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**Project “Strengthening access to justice through non-judicial redress mechanisms for victims of discrimination, hate crime and hate speech in Eastern Partnership countries”**

**Final Draft**

# Comparative study on hate speech laws and Armenian legislation

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Introduction .....	2
Summary of recommendations .....	3
Chapter One. International frameworks and hate speech.....	6
1. Definition of hate speech .....	6
2. Armenian hate speech laws.....	9
3. Hate speech, freedom of expression and international frameworks .....	12
4. Conclusion.....	19
Chapter Two. Reforming Armenian hate speech laws.....	20
1. Hate speech provisions .....	20
2. Categories of protected characteristics.....	28
3. Other offences which regulate hate speech .....	30
4. Conclusion.....	32
Chapter Three. Regulating online hate.....	34
1. 'What is a crime offline, should be a crime online' .....	34
2. Responsibility of Internet companies .....	35
3. Current Armenian laws governing the Internet .....	36
4. International frameworks and obligations.....	37
5. Regulating social media companies and online hate speech .....	40
Chapter Four. Enforcement and implementation .....	44
1. Standing and enforcement.....	44
2. Training .....	45
3. Collection of data and statistics .....	46
4. Underreporting .....	46
5. Additional measures .....	47
6. Conclusion.....	47
Acknowledgements .....	48
Appendix.....	49
1. International norms.....	49
2. National norms .....	51

# Introduction

This report aims to analyse the existing Armenian legislation on hate speech, and to identify areas in need of improvement. It compares Armenian legislation to international and regional frameworks on hate speech and draws on examples from a wide range of jurisdictions from within Council of Europe member states, to make recommendations for legislative reform.

The first chapter focuses on the existing Armenian provisions on hate speech. It then outlines the relevant international and regional frameworks and assesses to what extent Armenia complies with these obligations. Particular emphasis is placed on the European Commission Against Racism and Intolerance (ECRI) [General Policy Recommendation No. 15 on Combatting Hate Speech](#). This is a comprehensive document which outlines a number of ways in which states can strengthen their approach to hate speech. This part of the report identifies gaps in the legislative framework which then form the basis of the remaining chapters.

The second chapter focuses on these gaps and makes recommendations on how they can be filled by drawing on the experience from other Council of Europe countries. A number of country experts were interviewed as part of this study, with a view to gaining an overall picture of developments and trends across Europe. In deciding which jurisdictions to include in this report, we aimed to choose a range of countries based on geography, politics, culture, size and history. The countries used for this comparative part of the report are Denmark, France, Germany, Moldova, Montenegro, Romania, Serbia, Spain, Ukraine and UK.

The third chapter focuses specifically on regulating online hate. This is a relatively new phenomenon, and the difficulties associated with policing hate which appears on the internet, along with broader developments relating to the regulation of the online world, means that a different, more targeted approach is needed to reform the law.

The final chapter is concerned with some of the wider issues relating to the enforcement and implementation of the law. This chapter underlines the importance of broader structural changes that will be required to ensure that the law is effective.

This report was developed at the request of Armenian authorities, in particular the Ministry of Justice, as part of the assistance that the Council of Europe offers its member states through co-operation projects. The report was produced in the context of the project co-funded by the European Union and the Council of Europe “Strengthening access to justice through non-judiciary redress mechanisms for victims of discrimination, hate crime and hate speech in Eastern Partnership countries in the framework of the Partnership for Good Governance II.

# Summary of recommendations

**Recommendation 1:** Currently, under Article 226, whilst public statements are punished more severely than private statements, it remains the case that private statements are included in the offence. In this respect, the Armenian criminal legislation is currently over-broad. In order to comply with GPR 15, it is recommended that *Article 226 should be limited to public statements* in all instances, thus making the “public” element a substantive part of the offence rather than an aggravating feature to be taken into account at sentencing. This recommendation should be seen in relation to having sufficient civil and administrative legislation in place to deal with less severe cases which is discussed in more detail below under recommendations 5 and 6.

**Recommendation 2:** For the avoidance of doubt, and in order to comply with the obligations under the ICCPR, ICERD and GPR 15, and in order to bring Armenia in line with the majority of countries studied, it is recommended that explicit reference is made to the criminalising of the dissemination and distribution of material which expresses hate.

