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Russia's Gay Propaganda Ban: European Court for Human Rights Overrules the Silence

October 27, 2017

by Ryann McMurry

In June 2017, the European Court of Human Rights found that Russia's legislation restricting open expression and discussion of homosexuality [violated](#) the Human Rights Convention. The [case](#) was brought forth by three Russian LGBT activists that were arrested and fined for carrying banners stating that homosexuality was natural and not perversion. They challenged their guilty verdicts before Russia's Constitutional Court which ultimately [upheld](#) the law on the grounds of protecting morals. The activists appealed their case to the European Court of Human Rights in Strasbourg.

What has now become widely known as Russia's Gay Propaganda Ban is actually law arising from a [succession of statutes](#) introduced at the regional level in 2003 and 2006 and the federal level in 2013. Together, they largely prohibit public reference or promotion of homosexuality. Specifically, the federal statute banned "[creating a distorted image of social equivalence of traditional and nontraditional sexual relationships](#)." This legislation denotes a deep and powerful intolerance for the rights of Russia's queer communities.

Homosexual acts were decriminalized in Russia immediately following the fall of the Soviet Union. LGBT citizens, however, have consistently been subjected to [discrimination](#) and persecution at the hands of the government. President Vladimir Putin has utilized this issue as a rallying call for his nationalist message. One of Putin's primary goals in advancing the legislation was that it "[positions Russia as a defender of Christian and traditional values and the West as decadent and godless](#)." Since the propaganda ban, The Human Rights Watch has found an increase in discrimination and violence towards Russian LGBT communities. By positing homosexuality as contrary to Russian ideals and tradition, the ban "[sends a message that LGBT people are second-class citizens posing a threat to public morality](#)"

When defending their position to the European Court of Human Rights, Russia's primary [argument](#) was that the ban represented the majority view, and was essential to protecting children's right to avoid exposure to non-traditional sexual and familial norms. They characterized this purported aim as a human rights [concern](#) itself, and argued the ban was necessary to defend children's morality and health. Lastly, they claimed that since the laws didn't explicitly ban homosexuality then it could not possibly qualify as discriminatory.

The European Court of Human Rights took a very different position. Not only did they hold that the ban encourages homophobia, but that it is contrary to, "[the values of equality, pluralism, and tolerance in a democratic society](#)." They found that ban indeed violates the European Convention on Human Rights, ratified in Russia in 1998, because it is discriminatory and violates freedom of expression. The court explained that, "[the very purpose of the laws and the way there were](#)

formulated and applied was discriminatory,” and, “served no legitimate public interest.” In addition, they dispelled Russia’s claim that this ban protected the rights of children. The court said that even if this was the aim, there was no valid justification for the need of this protection, “let alone science-based evidence that one’s sexual orientation or identity was susceptible to change under external influence.”

The judges found six to one that the ban violates the Convention, and ordered Russia to pay the three activists 43,000 euros each in damages. As a member of the European Convention on Human Rights, Russia is obligated to respect and implement the court’s rulings. Russia said they are planning to file an appeal. This ruling solidified the notion that Russia merely decriminalizing homosexuality does not mean their additional laws cannot be discriminatory to the LGBT communities. In the attempt to quash promotion of healthy and equal sexual lifestyles Russia further alienates and stigmatizes this community, likely for nationalist political gain.

Intersection of Individuals with Disabilities and Refugee Status

November 20, 2017

by Sahar Takshi

Approximately seven to ten [percent](#) of refugees around the world have a disability. Refugees with disabilities face heightened challenges and require special medical attention when displaced, but they are the group most likely to remain [unseen](#) in every aspect of humanitarian assistance. The conditions of the refugee camps in Greece are reflective of how refugees with disabilities remain hidden in the asylum process.

Greece's treatment of refugees with disabilities demonstrates the extensive problems refugees face because of the lack of attention to this issue. The European Union has provided substantial funding to Greece to maintain "hotspot" asylum camps but refugees with disabilities continue to [struggle](#) in attaining shelter, sanitation, medical care, and mental health care. Overcrowding of the Greek camps and the strains of the EU-Turkey deal to relocate refugees from the overflowing Greek islands to Turkey amplify these challenges.

