

OSCE Perspective:
Important Freedom of Expression and Information Cases and Relevant Legal Trends
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I have been asked to describe some of the most important cases and relevant legal trends from the OSCE perspective. I have decided to look at the European continent through the lens of my Organization and particularly in light of the terms of my mandate as the Representative on Freedom of the Media.

As many of you already know, the institution of the Representative was created in 1997 and mandated to “observe relevant media developments in all participating States” and provide a “rapid response to serious non-compliance with OSCE principles and commitments by participating States in respect of freedom of expression and free media.” Of course this refers to wide panoply of measures or decisions taken at the national level: laws, decrees, police activities, arrests and, of course, court decisions. In other words, international standards on freedom of expression and freedom of the media applied by the OSCE and my Office in particular are also binding for national courts. Therefore, and respecting the internal division of powers, part of my job is to point at those decisions adopted by national courts which may erode and damage these freedoms.

I would like to take you through some of these national decisions that attracted my Office’s attention and which have been the object of one (or several) interventions by me.

Belarus

The first case (or collection of cases) that I want to raise is Belarus. I particularly want to talk about the cases of independent investigative journalists as Irina Khalip and Andrzej Poczobut. The Belarusian Criminal Code includes several provisions on libel and insult against the president of the country to the extent that almost any form of criticism against Lukashenko can easily be prosecuted by authorities as a crime.

This is a matter of major concern for two reasons: first, any form of criminal defamation is always criticized as a disproportionate measure (even if adopted vis-a-vis inappropriate or unacceptable forms of speech) as it may have a serious self-censoring effect on journalists or any other speakers. Second, special protections for public figures such as heads of state are particularly onerous because political and institutional figures should accept the highest level of scrutiny in order to guarantee accountability and a proper assessment of their performance by citizens.

The two above-mentioned journalists, Khalip and Poczobut, have faced several charges and have been convicted for covering rallies and demonstrations against Lukashenko (even if they did not participate in such events) and for publishing reports and articles that had been considered either an insult or a libel against the head of state. These decisions, taken by ordinary criminal courts, imposed severe punishment with prison terms of 3-4 years and high monetary fines.

Finally, Belarusian courts have dismissed the charges or commuted the sentences.

Switzerland

The second interesting case refers to a country as different from Belarus as can be. That is Switzerland.

It is very important to note that threats to free expression and free media can come from anywhere so we should pay due attention to old and deep-rooted democracies as well, as no country is fully free from the temptation of restricting uncomfortable expression.

In this Swiss case, the prosecutor and the police searched in the premises of a journalist who was investigating a case of plagiarism at the University of Neuchatel, which resulted in charges of defamation, slander and violation of secrecy brought against him by one of the directors of the university. A local court declared these measures invalid because the crimes allegedly committed by the journalist would never justify such an intrusion into his privacy.

The court takes into particular account the damage to his right to keep sources confidential and the possible negative effect on his investigative activities as a journalist. As you may understand, I was pleased to welcome, this time, a decision taken by a national court. In a way the two cases that I have just mentioned are quite similar because they refer to the need to strike a proper balance between the protection of certain principles and rights (like privacy or reputation) and the need to avoid undue restrictions in the work of investigative journalists, particularly in order to prevent any form of self-censorship.

In this balance, priority should be given to the right to freely seek, collect and disseminate information of public interest and, therefore, any restrictions should meet very strict requirements in terms of lawfulness, necessity and proportionality.

Greece

A very similar case again, this time in Greece, attracted my attention just a few months ago.

Kostas Vaxevanis, a journalist who became famous for publishing the names of Greek nationals holding accounts in Swiss banks to allegedly evade taxes, had to face a long criminal procedure. He was arrested in October 2012 (on the grounds of an alleged violation of privacy laws), then acquitted in November 2012 but this decision was overturned by the state prosecutor and a new trial was ordered. The final decision by a court in Athens to acquit him of all charges was also welcomed by my Office. I thought it was very important for a country suffering a very serious financial crisis not to restrict reporting that would bring some light to tax evasion and corruption. Investigative journalism needs support anywhere and anytime, but it is particularly needed in those countries where institutional malfunction and political corruption have brought serious social unrest.