**Recommendation 3:** The Armenian legislation should include a clearer element on ‘incitement to violence’ to ensure that this covers more nuanced encouragement to commit violence that may not be covered by the ‘public calls for violence’ under Article 226.2. In addition to this, the inclusion of intolerance to the Article 314 of the Draft Criminal Code is welcomed. For the avoidance of doubt, it is recommended that the word ‘discrimination’ is also included rather than assume discrimination is covered by the word ‘intolerance’.

**Recommendation 4:** In order for the law to be more consistent with the EU Framework and GPR 15, and also to make a distinction between criminal provision and administrative provisions (which will be discussed below) it is suggested that the hate speech provisions under the Criminal Law are framed in order to limit them to instances where the defendant has intention or recklessness as to the inciting of hatred or violence or discrimination. This would mean that the Criminal Law would capture the most serious instances of hate speech and would allow less serious subjective states of mind to be dealt with in the administrative law. Where material is likely to have this effect - but it is not within the intention or recklessness of the defendant that it should have this effect - we would recommend the use of the administrative law as it shows that the focus is on the potential impact that the material might have on the public peace rather than on trying to punish the criminal mind of the defendant.

**Recommendation 5:** It is recommended that a new stand-alone administrative offence should be created which outlaws speech aimed at incitement to discrimination, violence and hatred but which does not require the high thresholds normally required of the criminal law, such as intention or recklessness, or the public element. This offence can also be used to broaden out the kind of behaviour captured by hate speech offences to reflect particular issues relating to Armenian culture and history that are considered particularly serious such as relations with Azerbaijan.

**Recommendation 6:** The Armenian government is urged to consider enacting its draft anti-discrimination legislation as part of a multi-pronged approach to tackling inequalities in society that are exacerbated by and caused by hate speech. It is encouraged to highlight the link

between inequality and hate speech in order to ensure the effectiveness of hate speech legislation.

**Recommendation 7:** Including sexual orientation and gender identity directly in the legislation would send a clear signal of commitment from the Armenian state that it wants to ensure equality for all its citizens, and it would certainly strengthen the implementation of the law against these types of hate speech. This is also the preferred option under GPR 15. Whilst the open category of characteristics currently used in Armenia means that sexual orientation and gender identity are, in principle covered by the legislation, it is clear that this approach would fall short of the level of protection that most countries are opting for and which ECRI's country report recommends.

**Recommendation 8:** Ensure that all laws relating to hate speech, such as the Law on Audiovisual Media are harmonised in terms of the characteristics protected in line with recommendation 7 of this report.

**Recommendation 9:** Strengthen the law in relation to group activities in order to comply more clearly with GPR 15.

**Recommendation 10:** We recommend that any offence relating to the dissemination of material is drafted in such a way that it clearly also applies to material distributed over the internet in order to satisfy this.

**Recommendation 11:** Compliance with the Additional Protocol to the Cybercrime Convention Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems can be achieved in two ways. Either a new stand-alone offence could be created to cover threats made through a computer system, or instead, an amendment could be added to each of the existing offences involving threats to make it clear that they also apply online.

**Recommendation 12:** It is recommended that in addition to the amendments to Article 226 (such as limiting its use to 'public' statement), for the avoidance of doubt, there should also be an additional reference to its applicability in the online world.

**Recommendation 13:** Article 12 and 51 need to be reformed so that they comply with freedom of expression. Firstly, this will require more specific references to the types of speech that are outlawed. The wording should mirror that used in the offences which apply to individual perpetrators as outlined in the previous chapter. This should include reference to the same protected characteristics. Secondly, the penalties available to the regulator need to be expanded upon to include fines and other measures to enforce compliance with the law. Regulating internet companies is an emerging area that will be discussed in more detail below.

**Recommendation 14:** Adopt the draft Law on Ensuring Equality including the ability of the Ombudsman's office to deal with initial complaints brought under the law.

**Recommendation 15:** Hate speech training should be a core part of the training curriculum for all current and prospective judges, prosecutors and investigators, in order to ensure that they understand the legislation, its importance and the impact of hate speech on victims and society more generally. The same approach should be adopted by the Police Academy.

**Recommendation 16:** Set up a nation-wide disaggregated data collection system to ensure that an appropriate evaluation and monitoring of the offences can be undertaken.

**Recommendation 17:** Consider ways of improving the reporting of hate speech offences through collaboration with NGOs, and also consider online option.

**Recommendation 18:** Consider non-legislative measures such as awareness raising campaigns to help tackle online hate speech.

