



Intervention by Bürgerbewegung Pax Europa

OSCE Human Dimension Implementation Meeting

Working Session 11

Tolerance and Non-Discrimination I (cont.)

including prevention and responses to hate crimes in the OSCE area and combating racism, xenophobia and discrimination, also focusing on intolerance on religious grounds

Warsaw, September 26, 2016

From “Charlie” to the Fight against Hate Speech

Only twelve months ago, in this very venue, BPE voiced great concern about the implementation of ever more restrictions on freedom of expression in the OSCE area.¹ The hard truth remains that, to be free, Freedom of Expression must include the right to hate who you choose, just as to love who you want.

The state of free expression has extensively deteriorated in the past year, not least due to the massive influx of migrants into the OSCE area. It is interesting to note here that where immigration rises causing an increase in diversity of race and religion, there is a decrease in the diversity of ideas allowed expression.

Recent developments in Germany are just one case in point. Aided by internet giants such as Facebook, YouTube, and Twitter, the European Union announced a new online speech code.² The main question arising from this cooperation is: “How does Facebook define ‘racism’, ‘xenophobia’

1 BPE intervention HDIM.NGO/01491/15, 2 Oct 2015

2 <https://www.gatestoneinstitute.org/8234/eu-free-speech>

or ‘hate speech’? Who decides which views can be considered ‘extreme’”? These questions are of no concern to Chancellor Angela Merkel and Justice Minister Heiko Maas, who delegated the task of monitoring the web to an NGO.³ The pressure was ratcheted up when police raided the residences of at least sixty people who were suspected of posting “agitation” against immigrants on the Internet. Mr. Maas said:

“The resolute action of investigative authorities should motivate everyone to think before getting creative on Facebook... Everyone should take that to heart before opening his mouth.”⁴ This is the German government's notification of “feel the chilling effect.”

Mr. Maas' words clearly serve as a deterrent and obstruct free debate. It is notable that this chilling effect is intended for those on the “right”, against those who question – sometimes with the use of drastic words – the wisdom of indiscriminately opening borders. It is not intended against those on the “left”, against those who denounce police officers as “pigs”⁵ or those who call on Germany to be bombed again.⁶ Criticism versus the call to bomb Germany. Hate speech versus normal discourse. This is, at best, duplicitous selective application of the law. At worst, freedom of expression is stifled.

This situation is exacerbated by the criminalization of questions. For example: the Dutch politician Geert Wilders is now being prosecuted for the third time, this time for asking a simple question, rather than making a statement.⁷ In the event that Mr. Wilders is convicted, discussion and debate will be rendered impossible because the questions themselves become the crime. Democracy will be the ultimate loser, because dialogue and open exchange of ideas enable a free society to grow and learn.

In recent years the terms “hate speech” and “hate crime” have become the new buzz words used to shut down discourse in the OSCE region. In addition, hate speech accusations are increasingly being leveled against those whose opinions do not meet the current standard (as set forth by governments and NGOs). More and more people, especially west of Vienna, are reported to the authorities for further investigation, taken to court and convicted for hate speech. Those who were “Charlie” only a year ago are now fighting “hate speech”.

3 Amadeu Antonio Foundation

4 <http://gatesofvienna.net/2016/07/the-voice-of-honecker-is-heard-again-in-the-land/>

5 <https://linksunten.indymedia.org/de/node/184675>

6 https://twitter.com/_juliaschramm/status/435413941091856384

7 For details on this case, see <http://gatesofvienna.net/2014/12/geert-wilders-to-be-prosecuted/>

The crux of the matter is that there is a glaring absence of a coherent and meaningful definition of the term “hate”, which is an interior condition, a feeling, and thus unavailable to the State for investigation or prosecution. It cannot constitute a crime in itself and is a temporary condition, like all feelings.

In free societies, the right to free expression must include the right to offend. The president's Christmas speech does not require freedom of expression; it is those expressions that ‘offend, shock and disturb’ that are protected by the European Court of Human Rights.⁸

There are acceptable limitations to freedom of expression, such as the protection of the rights and reputations of others. The ICCPR, in its Article 19(3) clearly defines these limitations⁹:

1. ‘...PROVIDED BY LAW...’

The right to freedom of expression cannot be limited at the whim of a public official. They must be applying a law or regulation that is formally recognized by those entrusted with law making.

The law or regulation must meet standards of clarity and precision so that people can foresee the consequences of their actions. Vaguely worded edicts, whose scope is unclear, will not meet this standard and are therefore not legitimate.

The rationale:

Vague laws have a ‘chilling effect’ and inhibit discussion on matters of public concern. They create a situation of uncertainty about what is permitted, resulting in people steering far clear of any controversial topic for fear that it may be illegal, even if it is not.

2. ‘...LEGITIMATE AIM...’

There must be a legitimate aim to limit the right to freedom of expression. The list of legitimate aims is not open-ended. They are provided for in Article 19(3) of the ICCPR: ‘...respect for the rights and reputations of others, and protection of national security, public order (ordre public), public health or morals’. They are exclusive and cannot be added to.

The rationale:

Not all the motives underlying governments’ decisions to limit freedom of expression are compatible with democratic government. For example, a desire to shield a government from criticism can never justify limitations on free speech. (This is important in light of German Justice Minister Maas' dire warning to “ to think before getting creative on Facebook”)

8 <http://swarb.co.uk/handyside-v-the-united-kingdom-echr-7-dec-1976/>

9 <https://www.article19.org/pages/en/limitations.html>

It is important to note that the law already accounts for restrictions of freedom of expression:

1. Slander and libel are already sufficiently criminalized, as are calls to set a house on fire.
2. New offenses are now being added, creating a chilling effect on free speech. The accusation of hate speech constitutes one such offense.

Effects of hate speech legislation on a society:

- Charges of hate speech lead to the denial of the obvious; we are engaging in the outright denial of the most heinous and evil occurrences around the globe.
- The question is no longer whether one's views are correct or insulting, but whether law enforcers or the OSCE should be empowered to tell the difference.
- Citizens are robbed of the right to be wrong.
- Hate speech laws do not protect ALL people in a society.
- Vague wording of hate speech laws cause a chilling effect, preventing people from speaking out of fear of becoming criminals.
- The truth of a statement is no longer of any concern. The truth has become part and parcel of hate speech.

Recommendations:

- BPE recommends that the words “hate” and “hatred” be abandoned by all official OSCE organs and in all OSCE publications.
- BPE recommends that a clear and just definition of the term “hate speech” be provided by ODIHR and participating States, as this would improve general acceptance of the concept. If this cannot be achieved then the concept of hate speech must be abandoned altogether.
- BPE calls on participating States to refrain from shackling freedom of expression by official censorship, which is disguised by charges of hate speech and which is imposed by governments, police and courts.
- concept.