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DEFAMATION AND DEMOCRACY

One of the striking differences between European and American approaches to civil society is in their respective attitudes toward speech. Whereas Europeans apparently see speech as one of many rights, subject to limitation in a variety of circumstances, Americans tend to see speech, expression and its related right, association, as the primary rights. It is difficult to believe that a European would say of the right to freedom of speech, as the great American Judge, Learned Hand, said „It presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all.“ U.S. v. A.P., 65 F, Suppl. 362 (SDNY 1943). Or as U.S. Supreme court Justice Benjamin Cardozo put it, „freedom of thought and speech“ are the „indispensable condition of nearly every other thought and freedom“. Palko v. Connecticut, 302 U.S. 319 (1937).

By the same token, no American court would allow so many restrictions as are permitted by the European Convention For The Protection of Human Rights and Fundamental Freedoms, Art. 10, which among other things, allows restrictions „for the protection of health or morals“.

The differences between the two cultures may be seen in many contexts. For example, almost all European countries exclude from protection speech that incites hatred of ethnic or other groups. In the United States, however, although we have struggled with what we call „hate speech“, such speech is normally protected against official action unless it is likely to incite or produce „imminent lawless action“. This is why the United States imposed a reservation to Article 20 on its ratification of the Covenant on Civil and Political Rights, Article 20 of which require signatory States to adopt legislation against „advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence“.

We thus allow American flags to be burned in protest, nazis to march in neighborhoods where Holocaust survivors live, and hoodlums to burn crosses to show their hatred of Black people.

Non-Americans with whom I have discussed this from all parts of the world find our approach unbelievable. To non-Americans, speech is a vital part of the political process, but like other parts of that process, instrumental and subject to conventional regulation. For Americans, speech is much more. In our Bill of Rights, it comes first,

together with freedom of religion. For Americans it involves the freedom to express, not just ideas but emotions, and not just for political reasons but for individual self-realization.

In this aspect, the differences in treatment of speech may well reflect differences between the highly individualistic society that is America, and the more communitarian societies of Europe and elsewhere. The individualistic anti-government streak in America has never been more prominent than today, though as so often in American and indeed world history, it is being exploited to promote class interests. In today's Europe, on the other hand, the effort at instilling individualistic capitalism has been unable to root out communitarian impulses. In almost all European countries, positive economic and social rights are enshrined in the Constitution; in the United States, nothing like that can be found in the federal Constitution. For example, a few years ago, the United States Supreme Court ruled that the State has no constitutional obligation to protect a four-year old little boy from being beaten so badly by his father that he was brain-damaged and became severely retarded, even though county welfare workers knew the child was being abused. *DeShaney v. Winnebago C'ty Soc. Serv. Dept.*, 489 U.S. 189 (1989). This attitude also makes it unlikely that we will ever ratify the Convention on Economic, Social and Cultural Rights.

I am not here to promote American views of the negative State in general - about which I personally have strong reservations - or of free speech in particular. On such matters, our different histories and situations may justify different approaches. But in one area, at least, it seems to me that European practice, if not in doctrine, is starkly inconsistent with any notion of freedom of expression, even in its most limited form, and particularly (though not exclusively) where the press is concerned. I refer to the many laws against defamation or insult of the President, the State, the Government (meaning the Prime Minister or other Ministers) or Members of Parliament.

No government official likes to be criticized. Indeed, there seems to be a direct correlation between the eminence and power of officials and the thinness of their skin. American President Lyndon B. Johnson, at the height of his powers, was furious about press criticism; former New York State Governor Mario Cuomo is said to have called journalists late at night to complain about their criticisms of him.

In America, however, public officials can rarely get any legal remedy for criticism, no matter how vicious and unfair it may be. We tried that once, in the last years of the 18th century, when we enacted the Alien and Sedition Laws. Under that law journalists and editors were sent to jail for such mild comments as charging President John Adams with a continual grasp for power ... an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice". One editor was sentenced to imprisonment for nine months for saying that the Adams administration had been „a tempest of malignant passions"; his system had been „a French war, an American navy, a large standing army, an additional load of taxes". Another editor was charged with libel for saying „our credit is so low that we are obliged to borrow money at 8 percent in time of peace". Beveridge, *II The Life of John Marshall* 30, 34, 37 (1947).

