

Freedom of expression and its limits – Was Voltaire right?

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Human rights used to be a favorite subject of legal, political and social discourse some twenty years ago. The fall of communism and the end of the cold war was largely attributed to the idea of human rights gaining an overwhelming support and popular enthusiasm. Based on that sentiment the World Human Rights Conference in Vienna in 1993 proclaimed an era of human rights. However, very soon we all have learned that we had been victims of our unrealistic dreams. Wars in Balkans and Rwanda, the attack on World Trade Centre, conflicts in Middle East, etc. proved that human rights are still violated, disregarded and negated. On top of it, also in our societies, more and more people tend to accept the fact that their human rights are being restricted in the name of security and public order.

In that context I would like to discuss the problem of freedom of speech. I certainly do not intend to cover that subject in its whole complexity.¹ Instead I am proposing to analyze a couple of controversies associated with that freedom. In particular after tragic events in France, discussion about the freedom of speech gained a new dimension.

Let me clarify that by “speech” or “expression” I mean a whole range of forms of expression: writing, pictures, songs, videos, films, flags (and burning flags), forms of dress like the headscarf, badges, theatrical performances, religious rites and symbols, hunger strikes, demonstrations and more. Free speech also means your right to express yourself by not speaking – like the Jehovah’s Witnesses in the US who declined to swear the oath of allegiance, because they considered it against their religion.

One should not be misled by the remark to *Voltaire* in the title of that paper. Certainly it is not my intention to dispute his concept. If we presume that he advocated the idea of unrestricted freedom of speech then probably we all agree that in his time he was right.² But let us rather discuss the following question: how does freedom of

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1 For a more thorough analysis see: Council of Europe (ed.), *Freedom of Expression: Essays in Honour of Nicolas Bratza*, President of the European Court of Human Rights, 2012; *Barendt*, *Freedom of speech*, 2005.

2 In fact the most often cited *Voltaire* quotation is apocryphal. He is incorrectly credited with writing: “I disapprove of what you say, but I will defend to the death your right to say it.” These were not his words, but rather those of *Evelyn Beatrice Hall*, written under the pseudonym *S.G. Tallentyre* in her 1906 biographical book “The Friends of Voltaire”.

expression look in our time? I am sure that we all are well aware that precisely free speech was used as an extremely dangerous weapon in not that distant history of both our nations – Poland and Germany. Various misuses of that freedom can be also observed contemporary. During the bloody conflicts in a former Yugoslavia and Rwanda and even today in Ukraine we observe how false propaganda, distortion of facts and suppression of free speech contributes to building an atmosphere of fear and haters. For example in 1994 in Rwanda, *Simon Bikindi's* three songs were indisputably used to fan the flames of ethnic hatred, resentment and fear of the Tutsi. Given Rwanda's oral tradition and the popularity of RTLM at the time, the International Court found that these broadcasts of *Simon Bikindi's* songs had an amplifying effect on the genocide.

So what to do with that freedom? Should it be controlled, restricted, perhaps censored? If so, by whom and with what criteria?

Allow me to make a small digression. Just few months ago the president of Poland *Bronisław Komorowski* opened a monument in front of a former office of Censorship (a very powerful institution indeed) to commemorate our struggle for a freedom of expression during communist time. The following quotation from *Tacitus* is encrypt "it is a rare fortune of those days that one may think what one likes and say what one thinks". The vast majority of Polish people were deprived of that privilege under the communist regime. And of course in East Germany the situation was even worse.

It is widely believed that freedom of expression is the touchstone of all human rights. It is the primary right in a democracy, without which effective rule of law is impossible. It is essential to an intellectually healthy society. It promotes individual self-fulfillment and acts as a check on the abuse of power by public officials. It exposes errors in the governance and administration of justice. In the famous words of *John Stuart Mill*, "the best test of truth is the power of thought to get itself accepted in the competition of the market", though *Mill's* belief rested on the assumption that the market would not be distorted by the State or media giants which in fact is our reality.

