

PROPAGANDA FOR WAR AND HATRED AND FREEDOM OF THE MEDIA

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Session 1 - Legal definitions and challenges to propaganda

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Panel on Propaganda for War and Hatred and Freedom of the Media

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Definition of war propaganda as speech inciting to violence

The lack of a clear definition is often deplored. The European Court of Human Rights applies a very wide concept of freedom of expression as a pillar of democratic society. However, it clearly sets limits where expression is likely to incite to or result in violence. In the Turkish cases like *Özgür Gündem v. Turkey* of 16.3.2000 advocating armed struggles and glorifying war in the late 90s it adopted a wide approach – “capable of causing violence”, which was also adopted by the Council of Europe Convention on the Prevention of Terrorism, Article 5 which includes besides incitement also “causes a danger that such offences may be committed”.

Generally, in the case of war propaganda one would assume the existence of incitement to violence and therefore war propaganda has to be prohibited and persecuted. However, war propaganda may also take the form of certain less violent ways, in order to make war more acceptable to the public, by not showing the killings, destructions or refugees.

Therefore, a wider definition of war propaganda should take into account that today the public is often manipulated in a certain direction by public relation specialists and companies, so-called “spin-doctors” and that disinformation campaigns are part of all wars. The media may feel a patriotic duty to support the state in an emergency situation.

Also how to distinguish between public accountability and private responsibility? In particular in times of the Internet there is hardly a clear distinction any more if there ever was. War propaganda could also include shaping a proper mindset for war by dehumanizing the enemy, which can constitute hate speech. Art. 4 of the International Convention against racial discrimination dealing with propaganda like racial superiority and incitement to racial discrimination should be mentioned here.

However, there is also a danger of overreaction as regulations and persecution of war propaganda could also lead to misuse to suppress other opinions by censorship, which can have a chilling effect on freedom of expression. For example, the EU Guidelines on Freedom of Expression Online and Offline emphasize that hate speech legislation must not be abused to limit democratic debates. Furthermore freedom of information has also to be provided as part of the right to freedom of expression. The “repressive approach”

therefore has its limits, the improvement of the quality and professionalism, of the autonomy and the plurality of the media appears more promising except in very clear cases. There is a need for the state of balancing the obligation in Article 20 (1) of the International Covenant on Civil and Political Rights on prohibition of war propaganda with the freedom of expression protected by Article 19, when it comes to the implementation of the prohibition. A common understanding at least at the regional level should be aimed at.

Finally, it will be for independent courts to draw the line. But they have to be transparent in balancing the often conflicting considerations and applying the principle of proportionality. But also courts may struggle with the context in which they are operating. However, patriotism must not be above the rule of law.

New Technologies – The Challenges of the Internet and Social Networks

New technologies provide new opportunities of expression and to get informed, but also new ways of manipulating public opinion. This can be seen for example in comments on newspaper articles or articles on information platforms. Such comments are in principle to be welcomed as a participatory approach but they may also be misused for defamation and hate speech or even propaganda for war. This raises the issue of how to determine the limits of freedom of expression online, which again requires careful balancing. Freedom of expression online is under attack anyway, attacks, which could be aggravated by using the excuse of fighting war propaganda and hate speech. Accordingly, authorities have to show accountability both towards enabling freedom of expression and preventing or reacting to hate speech and war propaganda.

In this respect the liability of Internet platforms has been an issue in the recent past. In order to prevent abusive expression some governments have blocked twitter or YouTube, which generally has been found by the European Court of Human Rights as disproportional as can be seen from the recent Cengiz case of December 2015 on blogging of YouTube by Turkish authorities.

