

**CHARLIE HEBDO CASE STUDY:
PUBLIC ORDER AS LIMIT TO FREEDOM OF EXPRESSION***

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Abstract

The freedom of expression is not an absolute right. It comes with limited limitations set out in the ICCPR and ECHR— applicable to France, taking into account public order, ensuring the rights of others, and it needs to be prescribed by law. A state may give its full support to the freedom of expression, but when its exercise is no longer harmless, one must question the extent of such freedom; how it must be compatible and in respect with other rights that are as important as the freedom of expression. This article seeks to see how the limitation to freedom of expression can be applied in relation to post Charlie Hebdo event.

Intisari

Kebebasan berekspresi bukan merupakan hak mutlak. Terdapat keterbatasan dari ICCPR dan ECHR— yang berlaku kepada Prancis, dengan mempertimbangkan ketertiban umum, menjamin hak-hak orang lain, dan perlu ditentukan oleh hukum. Sebuah negara dapat memberikan dukungan penuh terhadap kebebasan berekspresi, tetapi ketika implementasinya tidak lagi berbahaya, harus dipertanyakan sejauh mana kebebasan tersebut; bagaimana kebebasannya kompatibel dan sehubungan dengan hak-hak lain yang sama pentingnya dengan kebebasan berekspresi. Naskah ini berusaha untuk melihat bagaimana pembatasan kebebasan berekspresi dapat diterapkan dalam kaitannya dengan kasus Charlie Hebdo.

Keywords: *Charlie Hebdo, freedom of expression, public order, respect for religion, responsibility to protect, human rights.*

Kata Kunci: *Charlie Hebdo, kebebasan berekspresi, ketertiban umum, menghormati agama, tanggung jawab untuk melindungi, hak asasi manusia.*

* Preferred Citation Format: Putri, D. K. & Subarkah, A. (2015). Charlie Hebdo Case Study: Public Order as Limit to Freedom of Expression. *J.G.L.R.*, 3(1), 9-16.

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“Two wrongs do not make one right” –
Unknown

A. Introduction

Charlie Hebdo is a French weekly magazine that features cartoons and articles on various topics of politics, culture, religion etc. The magazine had recently came into international attention following the latest terrorist attack which killed 12 people and commenced society to stand and defend the freedom of expression.

The attack was following controversies which arose over the publication’s multiple editions since 2006, featuring the Prophet Muhammad. Some parts of the French society especially those that were associated with Islam, has claimed that the publications included inappropriate depiction of Muhammad such as racist and naked cartoons.¹ This eventually triggered lawsuits, debates, and demonstrations. The 2015 attacks in particular, has received mixed reaction from the international community, those in support of the freedom of expression—and those in favor of limiting such freedom.

This article attempts to emphasize that the devastating terrorist attacks should not only encourage the support for freedom of expression, but it should also trigger awareness—for the people at large, that freedom of expression should be in respect for other rights, and for the government, that maybe it is time to consider public order and safety as a limit of this freedom. This article will therefore discuss the extent of freedom of expression, its limitation, and when it may be regarded as abusing its own right.

¹ *Magazine’s nude Mohammad cartoons prompt France to shut embassies, schools in 20 countries*, available at <http://news.nationalpost.com/news/magazines-nude-mohammad-cartoons-prompt-france-to-shut-embassies-schools-in-20-countries>.

B. Freedom of expression and Public Order

Freedom of expression is one of the rights that is highly protected and promoted under international law.² It is basically the right to hold opinions without interference. This means all forms of opinions are protected, including opinions of political, moral or religious nature. To criminalize the holding of an opinion would only violate Article 19.³ The protection also extends to the requirement that the State shall avoid having or seeking to have monopoly control over the media.⁴ Article 19(2) of ICCPR seeks to set out the scope of freedom of speech—giving protection to the right to seek, receive, and impart information and ideas of all kinds—including artistic expression,⁵ journalism⁶ and religious discourse.⁷ The freedom of expression can take form in many ways by spoken or written expression in images and publications of book and newspapers,⁸ or

² Universal Declaration of Human Rights, Article 19; International Covenant on Civil and Political Rights, Article 19; European Convention on Human Rights, Article 10; American Convention on Human Rights, Article 13; African Charter on Human and People’s Rights, Article 9.

