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BOOK REVIEWS

Uladzislau Belavusau: *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*, Routledge 2013, pp. 304

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Although freedom of speech, and in particular the special case of hate speech, has already been extensively analyzed in the context of the legal doctrine and case law of both US and Western European democracies, the legal landscape of leading Central and Eastern Europe (CEE) states in this regard has remained unexplored. The role of American and European free speech models as a source of inspiration for the young CEE democracies has been, up until now, not well known to outside audiences. Uladzislau Belavusau's book changes this situation in a fundamental way by sharing with readers his extensive knowledge about the legislation and jurisprudence of Hungary, the Czech Republic and Poland. In this way Belavusau joins the discussion on the transformation processes of states in the period of transition – processes which also comprise changes in the areas of freedom of speech or, more precisely, determination of its boundaries in a free and democratic state and society.

In the first chapter of his book Belavusau presents the historical, political and legal conditions, and to some extent also the social conditions, that helped establish Hungary, the Czech Republic and Poland as transitional states. Presentation of the "communist legacy", which the author describes using references to, among others, Wojciech Sadurski, Jiří Přibáň and András Sajó, is particularly important for understanding the specific nature of the legal aspects discussed in the book. Without this context it would be difficult to understand the process of mainstreaming freedom of speech during transition and importing different "free speech models" into CEE countries.

In the next chapter Belavusau takes the reader, in a very effective and interesting way, through the intricacies of the concept of hate speech, which is analyzed from the point of view of the American and European models. Understanding the 'background' of the issues in question is very important, and Belavusau rightly chose to describe the attempts to define hate speech, which he characterises as an "uneasy enterprise". He presents a catalogue of the most important judgments of the US Supreme Court and the European Court of Human Rights (as well as those of the Court of Justice of the European Union) which set the framework for free speech in the context of different forms of hate speech – a framework usually enlarged in the case of the United States and

narrowed in the case of Europe. This very informative discussion emerges as a thorough and refined analysis of the problem he is dealing with, i.e. the judicial epistemology of free speech and speech-act theory in the context of postmodern legal deconstruction (e.g. in his fragment on the "deconstruction via ancient genealogy of free speech", pp. 87-93). One of the most important conclusions reached by Belavusau concerns the new settings in which representatives of various narratives (including feminist jurisprudence, queer legal discourse and critical race theory) suggest "new arrangements for influencing the position of the courts with regard to hate speech and other problematic issues. It is based on the invocation of the performative character of speech, revisiting the discriminatory context of utterances, historical predispositions and stereotypes, as well as personal victim stories" (p. 249). Paradoxically, this also raises the basic dispute over the penalization of hate speech: should the personal perspectives and narratives of the victims of hateful words and their entire social context be adopted in the law-making process and in the courts or, as suggested by Belavusau, should this "post-modern instrumentalisation of the right to freedom of speech" be rather rejected? In this context the lack of reference to the arguments of Jeremy Waldron, one of the best known authors discussing the issue of American and European borders to freedom of speech in the context of hate speech as broadly understood, seems surprising. In *The Harm in Hate Speech*, published in 2012, Waldron presents important and widely-discussed views on the problems which Belavasau critically analyzes and presents the hate speech dilemma from the point of view of its victims.[1] In Waldron's opinion, no member of the society should experience rejection, discrimination and violence by other members of society. Therefore the feeling of safety and belonging to the community, which is based on the inclusion of everybody into the sphere of social and public life, irrespective of racial or ethnic origin or religion, is a value that should be protected by the imposition of a ban on spreading hate speech. Furthermore, the dignity of those persons who become victims of "hateful words" becomes a key issue. As pointed out by Waldron, dignity in such cases is the basis for social legitimisation and of recognition of the unconditional rightful membership of minorities in society. It lays the foundation, both for the majority and for minorities, for the full functioning of minorities in social and public life, and those who voice hate speech undermine this foundation. They want the minorities to constantly feel that they are not wanted, worse, alien, and "not at home."

