

FREEDOM OF EXPRESSION: CRITICISING PUBLIC OFFICIALS

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Introduction

In what follows, I summarise an argument against prohibitions on freedom of speech with regard to criticism directed at public officials – namely, every person who has a legal power in an institution of the state, including the legislative branch (particularly parliament member), the judiciary (particularly judges) and the executive branch (including, for example, prosecutors, police officers) – and public institutions (rather than a public official at the institution) and the government in general (rather than a specific institution). Such criticism can include, for example, claims regarding the morality or legality of actions of public officials (for example, a claim that a police officer is corrupt), their qualifications (for example, a claim that a judge is lazy), or the efficiency of a certain institution (for example, the army). I argue that there are strong considerations in favour of criticising the performance of public officials (and institutions), and especially against legal (and particularly criminal) limitations on such criticism, and relatively weak considerations against this criticism, especially with regard to legal (and particularly criminal) limitations on criticising public officials.¹

The law in many countries includes criminal prohibitions on criticism of public officials, both general prohibitions, most notably the prohibition on ‘sedition’, and more specific prohibitions on criticism of judges, mainly the prohibition on ‘scandalising the court’. However, some of the original prohibitions have been repealed or restricted while other prohibitions are rarely enforced.² I argue that these criminal prohibitions are unjustified since the considerations against them outweigh the consideration in favour of them.

I. The Special Reasons for Criticising Public Officials

An analysis of the justification for limitations on freedom of expression should be conducted by taking several steps. First, we must ascertain in favour of allowing the relevant types of expression. Second, we should also

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¹ This paper is based on the book R. Segev, *Freedom of Expression against Governmental Authorities* (Supervisor – Mordechai Kremnitzer) Jerusalem: Israel Democracy Institute, 2001.

² For a review, see B. Van Niekerk, “The Uncloistering of the Virtue: Freedom of Speech and the Administration of Justice – A Comparative Review,” *South African Law Journal* (95) 1978, pp. 362-390; E. Barendt, *Freedom of Speech*, Oxford: Clarendon Press 1983, pp. 152-154; N. Dorsen, M. Rosenfeld, A. Sajó & S. Baer, *Comparative Constitutionalism: Cases and Materials*, St. Paul, Minnesota: West 2003, pp. 839-841.

reflect on the considerations for restricting these types of expression. Finally, we must juxtapose the opposing considerations in order to reach an overall conclusion whether the relevant type of expression should be permitted or limited. It is important to note that both the consideration in favour and the considerations against allowing or limiting expressions might vary depending on the type of expression.

We should distinguish two aspects when analysing the considerations supporting freedom of expression. First, the *scope* of freedom of expression, and second, the *strength* of freedom of expression. With respect to these two aspects, it is important to distinguish between types of expressions since not every consideration in favour of free expression has the same relevance or weight with regard to every type of expression.³ An important distinction is between *respect* for expression in light of its content and *tolerance* for expression regardless or even despite of its content. It is often said that freedom of expression is important when the content is disputed, since freedom of expression is unnecessary when no one disputes. This is true as a psychological observation but misleading as a normative one. Some considerations in favour (as well as against) freedom of expression are based on the content of the expression. Particularly, the considerations in favour of freedom of expression are especially weighty with regard to criticism of public officials: criticism of public officials contributes to evaluation of the performance of public officials. This is clearly true concerning accurate criticism, but it is also true, albeit to a lesser degree, to critique that is not based on accurate information or make a constructive suggestion concerning the conduct of public officials, since every claim regarding this subject may contribute to uncovering or confirming the truth, if only by drawing attention to certain issues and encouraging thought about those issues. An additional consideration in favour of criticising public officials (and against a criminal prohibition on this criticism) is the danger of improper bias by public officials against criticism – both unconscious bias and even abuse of power. For these reasons, expressions about the conduct of public officials, and particularly criticism of public officials, represent the core of freedom of expression.

I.1. Criticism of the Judiciary

This previous statement also applies with regard to criticism of judges or courts as an institution. Indeed, there are special reasons for protecting this kind of freedom of speech. The first reason derives from the broad scope and significance of the role of judges. Courts exercise great power in deciding legal rights, including the power to decide private suits and to convict people of committing offences and to punish them and thus affect their liberty and property.

³ See generally, R. Segev, *Freedom of Expression: Justifications and Restrictions* (Supervisor – Mordechai Kremnitzer) Jerusalem: Israel Democracy Institute 2008.

