

ARTICLES

FREEDOM OF SPEECH IN EUROPE AND IN THE UNITED STATES OF AMERICA. A FEW REMARKS ON THE HISTORY OF THE IDEA AND ITS NEW CHALLENGES

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One can hardly overestimate the meaning of freedom of speech in the European tradition. It dates back to the times of the ancient Greece, although it was only John Milton who wrote the first tract devoted to the subject in question. In his *Areopagitica* (1644), Milton skillfully defended the principle of a free flow of ideas by stressing out that an open and undisturbed clash of various information and opinions is a condition of discovering truth in life. The best-known and most frequently quoted fragment of *Areopagitica* reads: “And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing” (Milton 2002, 10, p. 2).

Milton claimed that in Europe the tradition of licensing books had been invented by the Catholic church. According to his opinion, in the ancient Athens only two types of writings were suppressed by the civil powers: blasphemous or atheistic and libellous. The same holds true for Rome – before its descent into tyranny. Even the earliest Christian emperors did not depart from that rather tolerant position. Only after the Council of Trent (1545-1563), when the Spanish Inquisition began to exert its ominous influence onto public life and when the Index of Prohibited Books was introduced, the policy of toleration was over. As Milton puts it, the Index raked “through the entralls of many an old good Author, with a violation wors then any could be offer’d to his tomb” (Ibid., 5, p. 5).

There is no doubt that Milton went too far when he said that the Catholic church was the only institution that could be regarded as guilty of introducing a prior restraint. His attack on Catholicism in *Areopagitica* must be read with the context of the English Civil War in mind. One must also remember that Milton's tract under discussion is an oration addressed to the Parliament dominated by puritans. The English writer tried to stop the Parliament from introducing the Licensing Order of June 16th, 1643, which was designed to bring publishing under government control by singling out a certain number of official censors to whom authors would submit their texts for approval before publication. According to Milton's conviction, the Parliament should be less enthusiastic about bringing into life the act in question, once its members knew it was the Catholic church and its "glutton Friars" (Ibid., 5) who had always aimed at introducing the prior restraint into public life in order to curb intellectual and spiritual freedom in the country. He wrote on one the first pages of *Areopagitica*: "But that other clause of Licencing Books, which we thought had dy'd with his brother *quadragesimal* and matrimonial *when the Prelats expir'd*, I shall now attend with such a Homily, as shall lay before ye, first the inventors of it to be those whom ye will be loath to own..." (Ibid., 3).

Milton's idea of "a free and open encounter" of truth and falsehood was taken up over two centuries later by John Stuart Mill in his *On Liberty* (1859). Although he was not very optimistic about human nature and thought that it all depends on circumstances whether people were more ready to serve the truth or falsehood, he still believed that a free flow of opinions is the *sine qua non* condition of seeking truth in public life. Here is Mill's argumentation regarding the subject:

"First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this, is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very often commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience" (John Stuart Mill 1992, 73).

John Milton and John Stuart Mill lived in different times and their views on various political and social issues were also different. However, they had one thing

in common: the conviction that the consent to “the collision of adverse opinions” is necessary in the search of truth. Their position was endorsed by Justice Oliver Wendell Holmes, who argued that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” (Sajó 2004, 30). In *Abrams et al. v. United States* (1919), Holmes turned Milton’s and Mill’s principle of the free flow of ideas into his own theory of “the free marketplace of ideas”. According to that theory, not only favourably received opinions but also aggressive and hated views should be recognized as natural products of the market in question.

In 1964, the US Superior Court stressed out in *New York Times versus Sullivan* that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” (Ibid., 32). At that time, in Europe one could still hardly speak about such kind of legally-endorsed standards of freedom of speech. Only in *Handyside v. United Kingdom* (1976) the European Court of Human Rights (ECHR) expressed the following opinion:

“Subject to paragraph of Article 10, it [Article 10 (1)] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’ “ (Feldman 1998, 157).

This position was upheld by the European Court of Human Rights in such cases as *Sunday Times v. United Kingdom* (1979), *Lingens v. Austria* (1986), *Castells v. Spain* (1992), *Open Door and Dublin Well Woman v. Ireland* (1992), *Jersild v. Denmark* (1994), *Otto-Preminger Institute v. Austria* (1995), *Oberschlick v. Austria* (1997), *Feldek v. Slovakia* (2000) or *Vides Aizsardzibas Klubs v. Latvia* (2004). According to the doctrine that the ECHR has developed on the basis of the above-mentioned cases, freedom of expression should not be an absolute right. Nevertheless, the scope of its protection is almost absolute with regard to those ideas and opinions that have any reference to political life. Thus, the degree of protection of critical opinions concerning the government should be the greatest (*Castells v. Spain*). Also those attacks on politicians that refer to their public activities should not be restricted (e. g. *Lingens v. Austria*, *Oberschlick v. Austria*, *Feldek v. Slovakia*). However, critical remarks relating to public functionaries (like policemen or municipal guards) must be less protected (*Janowski v. Poland*, 1999). The same applies to the opinions and ideas pertaining to morality or religion (e. g. *Handyside v. United Kingdom*, *Müller v. Switzerland*, 1988; *Otto-Preminger Institute v. Austria*).