# Chapter One. International frameworks and hate speech

This chapter seeks to outline the current Armenian legislation on hate speech and to examine how it compares to the requirements under international frameworks. It also deals with some initial definitional issues in relation to hate speech. The focus of this, and the following chapter, will be offline hate speech, whilst online hate speech will be dealt with separately in Chapter Three.

This chapter will begin with a discussion of the definition of hate speech. This will be followed by an outline of the existing Armenian provisions on hate speech. Next, the report will summarise the international frameworks on hate speech. It will examine to what extent Armenian legislation complies with international obligations and will highlight any gaps.

## 1. Definition of hate speech

An obvious initial question to pose in a report of this type is: what is hate speech? However, this is a difficult question to answer.

There is no agreed definition of hate speech either at the international or European level. Indeed, the international frameworks we will consider in this chapter do not provide definitions of hate speech at all, but rather instruct states in very general terms to legislate against certain types of speech. The [1997 Recommendation of the Council of Europe Committee of Ministers on Hate Speech](#) (CM Recommendation) attempted for the first time a definition of hate speech which it set out as:

“all forms of expression which spread, incite, promote or justify *racial hatred*, *xenophobia*, *anti-Semitism* or other forms of hatred based on **intolerance**, including intolerant expression by aggressive *nationalism* and *ethnocentrism*, **discrimination** and **hostility** against *minorities*, *migrants* and people of *immigrant* origin.”<sup>12</sup>

The words highlighted in this definition in **bold** demonstrate that hate speech covers more than just expressions of hatred. In fact, when looking at the vast array of hate speech offences found in the jurisdictions studied as part of this report, it is clear that this basic definition can translate into a number of different provisions aimed at a broad spectrum of behaviour described in terms closely related to these words:

- making statements which **threaten**, **deride** or **degrade**;<sup>3</sup> (Denmark)
- incitement to **hatred** or **discrimination**;<sup>4</sup> (Romania)
- Instigates or exacerbates **hatred** or **intolerance**;<sup>5</sup> (Serbia)

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<sup>1</sup> Recommendation No. R (97) 20 of the Committee of Ministers to member states on “hate speech”

<sup>2</sup> See also the definition of Hate Speech which is set out in the recitals of ECRI GPR No. 15

<sup>3</sup> Art 266b of the Danish Penal Code

<sup>4</sup> Art. 369 Romanian Criminal Code

<sup>5</sup> Art 317, Serbian Criminal Code

- **propagating ideas of superiority or intolerance or discrimination;**<sup>6</sup> (Serbia)
- inciting **enmity or hatred;**<sup>7</sup> (Ukraine)
- Inciting **hatred or violence or use of arbitrary measures or violates dignity by insulting, maliciously maligning or defaming;**<sup>8</sup> (Germany)
- Causes, propagates, advocates or justifies **hatred;**<sup>9</sup> (Moldova)
- Fostering, promoting, or inciting **hatred, hostility, discrimination or violence;**<sup>10</sup> (Spain)
- Inciting (or provoking) **discrimination, hatred or violence;**<sup>11</sup> (France)
- **Stirring up hatred;**<sup>12</sup>(UK)

The words in *italics* in the CM Recommendation emphasise another important aspect of the definition of hate speech which is that it is hateful speech aimed at *specific groups of people*. The CM Recommendation is fairly narrow and, as we will see in the next chapter, most countries we studied, including Armenia, adopt a wider range of protected characteristics. Nevertheless, it is clear that there are limitations to which groups can gain the protection of hate speech laws. This is because the rationale behind these laws is, broadly speaking, to give protection to groups of people who have been subject to discrimination both historically and in the present, and to target speech that is harmful because it exacerbates existing fault lines in society.

The definitional issue is compounded further when we recognise the distinction between *general* definitions of hate speech and *legal* definitions of hate speech. The UN set out a general definition of hate speech in the [UN Plan of Action on Hate Speech](#) as follows:

“any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.”<sup>13</sup>

This general definition is wider than the CM Recommendation and will include all sorts of speech that whilst offensive and hurtful, is not necessarily speech that should be prohibited by law. Nevertheless, it still retains the two crucial elements identified above: namely the fact that the speech needs to be discriminatory or attacking, and that fact that it needs to be aimed at a group of people based on certain characteristics. Given the breadth of this definition, it is clear that when attempting to legislate for hate speech, it is not a *general* definition of hate speech that we are looking for, but instead an understanding of where the dividing line should be between speech that is hateful - but should remain lawful - and speech that is sufficiently serious and dangerous that it requires intervention by the law in a way that does not infringe freedom of expression.