In my presentation I would like to discuss the problem of free speech in the European context. However let us remember that we are also influenced by the model cherished by our as they say oversees American cousins. The US has opted for absolute freedom of expression or perhaps almost absolute.³ Of course even in the States you are not allowed to shout "fire" in a crowded cinema theatre when there is no fire. What kind of dilemma that US approach to freedom of speech can possibly provoke is well illustrated by the example of *Aryeh Neier* a world famous human rights defender. I had a privilege of meeting him during the Balkan conflict. As an infant in Berlin, *Neier* narrowly escaped death in the Nazi Holocaust that claimed the lives of most of his Jewish family. Several decades later, in 1978, as executive director of the American Civil Liberties Union (famous ACLU), he was reviled by much of the American Jewish community for defending the Nazis' right to march and speak in Skokie, Illinois.

The letter, which appears to haunt *Neier*, is representative of thousands he received after he began defending the Neo-Nazis. A man wrote to him:

3 For more see: *Barron/Dienes*, First Amendment Law, 1991, p. 529.

“My only hope [...] is that if we are both forced into a march someday to some crematorium, you will be at the head of the parade, at which time you will in your rapture have an opportunity to sing hosannas in praise of freedom of speech for your tormentors.”

But *Neier* replies,

“I could not bring myself to advocate freedom of speech in Skokie if I did not believe that the chances are best for preventing a repetition of the Holocaust in a society where every incursion on freedom is resisted.”⁴

Do we in Europe share his conviction about a need of absolute freedom of expression? The answer is clear – no! Our historical experience teaches us that a more careful approach is needed. That freedom can collide with other important values – like privacy, need to protect state secrecy, combat terrorism, protect historical memories, etc. How to solve those possible conflicts? International law and in particular law governing human rights offers only certain and limited guidelines.

Let us for example touch upon the question on how far we can restrict freedom of expression in order to protect privacy. There is quite a number of the European Court of Human Rights judgments dealing with that question. Let me remind you of the well-known first judgment in the case *von Hannover v. Germany* where the Court found that the right of privacy of applicants (*Princess Caroline* and her family) was indeed violated by publishing certain intimate photos. The court stated *inter alia*:

“Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. [...] 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. [...] freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly”.

The Court has also repeatedly emphasized the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Would it be otherwise, the press would be unable to play its vital role of a “public watchdog”. At the same time the right of the publishing companies to freedom of expression must be balanced against the right of the applicants to respect for their private life. Fundamental importance should be attached to the question whether the photos, considered in the light of the accompanying articles, had contributed to “a debate of general interest”. The Court offered negative answer. *Princess Caroline* was complaining of nothing more or less than constant hounding by the paparazzi and the

4 See: *Neier*, *Defending My Enemy: American Nazis in Skokie, Illinois, and the Risks of Freedom*, 1979.

publication of their photographs, which made it impossible for her and her family to have any private life except behind closed doors. Such intrusion should not be seen as exercising freedom of speech.⁵

On the other hand, in another judgment published on the very same day as *von Hannover* the Court found that an injunction imposed on the publisher of *Bild*, as a consequence of two articles reporting that a well-known TV actor had a conviction for the unlawful possession of drugs, breached the publisher's Article 10 rights. The Court noted that the articles concerned public judicial facts, and therefore were of general interest, and that the actor was a well-known public figure.⁶

In 2012, the European Court of Human Rights ruled that the Polish courts had not given enough protection to free political debate. The Polish courts had convicted a local councilor of defamation for alleging that the mayor of her municipality had interfered unlawfully with the prosecution service. The Strasbourg Court recalled that politicians acting in their public capacity

“inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large.”

It pointed out that it is

“precisely the task of an elected representative to ask awkward questions about those who hold public office and to be hard-hitting in her criticism of fellow politicians responsible for the management of the public purse.”⁷

In another case concerning Poland decided in 2012, a journalist and editor-in-chief of TEMI, a local weekly newspaper in Tarnów, complained that their right to freedom of expression had been violated. The paper had published a series of articles alleging that a local councilor had broken the law and been guilty of offensive conduct. The journalist and editor were convicted for defaming the councilor.

The Strasbourg Court once again emphasized the essential role played by the press in a democratic society, and the duty of the press to impart information and ideas on matters of public interest. It recalled that a degree of exaggeration and immoderation is allowed for those taking part in a public debate on matters of general interest. The Court unanimously found a violation of the right to free expression protected by Article 10.⁸

To sum up – privacy can serve as a restriction of the freedom of expression but in a political debate that restriction is very limited and should be always very carefully scrutinized in particular when the subject-matter of the publication concerned deals with issues of public interest or the role of the press as a “public watchdog”. The European Court of Human Rights rightly so tends to protect the special role of the press in the context of freedom of expression vis-à-vis protection of privacy.