In cases referring to moral and religious issues, it is the state authorities and not the ECHR who is supposed to decide which expressions can and which cannot be tolerated. The reason for that is the fact that there is not such a thing as homogeneous

European morality. The same opinions, ideas or events pertaining to morality or religion may be received in a different way in such countries as the Netherlands, Ireland, Germany, France, Austria, Lithuania or Poland – therefore the European Court of Human Rights should refrain from imposing any kind of “universal” ideas or norms of moral or religious character on the residents of those countries.

There is no doubt that freedom of expression is less protected in Europe than in the United States of America. In the latter, the right to free speech is stipulated in the First Amendment to the US Constitution, which simply reads: “Congress shall make no law... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (Patrick 1991, 37). Such a brief statement regarding the subject in question has made some people believe that freedom of speech must be absolute in the United States. One of the “absolutists” was Justice Hugo Black, who served on the US Supreme Court from 1937 until 1971. In *Dennis v. United States* (1951), he expressed the following opinion:

“...I have always believed that the First Amendment is the keystone of our government, that the freedoms it guarantees provide the best insurance against destruction of all freedom [...] I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress’ or our own notions of mere “reasonableness”. Such a doctrine waters down the First Amendment so that it amounts to a little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those ‘safe’ or orthodox views which rarely need its protection...” (Ibid., 35-36).

Not many American contemporary lawyers and scholars share Hugo Black’s viewpoint in this regard. Most of them agree that freedom of speech should not be unfettered. For instance, very few Americans are ready to admit that pornography deserves any kind of special protection. Also hate speech has always been a bone of contention between the supporters and opponents of the idea of absolute freedom of expression. Still, there can be no questions or doubts that the idea of free speech means in the United States something more than in any other country. According to a British lawyer Stephen Sedley, the First Amendment is “both a sacred cow of US constitutional law and the dominant topic of human rights litigation in this country” (Sedley 1998, 23).

One can hardly say it about Europe. It becomes obvious when comparing the concise form of the First Amendment to the lengthy text of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention for Human Rights - ECHR). The latter reads:

“1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without

interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (Hofmański 2000, 64).

Considering Article 10 (2), it seems that protection of freedom of expression must be a complicated issue in the light of Article 10. In fact, this provision lays on the European Court of Human Rights the obligation of taking difficult decisions. Each time when examining a definite case, the ECHR has to judge if factual and legal circumstances of the case under consideration justify restriction of freedom of speech. The premises stipulated in the above-quoted Article 10 (2) are not the only possible justification of such a restriction. In each case of an alleged violation of the provision in question, the ECHR uses a three-pronged test. It boils down to making sure that the restriction has been prescribed by national law, that it has been necessary in a democratic society and that the interference in the right to freedom of speech has been proportionate to the legitimate aim pursued.

Although all kinds of speech are protected under Article 10, the highest scope of protection is given to those ideas and opinions that pertain to relationships between state authorities and citizens. In *Ceylan v. Turkey* (1999), the ECHR stated: “In a democratic system, the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion” (Sajó 2004, 74-75). It sounds understandable, considering the fact that freedom of speech is not only one of the most important substantial rights named in the European Convention of Human Rights but also an instrument of protecting other rights and freedoms stipulated in this document. The right to speak freely and the right to know allow the society “to hold opinions and to receive and impart information and ideas”, also the ones that refer to all kinds of action from the side of the authorities. Thanks to that, the society can keep an eye on them and make sure that national authorities do not violate such civil rights and freedoms as the right to life, prohibition of torture, prohibition of slavery and forced labour; right to fair trial or freedom of assembly and association.

The above-mentioned “close scrutiny” means that the authorities under discussion have a lesser margin of appreciation, i. e. “ability to find that a legitimate aim of restriction outweighs the freedom of expression” (Ibid., 75). In general, political

speech is the most protected since open and robust debates on matters of public interest are necessary in a democratic society. This position is undoubtedly upheld by such scholars as Jürgen Habermas, whose “paradigm presupposes the possibility of unhindered communication as a foundation for true democracy” (O’Byrne 2003, 2). But should this “unhindered communication” mean that literally all kind of expressions pertaining to public matters are allowed to find their way to the modern “free marketplace of ideas”? For example, religion often becomes such a “public matter”; does it mean that all religious opinions should be allowed?

It is easy to say “no” – and simply quote the above-mentioned position of the European Court of Human Rights referring to the lack of “homogeneous European morality” and to the necessity of respecting various religious beliefs and views. However, the issue seems more complicated. There is no doubt that expressing one’s religious opinions and ideas may take on a political meaning under certain circumstances. It is enough to remember global protests that broke out at the beginning of 2006 in Arabic countries following to publishing cartoons of Muhammad by Danish newspaper *Jyllands-Posten*.

