between their shores to some of the most densely populated and populous countries on earth, from the world's biggest democracies to the globe's most precarious and cloistered situations. The word "heterogeneity" aptly comes to mind to describe the varied physiognomy of the setting, and it applies to the political, economic, social, cultural and legal context of the region with transnational implications.

Like other parts of the world, this region is faced with the issue of freedom of expression and related constraints as a key test for the realization of human rights today. It is at times challenged by illiberal tendencies which strain the social and cultural nexus between different groups and individuals, leading to disrespect and intolerance and regrettably culminating in tensions and conflicts. Yet, it should not be forgotten that the roots of human rights also originated in the region. Three of the major world religions – Christianity, Islam and Judaism – were all born in the western part of Asia, and Buddhism, Hinduism and the many philosophies found in other parts of the region preach peace and kindness, with a universal commitment to human life and empathy/sympathy for other persons beyond oneself as a value to be nurtured and cherished.

From the formal angle of standard setting and exposition through treaty-making, it is true that unlike in other regions of the globe, there is no regional Convention formulated by Governments to establish a human rights protection system for the Asia-Pacific region. However, this should not overlook gradual and graduated inputs of increasing magnitude which are supportive of human rights. In principle, as will be seen below, many countries have national laws, such as Constitutions, which advert to elements of human rights, with various guarantees for individuals and communities. Nearly 20 countries have set up national human rights commissions and or ombudspersons as national human rights institutions. In various corners of the region, sub-regional initiatives have emerged to concretize norms and related structures in the pursuit of human rights.

¹ Afghanistan, Armenia, Australia, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, Cyprus, Democratic People's Republic of Korea, Fiji, Hong Kong Special Administrative Region of PRC, India, Indonesia, Iraq, Iran, Israel, Japan, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Macau Special Administrative Region of PRC, Malaysia, Maldives, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, Nepal New Zealand, Pakistan, Palau, Palestine, Papua New Guinea, People's Republic of China (PRC), Philippines, Qatar, Republic of Korea, Samoa, Saudi Arabia, Singapore, Sri Lanka, Solomon Islands, Tajikistan, Thailand, Timor Leste, Tonga, Turkmenistan, Tuvalu, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen.

- In West Asia, there is now an Arab Charter of Human Rights which interlinks between the Arab countries of this region and those of North Africa.
- The Office of the United Nations (UN) High Commissioner for Human Rights (OHCHR) has a regional human rights office in Beirut and recently a UN Human Rights Training and Documentation Centre for South-West Asia and the Arab Region was set up in Qatar.
- In South Asia, various specific treaties on child rights and women's rights have appeared as a step-by-step approach to trans-boundary system-building on human rights.
- In South-East Asia, recently the Charter of the Association of Southeast Asian Nations was adopted by ten countries with key references to human rights, democracy, peace, rule of law and international law. Consequently, the ASEAN Inter-governmental Human Rights Commission was established as the first entity of its kind with a mandate to promote and protect human rights.
- There are also OHCHR regional offices in Bangkok for South-East Asia and in Suva for the Pacific region.

The relationship between countries of the region and the international human rights framework deserves note. All of these countries accept the Universal Declaration of Human Rights, even though at times there may be whispers of the need to cater more readily to the concerns of developing countries. They have all cooperated with the newly established Universal Periodic Review (UPR) under the UN Human Rights Council. However, their participation in international treaty-making and their cooperation with UN Special Procedures, with bearing on the question of human rights, varies. While an increasing number of Asia-Pacific countries are becoming parties to international human rights treaties, there is still a notable quantitative gap in terms of the number of ratifications. The only two human rights treaties to which all Asia Pacific countries are parties are the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. Of course, as with other regions, there remains the pervasive qualitative issue of implementation of all the obligations expressly undertaken by States as well as of those norms binding on all countries by virtue of customary international law.

With regard to the question of freedom of expression and the prohibition of incitement to hatred, the starting point for balancing between the right and the constraint imposed on the right, or the rule and the exception to the rule, is the Universal Declaration of Human Rights which remains pertinent to all Asia-Pacific countries today. Articles 18 and 19 guarantee the rights to freedom of religion and expression. The parameters for possible constraints are found in Article 29 (2) which stipulates as follows:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition

and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

Innately, the provision introduces the notion of legality which is needed to justify limitations on those rights and the notion of legitimacy which helps to measure the ultimate goal of the exercise – to be compliant with a democratic society. In international law, there are various other notions such as necessity and proportionality which come into play when constraints are imposed on the exercise of rights.

However, it is the International Covenant on Civil and Political Rights (ICCPR) which guides us most prominently on the relationship between freedom of expression and the prohibition against incitement to hatred or “hate speech”. It is important to read two articles from this Covenant together, anchored in the primordial nature of the right to freedom of expression, although that right is not absolute in substance.

Article 19 provides that:

- “ 1. Everyone shall have the right to hold opinions without interference.
2. Everyone should 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 and reputations of others;
 - b. For the protection of national security or of public order (ordre public), or of public health or morals.”

This is qualified by Article 20 as follows:

- “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.”

It is worth underlining that the exception in Article 20 relating to hate speech is an exception to the right to freedom of expression and not vice versa. The wording of Article 20 also implies a variety of components: not simply advocacy but advocacy of national, racial or religious hatred; not simply such advocacy, but one that constitutes incitement; not simply such incitement, but one that is related to discrimination, hostility or violence. The injunction inherent in Article 20 is further advanced by the International Convention on the Elimination of All Forms of Racial

Discrimination (CERD) which adds (in regard to racial discrimination only) another Article pertinent to the discussion: Article 4, as follows:

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention, inter alia:

- a) Shall declare an offence punishable by all 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, and also the provision of any assistance to racist activities, including the financing thereof;
- b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

Despite the lack of ratification by some Asia-Pacific countries, the directions laid down by these treaties with their provisions on freedom of expression and the prohibition of hate speech provide key guidance to all countries in the delicate equilibrium to be established between the rule and the exception to that rule. This appropriately leads into the realm of national laws, policies, jurisprudence and related situations, inviting us to assess whether they complement international standards and to ascertain some of the lessons from the process and the underlying threads.

B. State of the Law:

A perusal of the laws from the region reveals that a large number of countries and territories covered by this study have laws which can be used, directly or indirectly, to prohibit hate speech in its various manifestations, although the terminology on the issue may vary. They include: Afghanistan, Armenia, Australia, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei, Cambodia, Fiji, India, Indonesia, Iraq, Iran, Israel, Japan, Kazakhstan, Kiribati, Kyrgyzstan, Lao People’s Democratic Republic (PDR), Malaysia, Maldives, Mongolia, Myanmar, New Zealand, Pakistan, People’s Republic of China, Philippines, Qatar, Republic of Korea, Saudi Arabia, Singapore, Sri Lanka, Syria, Tajikistan, Thailand, Timor Leste, Tonga, Turkmenistan, Tuvalu, United Arab Emirates (UAE), Uzbekistan, Vanuatu, Vietnam and Yemen.

The laws range from national Constitutions to Criminal Code/Law and from general laws, such as on national security and on defamation, to more specific laws establishing offences linked with incitement to hatred, hostility or violence. In reality, these laws invite reflection from the angle of congruence with international standards to ensure a balance between rights and responsibilities and between universal standards and local sensibilities.

There is also a dichotomy between criminal law and civil law: in some jurisdictions, hate speech is more of a criminal law issue (e.g. Armenia, Azerbaijan, Pakistan), in others it is more of a civil law issue (e.g. Australia), or in some cases it is both criminal and civil (e.g. New Zealand). At times it gives rise to aggravated penalties (e.g. New Zealand). Defamation laws can also be used to address forms of hate speech, and there is a morass of national security laws which could be extended to cover situations of hate speech. New laws on this front encompass the media and cyberspace. “Soft law” in terms of media codes or the equivalent are also evident. An important thread is that it is individuals and groups who should be the targeted beneficiaries to be protected from harm. From another angle, some countries have laws which protect beliefs or ideas rather than individuals and groups, and this is particularly evident in the case of anti-blasphemy laws (namely, protection of religion(s)/beliefs rather than an individual or group) listed below.