³ *Faurisson v. France*, Communication No. 550/93, Report of the Human Rights Committee; *Mpakususu v. Zaire*, Communication No. 157/1983, Report of the Human Rights Committee; *Primo Jose Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, Report of the Human Rights Committee.

⁴ Concluding observations on Guyana (CCPR/CO/79/Add.121); Concluding observations on the Russian Federation (CCPR/CO/79/RUS); Concluding observations on Vietnam (CCPR/CO/75/VNM); Concluding observations on Italy (CCPR/CO/Add.37).

⁵ *Hak-Chul Sin v. Republic of Korea*, Communication No. 926/2000, Report of the Human Rights Committee.

⁶ *Mavlonov et.al. v. Uzbekistan*, Communication No. 1334/2004, Report of the Human Rights Committee.

⁷ *Ross v. Canada*, Communication No. 736/97, Report of the Human Rights Committee.

⁸ *Ahmad et. Al. v. Denmark*, Communication No. 1487/2006, Report of the Human Rights Committee.

the media.⁹ The publications of Charlie Hebdo are subject to protection under the provisions of Article 19. Its expressions of religious opinions—even if it had been deemed as offensive, are considered in line with the scope under Article 19(2).¹⁰

However, such freedom is not absolute in nature. Freedom of expression can only be limited by virtue of Article 19(3) of ICCPR—stating that the freedom of expression carries with it, special duties and responsibilities. In this sense, it may be subject to certain restrictions provided by law and is necessary for the protection of public order. Public order refers to the rules purposed to ensure the peaceful and effective functioning of society.¹¹ For instance, in order for a State to maintain public order, it may in certain circumstances to regulate speech – making in a particular public place. It is a condition characterized by the absence of widespread criminal and political violence such as murder, riots, intimidation against groups or individuals.¹²

In *Otto-Preminger-Institut*,¹³ provocative portrayals of objects of religious veneration could be regarded as a malicious violation of the spirit of tolerance. Further, to avoid violence against targeted groups—as demonstrated in *Kokkinakis* judgment,¹⁴ a State could legitimately consider it necessary to take measures aimed at repressing certain forms of conduct,

including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others.

Comparable to the Charlie Hebdo case, the cartoons of Muhammad may be found to be incompatible with the respect for religion of others and may therefore call for limitation. This is in virtue to the fact that in democratic societies, in which religions coexist within the same population, it may be necessary to place restrictions to ensure that everyone's beliefs are respected¹⁵—especially when considering the fact that the Muslim population in France has reached the percentage of 7.5% of the total population—making France the country with the most Muslims in the Western Europe.¹⁶ Such understanding is even strengthened by the past events relating to Charlie Hebdo where aside from the 2015 shooting, the publication was faced with lawsuits,¹⁷ other attacks,¹⁸ and demonstrations.¹⁹ These events indicate that the publications were not harmless and have raised negative impacts—involving death of innocent lives.

⁹ *Gauthier v. Canada*, Communication No. 633/95, Report of the Human Rights Committee.

¹⁰ *Ross v. Canada*, Communication No. 736/97, Report of the Human Rights Committee.

¹¹ *Siracusa Principles, Coleman v. Australia*, Communication No. 1157/2003, Report of the Human Rights Committee.

¹² Colette Rausch, *Combating Serious Crime in Post – Conflict Societies: A Handbook for Policymakers and Practitioners*, U.S Institute of Peace Press: Washington D.C., 2006.

¹³ *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295.

¹⁴ *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A.