It seems that the uproar over the Muhammad cartoons can be regarded as a kind of a test concerning the limits of free speech. Undoubtedly, it also points to challenges that must be faced nowadays by the advocates of freedom of expression. Therefore, it is worthwhile to come back to the facts for a moment.

In September, 2005, *Jyllands-Posten* published a dozen of Muhammad caricatures. Especially two of them proved outrageous for the Muslim world: the one depicting the Prophet with a bomb in the turban and the one in which Muhammad tries to discourage suicide-bombers from carrying on with their activity by warning them that there are no more virgins in heaven. The cartoons were obviously meant as a test case of the ability of the western democracies to withstand the demands of political Islam after America had launched its war on terror as a result of the events of 11 September, 2001. In January and February, 2006, the *Jyllands-Posten’s* pictures of Muhammad appeared in many other newspapers and journals, some of them outside Europe.

The West was baffled by the reaction of the Muslim world to the cartoons. Attacking and torching Danish and Norwegian embassies by infuriated crowds in Syria and Iran, destroying national symbols of Denmark and Norway in many Arabic countries, threatening the whole West with a total war – all this was received by western governments with shock and muddle. There is no doubt that whereas some protests were spontaneous, others were deliberately manipulated by Islamist extremists. Western media stressed out that the latter found the cartoon issue an ideal platform for promoting their version of the faith and their political aims connected to it. For example, according to *The Economist* “a Danish imam, Abu Laban, may have started

the whole thing by touring the Middle East to drum up outrage, including distributing far more offensive cartoons of the Prophet (as a pig, as a paedophile) which he said had been 'received' by Muslims in Denmark" (*MI, MO* 2006, 25).

The issue of the Muhammad caricatures showed the world that the West was divided in its reactions to the aggressive protests in Arabic countries. While the turmoil was spreading across the Muslim world, many Europeans discovered with disappointment that Britain and America were reluctant to take a principled stand on grounds of free speech. Such pieces of information like the one according to which "three editors and a reporter quit the *New York Press* over a decision not to reprint the caricatures, and President George Bush called on world governments to stop the violence and be 'respectful'" (*Ibid.*, 24) could surprise advocates of freedom of expression, especially those of them who believed that free speech is really "a sacred cow of US constitutional law".

It is understandable, at least to a certain degree, that the Muslims had the right to take offence because of the Muhammad cartoons. Religious convictions should be respected, one cannot make a laughing stock out of them. It seems obvious to anybody who has any common sense; it is also consistent with the above-mentioned position of the European Court of Human Rights in Strasbourg. Nevertheless, it should be noticed that in the cartoons issue under discussion religion was mixed with politics. *The Jyllands Posten's* caricatures were published to draw the attention of the world to a timely social phenomenon: Islamist terrorism.

In this context, one can hardly see the publication of the Muhammad cartoons as an action aimed at offending religious feelings of the Muslims by ignoring their injunction against picturing the Prophet. On the contrary, the caricatures can be regarded then as a form of protest against using religion for political purposes. Such kind of argumentation may prove unacceptable for many Muslims but it seems conformable to the ECHR doctrine concerning standards of freedom of expression. It is also consistent with the stand of those advocates of the standards in question who oppose all kinds of speech that is exclusively aimed at hurting someone's religious feelings but who have simultaneously more or less understanding for using religious symbols when touching upon public issues of great importance.

In this light, it is difficult to accept the reaction of Great Britain and the United States to the uproar over the Muhammad cartoons. A journalist of the *Washington Post*, Anne Applebaum, points out to the hypocrisy of many American newspapers that refused to reprint the cartoons of the Prophet – but did not mind publishing controversial Andres Serrano's photography depicting Jesus Christ on the cross placed in a jar with urine (Applebaum 2006, 12).

Linking the Muhammad cartoons with the Serrano's photography (published in 1989), is a point to ponder. The two cases say a lot about one more important phe-

nomenon related to the issue of freedom of expression: political correctness. It is hard to doubt that the United States did not support the advocates of free speech on the matter of the caricatures because of their political interests. The US government, which is one way or the other perceived by the Muslim world as its greatest deadly enemy, obviously wanted to avoid more problems with the Arabic countries. Many American newspapers must have understood it and chose self-censorship. That's why small European countries, like Denmark, Norway or the Czech Republic, whose leaders and media did not want to yield to the demands of infuriated crowds in Arabic states, had to replace the United States in the role of the most important defender of free speech. Undoubtedly, it meant not only honour and glory for them - but also a heavy burden.

Political correctness, double standards, and self-censorship seem the greatest challenges for the western principle of the free marketplace of ideas in the times of terrorism accompanied by religious fundamentalism. Under such circumstances, there are no simple solutions. There is a constant necessity to choose between freedom and security. Yet neither John Milton nor John Stuart Mill considered free speech, which has become an important ingredient of the European identity, a simple remedy to all the evil in the world.

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