The spread can be seen as follows:

i) Constitutions

Generally, countries with national constitutions have provisions on the rights to freedom of expression and religion. There are also possible constraints on rights, on the basis of public interest. For instance, while Article 20 of the Constitution of the Republic of Korea guarantees freedom of religion, Article 21 relates to freedom of expression with the following components:

“(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association [...].

(4) Neither speech nor the press shall violate the honour or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honour or rights of other persons, claims may be made for the damage resulting therefrom.”

A small number of Constitutions in the Asia-Pacific region have specific provisions against hate speech. The conglomeration is in Central Asia and the South Caucasus. For instance, Armenia’s Constitution has this provision in Article 47:

“Everyone shall be obliged to honour the Constitutions and laws, to respect the rights, freedoms and dignity of others.

The exercise of rights and freedoms with the purpose of overthrowing the constitutional order, inciting national, racial and religious hatred, advocating violence or war shall be prohibited.”

In the same vein, the Constitution of Azerbaijan provides in Article 47:

“Every person shall have freedom of thought and speech.

Nobody shall be forced to identify or refuse his/her ideas and principles. Propaganda inciting racial, ethnic or religious animosity or hostility shall be banned.”

Per Uzbek Constitution: Article 57:

“The formation and functioning of political parties and public associations aiming to do the following shall be prohibited: [...] advocating war and social, national, racial and religious hostility, and encroaching on the health and morality of the people, as well as of any armed associations and political parties based on the national and religious principles.”

There is a similar provision in the Constitution of Turkmenistan (Article 30):

“Prohibited is the establishment and activity of political parties, other public, paramilitary associations, aimed at bringing violent change to the constitutional order, introducing violence into their activity, opposing the constitutional rights and freedoms of citizens, advocating war, racial, national or religious hatred, encroaching on the health and morals of the people, as well as the political parties with ethnic or religious attributes.”

In other parts of the region, there is a sprinkle of countries with such provisions. In the Constitution of Fiji, there is a provision as follows (Section 30):

“(1) Every person has the right to freedom of speech and expression, including:

- (a) freedom to seek, receive and impart information and ideas; and
- (b) Freedom of the press and other media.

(2) A law may limit, or may authorize the limitation of, the right to freedom of expression in the interests of: [...]

- (b) the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including: (i) the right to be free from hate speech, whether directed against individuals or groups [...].”

Meanwhile, Bhutan’s Constitution enables the State to restrict rights when it concerns incitement to an offence on the grounds of race, sex, language, or religion (Article 22).

ii) Criminal Law/Code

A range of countries from the Asia-Pacific region have criminal law provisions against hate speech and the grounds covered oscillate between race, ethnicity and religion. These are exemplified by the following:

Per Brunei's Penal Code:

“Section 298: Uttering words etc. with deliberate intent to wound religious feelings.

Whoever, with deliberate intention of wounding the religious 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, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both [...]”

“Section 505: Statements conducting to public mischief.

Whoever makes, publishes, or circulates any statement, rumour, or report [...] (c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, [...] shall be punished with imprisonment for a term which may extend to 5 years and with fine.”

Per Cambodia's Criminal Code:

“Section 59: Incitement leading to the Commission of a Felony

Any person who, by speech, shouts or threats made in a public place or meeting, or by writings, publications, drawings, engravings, paintings, emblems, films or any other mode of writing, speech, or film that is sold, distributed, offered for sale or displayed in a public place or meeting, or by signs or posters displayed in public, or by any other means of audiovisual communication, directly incites one or more persons to commit a felony shall be punished as an accomplice to the felony. This provision also applies if the incitement leads merely to an attempt to commit a felony.”

“Section 61: Incitement to discrimination

1. Any person who, by one of the means listed in Article 59, provokes national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be punished by imprisonment of one month to one year, a fine of one million to ten million Riels, or both.”

Per Indonesia's Penal Code (Article 156):

“The person who publicly gives expression to feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia, shall be punished by a maximum imprisonment of four years or a maximum fine of three hundred rupiahs. By group in this and in the following article shall be understood each part of the population of Indonesia that distinguishes itself from one or more other parts of that population by race, country of origin, religion, origin, descent, nationality or constitutional condition.”

Malaysia’s Criminal Code states in (amended) Section 298 re “uttering words, etc., with deliberate intent to wound the religious feelings”:

“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, shall be punished with [...] for a term which may extend to three years, or with fine, or with both.”

It adds in Section 298A in regard to promotion of enmity between different groups on ground of religion or race, that a person who:

“a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion or race, disharmony, disunity, or feelings of enmity, hatred or ill will between different religious or racial groups or communities; or

b) commits any act which is prejudicial to the maintenance of harmony between different religious or racial groups or communities, and which disturbs or is likely to disturb the public tranquility, and which disturbs or is likely to disturb the public tranquility,

shall be punished with imprisonment which may extend to three years, or with fine, or with both”

Per Myanmar’s Penal Code (Section 505):

“Whoever makes, publishes or circulates any statement, rumour or report –

d) With intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, [...] shall be punished with imprisonment which may extend to two years, or with fine, or with both.”

Singapore’s Penal Code provides in Section 298, entitled “Uttering words, etc., with deliberate intent to wound the religious or racial feelings of any person”:

“298. 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 an 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.”

Per Section 298 A on “Promoting enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony”:

“Whoever –

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, knowingly promotes or attempts to promote, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different religious or racial groups or communities; or

(b) commits any act which he knows is prejudicial to the maintenance of harmony between different religious or racial groups and which disturbs or is likely to disturb the public tranquility, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.”

Per Vietnam’s Criminal Code (Section 87), entitled “Undermining the unity policy”:

“1. Those who commit one of the following acts with a view to opposing the people’s administration shall be sentenced to between five and fifteen years of imprisonment: [...]

(b) Sowing hatred, ethnic bias and/or division, infringing upon the rights to equality among the community of Vietnamese nationalities [...].”

Bangladesh’s Penal Code (Section 153 A) sanctions against the promotion or attempt to promote feelings of enmity or hatred between different classes. Bhutan’s Penal Code (Section 458) provides that a person shall be guilty of the offence of promoting civil unrest, if the person advocates national, racial, ethnic, linguistic, caste based or religious abhorrence constituting an incitement to violence. India’s and Pakistan’s Criminal Code has Section 295, which prohibits injuring or defiling place of worship with intent to insult the religion of any class.

Armenia’s Criminal Code states as follows per Section 226 concerning “Inciting national, racial or religious hatred”:

“1. Actions aimed at the incitement of national, racial or religious hatred, at racial superiority or humiliation of national dignity, are punished with a fine in the amount of 200 to 500 minimal salaries, or with correctional labour for up to 2 years, or with imprisonment for the term of 2-4 years.