Greece formerly labelled asylum seekers with registered disabilities as "vulnerable." This distinction allowed exemptions from the border process that sends refugees back to Turkey, priority in the system, and issuance of asylum cards that allow free movement around the mainland and access to medical services. In December 2016, however, the EU encouraged Greece to abolish the "vulnerability" assessment because the practice was unsustainable. Contrarily, a representative of Doctors Without Borders stated that not enough refugees are being [identified](#) as "vulnerable" even though they meet the criteria.

The lack of services available to refugees with disabilities at asylum camps is regrettably pervasive. For example, one deaf man from Syria was unable to get [hearing](#) aids. Another Iraqi couple were unable to register their physical disabilities because they lacked documentation as proof. Many of the Greek camps reportedly lack [accessible](#) toilets and showers. One elder Syrian woman was unable to shower for an entire month and parents of an eight-year-old from Afghanistan were reduced to putting their disabled son in diapers because the toilets were inaccessible. Clearly the lack of appropriate accommodations and services for individuals with disabilities at the camps does not fulfil their basic human needs.

A major factor that impedes access to treatment is identifying refugees with disabilities. One medical professional at a camp in Greece stated that, due to a lack of resources, time, and expertise, many refugees with disabilities are not [identified](#) if their disability is not visible. Additionally, a psychologist in a camp in Thessaloniki stated that there was previously no safe [space](#) available for refugees to share their problems, but they have recently received a transport container where people can meet with him behind closed doors. Another representative, however, stated that some of those safe spaces are not accessible to people with physical disabilities because they lack ramps, for example.

The experience of refugees in Greece is reflective of a global crisis for displaced people with disabilities. For example, Canada's Immigration and Refugee Protection Act [forbids](#) the admission of foreign nationals whose health conditions are expected to cause burdens on health or social services; this provision was seen when a family was denied residency because their son with Down syndrome was expected to impose higher education costs. Moreover, the Dubs program, a resettlement scheme for vulnerable child refugees in the United Kingdom, was recently [suspended](#), leaving displaced children with mobility problems and learning disabilities without sanctuary.

While limited, there are some obligations for nations to provide adequate services to refugees with disabilities. Rule 21 of the [Standard Rules on the Equalization of Opportunities for Persons with Disabilities](#) calls for UN member states to take steps to provide equal opportunities for those with disabilities, including [refugees](#). Article 4 of the [UN Convention on the Rights of Persons with Disabilities](#) holds that State Parties must undertake to ensure the protection and promotion of human rights of persons with disabilities in all policies and programs. This extends to asylum programs during humanitarian emergencies as defined under Article 11 and the right to acquire documentation of nationality under Article 18. Article 24 of UNHCR's [Convention and Protocol Relating to the Status of Refugees](#) holds that member states must provide refugees the same treatment given to citizens with respect to social security, which includes disability and old age. These rules implore member states to address the issue of refugees with disabilities, although they are minimal in their obligations.

The UNHCR co-funded a [report](#) by the Women's Commission for Refugee Women and Children on refugees with disabilities. The report found that data on this topic is lacking, inconsistent, or inaccurate. Clearly, more research is required to understand the specific areas in which resources for refugees with disabilities are lacking so that specific obligations can be defined for asylum nations. Refuge nations should adhere to the provisions of the Convention on the Rights of Persons with Disabilities and the Convention on the Status of Refugees by providing reasonable accommodations, affording refugees with disabilities the same status as their non-disabled counterparts, and engaging in research on the intersection of refugees and individuals with disabilities.

Hate Speech Is Not Free Speech for Europe

December 4, 2017

by Flaka Pollozhani*

A few months ago, the German Bundestag adopted the Network Enforcement Act.^[1] After taking effect in October 2017, the Network Enforcement Act, also known as the “Facebook Law,” fines social media companies for taking no action on hate speech.^[2] The “Facebook Law” compels companies such as Facebook, Twitter, and YouTube to remove hate speech comments or content or face statutorily prescribed fines ranging from \$5.7 million to \$57 million.^[3]

What does Germany’s new law require?