In evaluating the power of the judiciary, we should bear in mind that, due to the importance of the independence of the judiciary, the decisions of courts are typically final: no other authority has the power to intervene in or change judicial decisions. While there is an appeal system within the judicial system, it is typically limited in light of the common rule that appellate courts rarely evaluate the findings of fact made by the trial court.

Another important feature is the wide discretion judges often have, both normative discretion – within the law (the interpretation of the law) and beyond the law – and factual discretion.

An additional aspect is the claim that there is special reticence from critical evaluation of the performance of the judicial system. According to this claim, in many western countries discussion of the functioning of the courts, and critical discussion in particular, is rare and significantly more moderate than the debate on other public officials. This is due to reservations of laymen, particularly of the media and of jurists, who possess the tools for serious discussion of the performance of the courts, to criticise judges and the judicial system. The argument is that this reluctance derives not only from legal restrictions on criticism of the courts but also from informal restrictions that jurists and the media assume voluntarily. The result is an absence of real, critical discussion of issues related to the judicial process. Consequentially, it seems that, in general, the judiciary is the least criticised governmental authority.⁴

It is important to note that real supervision of the functioning of the judiciary requires not only freedom of *information* concerning the judicial process, but also freedom of *critical appraisal* of relevant information. Therefore, it is not enough that most court proceedings are public; an open debate of subjects related to the performance of judicial system and freedom to criticise the workings of the courts are also essential in order to evaluate the apparent facts, and thereby to engender true supervision.

I thus conclude that there are weighty considerations against prohibitions on criticising the conduct of public officials, including judges. I now turn to consider the argument for a restriction of criticism of public officials.

II. The Argument in Favour of Limiting Expression Critical of Public Officials

The most common argument in favour of limiting criticism of public officials is based on the significance of general, long-term public confidence in public officials – i.e. the view that public officials carry out their tasks properly. According to this claim, public confidence in public officials has instrumental value. It is important as a means for achieving *another* objective that is

⁴ See Van Niekerk 1978, *supra* note 2, pp. 363, 369-370, 374-375, 377-379, 381-383, 554-570.

valuable in itself: an efficient functioning of the government that in turn contributes to the lives of individuals.

According to the first part of this argument, the degree of public confidence in the institutions of government influences their ability to function effectively. Though the government could advance its policies by the exercise of coercive force, regardless of the public's confidence, this ability is limited. Therefore, at least some degree of public confidence in government is an important factor in the efficient functioning of government.

However, the efficient functioning of government is not valuable in itself. It is only valuable when it is *proper*, namely, in accordance with valid moral principles. Accordingly, prohibiting opinions that criticise improper governmental actions would prevent the exposure of the flaws in the authority's actions and their correction.

Since public confidence in public officials is valuable only as a means for an effective and proper functioning its protection is valuable only when it is *justified* namely, based upon the truth. When confidence in officials is based on incorrect information, the result is an unfounded confidence in officials. There is no justification for protecting unfounded confidence that is based on a false or distorted information. While unfounded criticism of public officials might undermine their status, this is a welcome result.

Nevertheless, public confidence is sometimes instrumentally important. If people do not trust the courts, they may refrain from turning to the courts in order to protect their rights. This could leave them without a remedy or lead them to adopt alternative, including violent, measures for settling disputes. Particularly, the cooperation of individuals is required as a prerequisite to the supervision by courts of the activities of other branches of the government since individuals often initiate legal proceedings and provide information concerning the functioning of governmental authorities.

A more specific argument in favour of a prohibition on criticising judges is that it is required since judges do not have other options to confront criticism.⁵ In my opinion, this argument is exaggerated. The law in many countries permits judges, like other civil servants, to sue in order to protect their reputation by means of the law of defamation.⁶ In practice, judges tend not to avail themselves of this option. However, in this regard, judges are not very different from other public officials. Therefore, it is doubtful that judges' reticence to benefit from the law of defamation makes them sufficiently different to justify granting them special status. In any case, and most importantly, legal recourse to the law of defamation does not exhaust the possibilities for response to criticism available to judges. While it might

⁵ See, for example, N. Lowe & B. Sufrin, *Borrie & Lowe on the Law of Contempt* 3rd ed., London: Butterworths 1996, p. 361.