5 ECHR, Application no. 59320/00, judgment of 24/6/2004, *Hannover v. Germany*.

6 ECHR, Application no. 39954/08, judgment of 7/2/2012, *Axel Springer AG v. Germany*.

7 ECHR, Application no. 46712/06, judgment of 24/7/2012, *Ziebiński v. Poland*.

8 ECHR, Application no. 19127/06, judgment of 23/10/2012, *Jucha and Żak v. Poland*.

I wonder do we still value high our privacy? I was surprised to learn that privacy as it turns out, was not much of a concern for German internet users. Researchers at Humboldt University found that 73 % of German test customers preferred an online shop that required them to enter a significant amount of personal information over a more anonymous website with slightly higher prices. Even when both shops offered identical prices in a separate study, about half of all customers chose the shop that required them to enter more personal information, suggesting that the average German online shopper attaches little value at all to their privacy. I am sure that the same results will be obtained in any other European country. Perhaps we are all not fully aware of the possible far reaching consequences of that situation.

Today we cannot discuss freedom of expression without touching the most significant phenomenon of our time – Internet.⁹ Let us be aware that it took radio broadcasters 38 years to reach an audience of 50 million, television 13 years, and the Internet just four. At the same time, while dramatically increasing the power of free speech, the nature and impact of the Internet mean that it can be very harmful. Ideas and information that spread rumors and provoke scandals around the world, racist, obscene and anonymously defamatory speech: all may find a safe haven in cyberspace. The cardinal role played by the Internet in enhancing freedom of speech in a democratic society is counterbalanced by the magnified repercussions of harmful speech especially on rights to privacy and reputation in cases abuse. How should freedom of expression on the Internet be dealt with in order to take into account the unique nature of that medium? Should the Internet lead into re-assessment of the free speech principles established in our European context – mainly by the European Court of Human Rights? So far we do not have an answer to those dilemmas. Problems like the impact of information disseminated in cyberspace on public morals and the reputation of others, the wide accessibility without physical frontiers of the Internet and the availability of vast quantities of information on the Internet long after it has entered the public domain, the regulation of indecent images of children circulating on the internet, the role and immunity of Internet service providers, Internet access rights, extent to which governments are empowered to develop powerful surveillance devices to trace online communications – the European Court will have to address sooner or later. We still do not know how this powerful medium – Internet – will shape the principle of freedom of speech.

The Court decision in case *Delfi v. Estonia* offers certain preliminary guidelines (we are still waiting for the Grand Chamber decision).¹⁰ The case concerned the liability of an Internet news portal for offensive comments that were posted by readers below one of its online news articles. The portal complained that being held liable, as domestic courts ruled, for the comments of its readers breached its right to freedom of expression.

9 See the very interesting comments by *Kamiński*, Some Remarks on Freedom of Expression Standards in the Internet Era, in: Zenner (ed.), *Nova Acta Leopoldina*, Human Rights and Science, BD. 119, NR. 403, 2014, pp. 45-48.

10 ECHR, Application no. 64569/09, judgment of 10/10/2013, *Delfi AS v. Estonia*.

The Court held that the finding of liability by the Estonian courts was a justified and proportionate restriction on the portal's right to freedom of expression, in particular because the comments were highly offensive; the portal failed to prevent them from becoming public, profited from their existence, but allowed their authors to remain anonymous. The Court also found that the fine imposed by the Estonian courts was not excessive. Of particular interest was the Court's finding on the issue of the lawfulness of the interference with the portal's right to freedom of expression.

Let me now switch into another controversial issue – so called historical revisionism – holocaust denial or “Auschwitz lay”? As you know it is punishable to deny holocaust both in Germany and Poland. Is it necessary to keep those restrictions today? Courts both in our countries and Strasbourg answered in the affirmative. That policy goes in line with EU proposals. The Council Framework Decision,¹¹ adopted in November 2008, aims at homogenizing the criminal legislation of member states on two issues. First, targets racist or xenophobic behavior, “publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin”. There is overwhelming acceptance among EU member states towards that principle. However, the second provision of the Framework Decision is more controversial. It refers to the crime of denial: “publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes” – a reference not only to the Holocaust but a wide array of international crimes. Our countries – Poland and Germany, as explained – complied with that request. But for example Italian historians had protested against a proposed bill criminalizing the denial of the Holocaust in Italy along the lines of that Framework Decision. The Società Italiana per lo Studio della Storia Contemporanea (SISSCO) launched a petition affirming that such a law would be dangerous, useless and counterproductive, because it would provide deniers with

“the opportunity to present themselves as defenders of freedom of expression”.