The Anti-Defamation League makes use of a ‘pyramid of hate’ which is predominantly used to explain why hate speech ought to be criminalised and regulated, and how doing so serves to

<sup>6</sup> Art 387, Serbian Criminal Code

<sup>7</sup> Article 161, Ukrainian Criminal Code

<sup>8</sup> Article 130, (1) 1 and 2, German Criminal Code

<sup>9</sup> Law on Freedom of Expression No 64/2010, Moldova

<sup>10</sup> Article 510, Spanish Criminal Code

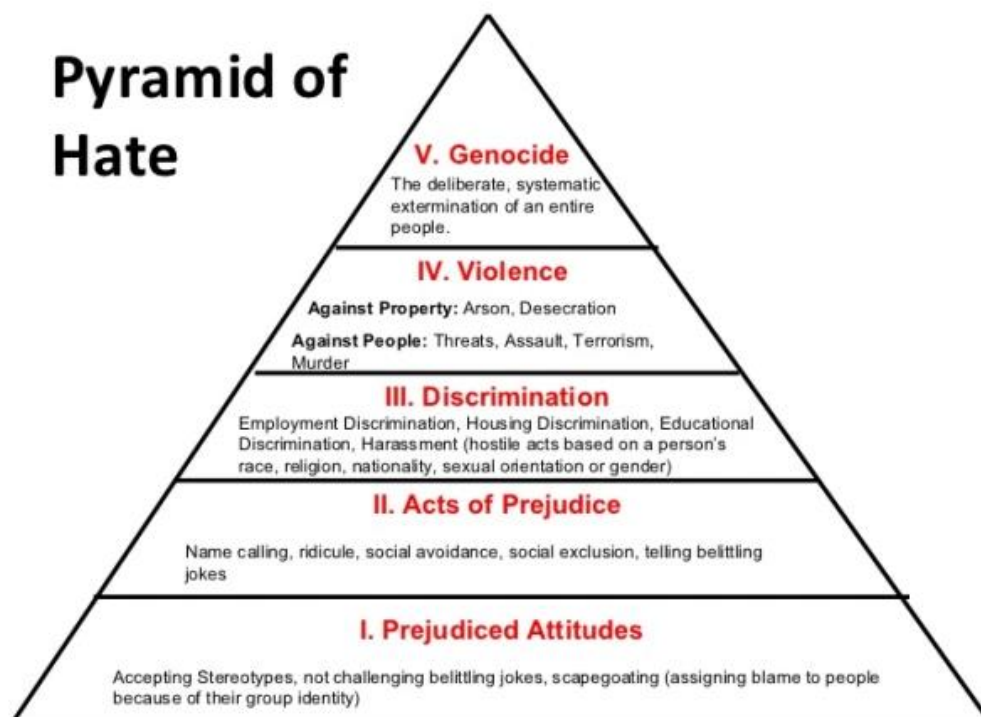
<sup>11</sup> Article 23 and 24, Freedom of the Press Law, 1881 (France)

<sup>12</sup> Section 18, Public Order Act, 1986 (England, Scotland, Wales)

<sup>13</sup> <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf> (last accessed 27th July 2020)



support democratic values and prevents bias-motivated violence, and, at the extreme end, genocide.



However, the pyramid is also useful in demonstrating how hate speech is often used as a catch-all term for a vast array of different types of speech which in fact need closer analysis and more thought in order to determine how and to what extent it should be proscribed by law.<sup>14</sup> This pyramid is also useful in understanding the situation in Armenia. Most of the speech that is currently of concern to citizens and the public falls in the lower half of the pyramid. This is important as it will have an impact on whether it is appropriate for that speech to be made illegal.

From this pyramid we can see that the types of offences that can broadly be described as 'hate speech offences' can be very long if we include aggravated hate crimes, terrorist crimes, offences relating to the regulation of the media and audio-visual technology, specific offences against calls to, for example, genocide or holocaust denial, or offences relating to the denial of fundamental rights.<sup>15</sup>

This extensive list of offences goes beyond the CM Recommendation definition and serves to illustrate the difficulties in arriving at a single all-encompassing definition of 'hate speech'. For the purposes of this report, when choosing which offences within the countries studied to

<sup>14</sup> The ADL version of this pyramid can be found at: <https://www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf> (last accessed 27th July 2020)

<sup>15</sup> Such as Article 397 1 of the Armenian Criminal Code criminalizing the negation, mitigation, approval or justification of Genocide and other crimes against peace and human Security. See also the wide definition of hate speech used in ECRI's General Policy Recommendation No. 15 on combating hate speech, page 16-19

consider, we will focus predominantly on provisions which fall into the narrower definition of hate speech adopted by the CM Recommendation: namely offences which are targeted at forms of expression which spread, incite, promote or justify hatred, intolerance, discrimination and hostility against minorities. However, we are not restricted by this definition, and when necessary will include reference to offences that are broader than this. This also underlines the fact that tackling hate speech requires more than just the one single law and will require a more holistic approach to tackling this problem.