2. The actions envisaged in part 1 of this Article is committed:

(a) Publicly or by the mass media, with violence or threat of violence;

(b) By abuse of official position

(c) By an organized group,...are punished with imprisonment for the term of 3 to 6 years”

In Azerbaijan, Section 283 of the Criminal Code provides that “actions designed to inflame ethnic, racial, social or religious hatred and enmity or to offend ethnic pride, and actions aimed at restricting the rights of citizens, or according superior status to citizens on the grounds of their ethnic or racial origin, social position, or attitude to religion shall, if such actions are performed in public or using the media, be punishable by fines of between 1,000 and 2,000 nominal financial units, or by restriction of liberty for periods of up to three years, or by imprisonment for terms of between two to four years.”²

Kyrgyzstan’s Penal Code Section 299 defines incitement to national, racist or religious hatred as a specific offence, while Uzbekistan’s Criminal Code Section 156 incriminates incitement to ethnic, racial or religious hatred with punishment of deprivation of liberty of up to five years. Under Israel’s Penal Code, Section 173, a person who “publishes any printed, writing, picture, or effigy calculated to outrage the religious feelings or belief of other persons”, or who “utters in a public place and in the hearing of another person any word or sound calculated to outrage his religious feelings or belief” is liable to imprisonment of one year. Meanwhile, Syria’s Criminal Code Section 307 provides that any act, piece of writing or speech aimed at, or resulting in the provocation of sectarian or racial division or creation of conflict between confessional groups and the different constituent elements of the nation shall be prohibited. Section 463 adds that anyone who expresses contempt for the religious rites performed in public or who encourages mockery of such a rite shall be subjected to a penalty. This includes actions and gestures in public places, speech or cries that can be heard or are broadcast by mechanical means.

Afghanistan’s Penal Code provides that, per Section 348:

“Every individual that explicitly offends, through statement, action, writing or other means, one of the followers of religions who openly exercises his/her religious practices, is sentenced to a sort term imprisonment of less than three months, and paying cash fine not below 3,000 AFs nor exceeding 12,000 Afs.”

Jordan’s Penal Code states that:

“Any act or written or spoken communication that gives rise, or is intended to give rise, to religious or racial bigotry or seeks to instigate strife among the various communities and races that constitute the nation shall be punished by a term of imprisonment of six months to three years and a fine not exceeding 50 dinars.”³

² Source: CCPR/C/AZE/3, 10 December 2007, Third periodic report of Azerbaijan, paras 481-492..

³ Source: CCPR/C/76/Add.1, 18 January 1993, Third periodic report of Jordan, para 25.

China's Criminal law (1997) provisions on the issue deserve note as follows:

“Section 249

Those provoking ethnic hatred or discrimination, if the case is serious, are to be sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights. If the case is especially serious, they are to be sentenced to three to 10 years in prison.

Section 250

Persons directly responsible for publishing materials that discriminate or insult minority nationalities, if the case is serious and results in grave consequences, are to be sentenced to three years or fewer in prison, or put under criminal detention or surveillance.

Section 251

Workers of state organs who illegally deprive citizens' right to religious beliefs or who encroach on minority nationalities' customs or habits, if the case is serious, are to be sentenced to two years or fewer in prison or put under criminal detention.”

The most recent criminal law on the issue is the Timorese Penal Code 2009 whose Section 135 on religious or racial discrimination provides:

“1. Any person who establishes or constitutes an organization or develops activities of organized propaganda inciting or encouraging religious or racial discrimination, hatred or violence, or takes part in the organization or carrying out of the activities referred to in the previous paragraph, or provides assistance thereto, including funding, is punishable with 4 to 12 years imprisonment.

2. Any person who, at a public meeting, through written medium destined for dissemination or in the media, provokes acts of violence against a person or group of people on grounds of race, colour, ethnic origin or religion, with the intent to incite or encourage racial or religious discrimination, is punishable with 2 to 8 years imprisonment.”

On another front, it can be noted that several countries have criminal law provisions on defamation which are very much to do with damaging the reputation of another person in spoken (slander) or written form (libel). It is not the intention of this study to enter into detail about all Asia-Pacific countries on this matter, but only to observe that there may at times be an overlap with aspects of hate speech. Some examples are offered as illustration. Israel's *Prohibition of Defamation Act 1995* prohibits defamation of any group, including national, racial and religious groups. Incitement to discrimination and hostility may also fall under the Penal Code.

The offence of criminal defamation is generally found in Southeast Asia, as shown by the Indonesian Criminal Code provides in Section 310:

“1) The person who intentionally harms someone’s honour or reputation by charging him with a certain fact, with the obvious intent to obviously give publicity thereof, shall, being guilty of slander, be punished by a maximum fine of imprisonment of nine months or a maximum fine of three hundred rupiahs.

2) If this takes place by means of writings or portraits disseminated, openly demonstrated or put up, the principal shall, being guilty of libel, be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred rupiahs.”

There is, in principle, a defence in subsection 3 (“Neither slander or libel shall exist as far as the principal obviously has acted in the general interest or for a necessary defence”), giving rise to an issue concerning its interpretation in practice.

In the Lao PDR Penal Code, Section 87 sanctions against defamation as follows:

“Any individual seriously damaging the honour of other persons through writings, words or other means is punishable of three months to one year imprisonment or of reformatory penalties without privation of liberty or fines ranging from 5,000 to 10,000 Kips.

Any individual causing serious damages to the prestige of other persons by spreading false allegations through writings, words or other means is punishable of three months to one year imprisonment or of correctional penalty without privation of liberty or of a fine from 5,000 to 10,000 kips.”

Criminal defamation is found in the Philippine Criminal Code (Sections 355, 358 and 360) and in the Thai Criminal Code.

Internationally, the issue of criminal defamation has given rise to much soul-searching, and various sources advocate that defamation should be under the civil law rather than criminal law.

iii) Civil Law/Code

The general Civil Law legislation or Civil Codes which exist in Asia-Pacific countries do not delve directly into the question of hate speech. However, they all cover the issue of defamation and as indicated above, there may at times be an overlap with aspects of hate speech. There may also be specific laws with provisions dealing expressly with hate speech giving rise to civil liability (and or criminal responsibility) and this is dealt with in the next section of this study.

iv) Specific Laws on Hate Speech

A small number of countries have specific laws/provisions on hate speech beyond those referred to earlier in this study. Australia and New Zealand are key examples. Australian federal

legislation revolves around the Racial Discrimination Act (RDA) 1975 as amended; the law itself helps to implement the CERD in Australia. Racial discrimination is unlawful and gives rise to civil liability: per section 9:

“1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life”.

Incitement in this regard is also unlawful (Section 17):

“It is unlawful for a person:

- a) To incite the doing of an act that is unlawful by reason of a provision of this Part; or
- b) To assist or promote whether by financial assistance or otherwise the doing of such an act.”

Part IIA of the Act then legislates to prohibit offensive behaviour based on racial hatred. Its Section 18 C elaborates upon offensive behaviour as follows:

“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.

2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- a) causes words, sounds, images or writing to be communicated to the public; or
- b) is done in a public place; or
- c) is done in the sight or hearing of people who are in a public place [...]

A defense is provided for:

“Section 18 C 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.”

The law opens the door to enabling the Human Rights and Equal Opportunity Commission to intervene in proceedings concerning racial discrimination in the courts, with the leave of the court. Interestingly, the scope of the law concerns race and does not cover religion, while the offensive behaviour is measured by the fact that it is a public act (not private act). Moreover, the hate speech on this front must be directed at a person or persons. The offence is not absolute and a defense is provided for.

In Australia, laws at the State level provide more specificity. Some laws at that level cover hate speech in regard to religion (“religious vilification”) but the test is that the speech is targeted to individuals or groups. The vilification may cover other grounds such as sexual orientation. A number of cases illustrate the law in practice in a later section of this study.

The New Zealand setting is summarized as follows in the country’s UPR document (A/HRC/WG.6/5/NZL/1 (April 2009)):

“66. In New Zealand the right to freedom of opinion and expression is legally protected through the Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993. While these Acts protect the right to freedom of opinion and expression they also set out responsibilities, making it unlawful for example to use threatening, abusive or insulting words or other material to excite racial hostility against any group of people, by reason of their colour, race, or ethnic or national origin. The Human Rights Act also creates the criminal offence of inciting racial disharmony. While these Acts have positively influenced the legislature, the judiciary, policy-making and the public thinking, some tension remains in balancing the rights with the responsibilities. Ongoing education is needed, as well as greater awareness raising of the various complaint mechanisms that exist [...]