⁶ See Van Niekerk 1978, *supra* note 2, p. 544.

be undesirable for judges to express opinion on issues that are not directly relevant to their judicial office, particularly regarding issues that are the subject of political dispute or specific issues under adjudication, the objections to judges expressing their opinions on fundamental issues related to their judicial office are less persuasive. Moreover, there are significant considerations in favour of pertinent responses of judges to criticism regarding their performance. In fact, judges sometimes do respond to criticism in diverse forums including formal judgments, as members of various committees (including commissions of inquiry), law review articles, lectures and public events, and even in media interviews. In addition, other individuals and institutions occasionally respond to criticism of judges on their behalf. In this regard, the position of judges is special in a different way, as it is doubtful that there are many other public officials whose opinions are officially published and reported by the media on a regular basis. An additional factor that should be taken into account is that when judges do not respond to criticism, this is often understood by many people (erroneously) as due to their inability to respond rather than the lack of a convincing reply.

III. The Scope of Limitations on Criticising Public Officials

The consideration discussed in the previous section in favour of prohibiting criticism of public officials and institutions entails several restrictions on the content of such a prohibition (before considering whether it is justified overall, in light of the considerations against it too).

The first restriction on the scope of a prohibition on criticism is that it should apply only to criticism made in public, which can influence public confidence. Another restriction is that the prohibition should apply only to publications which reach a significant number of people. Prevailing legal prohibitions are not always consonant with these requirements.

The most important restriction on a prohibition on criticism concerns the content of the criticism. As noted above, a prohibition should be limited to *false statements* since accurate statements cannot undermine *justified* confidence in public officials. Yet many of the existing legal prohibitions are not limited to false factual statements nor do they recognise a defence of truth.

The implementation of this limitation is simple concerning specific factual statements, for example, the claim that a certain public official lied at a certain occasion. It is more complex concerning other types of expressions, specifically *general factual assessments* – for example, the claim that courts are inefficient – and *normative arguments* – for example, that a certain decision of a public official is immoral. While the application and implementation of the distinction between correct and incorrect statements is widely agreed upon when it concerns specific factual statements, there is no such agreement when it concerns general factual assessments and normative arguments.

With regard to normative arguments, there is disagreement on whether there are objective standards of truth. But even assuming that there are such standards, there are strong considerations against a criminal prohibition which requires ascertaining them. It is often hard to identify clear general standards for normative arguments, and unguided discretion of law-enforcement officials, police officers, prosecutors and judges seems to raise a serious danger of mistake – and of bias and abuse.

This conclusion applies also to general factual assessments that cannot be reduced to concrete, specific factual claims. Though it is possible, in principle, to examine the accuracy of such expressions, the framework of a criminal prohibition is an inappropriate forum.

Thus, a prohibition on criticism against public officials should not apply to normative arguments and general factual assessments since such a prohibition requires a distinction between accurate and false statements and such a distinction is very difficult to implement in the framework of a criminal prohibition regarding these types of expressions.

Restricting prohibitions on criticism of public officials to specific factual falsehoods is desirable for other reasons as well. First, specific negative factual assertions typically undermine public confidence more than other kinds of expressions: people tend to assume that specific factual claims are true, whereas they tend to regard normative opinions and general factual assessments with a greater degree of skepticism. Therefore, the considerations against such statements are weightier. Moreover, the consideration in favour such statements are often weak compared to false normative arguments or general factual assessments the performance of public officials.

Another restriction I believe should be placed on prohibition on criticism of public officials is that it should be limited to expressions that create a significant probability of undermining an important aspect of justified public confidence. This is not a trivial requirement. While almost every critical statement with regard to public officials is likely to undermine someone's confidence, only a few expressions are likely to undermine the confidence of a significant part of the public.

The examination of the danger of unjustified public confidence should take account of the following factors. First, the public stature of the speaker should be examined: the higher the public status of the speaker, the greater the probability that the statement will be deemed trustworthy and, accordingly, the greater the danger posed to public confidence. Conversely, if the critic is not considered an expert in the subject matter of the statement, or if the speaker is clearly biased, the danger posed by the statement for public confidence weakens.

Second, with regard to the audience, the wider spread of publication of the criticism and accordingly the greater the number of people exposed to it, the greater the danger, and vice versa. The degree of danger posed to public confidence also depends on specific characteristics of the audience. For example, criticism of the performance of certain judges circulated at a closed judicial conference is less likely to undermine public confidence than a more general publication. This variable is often not taken into account. The typical case is that of instituting proceedings for scandalising the court on the basis of critical arguments made in documents that reach the attention of only a small number of law-enforcement officials, where it is clear that in view of the identity of the audience, there is usually no real danger to public confidence in the judicial system.

