

STATEMENTS WHICH OFFEND, SHOCK OR DISTURB

FOCUS ON THE FREEDOM OF SPEECH



1. INTRODUCTION

The Centre for equal opportunities and opposition to racism is regularly questioned about statements which defy the boundaries of free speech. Should one be able to say anything and everything? Can freedom of speech justify any statement? Or which statements can infringe the law? At what point can a statement be considered to be an incitement to hatred, violence or discrimination? For these questions, a simple yes/no answer will never suffice. That is why the Centre has chosen freedom of speech as the central topic of

its Diversity/Discrimination Annual Report 2011. It is a risky topic, bound to lead to disagreement and discord. However, readers eager for controversy will be disappointed: with this analysis the Centre aims to demonstrate that this question, which is fundamental for a democracy, can be calmly addressed in a concrete and critical manner which recognises its full complexity, in both legal and societal terms. There will be no ideological side-taking or moralising but simply legal analyses, concrete examples and hypotheses.

2. DISCRIMINATION VERSUS HATE SPEECH

In the field of equal opportunity and racism, one encounters three types of phenomena: discrimination, hate crimes and hate speech. With regard to principles, the first two lead to little debate: it is universally acknowledged that equal treatment in employment, housing, etc. must be guaranteed for all; also, it is universally accepted that physically assaulting someone, his or her property, because of his race or sexual orientation is an aggravating circumstance that must be severely punished. However, when asked what constitutes a racial or homophobic slur or at which point it can be considered as incitement to hatred or discrimination, it seems impossible to reach a consensus. The matter becomes much more complicated. Reason enough, some might say, not to discuss it. Should we avoid upsetting subjects? The Centre chooses the opposite response. To attempt to gain a clearer insight into the issues, free of any ideological slant, with an aim which is twofold:

1. Freedom of speech is one of the foundations of democracy, one of our fundamental rights. But no right, no matter how fundamental, is ever absolute. Every right may be restricted by other fundamental rights: equal treatment, public order, respect for

privacy, collective life, consumer protection, etc. In an increasingly diverse society, which is, however, also a society in crisis, this issue is particularly acute. Certainly if one considers the many issues posed by the Internet, which is an extraordinary tool for communication and information, but is at the same time a source of frustration, hatred and lies. Therefore, this focus offers the Centre a way of examining Belgian society in light of a major democratic issue, drawing upon its own expertise and hypotheses, as well as its doubts and questions.

2. When the Centre is criticised, quite often it's due to the positions it takes on matters of freedom of speech. This criticism often comes from two directions at the same time. Sometimes, certain parties will accuse the Centre of being a "*thoughts police*", or a "*temple of political correctness*". But others will accuse the Centre of exactly the opposite, specifically, of failing to stand up to a form of speech that is viewed as shocking or threatening. Sometimes even, it is the same accusers who, depending on the topic, indict the Centre one day for being too interventionist, and the next day as not interventionist enough. The Centre, therefore, does not aim

to justify itself but simply to explain its method of working and to place it in the greater context of its aims.

It would be useful, to begin with, to show how working in the area of hate speech is a highly specific terrain, very different from working in the area of discrimination:

- » In the case of **discrimination**, the legal instrument is based on the general principle of equal treatment. In principle, one should never treat two different categories of persons differently unless there is an “*objective and reasonable justification*” for it. On this basis, it is possible to sanction inequality of treatment in a very broad and comprehensive way, whether it is direct or indirect, intentional or unintentional (this is why these laws comprise a civil aspect). Thus, this kind of legal basis allows the Centre to intervene quickly when confronted with cases of discrimination in employment, housing, goods and services, etc. And, although the Centre always favours an amicable resolution or negotiation, it will undertake legal action when necessary;
- » In the case of **speech that incites hatred, discrimination or violence**, the general principle is freedom of speech. In principle, one can say anything one wants to say, except for statements which incite hatred, discrimination or violence. Here, the inverse reasoning is applied: these are limitations to freedom that must be duly justified and proportionate. We are in a penal context here: in order to lawfully accuse someone on the grounds of inciting hatred, discrimination or violence, one therefore must prove there was an *intention* to cause harm. Unlike in cases of discrimination, the situations of this type in which the Centre is able to intervene are therefore much rarer.