67. [...] there are a number of incidents of religious intolerance, harassment and abuse that occur from time to time. In the year to June 2008, 5 per cent of the complaints received by the New Zealand Human Rights Commission (NZHRC) on discrimination were on the basis of religious or ethical belief.”

While the BORA stipulates the rights to be protected, such as freedom of expression and religion, the other law has a variety of provisions based on both civil liability and criminal responsibility:

Per section 61: Racial Disharmony

“1) It shall be unlawful for any person –

- a) To publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive or insulting; or
- b) To use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place or at any meeting to which the public are invited or have access, words which are threatening, abusive or insulting, or
- c) To use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television, -

Being matter or words likely to excite hostility against or bring into contempt any group or persons in or who may be coming to New Zealand on the ground of colour, race, or ethnic or national origins of that group of persons.”

Section 63 then covers racial harassment:

“1) It shall be unlawful for any person to use language (whether written or spoken), or visual material, or physical behavior that –

- a) Expresses hostility against, or brings into contempt or ridicule, any other person on the ground of colour, race, or ethnic or national origins of that person; and
- b) Is hurtful or offensive to that other person (whether or not that is conveyed to the first mentioned person); and
- c) Is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (2) of this section.”

The prohibition of incitement then appears in Section 131 to justify the increase in criminal penalties:

“Inciting racial disharmony

- 1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7000 who, with intent to excite hostility or ill-will against , or bring into contempt or ridicule, any group of persons in New Zealand on the ground of colour, race, or ethnic or national origins of that group of persons –
 - a. Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive or insulting; or

- b. Uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981) or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening or insulting –

Being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.”

However, there is a screening process in that a prosecution depends on the consent of the Attorney General (Section 132).

The New Zealand approach to hate speech related to racial discrimination is thus a blend of offences linked with civil and criminal law. There is also linkage with other legislation giving rise to minor offences (summary cases), but prosecution depends on the green light from the Attorney General. Incitement is a direct ground for increasing penalties. However, it does not cover religious grounds.

Singapore has an Act on the Maintenance of Religious Harmony which allows the Minister in charge to issue restraining order on a person who might otherwise incite any person or religious group to undertake various unlawful acts such as:

- “c) carrying out subversive activities under the guise of propagating or practicing any religious belief; or
- d) Exciting disaffection against the President or the Government while, or under the guise of , propagating or practicing any religious belief.” (Section 8(1)).

Israel’s 1962 Safety in Public Places Law prohibits racially motivated expression at sporting event.

A number of countries also witness the presence of media and cyber-related laws with direct impact on hate speech. Iran’s press law (1986) enjoins the press from “creating discord between and among social walks of life specially by raising ethnic and racial issues” (Section 6). Israel’s 1990 Second Television and Radio Authority Act prohibits concessionaires from broadcasting any material containing racial incitement and they are under a responsibility to ensure that their broadcasts do not incite discrimination on grounds of religion, race, nationality, ethnicity, lifestyle or origin. Armenia’s 2000 law on television and radio broadcasting forbids the use of these media for “ethnic, religious or racial discrimination” (Section 24). Kazakhstan’s law on the mass media (Section 25) imposes responsibility on the owner/chief editor of mass medium for materials containing propaganda or agitation of forced modification of the constitutional regime, crippling the country, undermining the security of the State, and promoting war, social, racial,

national, religious, class and ancestral superiority. The UAE 2006 law on the prevention of information technology crimes also relates to the issue and is dealt with further below.

Cambodia's 1995 law on the regime of the press interlinks between the hard law and soft law approach as follows (per Section 7):

“Each Press Association shall establish a code of ethics for internal application in its association. The press has an obligation to comply with the code of ethics, which should primarily include necessary principles as follows: [...]

6. Shall avoid publishing any information which incites and causes to have discrimination as on the basis of race, colour, sex, language, belief, religion, opinion or political tendency, national or social origin, resources, or other status.”

Several countries in Southeast Asia have laws on computer crimes which could be used against hate speech, e.g. Malaysia's Computer Crimes Act 1997 and Thailand Computer Crimes Act 2007. Malaysia also has the Printing, Presses and Publications Act 1984, while Brunei has the Censorship of Films and Public Entertainments Act. Myanmar has the Press Emergency Powers Act 1931 and Electronic Transactions Law Act 2004.

There are also “soft law” industry Codes with provisions countering hate speech. For instance, Singapore's Internet Code of Practice lists as prohibited material that “glorifies, incites or endorses ethnic, racial or religious hatred, strife or intolerance”. Malaysia has also seen the drafting of a media code with 9 prohibited contents, including violence and menacing content.

v) Other Laws

All countries have laws concerning national security which could also be used to curb hate speech and it is not the intention of this study to examine these laws. Suffice it to note that the nomenclature “Internal Security Act” appears in several countries (e.g. Thailand, Singapore, Malaysia). There may also be “sedition” laws which have bearing on the issue of incitement (e.g. Malaysia). It is worth bearing in mind that basically, sedition is incitement against the State, while the hate speech of concern to this study is incitement against individuals and groups.

A number of countries also have anti-blasphemy laws which are targeted to protect religion or related belief. The UAE law mentioned above reads (per Section 15):

“The penalty of imprisonment and a fine or either applies to whoever commits any of the following offences through the Internet or an information technology device:

1. Abuse of an Islamic holy shrine or ritual
2. Abuse of a holy shrine or ritual of any other religion where such shrine or ritual is protected under Islamic Sharia
3. Defamation of any of the divine religions

4. Glorification, incitement or promotion of wrongdoing

The penalty shall be imprisonment for up to 7 years for an offence involving opposition to Islam or injury to the tenets and principles of Islam, opposition or injury to the established practices of Islam, prejudice to Islam the breaching of a religion other than Islam or the propagation, advocacy or promotion of any discipline or idea of such nature.”

Other Middle Eastern countries with anti-blasphemy laws include Lebanon, Oman and Qatar. Oman’s law is as follows:

“Oman’s Penal Code as issued by Royal Decree 7/74 comprises articles which make defamation of religions and faiths punishable by law, especially (Section) 130 bis, amended by Royal Decree 72/2001, stating that any provocation of religious strife is considered a criminal offence. Thus, the article states that “ Any person who promotes or incites religious or sectarian conflicts or theorems of hatred or strife among the populations shall be punished by imprisonment for a maximum of 10 years.” Article 209 states clearly that it is a criminal offence to commit an affront to religious and faiths with a view to contempt them. No cases of incitement or spreading or publishing or circulating views based on allegations of racial or religious supremacy, or activities either by individuals or institutions or government/non-government organizations have been recorded in the Sultanate”.⁴

Qatar’s Criminal Code section 256 imposes a term of imprisonment of up to seven years for:

“Defaming a divine religion that is protected under the Islamic Shariah.

Insulting a prophet by the spoken word, in writing, in an image, by means of a gesture or by any other method.

Vandalising, damaging, destroying or defiling buildings or their contents which are used to perform the rituals of any of the divinely revealed religions protected under the Islamic Shariah”.⁵

Indonesia’s law is based on section 156A of the Criminal Code and a 1965 presidential decision on the issue. Per section 156A:

“By a maximum imprisonment of five years shall be punished any person who deliberately in public gives expression to feelings or commits an act

⁴ Source: OHCHR, letter from Oman authorities (May 2008).

⁵ Source: OHCHR, letter from Qatar authorities (May 2007).

- a. Which principally have the character of being in enmity with, abusing or staining a religion, adhered to in Indonesia;
- b. With the intention to prevent a person to adhere to a religion based on the belief of the almighty God.”