With regard to the liability of intermediaries: here two recent cases have been decided by the European Court of Human Rights in different ways: In the Delfi case finally decided in 2015 no violation of Art. 10 has been found by the Court as in this specific case it saw a particular responsibility of the news platform because of its commercial interests. In a recently decided Hungarian case which concerned the liability of a non-profit self-regulatory association of internet service providers (MTE) as well as an internet news portal for vulgar and offensive speech it found, however, a violation of Art. 10 because the Hungarian courts had not carried out a proper balancing between freedom of expression and the right to respect for commercial reputation and the injurious nature of comments on the internet news portal had been taken by the Hungarian courts at face value as unlawful without deeper investigation. Furthermore, there was no hate speech or incitement to violence in this case. Accordingly, MTE as a non-profit self-regulatory association of internet service providers and the news portal were found not to have violated Article 10, which was also because there was no commercial interest at least from the side of MTE present in this case.

Translated to our topic the definition of incitement to violence and the existence of hate speech according to the practice of the European Court of Human Rights will be crucial

also in future cases. Restriction of such expression by the state is legitimate and no violation of the freedom of expression.

The use of social media to influence public opinion raises the question of how to deal with private actors operating social media. The problem is aggravated by the fact that those actors are usually operating from abroad and the jurisdiction of a state is difficult to be asserted. However, there are procedures in place by all major Internet companies which allow a state to request respect for its laws in particular if this is based on judicial decisions. The Internet companies usually have the final decision, but this can be challenged in national courts. In such case a final decision could be expected for the Council of Europe area from the European Court of Human Rights.

In this context it should also be pointed out that international cooperation is the best means of dealing with such problems. The Cybercrime Convention and its Protocol on Xenophobic and Racism provides a possible framework to deal with illegal content.

In any case transparent regulation of the media is crucial, which preferably should take the form of self-regulation, with independent agencies and strong press councils as suggested by the non-paper. In this way existing ethical codes would appear more effective. However, there is also a need for an educated and independent judiciary, which can properly deal with interferences with freedom of expression in order to prevent arbitrary restrictions.

Austria

Regarding the question on how best to tackle war propaganda and hate speech the Austrian example may be of interest. In Austria a discussion of war propaganda took place in 2014 at the occasion of the 100th anniversary of the First World War! Certainly the role of war propaganda in the Third Reich, in the times of Goebbels is well known. However, different from Germany there is no explicit prohibition of war propaganda in the Austrian law in spite of the clear language of Article 20 (1), most likely for the same reasons as other states have made reservations or abstained from adopting particular legal provisions, namely that there has been a fear of potential abuse.

Since January of this year the provisions against hate speech have been strengthened in the Austrian Criminal Code (§ 283). Public incitement to violence or to hate against particular groups are crucial for finding a violation. The incitement has to be open to many people, which in practice means around 30 and thus covers also incitement on the Internet. The object of the incitement is clearly defined in the law as a church or religious community, or any other group defined by race, color, language, religion or belief, nationality, national or ethnic origin, sex, disability, age or sexual orientation. Even if the incitement causes violence by third persons against specific groups there is a possibility to indict responsible persons. It remains to be seen how the new provisions, which also adopt a new concept of the “public” meaning that a smaller group of persons can be considered as public, will function in practice.

Privatization and accountability

A short note on privatization of the public media to address war propaganda: this has been suggested as a way to improve the quality of the media for example in Turkey or in Serbia. However, practice shows that privately owned media can be influenced by the government by way of economic benefits. While the government usually can be held responsible for the public media as part of its public accountability, for example by other public institutions like ombudsmen, anti-corruption agencies or national human rights institutions, this becomes more difficult with a private owner, who might be even more abusive in order to win government contracts or pursue other private interests. Hence the interest of all sort of tycoons also to own part of the media. Therefore, it is important to assure that media can operate freely in order to serve the public interest. For this purpose the resilience of media against pressures of all kind needs to be strengthened. Objective and autonomous watchdogs like media associations, press councils and national and international associations of journalists as well as international institutions like the Representative on the Freedom of the Media can play an important role.

Relevance of Civil Society

The best way to prevent or to address war propaganda or hate speech is by educating and mobilizing the public in general and civil society in particular. Accordingly, suggestions by the Representative on the Freedom of the Media on strengthening media literacy for citizens is crucial. An important actor in this respect are civil society organizations, which, however, are faced with a shrinking space for their activities if not persecutions in certain countries, a trend, which needs to be reversed.