This difference between the tools for combating discrimination and hate speech sometimes leads to misconceptions, the erroneous impression that there is a “*double standard*”, such as when the Centre remains adamant on the issue of reducing discrimination (even involuntary) in hiring employees, for example, but does not react to offensive or unacceptable speech. The explanation however is something else entirely. As we have just seen, the two phenomena are addressed through ‘inverse’ legal reasoning: in one case, equality of treatment has primacy, and it is the difference in

treatment which is the exception ; in the other case, it is freedom of speech that takes precedence, and it is the incitement to hatred which is the exception.

2.1. When words lead to action

How can we therefore resolve the dilemma between freedom of speech and the repression of hate speech? The working hypothesis that the Centre applies is as follows: considering *statements* which incite hatred and violence as particular types of *acts* of hatred and violence. In order to assess the potentially reprehensible effect of words, one must look not at the *opinion* that they express, but at the *act* that they constitute. What determines whether or not words are harmful, and liable for prosecution, is their dimension which is known as “*performative*” (that which makes them an action, an attitude), much more than their “*representative*” dimension (the opinion that these words convey), even though these two dimensions, naturally, remain closely linked. What should one in fact look at in order to assess whether or not a statement is lawful? On one hand, *the intention* of the speaker; on the other hand, the *context* in which it is uttered (before what kind of audience, on what kind of occasion, etc.). In fact, these two elements make up what is known in linguistics as a performative statement, that is, a statement which has an effect, which does something. “*Doing things with words*”, according to the title of the pioneering work by John Austin¹. A statement that incites hatred is therefore a linguistic act as performed with this intention, and in a context which makes it potentially effective towards the audience addressed.

When the legislation bans incitement to hatred, it does not ban opinions of a certain type, it is rather a case here of conduct that utilises the vector of language to provoke some form of violence. In considering matters from this angle, the locus of the question is shifted. It is no longer a matter of knowing what type of opinions may or may not be lawful, but which verbal acts are compatible with democracy and which are not.

Our hypothesis would seem to be supported by the practice of judges (and thus also of the attorneys

1 J.L. Austin, *How to do Things with Words*, 2nd edition, Oxford, Oxford University Press, 1975.

who address them), who are highly attuned, whether consciously or not, to the performative dimension of language. What do legal specialists in fact do in order to assess the criminally prosecutable nature of a statement, in terms of incitement to hate? They examine the *intention* of the speaker and the *context* of the remarks (particularly their public nature), which are the exact two pragmatic elements which, in ‘synthesis’, generates the performative power, the ‘pragmatic’ effect of a statement (its capacity to persuade, to win over its listener, to actually incite him to commit an act of some sort). Do judges not automatically take a pragmatic stance?

Of course shifting the centre of gravity of the debate concerning freedom of speech will not resolve all of the problems, but may suffice to clarify certain matters.

2.2. The Centre’s approach

Let us address the core of the Centre’s work: the concrete cases. When facing a concrete case, the Centre uses the following framework for analysis:

1. the Centre always gives priority to freedom of speech. The Centre upholds this principle at all times, even when it is a question of, according to the famous phrase of the European Court of human rights, statements “*which offend, shock or disturb*”. Contrary to the reputation sometimes attributed to it, the Centre intervenes very little in the area of freedom of speech. It only takes legal action in those cases in which this is urgently necessary. In 2011, it acted as a plaintiff in the case of incitement to hatred and violence in just a single case, involving the fundamentalist group Sharia4Belgium.
2. the Centre also evaluates the appropriateness of a potential lawsuit. Even when it appears that a statement may be in violation of law, other parameters must be measured:
 - » would taking legal action not grant too much importance or impact to statements which have been made in a limited context?
 - » would taking legal action not be falling into a trap set by the author of the statement?
 - » on the Internet (discussion forums, chain letters, etc.), a different type of reaction is often quicker

and more suitable (“*notice and take down*”, analysis and “*counter-mail*”, etc.);