- Social media companies must develop and implement a procedure for managing complaints about purportedly unlawful content, which must include taking immediate notice of the complaint. Providers are then obligated to remove or block access to “manifestly unlawful” content within 24 hours of receiving the complaint.
- For content that is unlawful but not “manifestly unlawful,” providers have seven days to remove or block access to the unlawful content.
- Providers that receive more than 100 complaints about unlawful content per year will be required to publish two annual reports written in German that detail the mechanisms in place to report unlawful content and the criteria used to evaluate the reported content, how the provider handled the complaints, and the number of complaints received.
- Providers must also make monthly reviews of their processes for handling notices of unlawful content and immediately rectify any inadequacies in the process.
- Providers face fines of up to \$57 million for, among other things, failing to produce the bi-yearly reports if required, to develop a procedure for receiving and evaluating notices, to conduct the monthly reviews of their processes, or to eliminate inadequacies in the procedure.

Social advocacy groups and politicians on both the left and the right have issued statements opposing the “Facebook Law,” commenting that the law places a serious restriction on online freedom of expression, thereby positioning social media companies in a role similar to prosecutors and judges by requiring them to determine what is and what is not hate speech. David Kaye, U.N. Special Rapporteur on Freedom of Expression, asked the German government to conduct a review

* Flaka Pollozhani is an Albanian coming from Macedonia. At the American University Washington College of Law she is staying as an International Visiting Scholar at the Center for Human Rights and Humanitarian Law. She has a B.A. in Law and a joint M.A. degree in International Relations and Human Rights from the University of Tetova and the University of Gothenburg. In 2013, she conducted a research on Freedom of Expression and the European System for the Protection of Human Rights as part of an exchange scholars program at the University of Graz in Austria. Since 2014, she has been working at the Community Center of Struga Municipality, providing legal and administrative aid for citizens and non-formal education. She is currently a Ph.D. student in International Relations at Ss. Cyril and Methodius University in Skopje, Macedonia.

on the compliance of the “Facebook Law” with international law and expressed his concerns about some of the few provisions of the “Facebook Law” and its consequences.^[4] Christian Mihr, the Executive Director of the Reporters Without Borders-Germany expressed his deep concern about the “Facebook Law”: *“Our worst fears have been realized, the German law on online hate speech is now serving as a model for non-democratic states to limit Internet debate,”* referring to the Russian draft law of the online media.^[5]

The adoption of the “Facebook Law” followed a series of actions of the European Union and Council of Europe aimed at combating hate speech. The European Commission has previously presented a list of measures suggesting how social media companies may permanently remove hate speech comments posted on their pages.^[6] Given the influence of a country such as Germany in the European Union, and in Europe generally, it is logical to anticipate that similar actions might follow in other countries as well.

In a 2015 case before the [European Court of Human Rights](#) (ECtHR) in Strasbourg, the Court did not protect an online portal in Estonia, which faced fines from the Estonian courts after being accused by an Estonian company of free speech violations. The Court ruled that the Estonian State did not violate Article 10 of the European Convention on Human Rights.^[7] The Court noted “that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression... However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. The Court further observed that “this characterization and analysis of the unlawful nature of the comments in question...is obviously based on the fact that the majority of the comments are, viewed on their face, tantamount to an incitement to hatred or to violence....”^[8] In conclusion, the Court found that Estonian courts placed a justified and proportionate restriction on the portal’s freedom of expression.