At this point it is also important to draw a distinction between hate *speech* and hate *crime*. Hate crimes are existing criminal offences, such as violent assaults, where there was a bias or hate motivation underlying the offence and where this bias or hate aggravates the offence. By contrast, hate *speech* offences are ones where the offence is purely based on outlawing speech or expression because of its hateful content, as opposed to any violence perpetrated by the offender. This report deals with hate speech and not hate crime.

The list of different hate speech provisions outlined above also serves to illustrate that there is a certain amount of flexibility in terms of how a country may decide to legislate against hate speech. What should constitute hate speech will be an interplay of a number of domestic, social, cultural and historical factors that will determine the parameters of hate speech in any one jurisdiction, and so looking to one specific country as having the ideal law is not appropriate. However, this report seeks to help navigate through the different jurisdictional approaches and to highlight the different elements that need to be taken into account when deciding how to legislate for hate speech. It will show some basic principles that need to be adopted and will come up with suggestions based specifically on Armenia and its particular needs and legal system.

## 2. Armenian hate speech laws

Before examining the international frameworks which relate to hate speech, we need to first evaluate the current state of hate speech laws in Armenia. What follows is a description of the existing legal position, including the draft provisions currently before Parliament.

### 2.1 Constitution

As a starting point, it needs to be noted that whilst Article 42 of the Armenian Constitution guarantees the right to freedom of expression, it also allows for restrictions on this right in certain circumstances, such as for the protection of 'public order...morals or the honour and good reputation of others and other basic rights and freedoms'. Article 77 explicitly prohibits the use of the rights and freedoms outlined in the constitution to incite national, racial or religious hatred. This article is important because it makes it explicit that hate speech laws can be compatible with Article 42, as freedom of expression cannot be used as a defence for certain types of speech. Furthermore, Article 29 of the Armenian Constitution also prohibits discrimination based on sex, race, skin colour, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to a national minority,

property status, birth, disability, age, or other personal or social circumstance.<sup>16</sup> Therefore, under the Armenian constitution, hate speech laws are justifiable, and arguably necessary in some circumstances, in order to guarantee Article 77.

## 2.2 Criminal law measures

Currently, the Armenian Criminal Code legislates against hate speech under Article 226 which prohibits actions aimed at the **incitement of national, racial or religious hostility, at racial superiority or humiliation of national dignity**. This offence is aggravated if it is committed, *inter alia*, publicly or by mass media.

In April 2020, this offence was supplemented by the new and more complex Article 226.2 which prohibits **the public call for violence against a person or group of persons based on sex, race, colour, ethnic or social origin, genetic characteristics, language, religion, ideology, political or other views, affiliation to national minority, property status, origin, disability, age or other personal or social ground, including such acts as publicly justifying or advocating such violence**. Article 226.2 is designed as a gap-filling piece of legislation given that calls to violence are already outlawed elsewhere in the Criminal Code. As such, Article 226.2 expressly excludes from its scope any acts and speech which are already covered by other legislation.<sup>17</sup> There could be an argument for saying that not much is left for Article 226.2 to deal with given that it is so narrowly focussed on violence.

In practice, Article 226 has rarely been used. The court practice annual statistical reports provide no data from 2015 to 2020 of judgments delivered under Article 226.<sup>18</sup> One of the reasons for this is the fact that it protects only nationality, race and religion. Article 226.2, by contrast, adopts a more modern law-making approach and lists a much wider group of protected characteristics. The inclusion of ‘other personal and social grounds’ also makes it non-exhaustive, thus mirroring the wording and approach of Article 77 and Article 29 of the Constitution, and as such, reflects the concept of the general prohibition of discrimination in Protocol 12 of the European Convention of Human Rights which Armenia has ratified.