¹⁵ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press: NY, 2010, p. 333; *Leyla Sahin v. Turkey*, No. 44774/98, ECtHR judgment, 10 November 2005, ¶ 106.

¹⁶ 'Map: France's growing Muslim population', available at <http://www.washingtonpost.com/blogs/worldviews/wp/2015/01/09/map-frances-growing-muslim-population/> (accessed on April 7, 2015).

¹⁷ *Mosque of Paris v. Val*.

¹⁸ *Charlie Hebdo attack: 2011 firebomb over Prophet Mohammed issue*, available at <http://www.telegraph.co.uk/news/worldnews/europe/france/11330145/Charlie-Hebdo-attack-2011-firebomb-over-Prophet-Mohammed-issue.html>.

¹⁹ *Protests break out around the world against Charlie Hebdo*, available at <http://www.cbsnews.com/pictures/protests-break-out-around-the-world-against-charlie-hebdo/>

Moreover, a limitation is of course shall be proportional and the least intrusive to achieve its protective function.²⁰ In order to satisfy the principle of proportionality, such limitation must be a direct and immediate connection between the expression and the threat. In the present situation, a restriction may be imposed by the French government at least, to ban provocative portrayals of objects of any religious veneration as demonstrated in *Otto-Preminger-Institut*. Naked cartoons of Muhammad for instance may be interpreted as provocative portrayals by some groups especially when taking into account that depiction of the Prophet is prohibited according to the religion.

Imposing a limitation such as this would not be the first time for a European State. In *Murphy v. Ireland*,²¹ the ECtHR accepted that a restriction of advertising religious events by Irish laws is aimed to protect public order and safety together with the protection of the rights and freedoms of others. Further, the Court acknowledges that religion has been a divisive issue and that religious advertising might be considered as offensive and open to interpretation. By these considerations, the Court was of the opinion that the restriction was not irrelevant nor a disproportionate limitation on the applicant's freedom of expression. Similar to that found in *Murphy v. Ireland*, depictions of Muhammad by Charlie Hebdo—even when the publications claimed that it was aimed against extremists, may lead to misinterpretations by the people at large, which may and did opened doors to multiple violence, hence, a public disorder. Therefore, states should take in careful consideration of protecting

the order and safety of the public. However, limitations must also be made firm by domestic law—something that is insufficient in French laws.

C. France's responsibility to respect, protect, fulfill human rights

As States parties of ICCPR,²² France have obligation to respect, protect and fulfill the Civil and Political Rights ["CPR"] of their people, including the rights of freedom of expression and opinion.²³

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole.²⁴ The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression.²⁵ This obligation also manifest on the obligation of State parties to adapt a legal system on their domestic law to protect and fulfill freedoms of opinion and expression.

The current France's Constitution which is called Constitution of the Fifth Republic²⁶ does not contain a bill of rights, but in its preamble mentions that France should follow the principles on the Declaration of the Rights of Man and of the Citizen ["The Declaration"].²⁷ There are several fundamental principles according to the Declaration, such as (a) equality before the law, (b) presumption of innocence, and (c)

²² France ratified ICCPR on 4 November 1980.

²³ Article 19 ICCPR; Human Rights Committee, *General Comment No. 34*, CCPR/C/GC/34, 12 September 2011, ¶¶ 7,8.

²⁴ Human Rights Committee, *General Comment No. 34*, CCPR/C/GC/34, 12 September 2011, ¶ 7.

²⁵ Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, ¶8; Communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999.

²⁶ Constitution of France was adopted on 4 October 1958.

²⁷ Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793).

²⁰ Human Rights Committee, *General Comment No. 34*, CCPR/C/GC/34, 12 September 2011, ¶ 34.

²¹ *Murphy v. Ireland*, No. 44179/98, ECHR 2003-IX.

freedom of thoughts and of opinion including freedom of religion. Therefore, it is clear that France legal system acknowledged the concept of the freedom of expression through its recognition of freedom of thoughts and opinion including freedom of religion. Therefore, France's obligation to respect freedom of opinion and expression under ICCPR had been fulfilled.