The ECtHR has issued several judgments related to hate speech, noting that hate speech constitutes an exceptionally relevant issue and that human rights defenders should put their effort into combating hate speech as negative phenomenon. The 2006 *Erbakan v. Turkey* decision reflects the essence of the ECtHR’s current position concerning hate speech: “[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principles, may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression, which spread, incite, promote or justify hatred based on intolerance.”^[9]

The European Commission against Racism and Intolerance (ECRI),^[10] another important mechanism for the protection of human rights in Europe, is dealing more and more seriously with the fight against hate speech. The ECRI’s General Policy Recommendation No.15, among others, recommended to its forty-seven Member States to seek to identify the conditions conducive to the use of hate speech as a phenomenon and the different forms it takes. Furthermore, the recommendations indicated that the Members States measure the harm that hate speech causes by developing reliable tools, and ensuring that there are public authorities designated to use these tools properly, in order to fight the dissemination of hate speech, through a continuous monitoring.^[11]

The United States differs from Europe on its approach to hate speech, although both value the freedom of expression as a core value of the democracy. The US Constitution's First Amendment provides stronger free speech protections than those of most European democracies.^[12] In Europe, there is no general First Amendment exception, which allows the government to punish "hate speech" that denigrates people based on their identity, although Germany makes an exception from this.^[13] According to Ken White, a First Amendment litigator, things that are referred to as "hate speech" in the US may occasionally fall into an existing First Amendment exception: a racist speech might seek to incite imminent violence against a group, or might be reasonably interpreted as an immediate threat to do harm. However, "hate speech," generally receives broad constitutional protections in the US.^[14]

Another example that highlights these different approaches to free speech limitations is the issue of defamation, which is regarded as Criminal Offence in most European countries; ^[15] this is not the case in US. This adds to the more restrictive European approach that I argued above, it is another mean of restriction of freedom of expression by criminalizing various types of slander (libel and defamation), since defamatory "fake news" are often regarded to be close to hate speech.

The emergence and exponential growth of technological advances in social media engagement in particular have created unprecedented challenges, in both the US and Europe, for how to navigate free speech issues. Social media, and the fast flow of information confused with "fake news" and hate propaganda, have made it even more difficult for policymakers, legal practitioners, and individual citizens around the world to follow and to distinguish freedom of expression from hate speech.

There is no doubt that serious institutional measures should be addressed on both sides of the Atlantic, and perhaps greater trans-Atlantic dialogue and cooperation is needed to address this evolving issue, because in the end, the new law in Germany will result in the fines for mainly American companies.

[1] The German Bundestag constitutional and legislative body at the federal level in Germany.

[2] Official German version available at: <https://cdn.netzpolitik.org/wp-upload/2017/06/Synopse-NetzDG-final.pdf>. English version available at: https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf;jsessionid=F3686C36773D5F5831D70F32DDB50CDD.1_cid289?_blob=publicationFile&v=2

[3] <https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m>

[4] Read the full statement of the U.N. Special Rapporteur on Freedom of Expression: <http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf>

[5] <https://rsf.org/en/news/russian-bill-copy-and-paste-germanys-hate-speech-law>

[6] European Commission Code of Conduct on countering Illegal online hate speech: http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf

[7] Article 10 of the European Convention on Human Rights protects freedom of expression.

[8] European Court of Human Rights factsheet on hate speech, June 2016, Case: *Delfi v. Estonia*, http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf, p.13.

[9] ECtHR, Appl. No. 59405/00, *Erbakan v. Turkey*, Judgement of the Court of 6 July 2006, §56.

[10] A monitoring body of the Council of Europe, read more about the work of ECRI here: https://www.coe.int/t/dghl/monitoring/ecri/default_en.asp

[11] European Commission against racism and intolerance, General Policy Recommendation no.5 on Combating Hate Speech, 2015, p.5, https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf

[12] The US Constitution's First Amendment provides that Congress make no law respecting an establishment of religion or prohibiting its free exercise. It protects freedom of speech, the press, assembly, and the right to petition the Government for a redress of grievances.

[13] Chapter 130 of the Criminal Code foresees imprisonment or fines for hate speech presentations through radio, media services or telecommunication services. See the German Criminal Code here: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html

[14] Take a look at his piece for Los Angeles Times "Actually hate speech is protected speech", <http://www.latimes.com/opinion/op-ed/la-oe-white-first-amendment-slogans-20170608-story.html>

[15] See a map of countries that have defamation as a Criminal Offence: <http://legaldb.freemedia.at/defamation-laws-in-europe/>