Both these provisions are currently under review by Parliament. Under the new draft Criminal Code and a new hate speech article under 314 would criminalise any action aimed at **‘the incitement of national, ethnic, racial, political, ideological or religious hostility, hatred or intolerance, as well as the incitement of hatred, intolerance or hostility against another social group’**.<sup>19</sup>

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<sup>16</sup> The addition of ‘other personal or social circumstance’ is a non-exhaustive open-ended provision which allows for the additional inclusion of other characteristics. This is in line with Protocol 12 of the European Convention of Human Rights.

<sup>17</sup> As those defined under Part 4 of article 225 (Active disobedience to the legal requirements of the representative of authorities during mass disorder, or calls for violence against people or for mass disorder), article 226 (Inciting national, racial or religious enmity), article 226.1 (Public calls for terrorism, financing of terrorism and international terrorism, publicly justifying or advocating the commission of these crimes), article 301 (Public calls to seize the power, violate the territorial integrity or to violently overthrow the constitutional order), article 385 (Public calls for aggressive war) and article 397.1 (denying, mitigating, approving or justifying genocide and other crimes against peace and human security).

<sup>18</sup> Annual statistical reports published by Supreme Judicial Council at this official webpage. The reports are available here: <http://court.am/hy/monitoring>

<sup>19</sup> Draft Armenian Criminal Code, Article 314

The authors of the draft took into account the recommendations of the European Commission against Racism and Intolerance (ECRI) and have broadened Article 226 in two main ways. Firstly, in addition to hostility which is covered by the existing legislation, hatred and intolerance are now added to the list of prohibited behaviour. This is in line with Article 20(2) of the ICCPR which requires States to ‘prohibit’ certain forms of speech which are intended to sow hatred, namely ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’ Secondly, the inclusion of ‘other social group’ is far wider than the narrow group of protected characteristics under Article 226 and mirrors the approach used in Article 226.2. However, it does not explicitly include sexual orientation and gender identity as per ECRI’s recommendations.<sup>20</sup>

The text of Article 315 of the Draft Criminal Code is identical to that of Article 226.2. Hence, the draft code envisages the same level of protection against public calls as the current amended article.

Finally, under Article 198 of the Draft Criminal Code, a new offence of discrimination is proposed. This would cover cases where a person has received differential treatment which degrades a person’s honour and dignity or their rights and freedoms or gives a person an advantage without reasonable explanation.

## 2.3 Civil law measures

At the moment, Armenia lacks any civil law measures directly prohibiting hate speech. Whilst there are provisions which outlaw insult and defamation,<sup>21</sup> they do not explicitly include hate speech. So, whilst some civil disputes may involve hate speech under the Civil Code, the claim must be formulated on the basis of insult or defamation.

There is also a distinct absence of a comprehensive non-discrimination legal framework. The draft law on Ensuring Legal Equality has yet to be adopted, and any progress with its implementation appears to be suspended. This is a major gap in the legislation which substantially weakens the redress mechanisms against hate speech.

## 2.4 Administrative law

There is also an absence of any administrative law provisions on hate speech. Administrative Law<sup>22</sup> can play an effective role in curbing hate speech practices where the severity and public danger of hate speech do not reach the minimum threshold of the criminal law, but where there is still a general need to regulate it in the interests of public order and peace. Administrative sanctions are also less onerous and stigmatising than those meted out in the Criminal Law, and so can help when trying to undertake the delicate balancing act between freedom of expression and the protection of society against hate speech.

The lack of civil and administrative provisions are themes that will be developed in more detail in this report.

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<sup>20</sup> ECRI Report on Armenia (fifth monitoring cycle), Adopted on 28 June 2016, paragraph 1, p. 35

