

The trouble with defining the limits of free speech online

Controversial behaviour on social media sites, some of which have resulted in users being arrested for their 'offensive' posts on Twitter, have sparked debates about the applicability of free speech laws to the online environment. Following a **statement** released by the Crown Prosecution Service, Director of Public Prosecutions Keir Starmer QC, in an **interview** with the BBC on 20 September, espoused a high threshold for prosecution, recognising the importance of transparent guidelines for prosecutors but also stressing the need to assess cases individually and in their own context, paying close attention to what was said, who it was said to, how many people heard it and what the intention of the message was.

Traditionally we can discern two core-positions when it comes to freedom of speech in a democracy – an absolutist and a relativist position. The former would comply with the US First Amendment Doctrine and considers all speech – bar incitement to violence and individual harm – protected, the latter position conforms to a more European Doctrine which does not consider hate speech for instance to be covered by the right to freedom of speech.

Historically, freedom of speech has never been absolute, not even in the US where communist discourse and ideology was banned from the public sphere at some point. However, it is fair to say that in Europe, again for historical reasons, a more restrictive climate in relation to freedom of speech in a democracy has always prevailed. Progressive legislation targeting sexism or discriminations in terms of race and (sexual) identity puts limits about what can be said in public and we have always thought that that was a good idea, again with reference to Europe's dark history. The emergence of the internet has however greatly complicated and even undermined the application of anti-racism and anti-hate speech regulation in Europe.

Not only is it easier to remain anonymous on the internet when speaking publicly, deeply **offensive content** produced by European citizens which would be plain illegal in some European countries, such as holocaust denial or glorification of Nazism, is hosted on US servers. This means it is protected by the US First Amendment and untouchable to European Law enforcers. However, this jurisdiction situation in which netizens in one locality can claim freedom of speech rights in another locality, also has a positive and beneficial side. This could be witnessed during the Arab Spring or in other parts of the world where opposition forces and activists could post content on Western based servers out of reach of local despots.

Another tension relating to freedom of speech and social media is the one between the public and the private, and between organisations and individuals. Restrictions on freedom of speech have traditionally been more stringent for media organisations than for individuals and even more so for audio-visual media than for the press. This has everything to do with the size of the audience media serve, the particular role they are required to fulfil in the public sphere and values of social responsibility that are attributed to the media. Hence, a BNP chairman in a BBC program will generate a lot of public consternation.

However, with the internet and social media the boundaries between what is public and what is private become blurred. Tweeting a tasteless joke meant for a group of (virtual) friends and which would before social media be shared in a private context or through a one-on-one email, has now suddenly become very public, at times amplified by the media into the mainstream public sphere. This obviously raises serious questions as to where the threshold lies in terms of who gets prosecuted and who gets away with publicly voicing racist or homophobic slurs, for example. However, I am personally not convinced by arguments that this threshold before somebody gets prosecuted should necessarily be high. In many European countries extreme right forces – post-fascists, but also populists such as Geert Wilders in the Netherlands, explicitly use freedom of speech arguments to legitimate their racist and wounding discourses, 'we say what the people are

thinking, but are not allowed to say anymore' as many extreme right activists put it. A high threshold would only send the wrong signal in view of this ideological struggle and erode Europe's anti-discrimination and anti-racism laws even further.

At the same time, I personally think it is a good idea that prosecutors call for a debate on this thorny issue as it goes to the core of democratic values. It raises questions regarding what constitutes freedom of speech and how this should be balanced with other democratic rights, such as respect for otherness, for diversity, anti-discrimination and anti-racism policies. But, this is not merely an ethical discussion, also a practical one. Where do we as a democracy draw the line between what is deemed acceptable and not in terms of transgressive speech by individuals? What is the threshold precisely, should it be low or high? And what needs to be done if and when that threshold is transgressed? This is a useful, but also a potentially dangerous debate.

The main danger of this debate relating to free speech and the internet is that it could easily transgress into providing the justification to intervene and regulate content online in other areas of public and political life. Once a regime and logic of control and repression in terms of online content is in place, how do we make sure that this mechanism will not be used to silence minority voices and ideas or to monitor and suppress protest movements' communicative practices? Other important questions that beg for an answers in this regard are: Who will define what is hurtful, offensive, wounding or injurious speech and as also pointed out by Keir Starmer, what is the context in which such language is being used?

September 27th, 2012 | [Filtering and Censorship](#), [Privacy](#) | [1 Comment](#)

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