Malaysia’s Syariah Criminal Offences (Federal Territories) Act 1997 has key provisions on the issue including:

“Insulting or bringing into contempt, etc. the religion of Islam

7. Any person who orally or in writing or by visible representation or in any other manner

–

- a) insults or brings into contempt the religion of Islam;
 - b) derides, apes or ridicules the practices or ceremonies relating to the religion of Islam;
- or
- c) degrades or brings into contempt any law relating to the religion of Islam for the time being in force in the Federal Territories,
- shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or both.

Deriding, etc., Quranic verses or Hadith

8. Any person who, by his words or acts, derides, insults, ridicules or brings into contempt the verses of Al-Quran or Hadith shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.”

Bangladesh’s anti-blasphemy law is based on the Penal Code’s Section 295 which sanctions against anyone who deliberately and maliciously insults the religion or the religious feelings of any class of citizens. This is similar to Section 295 in India’s and Malaysia’s Criminal Code. Parallel to this, the law in Pakistan imposes these penalties:

“295A: Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

Whoever, with deliberate and malicious intention of outraging the religious feelings, of any class of the citizens of Pakistan, by words, either spoken or written or by visible representations insults or attempts to insult the religion or religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine of with both.”

Section 295 B criminalizes a person who willfully defiles the Holy Qur’an with possible imprisonment for life. Section 295 C adds the death penalty in the case of a person who by words or by visible representation directly or indirectly defiles the sacred name of the Holy Prophet.

Section 298 forbids maliciously offending anyone's religious feelings, while section 298 A prohibits remarks against the "holy personages" of Islam. The latter covers inadvertent acts without the need to prove intent.

Syria's Criminal Code Section 463 stipulates that anyone who expresses contempt for religious rites performed in public or who encourages mockery of such a rite is liable to a penalty. Jordan's criminal law provisions include:

"Section 273: Anyone proven to have publicly offended any prophet shall be sentenced to imprisonment for a period of one and three years.

Section 278: Anyone proven guilty of any of the following shall be sentenced to imprisonment of a period not exceeding three months or a fine not exceeding 20 dinars:

1. Publishing any material that is offensive to other people's religious feeling or beliefs.
2. Publicly, with another person listening thereto, making speech or sound that is offensive to said person's religious feelings or beliefs.

Should the Public Prosecutor prosecute a journalist under article 38 of the Press and Publication Law rather than the Penal Code, a fine of 10,000-20,000 dinars would be imposed."

Yemen's Penal Code provides for punishment of up to three years and a fine an act which ridicules or contempt of a religion (Section 194). Meanwhile, in Qatar's response to the UN (in regard to this study), the following development is indicated:

"(Section) 263 of the Criminal Code provides that "anyone who produces, makes, sells, offers for sale, circulates, acquires, possesses or advertises products, goods, printed matter or cassettes containing images, slogans, words, symbols, signs or any other material that defames the Islamic religion or the divinely revealed religions protected under the Islamic sharia, shall be liable to imprisonment for a period of up to a year and/or a fine of up to 1,000 Qatari Rials.

- Anyone who uses computer diskettes, computer programmes or audio cassettes to defame the Islamic religion or the divinely revealed religions under the Islamic sharia shall be liable to the same penalty."

Israel has a law on the denial of the holocaust which also prohibits publications expressing sympathy with Nazi crimes. Meanwhile, civil society organizations advise that some countries, such as Japan, are in need of a law to overcome hate speech.

From the angle of penalties, in criminal law, the various offences give rise to sanctions ranging from fines to several years in prison. In extreme cases, such as in relation to anti-blasphemy, the death penalty is a possibility.

Threads

- The nomenclature relating to offences on incitement to hatred varies per country and there is no uniform terminology; for instance, incitement to national, racial or religious hatred (Armenia, Azerbaijan, Kyrgyzstan); uttering words with deliberate intent to wound religious feelings (Malaysia, Brunei); promotion of feelings of enmity and hatred (Bangladesh); express feelings of hostility (Indonesia); incitement to discrimination (Cambodia); outrage religious feelings (Israel); provocation of sectarian or racial division (Syria); excite racial hostility (New Zealand); incite unlawful act (Australia).
- Some offences cover incitement to racial and religious hatred (Armenia, Azerbaijan, Kyrgyzstan) while others cover only racial and or ethnic issues (China, Australia at federal level, New Zealand).
- In many countries (above), incitement to hatred give rise to criminal offence(s); in some countries, it is both criminal and civil (New Zealand) or merely civil (Australia).
- A number of countries have anti-blasphemy laws which may have bearing on prohibition of incitement to hatred (UAE, Lebanon, Oman, Qatar, Indonesia, Malaysia, Bangladesh, Pakistan, India, Syria, Jordan, Yemen, Qatar).
- Intent is not always required for the commission of an act (e.g. in relation to anti-blasphemy laws).
- Penalties range from fines to imprisonment, with the death penalty in some cases (e.g. Pakistan).

C. State of Policy:

For decades, many developing countries in the region have had various development policies in the form of national development plans. These guide the national strategies particularly on economic and social development. Originally, these plans were not much rights-focused, but in recent years, some refer more concretely to human rights as part of the development process, and issues of ethnicity such as minorities and migrant workers are encompassed particularly to enable the development process to be enjoyed by all. They are at times influenced by international trends. For example, Cambodia's National Strategic Development Plan 2006-2010

is targeted to growth, employment, equity and efficiency to enable the country to reach the Millennium Development Goals.

More specifically, a number of countries have adopted human rights action plans which have more potential to integrate anti-discrimination measures. They often refer to issues of ethnicity, although the issue of hate speech is implied rather than express. It is not clear to what extent they have been directly influenced by the orientations of the Durban Programme of Action from the most recent global conference on the issue of racism, xenophobia and related intolerance.

The Philippines, Indonesia and Thailand have had human rights action plans for over a decade. The current Philippine Plan targets for coverage: women, children, youth, indigenous cultural communities and Muslims. Some of the projected activities will have constructive impact on cross-cultural understanding which will help to prevent hate speech and related crimes.

In regard to indigenous peoples, for instance, the Plan recognizes that these groups are affected by illiteracy and it calls for the promotion of education, including mandatory course on indigenous law in law schools. It advocates intensive campaigns to promote understanding of these communities. It also recognizes that these groups are not adequately supported by social infrastructure. Thus it posits the need to have adequate representation of these groups in political positions to enable them to mobilize changes.

In regard to Muslims in the country, firstly, the Plan cites explicitly the issue of discrimination, unequal trade opportunities, especially of Muslim women; abusive use of the term “Muslim” by the media and some government officials in their reference to Muslim issues. It thus aims to increase the penalty for the crime of violation of places of worship and calls for promotion of rights in school. Secondly, it raises the issue of encroachment upon ancestral domains and indiscriminate military operations in Muslim communities. The Plan advocates a law to support the peace process and to dismantle military checkpoints in areas where they are no longer needed. It also opens the door to religious courts and a fund for religious education. Thirdly, it recognizes the lack of representation in various government organizations. It thus calls for the appointment of Muslim representatives in decision-making agencies of the government.

Thailand is now into its second Human Rights Action Plan. The first Plan recognized the issue of discrimination on religious grounds and called for action to overcome such practice. This call is sustained in the second plan which was launched in 2009. There is also an initiative to enable mother tongue education to take place in Southern Thailand where there is a predominantly Muslim community.

China’s human right action plan 2009-10 has provisions on the rights of ethnic minorities and human rights education. In regard to the freedom of religious belief and the prevention of discrimination, the Plan is targeted to the policy of freedom of religious belief based on these elements:

“- The State, in accordance with the law, protects normal religious activities, as well as the lawful rights and interests of religious bodies, venues of religious activities and religious believers.