<sup>21</sup> Civil Code, Article 1087.1

<sup>22</sup> In Armenia, this would be the Law on Administrative violations

## 2.5 Soft laws

Owing to the absence of a hate speech framework in civil and administrative statutory laws, a number of professional unions have attempted to self-regulate in order to prohibit hate speech in their particular sphere of activity. For example, 47 media outlets have jointly adopted the Code of Ethics for the Armenian Media and Journalists which provides clauses on the prohibition of prejudice on the ground of race, age, religious, nationality, sexual orientation, physical handicap, etc, (article 5.1), the prohibition of promoting ethnic or religious hatred and intolerance, or any discrimination on political, social, sexual grounds, or hate speech (article 5.2.) and the prohibition of advocating violence, war, denial of genocide and crimes against humanity.<sup>23</sup> In May 2017, the Media Ethics Observatory - which is a dispute resolution body for media entities and journalists on freedom of speech issues, and which operates on the basis of the above code of ethics - issued Guidelines on the 'Exclusion of Manifestations of Discrimination and Ensuring Tolerance in the Media' which contains articles about the prohibition of hate speech. Another self-regulated paper was issued for journalists specifically to cover their activities on social networks. Several other media outlets, such as the "Aravot" daily newspaper, have adopted their own ethics norms which as a rule stipulate the prohibition of discrimination and hate speech. The "Internet Society" non-governmental organization which manages the Armenian internet ".am" domain zone under agreement with ICANN and the Ministry of Transport and Communications, defined in its Policy of Domain Names Registration that domain name registration is subject to annulment in cases where the name presents a cause for discrimination on account of sex, race, colour, etc. or promotes violence or war propaganda, etc. Hence this regulation is applicable on all internet users under ".am" users, therefore, it has an application as wide as regular statutory norms.

## 3. Hate speech, freedom of expression and international frameworks

There is clearly an obligation under international law both under the United Nations Declaration of Human Rights (UNDHR) and the European Convention on Human Rights (ECHR) to respect freedom of expression.<sup>24</sup> However, freedom of expression is not unqualified right, and it cannot be exercised in a manner that is inconsistent with the rights of others; indeed there is a positive obligation, in some cases, under international laws for a state to ensure the existence of hate speech laws. Thus, whilst freedom of expression has to be respected both in the design of the law, and in its implementation, the existence of hate speech laws is not mutually exclusive with freedom of expression. This is indeed reflected in the Armenian Constitution under Articles 42, 77 and 29 as outlined above.

In this next section, the relevant international frameworks on hate speech will be examined, and a comparison with the Armenian legislation will be undertaken.

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<sup>23</sup> The code is available at the following link: [https://ypc.am/wp-content/uploads/2014/06/Code-of-Ethics\\_eng.pdf](https://ypc.am/wp-content/uploads/2014/06/Code-of-Ethics_eng.pdf)

<sup>24</sup> Article 19 of the UN Declaration of Human Rights and Article 10 of the European Convention on Human Rights

### 3.1 Article 4, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Under Article 4(a) of ICERD, states are required to make punishable by law the following:

- i) all dissemination of ideas based on racial superiority or hatred
- ii) incitement to racial discrimination
- iii) incitement to acts of violence against person or persons based on race, colour or ethnic origin.

What is important to note here is that is not speech that expresses hate that is outlawed but rather the *dissemination of ideas* or *incitement to discrimination or violence*.

Armenia has ratified this framework.

Article 226.2 of the Armenian Criminal Code does appear to cover iii) above as it criminalises incitement to acts of violence against certain groups of people.

However, there are gaps in the law in relation to i) and ii) above.

It is clear from the different wording under i) and ii) that ICERD makes a clear distinction between incitement and dissemination. Article 226 of the Armenian Criminal Code covers actions aimed at racial superiority and to incitement to hostility but does not explicitly criminalise specifically the *dissemination* of those ideas. It could be argued that the words 'action aimed at' can in principle cover acts of dissemination. However, there have been instances where courts have interpreted Article 226 as *not* covering dissemination. Either way, even if dissemination is read into the article, the remedies available to the courts are not sufficient for dissemination. There is nothing currently in Article 226 which would give courts the ability to stop the dissemination as the punishment is aimed at the individual making the speech rather than aimed at preventing dissemination. It would be preferable for the law to make explicit mention of dissemination and also to allow judges the power to impose restrictions which would prevent the dissemination of material as well as punish those who have carried out the dissemination.

Article 226 and 226.2 also do not cover incitement to racial *discrimination*.<sup>25</sup> The new draft Criminal Code envisages a separate crime of discrimination, but this would not entirely comply with Article 4 as it punishes 'discrimination' itself, rather than the incitement to discrimination which is an inchoate act which does not require any actual discrimination to have occurred. Although the draft of Article 314 does cover incitement to *intolerance*, ECRI treats discrimination and intolerance as two separate concepts and so Article 314 does not entirely meet the ICERD requirements.

Thus, insofar as Article 4 of ICERD is concerned, there are clearly areas where there is a mismatch with the current protection offered under Armenian Law.

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<sup>25</sup> Article 4 does not specify whether incitement to racial discrimination should be criminalised or covered by the civil law, but the reference to 'punishable by law' suggests that it should be a criminal offence.