And not only in order to properly scrutinize the activities of those in power but also to avoid the emergence of radical groups based on the dissemination of oversimplified and biased discourse.

Macedonia

The fourth case I want to mention today is related to the Macedonian journalist Tomislav Kezarovski. In 2008 Kezarovski reported about a serious crime occurred in Macedonia which purportedly had several political and corruption implications. After the report was published, the journalist was accused of revealing the identity of one of the witnesses in the future trial on the crime. As a consequence, Kezarovski was detained and remained deprived from liberty for several months before being condemned to four and a half years of prison by a court in Skopje in October 2013.

Some weeks later the Court released him from the detention center in which he had been held and he is now under house arrest. This is a case that got much attention. I did not intend to discuss the Macedonian rules on criminal procedure and protection of witnesses, but it was very clear to our Office that such a decision (together with the prolonged pre-trial detention) represented a disproportionate measure that would surely stifle investigative journalism in the country.

I do not ignore the importance of properly protecting witnesses and the fair administration of justice. However, restrictions on freedom of information on the grounds of such principles should never represent nor be used as a form of intimidation or threat against journalists. Detention and imprisonment should never be considered a necessary or adequate measure in such cases.

France

Last, my Office also intervened in a notorious case in France. Early this year, several local authorities banned the performances of the comedian Dieudonne M'Bala M'Bala. This decision was made as a consequence of a circular promulgated by the Minister of Interior in which he urged these officials to ban the shows because of anti-Semitic content – resulting in a direct attack on human dignity and, therefore, a disturbance of public order. It is worth noting here the link made by French authorities between hate speech, human dignity and public order. Along the lines of a decision adopted by the Council of State (administrative court) several years ago, some forms of racist speech will be illegal under a typical Criminal Law approach and from an administrative perspective as well, as it can be considered *per se* disturbances of public order.

Local administrative courts annulled the above-mentioned decisions to ban the performances on the grounds that the supposed attacks against human dignity (and therefore public order) could not be precisely determined in advance and could not be prohibited before they could take place.

In contrast, only a few hours later, the Council of State confirmed the bans by concluding that the disturbance of public order was actually something adequately foreseeable taking into account the personality and past performances of M'Bala M'Bala. The European Court of Human Rights is likely to have the final say on this issue.

Soon after the adoption of the decision of the Council of State, I wrote to the Minister of the Interior saying that in democratic societies people must be allowed to express their opinions and views no matter how offensive and shocking they might be. Of course, and according to

the case law of the Court in Strasbourg, extreme and threatening forms of hate speech might exceptionally require an ex-post response by public authorities. However, prior restraint and preventive prohibitions (as it was the case this time) should be always considered a disproportionate restriction.

The notion of public order (even in its widest possible meaning) cannot be accepted as a legitimate basis for such an intrusion on individual freedom in a democratic society.

This last case refers to a very important debate which is solved in different ways on both sides of the Atlantic. European jurisprudence accepts several possible limitations to freedom of expression aimed at preventing incitement to hatred, violence or discrimination (basically in line with the wording of Article 20 of the International Covenant on Civil and Political Rights).

This perspective is different from the approach of the U.S. Supreme Court where only in cases of clear and present danger of violence directly caused by speech, would a restriction be deemed acceptable and in line with the First Amendment. From the point of view of the European jurisprudence, incitement to hatred is, indeed, a key element in order to impose a legitimate restriction on freedom of speech as well, yet this incitement does not need to be linked to an immediate or foreseeable criminal action. The ECHR gives more prominence to avoiding possible damage springing from the dissemination of general ideas of hatred within a certain society –in particular if they target very specific and vulnerable groups – than to the possible benefits stemming from the public debate. However, in the case of Dieudonne M'Bala M'Bala, French administrative authorities, together with the Council of State, had gone beyond what would be an acceptable and proportionate response to racist speech in Europe.