- » the risk of potential defeat in court may prove catastrophic in terms of public opinion, in cases which have received heavy media coverage. The recent example of Geert Wilders in the Netherlands gives one pause.
3. it can happen that regarding a person or an organisation, it is not a given statement taken in isolation that is of such a nature as to incite hatred, discrimination or violence, but their repetition and systematic, articulated character which demonstrates a strategy and therefore an intention. In examining statements made within the political realm, the Centre often uses this framework for analysis.
 4. naturally, tolerating a statement legally does not mean that one approves of it in moral terms. The Centre is often called upon in relation to statements that do not fall under the protection of the law, but which it considers harmful to persons, groups or society in general.

To the extent that freedom of speech is based strongly on the context and on the way that it is received by the audience, all institutions must be encouraged to take responsibility according to the context in which they operate, which is always specific. Rather than calling for a change to the law in order to reduce freedom of speech, it is this sense of responsibility that must be promoted. A sense of responsibility that must be upheld, in an ideal world, by all citizens...

In summary:

- » Freedom of speech must remain the priority;
- » Dialogue and debate are the most powerful weapons to combat hatred and intolerance;
- » When confronted with hate speech, the responsibility is collective. The Centre encourages all civil society organisations to take up their responsibility (e.g.: moderators of Internet forums, editors, hierarchical or ethical authorities, etc.);
- » The legal-penal option is an ultimate step to which the Centre takes recourse only after thorough consideration.

2.3. In practice

2.3.1. Press

The jurisprudence at the European Court of human rights offers special safeguards for freedom of speech in journalism. The sole admissible restriction to this freedom is that which is necessary to maintain a democratic society.

The Belgian Constitution also provides that press offences must be judged by a Court of Assizes, which sets a very high threshold for actual legal action. However there is one notable exception made for offences inspired by racist or homophobic motivations. In this case, the criminal courts have competence.

The Centre regularly receives notifications about articles or other contributions in newspapers, magazines or other media. Often this is information presented without nuance or involving a poor choice of words which may be likely to reinforce certain prejudices or stereotypes. It may also be a matter of an editorial which arouses strong reactions. Whilst the Centre is dismayed by the polarising character of certain contributions, from a legal point of view, one is generally forced to conclude that freedom of the press wins out. It is thus recommended that offended readers react directly or, if possible, demand a right to rebuttal. In the event, the Centre is committed to playing a role as mediator and/or go-between towards the competent ethical authorities (the advisory boards for journalism ethics).

2.3.2. Internet

Each year, the Centre receives hundreds of notifications related to “*cyberhate*” (chain letters, websites, blogs, discussion forums, social networks, etc.) and must, unfortunately often conclude that the statements in question indeed incite hatred, discrimination or violence. It should be pointed out that there is no “*digital exception*” to the rules that prohibit incitement to hatred, discrimination or violence. Although the Internet is a global medium, the same rules apply for all types of messages, any time that they are distributed on Belgian territory, regardless of the media used (written, spoken, televised, electronic).

However, it is not realistic to envision systematically filing lawsuits for these cases, and there are three reasons why:

- » The time which is required for a legal procedure is no match for the immediacy of the Internet. The Centre therefore favours a rapid reaction that is suited to the reality of the Internet;
- » A lawsuit may needlessly generate publicity for authors and/or statements which could otherwise be immediately removed from the public eye and which therefore may not necessarily have a very significant harmful impact;
- » Finally, given the nature of the Internet, the legal action may run up against either the deployment of disproportionate means, or the impossibility of identifying a single perpetrator, obstacles of territorial competency, etc.