That lasted only a few years and was quickly repudiated. Since then, public debate has been robust to the point of harshness, and that received constitutional sanction.

One of the landmark cases involved the New York Times and our most intractable problem, race. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

In the 1960's an effort was made by public officials to use private defamation suits to block criticisms; they knew official action in the form of criminal proceedings was constitutionally out of question. In Alabama, a Southern state, a suit was brought by a racist police commissioner against the New York Times for an advertisement by civil rights leaders (four clergymen) that contained a few trivial mistakes. After the commissioner won before sympathetic local courts and juries and obtained a very large sum in damages, the United States Supreme Court stepped in. The court ruled that public officials could not maintain a defamation action unless the official could prove not only that the allegedly defamatory statement was false, but that the person uttering the falsehood either knew it was false or was recklessly indifferent to whether it was true or false. Mistakes are inevitable in any heated controversy, the Court observed, and the right to make good faith mistakes must be protected.

It is important to stress that this applies only to statements about public officials, or those in the public arena, about matters of public concern, and not to private people.

Regardless of the many difficulties we've had in applying this standard, the basic principle is clear: public officials are not immune to criticism, no matter how sharp, unpleasant and caustic it may be.

European practice, particularly as old patterns begin to reassert themselves, is very different. Leaders are using defamation and „insult“ laws more and more to stifle genuine criticism. There seems to be little awareness on the part of many of the new leaders - many of whom are now not so new - of the importance of a free press to a democratic society. Perhaps because the press in Europe has been more overtly ideological and party-oriented than in the United States, perhaps because of European traditions of individual honor—whatever the reason, defamation and insult laws have been invoked more and more against hostile speech by journalists and others.

It may be useful to draw a distinction here. In the narrow sense, defamation laws are laws that allege someone said or printed something factually wrong, something that is subject to tests of truth or falsehood. Insult laws, on the other hand, are laws that condemn epithets, name-calling, where accuracy, truth or falsity, has no relevance. To call an official „corrupt“ is libellous—it implies he or she takes bribes, a factual allegation. To call someone a „filthy dog“ implies nothing factual as to the subject's canine nature, or even about his or her habits of personal hygiene.

Almost all European countries have laws criminalizing defamation and/or insult of public officials. Early English law setting started it, the course for much of Western Europe, and later, the Western Hemisphere. A 1606 Star Chamber ruling, *de Libellis Famosis*, introduced into seditious libel the proposition that defamation of „great men“ was a more serious offense than simple defamation, in that „it concerns not only the breach of the peace, but also the scandal of Government“.

Today in France, all public officials enjoy statutory protection against insults, abuse, or defamation and if they bring a civil suit, insult or defamation of high government officials, it carries a higher penalty than that against private persons. In Germany, public figures are considered „more offendable“ by virtue of their prominent

positions and can recover greater damages. Moreover, sections of the criminal code prohibit defamation of the President, the Federal Republic and its symbols, as well as the state and federal legislatures, governments, and constitutional courts. Although these are rarely enforced and may be overcome by a defense of „justification“ they are nevertheless on the books.

These laws are not unusual, and are especially common in East Central Europe. Freedom House, an American organization dedicated to freedom of speech and market-oriented democracy, compiled a survey of civil society, democracy and markets in East Central Europe and the Newly Independent States. With few exceptions, in one country after another - Albania, Hungary, the Czech Republic, Georgia, Poland, Romania, Serbia - the law condemns libel or insult of public officials. For example, Hungary's Criminal Code § 232(1) provides that:

Whoever alleges or spreads in the presence of another person, facts liable to undermine the trust put into the authority or into an official, or fit to hurt the reputation of the official, or uses terms directly referring to such fact commits a misdemeanor ... to any person who in connection with the activity of the authority or of an official, uses terms liable to hurt the prestige of the authority or the reputation of the official.

Truth is a defense only if the statement was „motivated by public interest or by the legitimate interest of any person“. And Hungary is one of the freest of the new States.