In its effort to impose historical truth, the state would expose the truth at the risk of losing all legitimacy, undermining

“confidence in the free confrontation of stances and in free historiographical and intellectual research”.

The American Historical Association issued a statement on the Framework Decision affirming that any scientific research may only be assessed by experts of the same research field. If a historian should distort evidence, the only measure to be taken against him or her, by colleagues specialized in the same field, should be his or her exclusion from academic posts and, in extreme cases, from publications. The statement concluded:

11 Council Framework Decision 2008/913/JHA of 28/11/2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 of 6/12/2008, p. 55.

“If any other body, especially a body with the right to initiate legal proceedings and impose penalties, seeks to influence the course of historical research, the result will inevitably be intimidation of scholars and distortion of their findings.”

In October 2008 the French association *Liberté pour l’histoire* also protested and petitioned against the Framework Decision, expressing concern “about the retrospective moralization of history and intellectual censure”, and affirming that “history must not be a slave to contemporary politics nor can it be written on the command of competing memories”. As the association explained, “in a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions”.

This mobilization of historians and jurists against the Framework Decision is on point, but it is not a guarantee that the outcome can be predicted, given the European political landscape. In fact, the European Commission regrets in the conclusions of its report that “a number of member states have not transposed fully and/or correctly all the provisions of the Framework Decision, namely in relation to the offences of denying, condoning and grossly trivialising certain crimes”, and insists on the necessity of a “full and correct legal transposition of the existing Framework Decision”. In order to achieve this, the European Commission announces that it

“will engage in bilateral dialogues with member states during 2014 with a view to ensuring full and correct transposition”.

It is clear that we do not have an approach to that issue in Europe accepted by all. The following case *PETA v. Germany* also illustrates those differences.¹² The applicant association is the German branch of the animal rights organisation PETA (People for the Ethical Treatment of Animals). It pursues, *inter alia*, the aims of preventing animal suffering and of encouraging the public to abstain from using animal products. In March 2004 the applicant association planned to start an advertising campaign under the head “The Holocaust on your plate”. The intended campaign, which had been carried out in a similar way in the United States of America, consisted of a number of posters, each of which bore a photograph of concentration camp inmates along with a picture of animals kept in mass stocks, accompanied by a short text. One poster depicting a starving, naked male inmate alongside a starving cattle bore the title “The Holocaust on your plate” and the text “Between 1938 and 1945, 12 million human beings were killed in the Holocaust. As many animals are killed every hour in Europe for the purpose of human consumption”.

In March 2004, three individual persons filed a request with the Berlin regional court to be granted an injunction ordering the applicant association to desist from publishing or from allowing the publication of seven specified posters via the internet, in a public exhibition or in any other form. The plaintiffs were at the time the president and the two vice-presidents of the Central Jewish Council in Germany. All of them had survived the Holocaust when they were children and one lost her family through the Holocaust. They submitted that the intended campaign was offensive and violated

12 ECHR, Application no. 43481/09, judgment of 8/11/2012, *Peta Deutschland v. Germany*.

their human dignity. They were successful in their action and an injunction was granted by the Berlin court.

More or less at the same time in March 2004 the applicant association organized an exhibition in Vienna, where the same posters which form the subject matter of the instant proceedings were publicly displayed. A number of Austrian citizens of Jewish origin, who survived the Holocaust and who were not identical with the plaintiffs in the proceedings before the German courts, filed a request with the Austrian courts to be granted an injunction ordering the applicant association to desist from publishing the seven specified posters. However in 12 October 2006 the Austrian Supreme Court rejected the request. It considered that the impugned campaign was justified by the right to freedom of expression. According to the court the poster campaign did not debase the depicted concentration camp inmates. The court further considered that the poster campaign, besides addressing an important subject of general interest, had the positive effect of rekindling the memory of the national-socialist genocide. The concentration camp pictures documented the historic truth and recalled unfathomable crimes, which could be seen as a positive contribution to the process of dealing with the past (*Vergangenheitsaufarbeitung*). The plaintiffs had only been affected to a limited degree by way of a collective insult. Conversely, the applicant association had a legitimate interest in publicly addressing its subject even in a drastic way.