The chief strategy adopted by the Centre in cases related to discussion forums, social networks and blogs is what is known as “*notice and takedown* ”: the manager of the Web site, moderator of the discussion forum, etc., is informed of the potentially illegal material and is invited to delete it. In parallel, various initiatives and various instruments have been developed over the years: a Web site and a brochure on the subject of cyberhate, standardised responses to recurrent chain letters, training sessions for moderators, etc.

Yet this does not prevent the Centre, in those cases in which it is necessary, from filing a formal complaint or acting as a plaintiff in cases related to cyberhate.

2.3.3. The music scene

The Centre is regularly consulted before concerts or other shows which are deemed problematic on account of prior statements made by the artists involved (homophobic lyrics, statements made in the press, during shows, on televised platforms, etc.). The question is to determine whether it is appropriate to ban a show, concert, cultural event because of the ‘past’ of the artists concerned.

According to the Centre, preventative intervention by judicial means should be ruled out, as this constitutes questionable censorship.

The Centre therefore always issues an opinion that

strikes a similar note: no preventative censorship strictly on the basis of prior controversial statements. On the other hand, a call for vigilance is issued for the show or concert in question: if it should turn out that statements which constitute incitement to hatred or negationism are effectively made, then legal procedures can be launched. In order to enable repressive action of this type, the local authorities and police force have an essential role to play. Essentially it necessitates witness statements as well as the presence of police at the concert who can then draw up an official police report.

In any case, this legal position based on principle does not exclude any other types of measures or actions (awareness raising, information, protests, demonstrations,...). Moreover, the organisers of the show must be made aware of their responsibilities. For example, in the contracts with the artists, they may include a clause stipulating the respect of Belgian anti-discrimination laws.

The Centre recently distributed an information tool designed for concert organisers, concert venues and cultural centres throughout the country. Aside from practical overview of the laws in question, this document offers on one hand guidelines for evaluating whether or not a statement made by an artist is acceptable and on the other hand recommendations for how best to respond before, during and after a scheduled concert.

2.3.4. Humour

Humour also constitutes a special case. Jurisprudence which goes back to the 19th Century grants a certain impunity to humoristic or caricatural expression, on a dual basis: on one hand because laughter is considered as “*natural*”, being ungovernable and illogical, and also because humour is considered as a form of critique necessary to democratic life. In the case of satire or caricature, the courts will therefore be more tolerant than in the case of ‘serious’ statements. Let us not forget that despite the controversy unleashed by the publication of the ‘Danish’ caricatures of Mohammed, there was no condemnation in either Belgium or France.

Nevertheless, humour does not exempt artists from their legal responsibilities. Being fundamentally

opposed to censorship on principle, the Centre also calls, in the case of contentious shows, for witness statements, or for police to attend the performance, and/or for recordings to be made in order to intervene after the fact by legal or other means.

2.3.5. Football

Football is a good example of a case in which “*internal*” rules rightly go further than common law. The “*football law*”² provides for sanctions³ for persons who, alone or as part of a group, incite others to assault or injury, to hatred or abuse towards one or more individuals, whether this is in the stadium, in its vicinity or on Belgian territory (insofar as, in the two latter cases, it is due to and on the occasion of the organisation of a football match). The FIFA Disciplinary Code, which is included in the disciplinary regulations of the Belgian Football Union, also provides for sanctions for persons, players and clubs in the event that racist or abusive statements are made at football stadiums.

2.3.6. Statements made by “authorities”

The Centre regularly receives outraged reactions concerning statements made by political officeholders or policymakers, or other persons invested with a certain intellectual or moral authority. These matters regularly make the headlines and consequently, the Centre is expected to instantly express an opinion.

In such situations, the position of the Centre is as follows: on one hand, public figures must enjoy a special protection in terms of freedom of speech because they need to be able to take risks in the formulation of a given idea: this is effectively the meaning of the irresponsibility of members of Parliament, for example; on the other hand, as ‘professionals’ in public speaking, they are generally aware of the effects generated by their statements. The moral authority with which they have been entrusted must therefore encourage them to take greater responsibility. But this is a matter in the moral sphere and not the legal one.