A more complex aspect in evaluating the danger relates to the content of the speech, beyond its negative nature. For example, the subject matter of the criticism. The degree of the relevance of criticism on an important aspect of the functioning of the relevant institution affects the extent of the harm to the confidence in that institution. Another indicator is whether it concerns a central or a trivial matter. The latter would probably not pose a substantial threat to public confidence. Also, criticism directed at a general policy is more significant in this respect than criticism directed at a one-time incident that is unlikely to recur.

Finally, another aspect that affects the danger of undermining justified public confidence concerns the public's willingness to believe the criticism. Criticism that is *manifestly* absurd is unlikely to undermine public confidence (as opposed to unfounded criticism that appears to be credible).

The conclusion is therefore that a prohibition aimed at protecting justified public confidence in public officials should be limited to false, concrete and factual statements that create a significant danger of undermining public confidence. This conclusion narrows the scope of a prohibition significantly.

An important question concerns the content of a prohibition on criticism under uncertainty, from the point of view of the publisher, regarding the accuracy of a suspicion regarding the behaviour of a public official. The standard rule is that a criminal conviction requires, *inter alia*, that the offender is aware of each element of the offence and this requirement is often understood so that it is enough if the offender suspects that element is present. This requirement seems inappropriate with respect to the element in a prohibition on criticism that the criticism is false. If an agent suspects that a criticism might be false, but believe, in light of the information available at the time of publication, that there is a significant probability that it is accurate, he should not be convicted for publishing it. This is so particularly since, as opposed to the usual situation in which one can verify the relevant facts with relative ease, the possibility of obtaining information concerning

improper actions of public officials is typically quite limited. The main difficulty is that the relevant information is usually in the possession of the officials, and there is a real danger that the information will not be disclosed. Therefore, as opposed to the typical situation in which we may require that a person refrain from conduct if she is unable to verify the existence of circumstances that would render that conduct harmful, such a demand is problematic regarding publications concerning the conduct of public officials.

In my opinion, the prohibition should not require intent to undermine the public's confidence. Unlike the agent's awareness of the relevant facts, his or her intent is not a good indication to distinguish between justified and unjustified speech.⁷ The guiding principle for determining the boundaries of justified criticism should be the *value* of the speech (based on its content) rather than the intention of the agent.

IV. Protecting the Image of Public Officials through the Criminal Law

So far I have considered the importance of criticism of public officials, on the one hand, and that of public confidence in public officials on the other hand. However, the overall justification of a criminal prohibition depends also on additional considerations. One is the effectiveness of a criminal prohibition on criticism of public officials in protecting public confidence in them. It is unlikely that prohibiting criticism, let alone jailing critics, would persuade the public that the government is acting properly. It might even have the opposite result of undermining, rather than bolstering, the confidence of the public in government. One reason for the ineffectiveness of a criminal prohibition in this regard is that establishing and enforcing such a prohibition may be viewed as an instrument by which the relevant officials protect their personal interest or their political views. Another reason is that the criminal process is likely to draw attention to the criticism and might cause the public to suspect that it is accurate, especially in case of an acquittal, even when it is based on lack of proof beyond a reasonable doubt regarding one of the elements of the offence rather than on a finding that the criticism is (probably) accurate.

Moreover, alternative measures for protecting public confidence in public officials are often more efficient and less costly. The most straightforward alternative in this regard is verbal response of the relevant officials to the criticism. Public officials possess the best tools for responding to criticism, both in terms of their ability to obtain the relevant information concerning their performance and in terms of their ability to draw the attention of the media and thus make their response heard.

⁷ The relation between moral rightness (wrongness) and intent is of course generally debated. For a recent argument against the significance of intention, see T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*, Cambridge, Massachusetts: Harvard University Press 2008, chapters 2 & 3.

Another important consideration against criminal prohibition on negative expressions – including false ones – is that it might lead to excessive deterrence and curtail important speech. This danger increases with regard to vague prohibitions.

Conclusion – A Proposal to Repeal the Prohibitions Protecting the Status of Public Officials

The above analysis of the pertinent considerations clearly suggests that a prohibition on criticising public officials and institutions, including the narrow prohibition considered above, is unjustified. The consideration supporting such a prohibition – the protecting of the confidence of the public – is weak and the considerations against – mainly the importance of expressions dealing with the conduct of public officials and the ineffectiveness of the criminal law in this regard – are overwhelming. Moreover, there is a symbolic and educational value in an absolute principle of freedom of expression concerning the conduct of public officials. Therefore, I believe that legal prohibitions of this kind are unjustified and should be repealed.