As you see in two countries there are two different approaches to the same issue.

PETA complained to Strasbourg claiming violation of free expression by the fact that its campaign was prohibited in Germany. The Court considers that the facts of this case cannot be detached from the historical and social context in which the expression of opinion takes place. It observes that a reference to the Holocaust must also be seen in the specific context of the German past and respects the government's stance that they deem themselves under a special obligation towards the Jews living in Germany. In the light of this, the Court considers that the domestic courts gave relevant and sufficient reasons for granting the civil injunction against the publication of the posters. This is not called into question by the fact that courts in other jurisdictions (Austria and Switzerland) might address similar issues in a different way. Perhaps this particular example demonstrates differences between those countries with their attitude towards their own past. Both approaches are acceptable as far as the European Convention of Human Rights is concerned. In that context quiet a wide margin of appreciation is accepted.

Let also touch upon other issue namely the chilling effect of counter-terrorism measures. Until recently – the conflict in Ukraine may modify it – we have observed that perceived threats have changed shifting the focus from military treats to threats from non-state actors, such as terrorists and criminal networks. This has led to a shift towards a more proactive, preventive measures against threats such as terrorism, in other words preemptive intelligence. Surveillance that was previously kept secret is now subject to public debate. There is a fear that tools created for legitimate purposes such as crime control can also be used for increased or total social control. Do the ends justify the means? Even if the State does not aim at total social control and the actual

surveillance is legitimate, the mere possibility of mass surveillance may lead to self-censorship and inhabitation.

The *Snowden affair* raises important and difficult questions about the limits of free speech. Indiscriminate leaking, of the kind associated with Wikileaks and *Julian Assange*, is unjustifiable. However, the British national newspapers that broke the story, *The Guardian*, behaved responsibly in its reporting of privacy intrusion in the public interest. The journalists involved were careful to avoid revelations that could give terrorist networks an advantage. *The Guardian* published only general information about the surveillance programs and cooperated with government requests to destroy sensitive material in its possession. Nevertheless, there is an on-going police investigation into whether *The Guardian* has breached anti-terrorism laws by sharing material with the *New York Times*.

In Poland, we have had a widely published story recently of one of our weekly publishing transcript of illegally obtained private conversations of members of the government and other public figures. The question: Is this responsible journalism or not? At the same time police action – invading the newspaper headquarter and attempting to confiscate some materials – raised serious protest also from lawyers.

The current febrile political climate challenges the commitment of liberal societies to freedom of speech. Governments are concerned to reduce the likelihood of acts of terrorism. To that end they consider it important to outlaw both, speech which appears to encourage or defend these atrocities and also speech which outrages religious communities and which may weaken their members' sympathy for society at large. But it is not a prudent course. The punishment of peddlers of hate speech or of the glorifiers of terrorism only creates martyrs for their causes, without necessarily averting any serious evil. Alternatively, suppressed material is driven underground, and it becomes impossible then to regulate its circulation. More importantly the dissemination of some harmless, even valuable, ideas may be deterred. It is as important now as it ever has been to defend freedom of speech and affirm its central role in the flourishing of liberal society. In Poland nowadays it is prohibited to publish "Mein Kampf" or "Communist Manifesto". In fact 24 years ago my Centre published Polish translation of "Mein Kampf" with some explanatory forward and indeed it stimulated very interesting debates.

Coming back to *Aryeh Naier* stance on freedom to express even most disturbing ideas and contents let me proclaimed that I have full sympathy to his position. It is my deep conviction that we must be free to challenge all limits to freedom of expression and information justified on such grounds as national security, public order, morality and the protection of intellectual property. In that debate I am "Charlie Hebdo". But real freedom should always go hand in hand with responsibilities. Let me finish my presentation with the following quotation:

"Freedom of speech is not worth much when expressed word is not free. When that word through egocentrism, lie, intrigues, hate or attacks against each other tainted is, for example when it used to spread hatred against those who represent other religion, nations or have different opinions' – Jean Paul, the Second."