2 Law of 21 December 1998 on security at football matches, amended by the laws of 10 March 2003, 27 December 2004 and 25 April 2007.

3 Articles 23 and 23 bis of the law of 21 December 1998 on security at football matches.

That is why, in response to statements made by public figures, the Centre will be particularly attentive to the recurrent nature of certain statements – a repetitive nature which indicates an intention, or a strategy to incite hatred.

2.3.7. Radical groups

The Centre gives special attention to organised forms of incitement to hatred. In fact, these can constitute a direct threat to democracy and social peace. That is why the Centre is particularly vigilant in this area and will intervene as rapidly as possible. That is also why close collaboration with other actors is necessary, both beforehand and after the fact: the courts, the police, the mayor.

2.3.8. Demonstrations

The right to public demonstration is a fundamental freedom in a democracy, but here too one runs into limits. The mayor of a city has the power to ban any

demonstration that is deemed a hazard to public order. Unlike in the case of shows or statements in the media, demonstrations always take place in public spaces and therefore have the potential to create serious problems of public unrest. This fact can easily justify preventative intervention.

It is also possible to prosecute organisations or demonstrators after the fact for expressing slogans or carrying banners that are in contravention of the law. However experience shows that this is often extremely difficult in legal terms, particularly because the boundary between political protests and incitement to hate can be a tenuous one, such as in cases of demonstrations against the policies of the state of Israel. Thus, comparing Israel to the Nazi regime, however shocking and inappropriate this may be, will not be considered by Belgian courts as a form of negationism. Moreover, Belgian jurisprudence has recently re-emphasised that racist *insults* are not punishable as such based on the antiracism law. Here again, the work of the police is essential in order to document potential infractions and to draw up official police reports.

3. CONCLUSION

As we have seen, it is not easy to develop a strategy for dealing with hate speech. The issue can be summarised by demonstrating that it involves two axes:

- » a temporal axis, according to which one intervenes in a preventative manner (in order to prevent the hate speech from occurring) or in a curative manner (once it has been perpetrated) ;
- » a strategic axis, according to which one elects to take a legal approach (through filing a lawsuit or a formal complaint) or a societal approach (awareness raising, conciliation).

Preventative action can take two forms: through bans, in other words, censorship, or by raising awareness of responsibility. As freedom of expression is a fundamental right, banning in advance should be avoided whenever possible. Only direct risks to public order justify a ban, and even then this option must be exer-

cised cautiously. That is why preference is given to raising awareness of responsibility, for example on the part of the organisers of shows, who can demand that the artists with whom they enter into contracts comply with the laws.

However, hate speech can and does occur. We must remember that in our approach it is not the content but its performative dimension that must be the focus of our attention: what is the author's intention and what is the context in which the statement is made? The Centre will thus perform a dual analysis: a legal analysis and a societal analysis.

The legal analysis will focus on two aspects:

- » **Has there been a violation of the law ?**

The chief stumbling block is to prove that the author's intention was indeed to incite hatred. We

have seen that it is often very difficult to obtain proof of this type (one indirect way is to document the repetition of the statement which is indicative of a strategy and therefore of an intention);

» **If so, is it appropriate to take legal action?**

We have seen that basically, aside from the legal analysis as such, it is sometimes counterproductive to take legal action, for example, to avoid playing the author's game (the case of Wilders in the Netherlands is typical of this point of view), in order not to give publicity to the statement, or if the risk of failure is too great;