- The State implements the Regulations on Religious Affairs, improves relevant auxiliary regulations and enacts relevant local laws and regulations to guarantee freedom of religious belief of citizens.
- The State protects its citizens from being compelled to believe in any religion, and from any discrimination on the grounds of religious belief, and guarantees the rights and interests of religious believers.
- The State respects ethnic minorities’ religious beliefs, and protects their religious cultural heritage. It continues to make necessary investments in the maintenance and reconstruction of temples, mosques and other religious facilities of important historical and cultural value in ethnic-minority areas.
- The State gives full play to the positive role of religious circles in the promotion of social harmony and socio-economic development. It also encourages and supports religious circles in launching social welfare programmes, exploring methods and channels for religions to better serve society and promote the people’s well-being.”

As with laws, the key challenge facing policies and plans is their effective implementation. The additional test facing policies and plans is that they are targeted to achieving results in a given period of time – usually a five year framework which is the structure of most economic and social development plans, and the two to five year framework which is the basis of most human rights action plans.

D. State of Practice:

This section refers particularly to the jurisprudence and practices of countries on the issue of hate speech. In the Pacific, the most documented judicial decisions on this front can be found in Australia and New Zealand. In South and South-East Asia, some cases can be identified. In West Asia and Central Asia, there are also some key instances.

Key jurisprudence can be seen as follows:

The largest number of hate speech-related jurisprudence can be found in relation to Australia and New Zealand. In *Hagan v Australia* (2003), the UN CERD Committee held that the word “nigger” affixed to a sports stadium in Australia was offensive based on “circumstances of

contemporary society”, even though the indigenous community nearby was against removal of the sign.⁶

In another Australian case - *Toben v Jones*, the appellant had published material on the internet querying whether the Holocaust had taken place, and this brought into play the Racial Discrimination Act above. The Australian Human Rights Commission found that this material vilified Jewish people, and the Federal Court issued an injunction enforcing the Commission’s finding. Toben appealed and then lost his appeal while arguing that:

“Part II A of the RDA (above) was intended to implement Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) which provides that parties to the CERD should criminalize the dissemination of ideas based on ‘racial hatred’. He inferred from this that Section 18C had to be read to cover only acts which amount to an expression of racial hatred if it were not to be beyond the constitutional power of the Commonwealth.

The Full Federal Court rejected this argument. Justice Carr, with whom Justice Kiefel agreed on this matter, wrote that ‘acts done in public which are objectively likely to offend, insult, humiliate or intimidate and which are done because of race, colour or national or ethnic origin are likely to incite other persons to racial hatred or discrimination or to constitute acts of racial hatred or discrimination [...]. Justice Allsop pointed out that Part IIA was intended to implement not only Article 4 of the CERD but also other provisions of the CERD and the ICCPR that cover the elimination of racial discrimination in all its forms, not only that of racial hatred.’⁷

At the state level in Australia, the law has been expanded to cover not only racial vilification but also other forms, including religious vilification and this has led to interesting jurisprudence. The most common ground on which vilification is prohibited is race defined in most jurisdictions as including colour, descent, nationality, ethnicity or ethnic origin. In New South Wales, the term “ethno-religious” was added to racial anti-vilification laws in 1994 to extend the operation of the laws to groups such as Jews and Sikhs, a move that formally recognized the extant approach of the courts. Other specified grounds include sexuality/homosexuality, disability, gender, gender identity/transgender status and HIV/AIDS status. Queensland expressly includes “religion”. Victoria includes “religious belief or activity” and Tasmania includes “religious belief or affiliation or religious activity” as protected grounds under anti-vilification laws.

⁶ Mariana Mello, “Hagan v Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law”, *Loyola of Los Angeles International and Comparative Law Review*, 28(2006), p. 365

⁷ Denise Meyerson, “The Protection of Religious Rights under Australian Law”, *Brigham Young University Law Review*, 2009, pp. 529; 533.

Federally and in Tasmania, civil provisions against vilification have been enacted, whereas in Western Australia only criminal provisions are in force. In all other states and the Australian Capital Territory, both civil and criminal provisions apply. In most jurisdictions, the wording of the civil offence is that it is an offence to “incite hatred towards, serious contempt for, or severe ridicule of, a person or group” of people on the specified grounds. Federally, the wording of the civil offence is that it is unlawful to do an act if it is reasonably likely to “offend, insult, humiliate or intimidate another person or a group of people” on a specified ground.

Criminal anti-vilification provisions have an understandably higher threshold. This can be demonstrated by the fact that in almost 20 years of criminal anti-vilification laws in Western Australia, there has been only one instance of a successful prosecution. Criminal anti-vilification provisions tend to require either a public act that incites, or an act with intention to incite, hatred, serious contempt or severe ridicule of a person on the specified ground by means which threaten physical harm to persons or property or which incite others to threaten physical harm to persons or property.⁸

The most famous case on the religious incitement issue, in relation to the state of Victoria, is the *Catch the Fire Ministries* case; the aforesaid is a church group whose aim is to convert people from Islam. The case revolved around Victoria’s Racial and Religious Tolerance Act (RRTA) 2001, Section 8(1) which states:

“A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.”

Exceptions are provided for in Sections 11 and 12 if the act was done reasonably and in good faith. According to a report, highly critical statements about Islam, illustrated by numerous references to Islamic texts, were made by a pastor of the Church during a seminar, by another pastor in a newsletter, and in an article on the Church’s website. Three converts to Islam [...] complained that the ministry and its two pastors had incited hatred against Muslims. This complaint was upheld by the Victorian Civil and Administrative Tribunal in *Islamic Council of Victoria v Catch the Fire Ministries Inc.* The Tribunal found that the respondents had breached Section 8 of the RRTA and that the “religious purpose” defense had not been made out because the views expressed were unbalanced and therefore the respondents had not acted “reasonably” and “in good faith”.

⁸ Katherine Gelber, “The False Analogy between Vilification and Sedition”, *Melbourne University Law Review*, 33(2009), pp. 270; 287-8.

Catch the Fire Ministries appealed to the Victorian Court of Appeal. The Court found that the Tribunal had made errors of law in its interpretation of Section 8. In setting out the correct interpretation, the Court made a number of points:

“First, it said that the Tribunal had erred by considering the effect of the words on an ‘ordinary reasonable’ reader or hearer when it should have considered their effect on the particular audience to which they were directed. Judge Nettle explained that the correct question is “whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case”, which includes the characteristics of the audience to which the conduct is directed. Furthermore, the effect of the conduct must be gauged by reference to the reasonable or ordinary member of that audience. There is no requirement, however, that the conduct must actually incite hatred.

A further error, at least according to Judge Nettle, involved failing to distinguish between inciting hatred or other relevant emotion against a religious belief and inciting against the adherents of a religion. His Honour remarked that there are many people who may ‘despise each other’s faiths and yet bear each other no ill will’. ‘The prohibition in section 8’ he concluded: Is not a prohibition against saying things about the religious beliefs of persons which are offensive to those persons, or even saying things about the religious beliefs of one group of persons which would cause another group of persons to despise those beliefs. It is saying things about the religious beliefs and practices of persons which go so far as to incite other persons to hate persons who adhere to those religious beliefs.”⁹

The lesson from such jurisprudence is this. The incitement to hatred involves an act directed to a third party to instigate that person to hate another person in relation to the latter’s race or other grounds such as religion. It is based on a triangular relationship. Merely making an offensive comment concerning a religion – a unilateral act by a person against an idea or belief, or making an offensive comment to a person in relation to that person’s religion – a bilateral relationship between the commentator and the other party – is not enough to qualify for incitement, although there might be other grounds for intervening (such as by means of the harassment law in the New Zealand below). Moreover, it can be added that while civil liability generally does not have to be based upon intent, criminal responsibility (as in general criminal law) requires an element of intent (*mens rea*), particularly here the intent to incite the hatred.

