

The need for fewer legal tools

Original: ENGLISH

OSCE Supplementary Human Dimension Meeting Rule of Law in the Promotion and Protection of Human Rights

Vienna, July 12th 2013

Session II: *Effective National and International Instruments to protect human rights and prevent human rights violations: Best practices, current challenges and solutions*



(This paper is an elaboration of the ICLA statement given near the end of Session II)

ICLA has followed with interest the discussions during the conference, and appreciates the great concern shown for the human rights situation throughout the OSCE area, east as well as west of Vienna. It is, however, a cause for concern that there is a distinct trend towards the creation of more tools, institutions and regulations. This not only makes law less transparent and understandable for the average citizen, it also has the potential to weaken national sovereignty and democratic legitimacy:

The OSCE Parliamentary Assembly representative (though in his private capacity) posed a very important question regarding human rights, in that he rightfully asked: “Who decides?” This is vital, for in order for these decisions to be considered just and legitimate by the general public, the institutions making such decisions need to be indisputably legitimate (and legitimized).

It is the view of ICLA that in order for human rights to be enshrined in the fabric of jurisprudence, as so appropriately called for in the Annotated Agenda, these rights need to be comprehensively understood and accepted in the national institutions, for they are endowed with democratic legitimacy. International institutions such as the OSCE, the United Nations etcetera are certainly also legitimate, but their legitimacy is of a different kind, which is not obvious to the average citizen, who also would not know how to raise issues in these institutions.

As for the instruments needed to ensure upholding of human rights in the OSCE participating States, it is the experience and opinion of ICLA that in reality we need fewer such tools, not more.

There are several reasons for this point of view, which superficially may seem surprising:

- The first is that even presently, the average citizen does not understand the tools that already exist, or the tools that require investment of time and money that can be difficult to shoulder.
- A second reason is that the plentitude of (generally well-intentioned tools) that exist can be contradictory, or worse, at odds with fundamental citizens' rights, such as freedom of expression.
- A third problem is that the plentitude of humans rights tools leads to legal ambiguities and uneven enforcement of the many laws, a severe problem for the legal security of citizens.
- A fourth challenge is that to follow all existing laws to the letter and the full extent of their text would require the introduction of an all-out totalitarian state; obviously not an option.
- A fifth complication is that the inability to extensively enforce these laws is motivating vigilante groups, usually of extreme left orientations, to enforce their understanding of the law, frequently by violent means.

One example of bad law currently on the books are the so-called “hate speech” laws, intended to protect a variety of groups – often many groups – from prejudice, stereotyping and insulting speech.

These laws, unfortunately, have become part of the problem, not of the solution. As an example, Denmark has a law of this kind, Article 266b in the Danish penal code, which stipulates that vilifying or insulting of a variety of minority groups defined by ethnicity, gender, origin, nationality or faith may not be denigrated in public. This broadly worded law constitutes a significant restriction to free speech for the Danes, as well as legal uncertainty about what is legal to say and what constitute a criminal offense. For example, take the following statement:

“All Belgian pedophile Catholic men are scumbags.”

This might constitute a quadruple “hate speech” offense under Danish law if said in public. Worse, the law is to some extent being applied also to private conversations, for instance to the manner that police officers address offenders of the law. A compounding problem is that factual and documentable statements are also covered by this law. Common sense would stipulate that speaking the truth can never be punishable, but that is not so under current Danish law.

Now, if a religion were to *teach* that Jews are comparable to apes and pigs, would that be illegal? Or would such teaching be protected due to being a religious dogma, even though not supported by fact? Article 67 Danish Constitution appears to give the answer, in that it bans religious societies from teaching anything contravening decency or public order, which such blatant racism certainly would be. Yet, this article is rarely enforced, leaving religious teachers free to use and quote from supposedly 'holy' books espousing such views. This is puzzling to the average citizen.

In Germany, hate speech laws have been taken yet further, becoming directly totalitarian in nature, in that they apply to private conversations in general. A puzzling consequence of that is that if one calls a criminal “an asshole”, one can be convicted for denigration. In a recent case, a human rights defender was convicted a fine of €450 for using such offensive speech towards a disruptive leftist stalker. The appeals court not only upheld the verdict, it also increased the fine to €1200.