» **If not, what alternative would be preferable?**

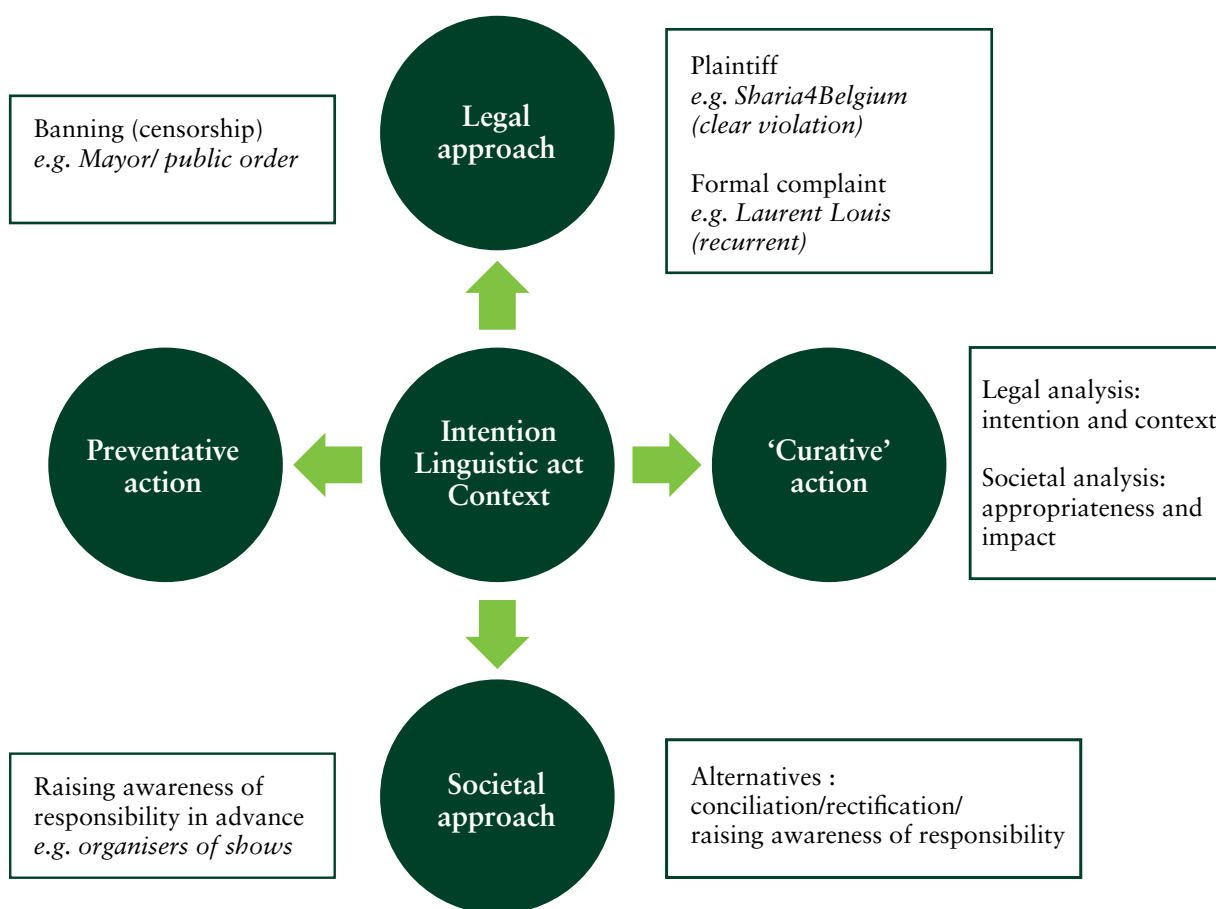
We have seen a number of cases in which conciliation (following apology by the author to the victim), immediate rectification (in the case of the Internet, for example) or raising awareness of responsibility

have proven to be the more effective response.

Societal analysis consists of examining the consequences for society in general of the statements considered to be hate speech. This analysis may sometimes lead to favouring an alternative option (conciliation), or to the decision that it is necessary to set an example through legal condemnation.

The Centre strives to perform these two analyses and to adopt a stance that is as professional and transparent as possible, with no guarantees of being able to achieve this in every case, and taking into account that, in a constantly shifting world of statements "*which offend, shock and disturb*", it is impossible to achieve consensus with regard to what should or should not be done.

The issues can be represented visually in a diagram.



**Statements which offend, shock and disturb.
Focus on the freedom of speech.**

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