In French Law, although it does not explicitly recognized religion law, the their law acknowledge that any interference to freedom of opinion including freedom of religion –which is effected a disruption of public order and damage of reputation of other- will constitute as an offence.²⁸ It was also extended on the application of the freedom of press,²⁹ which is affirmed under section 29 of the Freedom of Press Act, provide that the direct publication or reproduction of a statement or allegation, - which damages the honor or reputation of the person or body of whom the fact is alleged-, shall be an offence.³⁰

Pursuant to the Article 10 (2) of European Convention on Human Rights ["ECHR"], freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.³¹ It is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.³² The tolerance and respect for the equal dignity of all human beings

constitute the foundations of a democratic, pluralistic society. This principle may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.³³

When dealing with cases concerning incitement to hatred and freedom of expression, the European Court of Human Rights ["ECtHR"] uses two approaches which are provided for by the ECHR:

- (a) The approach of exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention; and
- (b) The approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).³⁴

Such as in the case of *I.A v. Turkey*, ECtHR found that Turkey had not violated the article 10 of the Convention in the applicant's conviction and sentence –which is insulting religion through the publication –, due to the fact that the applicant's "provocative" opinion constitutes as an abusive attack towards the Prophet of Islam.³⁵ Therefore, the assessment of the obligation to protect and to fulfill of CPR lies on the ability of state to provide an

²⁸ Article 11 of La Déclaration des droits de l'homme et du citoyen of 1789.

²⁹ Freedom of Press Act of 29 July 1881.

³⁰ Section 29 of Freedom of Press Act of 29 July 1881.

³¹ Article 10 (2) ECHR.

³² ECtHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, ¶ 49.

³³ ECtHR, *Erbakan v. Turkey*, judgment of 6 July 2006, ¶ 56.

³⁴ ECtHR, Factsheet-Hate speech, November 2014, p.1.

³⁵ ECtHR, *I.A. v. Turkey*, (no. 42571/98) 13 September 2005.

adjudication system, including investigation and prosecution any violation of CPR.³⁶

As opinion by Roy, the Islamic population in France lacks the political and social organization that could enable it to express dissatisfaction and act in the interests of the Muslims they represent.³⁷ In the 'Charlie Hebdo', several Muslim organizations had initiated proceedings seeking to prohibit a magazine depicting the prophet Mohammed. However, the request was annulled because it did not meet the strict requirements of Freedom of Press Act of 29 July 1881.³⁸ The fact that there were debates on Charlie Hebdo's action and lawsuits, France still could not protect and respond to the Charlie Hebdo's incident. Therefore the obligation to protect and fulfill freedom of expression and opinion had not been fulfilled.

D. Conclusion

The event of Charlie Hebdo serves as a wakeup call for limitation of freedom of expression. As important as that freedom may be, however when it causes violence and deaths of civilians, a state is expected to respond as there is an obligation to protect the rights of others. The Charlie Hebdo case indicates disturbance towards public order and harm of the rights of others. Consequently, France's obligation to protect human rights must be reviewed and should set a limitation in order to protect and ensure the fulfillment of the rights of others.

A limitation may follow one of the approaches set out by the ECHR. Further,

such limitation should be written in domestic law, and at least intrusive to achieve its protective function. In the context of freedom of expression, the point of issue is the disapproval of the inappropriate depiction or cartoon of religious veneration. Therefore the limitation should be strictly to prohibiting just that. And it should be applied to any religion or beliefs that coexist in France.

³⁶ Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

³⁷ O. Roy, *La laïcité face à l'islam*, Paris, France: Editions Stock 2005.

³⁸ Janssen, Esther, "Limits to Expression on Religion in France" (8 March 2012). *Agama & Religiusitas di Eropa, Journal of European Studies*, Vol. V, No. 1, p.10.

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