The third chapter of Belavusau's book consists of an analysis of the models of hate speech bans in the Czech Republic, Hungary and Poland. Undoubtedly, the information and discussion of the most important judgments in hate speech cases reached in the Polish, Czech and Hungarian court rooms constitute the greatest value of the book – Belavusau is the first author who has described the problem so thoroughly in the English-language literature. He rightly points to Hungary as a state which seems to

[1] J. Waldron, *The Harm in Hate Speech*, Harvard University Press, Cambridge: 2012. The arguments expressed in the book were previously presented by Waldron in a series of Holmes Lectures entitled "Dignity and Defamation: The Visibility of Hate" at Harvard Law School in October 2009.

display, to the highest degree, the "First Amendment attitude" towards hate speech, and he describes the fascinating "saga" of constitutional interpretations used in individual attempts to regulate the problem in Hungary. However, the correct conclusion drawn by Belavusau, namely that "[i]n the climate of the constant challenging of the provisions by the Constitutional Court, the lower courts became unwilling to prosecute the virulent haters" (p. 149), should be augmented with another observation. Taking into account the scale and forms of anti-Semitic and anti-Roma hatred present in Hungary, the attempt to combine both the American and European models (resulting in the behaviour of the Hungarian courts described by Belavusau) should rather be seen as an experiment with negative consequences. At the same time, one must agree with the author's observation that the CEE states under analysis have, with respect to defining their attitude towards hate speech, rather followed the "mandatory European model", characterized by its pragmatic and utilitarian attitude. Therefore, it is difficult to completely share Belavusau's conclusion when, referring to the comments on "new avenues of legal deconstruction" (p. 249), he says that "[t]hose strategies articulated within the narratives of the American postmodern movements can be successfully transplanted into the new European context" (p. 250). If this "new European context" also includes Poland, it is difficult to imagine that Polish judges, prosecutors and law-makers today have adopted the victim- and socio-historical-oriented perspective, since it is a problem for them to even find anti-Semitism in the "Gas the Jews!" slogans chanted by football hooligans.[2]

The majority of my polemical comments relate to the next chapter of the book which is devoted to historical revisionism.[3] From the first moment it is clear to the reader that the author subscribes to the *Appel de Blois* initiative, in which eminent intellectuals claim: "History must not be a slave to contemporary politics nor can it be written on the command of competing memories. 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."[4] I too realize the dangers depicted in the Appeal, and I agree with Belavusau when he says that we cannot "criminalize human narrow-mindedness, apathy, absurdity, and naivety" (p.174). But the best known Holocaust deniers, as well as the entire negationist movement, are not slow-witted simpletons but mostly well educated people, fully aware of what they are doing and saying. They clearly define the aim of their actions – they want to expose the "Jewish swindlers". Therefore, in opposition to Belavusau, I think that the penalization of Holocaust denial should be excluded

[2] P. Żytnicki, *Antysemityzm kiboli to nie grzech* [Soccer fans' anti-Semitism is not a sin], Gazeta Wyborcza 10.01.2014.

[3] It is problematic to use the term "historical revisionism" with reference to Holocaust denial. Although the author renounces the view that Holocaust deniers conduct historical research (p. 170), as a result of which they come to the conclusion that gas chambers could not hold so many Jews, the use of this term throughout the entire chapter can be regarded as misleading.

[4] P. Nora, Président, Liberté pour l'histoire, *Blois Appeal*, http://www.lph-asso.fr/index.php?option=com_content&view=article&id=47&Itemid=14&lang=en (accessed 15 January 2014).

from the category of "history judged by law", and included in the area of hate speech which is worthy of banning.

The argument that Holocaust denial should be treated differently than other cases of negation of historical events is corroborated by the jurisprudence of the European Court of Human Rights (ECtHR), including the recent ruling in the *Perinçek v. Switzerland* case, in which the Court ruled on the penalization of Armenian genocide denial.[5] Moreover, no reference in the book is made to one of the most important ECtHR judgments on Holocaust denial, handed down when Roger Garaudy's complaint was examined.[6] In the process of considering the legitimacy of the complaint, the ECtHR's standpoint with respect to attempts to invoke the European Convention of Human Rights and Fundamental Freedoms by those who disseminate Holocaust denial was articulated with great clarity. In its decision, the Strasbourg Court firmly declared that the negation of the Holocaust is: "one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based […]. Such acts are incompatible with democracy and human rights because they infringe the rights of others."[7]

When Belavusau writes that "[t]he number of historians producing revisionist texts is not great, and they are already socially stigmatized as marginal and ludicrous figures" (p. 179), he seems not to notice the speed and ease with which Holocaust denial has become an official historical doctrine in many Arab and Muslim countries.[8] He also seems to ignore the statistics about the appalling and shameful lack of knowledge about the Holocaust among young people, which leads to the likely prospect that Holocaust denial by future generations may become a legitimate "version" of historical events.[9] Obviously one cannot claim that legal bans will reverse this negative trend. However, if law is treated as a signal given to society and an indication by the legislator of what is a legitimate part of democratic discourse and what constitutes its abuse, then the ban on Holocaust denial certainly seems justified.