In Sweden, several dubious cases concerning 'discrimination' have resulted in fines and reparations in the range of several thousand euros, more than is granted in compensation for cases of physical violence. Apparently, a right not to be insulted is being introduced and enacted in Sweden.

It is worth noting that similar denigrations in the opposite direction, from members of minorities towards members of majorities, are generally not considered criminal offenses.

These restrictions on free speech, applying only to parts of the population and unevenly enforced, are bound to create resentment and hatred, which can easily result in other kinds of expression which are much more harmful than mere offending speech. Thus, hate speech laws become sources of resentment and hatred, contrary to their stated purpose, and tend to damage social cohesion, too.

The solution to this dilemma, in the view of ICLA, is not more yet more regulation and yet more national or international institutions overseeing the activities of citizens and other institutions. Such a maze of intricate control is not comprehensible, in purpose nor in implementation, and will only lead to a lack of confidence in law and legal authorities. Contrary to the commitment and stated intention of OSCE, more regulation empowers experts and the judiciary, not civic society.

For as Ayn Rand famously said:

“There's no way to rule innocent men. The only power any government has is the power to crack down on criminals. Well, when there aren't enough criminals, one makes them. One declares so many things to be a crime that it becomes impossible for men to live without breaking laws.”

Thus, it is the opinion of ICLA that better upholding of human rights cannot be achieved by means of more law and regulation, but rather by less. In particular, we in Europe are in need of fundamental guarantees similar to those Americans have in the Bill of Rights, which was so eloquently praised by the US representative during Session I of this conference, and our American friends have a similar need to have the Bill of Rights not only praised, but respected in practice.

The average citizen does not have the time or inclination to read comprehensive reports on human rights or to learn the myriad of nuances that theoretically restrict and regulate his life. For law to remain respected in society, it needs to be clearly legitimate, understandable and enforceable. That enables the state to enforce it correctly, and sets the peaceful citizen free to do as he sees fit.

Thus, ICLA proposes OSCE to improve the human rights situation by the following measures:

- Call upon participating states to universally repeal blasphemy laws.
It cannot be the duty of the state to enforce respect for beliefs that are no business of the state. That would include, for example, belief in the flying spaghetti monster, fairies or other entities that are considered real by some, superstition by others. It remains, however, a duty of the state to protect citizens from having religious doctrines or laws forced upon them.
- Call upon participating States to decriminalize defamation.
Given the technological developments, such bans have become impossible to enforce, while at the same time libel and slander is now very easy to contradict. These laws are outdated.
- Encourage participating States to repeal, or at least strictly limit, all “hate speech” legislation.
Apart from the reasons given above, such laws also cause debate on serious issues to degenerate into legal threats, or even threats of violence, as some extreme political groups have taken upon themselves to enforce them much more strictly than the state does. And, as noted, restrictions on free speech constitute sources of resentment and hatred when people are not permitted, or punished for, expressing themselves or seeking redress for their grievances.
- Shift focus on individual rights, and avoid the pitfall of granting special privileges to groups.
- Empower national institutions to oversee and uphold human rights.
While it may be tempting to grant yet more authority to international bodies, there are good reasons to focus on empowering national institutions instead, even though they may commit mistakes underway. For only national bodies carry clear democratic legitimacy, and only here can the understanding and use of human rights be firmly embedded into the fabric of the judiciary, transparent and useful to citizens at large.

References:

<http://www.osce.org/odihr/103362>
<http://www.legal-project.org/issues/european-hate-speech-laws>
<http://jyllands-posten.dk/indland/article1604532.ece>
<http://www.palwatch.org/main.aspx?fi=786>
<http://www.thedanishparliament.dk/Publications/My%20Constitutional%20Act%20with%20explanations/Chapter%207.aspx>
<http://www.pi-news.net/2013/07/freiheitskämpfer-markus-in-munchen-verurteilt>
http://www.upi.com/Top_News/World-News/2013/05/20/Handshake-ordeal-leads-to-Swedish-town-paying-fine/UPI-97581369084173
<http://www.venganza.org/>
<http://www.osce.org/fom/101287>
<http://europenews.dk/en/node/44172>