In its New York Times opinion, the U.S. Supreme Court commented that „even a false statement may be deemed to make a valuable contribution to the public debate, since it brings about the clear perception and livelier impression of truth, produced by its collision with error“. One can justify some defamation laws by insisting on basically truthful statements (allowing a margin for unintentional error). But there is nothing to be said in favor of laws against merely „insulting“ a president, other public officials, or the country. Such insults are merely inarticulate forms of disagreement, what we in America call „blowing off steam“. People in high places have ample opportunity, by word and by deed, to offset any harm from such disrespect, without suppressing the expression of opposition. Indeed, allowing such expressions is a way of preventing them from going any further and becoming action. Freedom of expression thus serves as what in America is called a safety valve, reducing the danger of an explosion from pent-up resentment.

Admittedly, some of these statutes are not enforced. But many are. A few of the many examples, not just in East Central Europe but elsewhere, will illustrate the point.

In Poland, a man named Stanislaw Bartosinski, in conversation with a friend, called President Lech Walesa the Polish equivalent of „son of a bitch“. Bartosinski was charged with „publicly insulting the Polish Nation or State or its system of supreme bodies“. The prosecutor described the crime as entailing the use of „vulgar words“ in a „very public place“. For this offense, the defendant was convicted and fined.

Two Polish students also ran afoul of the law when, after a demonstration in 1992, they shouted „down with Walesa—Communist agent“. These students were also convicted and fined. A journalist, Ryszard Zajac, was actually imprisoned under the slander statute for publishing an article in which he referred to a local counsel in Katowice and to nine Solidarity officials as „dopes“ and „small-time politicians and careerists“

and with aspiring to become „a Communist party committee“. When he refused to apologize he went to jail for 10 months and was fined. A. E. Dick Howard. *Toward The Open Society in Central and Eastern Europe* pp. 32-33 (1995).

Another example: In Romania, a journalist compared President Iliescu to a pig, reminiscent of a Romanian fairy tale, and was charged with „offending State authority“. Id. at 35-36. Also in Romania, two journalists who had written that President Iliescu had worked for the KGB went on trial this September for „offending the authorities“. If convicted, they could get 3 years in prison.

Last month, Moskovskoi Komsomolets reporter Vadim Poegli, who called Russian Defense Minister Pavel Grachev a „thief“, was convicted of „insulting“ Grachev, though he was promptly amnestied.

And just two months ago, a court in Azerbaijan sentenced 6 employes of a satirical newspaper for prison terms up to 5 years for „insulting the honor and dignity“ of President Heydar Aliyev. Have his „honor and dignity“ really been protected by his having to jail critics? (OMRI 10/20/95.)

Elsewhere, journalists in Turkey have been punished for Comparing parliamentary deputies to „Pavlov's dogs“, and for insulting the President. Journalists in Croatia were charged with „spreading false information“ for parodies designed to highlight President Franjo Tudjman's authoritarian tendencies. In Belarus, which seems to be veering more and more toward oneman rule, - its President Lukashenka recently praised Hitler - the opposition newspaper Svoboda was charged with libel for criticizing government officials and fined.

All of the countries in East Central Europe are members of the Council and have adopted the European Convention. Use of the defamation and insult laws described here thus violates not only the constitutions of these countries but also their international obligations.

In 1992, Kyrgyzstan President A. Akayev declared, „No state, and certainly no civilized state, allows attacks against the Head of State, insults against State authority, and the Nation State dignity to go unpunished ... the point is not personality but the principles for the normal functioning of a democratic, law-governed state“.

That is simply not so. Democracy presupposes difference, and exists to allow those differences to determine public policy in a peaceful non-violent manner. Freedom of speech to express those differences to persuade, to debate, to criticize, to condemn, to let off steam - all these are necessary to a functioning democracy. And since those differences often go very deep and rouse strong emotions among people who, despite their differences, share a love of their country, the speech may be very harsh and offensive. Even if one sees speech as purely instrumental, however, purely to promote the democratic process, those in power may not use the euphemism of „respect“ to suppress speech by libel and insult laws, for that usually masks an attempt to keep themselves in power. Surely we have had enough of that in this bloodiest of centuries.