There are a few more questions that may be raised with respect to the author's discussion in this part of his book. Belavusau claims – but does not present any convincing evidence – that the decision of the Israeli Supreme Court on the legislation known as the "Nakba Act" is a "perverse cultural denial of historical atrocities" (p. 177). The Act

[5] ECHR judgment, *Perinçek v. Switzerland* (application no. 27510/08) Judgment, ECHR 17 December 2013, available at http://www.echr.coe.int.

[6] ECHR decision, *Roger Garaudy v. France* (application no. 65831/01) Decision, ECHR 24 June 2003, available at http://www.echr.coe.int.

[7] *Ibidem*, p. 22 of the translated extract.

[8] R. S. Wistrich (ed.), *Holocaust Denial: The Politics of Perfidy*, The Hebrew University & Magnes Press & De Gruyter, Jerusalem and Berlin: 2013.

[9] As indicated in a poll commissioned in 2012 by the Forsa Research Institute on January 25, just two days before the International Holocaust Memorial Day, 21 percent of Germans between 18 and 30 years of age, when asked about the most notorious Nazi extermination camp, had never heard of it (http://www.zeit.de/gesellschaft/2012-01/umfrage-Holocaust accessed 15 January 2014).

does not penalize individuals for saying that there were Nakba events: it states that any institution could lose state funding if it was to celebrate its anniversary. Although this decision may be considered a groundless restriction on the autonomy of local authorities, it has nothing to do with the problem of historical revisionism which Belavusau analyses. Furthermore, comparing the fate of other groups persecuted by Nazi Germany with that of Jews is, except for a completely justified comparison of the situation of Roma and Sinti, very questionable. The fate of homosexuals and Jehovah's witnesses is comparable to that of communists; the crimes committed on representatives of these groups qualify as crimes against humanity but not as the crime of genocide. And, finally, comparison of the fate of Slavic and Jewish victims on account of the number of murdered people is evidence of a surprising misunderstanding of what genocide is. It is not the number of those murdered that defines genocide, but the aim and consequences of the crime.

As a minor remark one should note that in his discussion of the Holocaust denial ban in Poland, Belavusau failed to note that the Polish Ombudsman withdrew the application to the Constitutional Tribunal for a ruling that the provision penalizing the publication of Holocaust denial is contrary to the Polish constitutional guarantee of freedom of speech and freedom of research.[10] The Ombudsman decided to withdraw the application because of negative opinions of the Speaker of the Parliament and the Prosecutor General. An analysis of the arguments presented by these two institutions would definitely be interesting material for the author.

In the final chapter, on pornography, Belavusau takes the readers on an extremely interesting journey across the historical, social and religious conditions which, in the author's opinion, have led to the risk that "[t]he ethos of the First Amendment will be inevitably tested *vis-à-vis* the relics of the Second Commandment" (p. 254). He also convincingly proves that the liberal model of legal regulation of pornography has been 'taken seriously' by the CEE states under analysis. It seems, however, that the author has not argued convincingly enough about the position of the "radical feminists" (so designated by Belavusau in contrast to "sex-positive" feminists), who would like pornography to be recognized as a certain form of hate speech against women, primarily in the dimension of its social consequences (i.e., violence against women and the strengthening of stereotypes which are humiliating and degrading for women).

Identifying the themes thought to be absent in a book is usually the reviewer's easiest job. It is not difficult to point out some additional problems that *could* have been analyzed (but which could also ruin the author's intentions and probably go beyond the scope required by the publisher). In the case of Belavusau's book the temptation to indicate topics which have not been discussed is less, because the author has very convincingly justified his choices. However, a few suggestions might still be useful.