In New Zealand, as noted above, the national law provides for both civil liability and criminal responsibility. In regard to the Human Rights Act 1993, “in assessing whether words are threatening, abusive or insulting, the courts adopt an objective test. As in *Neal v Sunday News Auckland Newspaper Publications Ltd*, the views of the overly sensitive complainant are

⁹ Meyerson, supra note 8, pp. 547-8.

inconclusive. However, the inquiry into whether the speech is likely to excite hostility of bring into contempt, involves a different test. The Complaints Review Tribunal, in *Proceedings Commissioner v Archer*, deemed an objective approach unsuitable. Instead, the focus is on those less perceptive or sensitive to racial differences, who are vulnerable to be excited to hostility. Again, care is taken not to adopt the standards of the extremely sensitive.”¹⁰

It can be added that in *King Ansell v Police*, the New Zealand Court of Appeal interpreted the notion of “ethnic origin” liberally to include Jews.¹¹ This was a rare case of criminal vilification and concerned pro-Nazi and anti-Semitic pamphlets. The accused was found to be guilty. He was sentenced to three months imprisonment, but on appeal, this was reduced to a \$400 fine since the pamphlet did not advocate violence. Another case illustrates use of Section 61 of the Human Rights Act. In *Proceedings Commissioner v Archer*, a Wellington radio announcer made anti-Chinese and anti-Japanese comments. In finding the accused to be guilty, the court found the comments to be reasonably offensive. New Zealand also has the Harassment Act 1997; this has been applied, for instance, to convict a man for sending abusive letters accompanied by pork to Muslims.¹²

In Southeast Asia, there have been some challenging cases. In Indonesia, for several years, there has been an issue concerning protection of religious minorities from hate speech. In 2005, the Indonesian Human Rights Commission reported as follows:

“Ahmadiyah adherents had experienced several acts of violence with the attack to Mubarak campus, Prung, West Java on 9 and 15 July 2005, the attack of Ahmadiyah adherents in Ketapang, Lombok in October 2005. As the consequences of the State obligations according to article 71 of the Act No.39/1999, all religions of the Indonesian people should be protected and treated equally by the State, including the adherents of Ahmadiyah.

In response to those attacks, Komnas HAM considered that the Government should actively provide:

- Protection guarantee to the victims;
- Firm actions to anarchy behavior;

¹⁰ Hannah Musgrove, What Makes Race So Special: Should hate speech provisions under the Human Rights Act 1993 be extended to cover target groups other than race?, BA dissertation, University of Otago, Dunedin, 2009, p. 20.

¹¹ *Ibid.*, p. 49.

¹² Christopher David Jones, Rocks can turn to sand and be washed away but words last forever: A Policy Recommendation for New Zealand’s Vilification Legislation, MA thesis, University of Waikato, Waikato, 2007.

- Guarantee of protection for all Indonesian citizen wherever they stay.”¹³

In 2010, Indonesia’s Constitutional Court upheld the country’s anti-blasphemy law which enables the authorities to impose criminal penalties on those who “deviate” from the official religions.¹⁴ This law was used when the authorities issued a joint ministerial decree prohibiting one of the religious minorities from spreading their beliefs to the public. The amicus brief filed with the court by civil society groups referred to the jurisprudence of other courts on the issue. Jurisprudence from the Republic of Korea and India were cited before the Indonesian court. In particular:

“30. In 1997 the South Korean Supreme Court rejected the defamation claim brought by one branch of the Christian church against another which had published a book criticizing the former. In its decision of 29 August 1997, the South Korean Supreme Court stated that “In the freedom of religion, the freedom to spread the religion is included, and in the freedom to spread religion, the freedom to criticize other religions...is included. Therefore, the freedom to criticize other religions is protected by the freedom of religion as a form of religious expression [...]”

31. In *R v Bhasin v State of Maharashtra and Marine Drive Police Station*, which was decided in January 2010, the Bombay High Court emphasizes that the right to freedom of expression covers the freedom to criticize religions. It stated “everything is open to criticism and religion is not exception to it. Every religion, whether it is Islam, Hinduism, Christianity or any other religion, can be criticized. Freedom of speech and expression covers criticism of a religion and no person can be sensitive about it. Healthy criticism provokes thought, encourages debate and helps us to evolve... The author has undoubtedly a right to be wrong”. It went on: “an author has a right to put forth a perspective that a particular religion is not secular. This is a view point which one has a right to assert.”¹⁵

Recently a court in Indonesia ordered the closure of a bar which used Buddha statues for decorations. A lawyer had filed a complaint on behalf of local Buddhists. It is reported that “the

¹³ Annual Report: The Indonesian National Human Rights Commission 2005 (Komnas Ham:Jakarta:2005), p. 55.

¹⁴ See the reports of the Special Rapporteur on freedom of religion or belief, A/65/207, para. 44 (footnote 42); and A/HRC/10/8/Add.1, paras. 55-68.

¹⁵ Amicus brief by Article 19/Amnesty International/Egyptian Initiative for Personal Rights/Cairo Institute for Human Rights Studies, Judicial Review of law Number 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Defamation, case number 140/PUU-VII/2009, March 2010, p. 10 (<http://www.article19.org/pdfs/analysis/judicial-review-of-law-number-1-pnps-1965-concerning-the-prevention-of-relig.pdf>).

licence holder was found guilty of blasphemy and of using Buddhist symbols and ornaments at an inappropriate place.”¹⁶

In Thailand, over 100,000 web pages have been blocked on grounds related to national security. It is reported that several web sites fueled hatred among the population. In Malaysia, in 2010, it was reported that two Malaysian brothers were sentenced to five years’ imprisonment for burning a church, while another four were held for attacking a Muslim prayer hall.¹⁷ The Sedition legislation has also been used to sue bloggers in relation to alleged incitement to racial and religious hatred.

In regard to South Asia, a pro-Tamil Tigers Indian film-maker was jailed for a year for inflammatory comments inciting violence. The film-maker had threatened to harm Sinhalese in case of attack on Tamil fishermen by the Sri Lankan navy. The court in Chennai is reported to have stated that: “[The accused] referred to Sinhalese students and had made an inflammatory speech that had the likelihood of even causing danger to their lives. A reading of his entire speech showed that it was provocative and inflammatory in nature, and would create disharmony and insecurity between two groups on the ground of race and place of birth. The speech was in the nature of likelihood of goading the public in general and his followers to involve themselves in violence.”¹⁸

In Pakistan after the introduction of various amendments to the Penal Code, such as sections 298 A and 295 C, this situation is noted:

“The number of blasphemy cases tripled. Between 1986 and 2006, more than 800 people were charged in 375 cases of blasphemy [...] As the Lahore High Court noted,

Ever since the law became more stringent, there has been an increase in the number of registration of blasphemy cases...between 1948 and 1979, 11 cases of blasphemy were registered. Three cases were reported between the period 1979 and 1986. Forty four cases were registered between 1987 and 1999. In 2000, fifty two cases were registered...this shows that the law was being abused [...] to settle [...] scores.”¹⁹

As an example of the sensibilities involved, in a recent case (2010), *Kumar v State*, Kumar, a doctor, was arrested under section 295 C because one of his colleagues thought that he had

¹⁶ Agence France Press, 1 September 2010.

¹⁷ Bangkok Post, 13 and 24 August 2010.

¹⁸ www.timesofindia.indiatimes.com

¹⁹ Report of the European Centre for Law and Justice, paper for the 2011 Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, Strasbourg, September 2010, p. 24.

blasphemed the Prophet by referring to a fellow doctor as a “messenger”. Although the appeals court held that Kumar should be allowed bail, the allegation and arrest were subjective based upon the complainant’s perspective. There was no objective application of any standards of blasphemy.”²⁰ It is reported that in 2010, “two brothers, Sajid and Rashid Emmanuel, were shot just days after evidence was delivered exonerating them from blasphemy charges.”²¹

There were some grave incidents in early 2011 where high ranking politicians who had called for the reform of the above blasphemy law in Pakistan were assassinated.²²

Bangladesh is reported to have banned books by Maududi, an author advocating supremacy of a religion, while the Maldives has banned books by Hassan Saeed on the basis that they violate religious principles. In the meantime, in Nepal, it is reported that some communities have been using inflammatory language with a degree of impunity.