In recent years in the CEE states, i.e. in the main geographical setting of the book, many stormy debates have taken place concerning the problems with penalization of

[10] Postanowienie Trybunału Konstytucyjnego (Decision of the Constitutional Tribunal) of 8 March 2011, 14/2/A/2011.

defamation (particularly significant in the context of a free press) and state control over the media. Some references to these problems, even a short overview of their discussion and the legal regulations adopted in Hungary, the Czech Republic and Poland would undoubtedly give the book a more comprehensive and complete character which, after all, is what is promised by its title.

What is also missing – and could be an extremely interesting part of the analysis – is information on how judges from the three CEE states in the ECtHR and the Court of Justice of the EU judges have ruled on cases related to hate speech, pornography and historical revisionism. Are the conditions which, in Belavusau's opinion, shape the law and jurisprudence of Hungary, the Czech Republic and Poland, reflected in the courtrooms of these international tribunals?

Perhaps it would also be interesting to add, in addition to the ECtHR judgments referred to and discussed in the book, the controversial ruling in the *Willem v. France* case on restrictions on the freedom of speech in the context of public encouragement of discrimination (in the form of a boycott) against Israeli products.[11] The controversy over the treatment of such appeals as hate speech has been prevalent in the academic community for a long time, hence its discussion could augment the analysis conducted by Belavusau.

One final remark. There is no doubt that Belavusau is very adept at formulating his arguments in a vivid way, which is a skill not often encountered in legal literature. His comparison of the ban on the presentation of Communist symbols to "Czardas", a traditional Hungarian dance which "starts slowly and ends in a very fast tempo" (p. 141), not only attracts the reader's attention but also perfectly describes the specific nature of the problem and the context in which it is discussed. Equally spectacular linguistic choices can be found elsewhere in the book. For example the author writes about the "Procrustean bed" in the context of defining historical revisionism; about the distinction between "parrhesiacal" (American) and "isegorical" (European) perceptions and interpretations of free speech (p. 91); and by quoting Erik Heinze's description he presents the specific character of international conferences on freedom of speech in a humorous way (pp. 247-248).[12] Sometimes, however, it seems that literary formulae become claims in their own right, which are not supported by proper arguments. In a summary of his views on freedom of speech in the context of pornography, Belavusau writes that pornography "does not exist *per se*. It does not reside in an artwork.

[11] ECHR judgment: *Willem v. France* (application no. 10883/05) Judgment, ECHR 16 July 2009, available at http://www.echr.coe.int.

[12] "European conferences on hate speech follow a similar pattern. A few Americans make impassioned speeches about the values of freedom and democracy. The Europeans dutifully listen and applaud. Then come tea and biscuits, where the pros and cons of various positions are exchanged with tepid enthusiasm. All delegates are then thanked for having attended an event that 'will surely provide food for thought'. The Europeans depart with the same views they held when they arrived; and the Americans leave crestfallen from a missionary venture that failed to convert a single soul." E. Heinze, *Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, [in:] I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford University Press, Oxford: 2009, p. 182.

The obscene is a fruit of our repressed sexuality" (p. 253), One can wonder whether this observation is not going too far into the sphere of psychology and criticism of art, which the author does refer to in his research but which are arguably not his principal fields of expertise. Some of the arguments are also very categorical in their tenor. When Belavusau mentions the "populist character" of the EU Framework Decision on Racism (p. 188), he sharply and perhaps unjustly makes a judgment about the intentions of the authors of the Decision.[13]

Belavusau has presented a very important and interesting book, written by an impressively erudite scholar in very vivid, sometimes almost poetic, language. *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* is more than a traditional and predictable comparison of "two battlefronts" – European and American. Nor is it a simple analysis of the jurisprudence and legislation of selected CEE states. It shows the interactions and relations between the American system, the model defined by the Council of Europe and the European Union, and the national jurisdictions of Hungary, the Czech Republic and Poland which have been developing for over 25 years since the fall of communism. Belavusau has established many important arguments and the book undoubtedly brings an added value to the comparative legal research on freedom of speech in its particular aspects. It is innovative and thought-provoking. Belavusau, while clear about his general position towards limitations on freedom of speech, does not provide the reader with radical, one-sided arguments, thus leaving space for further considerations on what the freedom of speech laws in CEE countries should look like. Hate speech, historical revisionism and pornography will probably always be at the centre of controversy over the allowable limits on freedom of speech. Belavusau's book is a well-argued position in this discussion, which from now on will constitute mandatory reading for its participants.

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[13] Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, [2008] OJ L 328.

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