In regard to India, a question has been raised concerning laws which prevent conversion from one religion to another and whether this may lead to religious tensions and hate speech. These laws exist in various states. In 1977 the Supreme Court found that these laws, under the title of “Freedom of Religions Acts”, did not violate the constitution as proselytizing “impinges on the freedom of conscience” guaranteed to all the citizens of the country alike”.²³ The UN Special Rapporteur on Freedom of Religion has commented that:

“There is a risk that ‘Freedom of Religion Acts’ may become a tool in the hands of those who wish to use religion for vested interests or to prosecute individuals on the ground of their religion or belief. While persecution, violence or discrimination based on religion or belief need to be sanctioned by law, the Special Rapporteur would like to caution against excessive or vague legislation on religious issues which could create tensions and problems instead of solving them.”²⁴

In West Asia, there have been some key instances requiring action against violence linked with racial and religious issues. In Israel, the Kach movement was outlawed by the authorities in relation to incidents of incitement to hatred against Muslims. In the case of *Yitzhak Orion v Israel*, conviction was confirmed by the Supreme Court in relation to two appellants who had

²⁰ Ibid., p. 25.

²¹ Ibid., p. 26. See also the urgent appeal sent on 27 July 2010 jointly by the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on extrajudicial, summary or arbitrary executions; and the Independent Expert on minority issues (A/HRC/16/53/Add.1, paras. 300-314).

²² The Economist, March 5-11, p.6.

²³ Report of the European Centre for Law and Justice, op. cit., p. 33.

²⁴ A/HRC/10/8/Add.3, para. 50.

been found guilty of assaulting Arabs.²⁵ In Syria, it is reported that in 2008, a court found against a private broadcaster on the ground of defamation in relation to articles posted on the web.

In the UPR process concerning the Islamic Republic of Iran, the following practices were noted in the stakeholders' report (November 2009):

“Iran’s 1979 Constitution set out basic rights to expression assembly and association. Yet, these were invariably weakened by broadly defined exceptions [...] vaguely worded laws within the Penal Code, entitled “Offences against the National and International Security of the Country”[...] many vague and overlapping, dealing with criticism, insult and defamation, notably of state officials, and at least one with the dissemination of “false information”. Punishments for such charges include imprisonment and flogging.”²⁶

In regard to Saudi Arabia, the UPR report based on UN sources cited the following (November 2008):

“The Committee on the Rights of the Child (CRC) was concerned about hate speech against religious minorities in schools and mosques and recommended taking effective measures to prevent and eliminate all forms of discrimination on the grounds of religion or belief and promoting religious tolerance and dialogue in society. Allegations concerning arrests, beatings, and detention of Christian worshippers, Ahmadiyya believers, and allegations of imprisonment, flogging, death sentences passed for alleged blasphemy and apostasy have also been transmitted to the Government. CERD was concerned about reports that persons of some racial or ethnic origins are unable to manifest their religious beliefs in Saudi Arabia. A 2007 International Labour Organisation (ILO) report indicated that migrant workers who are not Muslims must refrain from public display of religious symbols.”²⁷

In Central Asia, there have been some instances of hate speech and related governmental action which invite reflection on the balance between freedom of expression and its parameters. It is reported that the Supreme Court of Tajikistan designated Hizb ut-Tahrir (a group favouring the establishment of a Caliphate), an “extremist” organization. Members of the group have been arrested and convicted on grounds of sedition or incitement to racial, ethnic or religious hatred, even for possessing the organization’s leaflets. A similar approach has been adopted by Kyrgyzstan where criminal law has been applied to the group.

²⁵ Israel National Report under UPR, A/HRC/WG.6/3/ISR/1 (September 2008), para. 88.

²⁶ A/HRC/WG.6/IRN/3, para. 45.

²⁷ A/HRC/WG.6/4/SAU/2, para. 40.

In Uzbekistan, in 2010, it was reported that film director Umida Ahmedova was prosecuted for defamation and harming the country's reputation through a film directed by her. The film titled "The Burden of Virginity" addresses the issue of the tradition that women must remain chaste until marriage and tells the story of a girl driven from the bridegroom's home in shame.

In Azerbaijan, the following case indicates the ambivalence facing law and practice on protection from hate speech:

"In 2007 the Baku Court of Grave Crimes had sentenced the already jailed editor in chief of Realny Azerbaijan and Gundelik Azerbaijan to eight and a half years in prison on charges of supporting terrorism, inciting ethnic hatred and tax evasion. The charges were based on an article that Fatullayev wrote criticizing the government's policy towards Iran and listing specific locations in the country as potential targets for an Iranian attack. The sentence incorporated Fatullayev's previous libel conviction for an article he allegedly wrote purporting that government forces may have played a role in the 1992 events in Khojali. International and domestic observers considered his imprisonment politically motivated."²⁸

Even where there are no cases that can be publicly identified, it is salutary if countries indicate their willingness to reform. For example, in the UPR process, in response to one of the recommendations from the other countries, Saudi Arabia indicated that it would consider taking measures to deal with hate speech. In many of the countries identified with laws above, the more liberal trend would also indicate that where illiberal laws exist, they need to be reformed, and even if they are not yet reformed, they should not be applied where they conflict with international law. On another front, practices which promote cross-cultural understanding are welcome. For instance, Qatar has established an annual conference for interfaith dialogue to promote justice and peace.

In retrospect, perhaps the greatest conundrum is that in the region's non-democratic settings, there is not much room for freedom of expression and consequently not much room for hate speech from individuals and groups beyond the power base. However, what exudes from that power base is self-evident and is often synonymous with propaganda.

²⁸ Source: OHCHR, Input to OHCHR Expert workshops on prohibition of incitement to national, racial or religious hatred while ensuring respect of the freedom of expression, Addendum, p. 4.

Threads

- It is not easy to access cases and assess the law/policy in practice unless they are reported and published openly (as in Australia and New Zealand).
- Laws on incitement to hatred are tested by whether they are genuinely used to protect minorities (Indonesia, Malaysia, Sri Lanka, Pakistan, Nepal, India, Israel, Iran, Saudi Arabia).
- Freedom of speech covers the possibility to comment on beliefs (India, Republic of Korea).
- There is an issue of transparency to ensure that laws on incitement to hatred do not impinge on freedom of expression and are measured against international standards (Iran, Bangladesh, Tajikistan, Uzbekistan, Azerbaijan).
- Interaction with the international community is important to nurture objectivity and promote cross-cultural understanding (Qatar).

Lessons Learned:

In retrospect, some of the constructive developments to be noted from the Asia Pacific region include the following:

- Increasing ratification of /accession to human rights treaties, especially on the matter of hate speech, namely, the ICCPR;
- Presence of national laws pursuant to international treaties and balance between civil law and criminal law;
- Promise to change laws to comply with international standards;
- Active and independent courts deliberating on the subject and responding effectively to human rights;
- Adoption of national human rights action plans which could be used to promote ethnic understanding and inclusiveness;
- Formulation of Press Codes consistent with human rights;
- Space for civil society and freedom of media respectful of international standards;
- Reform of illiberal laws and non-application of such laws pending reform;
- Programmes to promote human rights education and cross-cultural understanding of human diversity and respect for different races and religions.

Yet, through the cases and related contexts above, the message is thus that in the interface with laws and policies on hate speech, care needs to be exercised to prevent distortions. Caution needs to be invited if countries wish to adopt new laws on this issue, to ensure that they comply with international standards. The components of what constitutes hate speech in international law are based on objective standards and international scrutiny, and it is that international architecture which provides a value added to ensure a universal sense of balance.