### 3.2 Article 20(2), International Covenant on Civil and Political Rights (ICCPR)

Article 20(2) of ICCPR requires states to prohibit by law ‘*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*’. This article has to be read in conjunction with Article 19 of the ICCPR which states that ‘everyone shall have the right to freedom of expression.’ This underlines the point made earlier that legislating against hate speech *is* compatible with freedom of expression. Indeed, Art 20(2) makes it a requirement under the ICCPR for states to legislate against hate speech in the same way that securing freedom of expression is a requirement. Armenia has ratified this framework.

As was the case with the ICERD, it is important to note here that it is not all expressions of hate that are prohibited, but rather the *advocacy* of hatred that constitutes incitement to discrimination, hostility or violence. Advocacy is defined as the ‘explicit, intentional, public and active support and promotion of hatred towards the target group.’<sup>26</sup> Importantly, the ICCPR does not explicitly require the use of the criminal law to achieve this end, and it has been confirmed that civil or administrative laws can be used instead if this is appropriate.<sup>27</sup>

Article 226 of the Armenian Criminal Code does satisfy Article 20(2) in relation to incitement to hostility and Article 226.2 covers the incitement to violence requirement.

However, as with the ICERD, there is still a gap in the Armenian legislation in relation to incitement to discrimination. As pointed out above, although Article 314 of the draft Criminal Code would criminalise intolerance, this is not the same as criminalising incitement to discrimination. In addition to this, advocacy under Article 20(2) includes the concept of dissemination which is also not currently covered by Armenian legislation.

### 3.3 The EU Framework Decision on Combatting Racism and Xenophobia by means of Criminal Law

The EU Framework Decision on Combatting Racism and Xenophobia by means of Criminal Law<sup>28</sup> makes it very clear that what is envisaged is the sanctioning of hate speech through the criminal law as opposed to the civil law or administrative law.

Under Article 1(1)(a) member states are required to punish intentional conduct which amounts to ‘publicly inciting ... violence or hatred directed against a group’ and under Article 1(1)(b) the public dissemination of material which amounts to public incitement of hatred against a group.

Like the ICERD, the EU Framework makes a clear distinction between incitement to hatred or violence, and the dissemination of hateful ideas. Thus, as has already been noted in relation

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<sup>26</sup> 2012 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

<sup>27</sup> *Mohamed Rabbae, A.B.S and N.A v. The Netherlands* (14 July 2016), Communication no. 2124/2011, para. 10.4

<sup>28</sup> <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008F0913> (last accessed 27th July 2020)

to ICERD and the ICCPR, whilst Articles 226 and 226.2 of the Armenian Criminal Code may satisfy the requirements to criminalise incitement to hatred and violence, they do not satisfy the requirement to criminalise the dissemination of hateful ideas.

However, a further point needs to be noted here. Criminalising incitement to discrimination is not required under the Framework, and thus makes it narrower than the requirement under the ICERD or the ICCPR. This is because the Framework is clearly aimed at the criminalisation of hate speech, as opposed to its regulation under the civil or criminal law, and so it demands a higher threshold for prosecution. This is reiterated in other aspects of the Framework. For example, the behaviour needs to be 'intentional' and expressed in 'public', and under Article 1(2), states can further limit the scope of the offence by only punishing conduct which was 'likely to disturb public order' or which was 'threatening, abusive or insulting'. This raises an issue that will be discussed further in the next chapter which is to do with different levels of liability being imposed depending on whether the criminal, or civil or administrative law is used to regulate hate speech.

### 3.4 Council of Europe and the European Convention on Human Rights

Under Article 10 of the ECHR, states are required to guarantee freedom of expression to citizens. Unlike the ICERD, the ICCPR and the European Framework, the ECHR does not create a corresponding positive obligation on states to legislate against hate speech. However, Article 10 does not create an absolute right to freedom of expression either. Article 10 declares that everyone has the right to freedom of expression, but that states can restrict this right if it is 'necessary in a democratic society... in the interests of ... public safety, the prevention of disorder or crime, for the protection of ... morals, for the protection of the reputation or rights of others'. This means that hate speech laws can be created if their justification lies in any of these factors.

In considering the jurisprudence of the court itself, it is clear that whilst there will be scrutiny of hate speech laws, overall the Court is supportive of such provisions. In *Féret v. Belgium* (2009) the court found Belgian hate speech laws to be compatible with freedom of expression and stated that:

'insults, ridicule or defamation aimed at specific population groups or incitement to discrimination, [suffices] for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people's dignity, or even their safety'.<sup>29</sup>

In *Vejdeland and Others v. Sweden* (2012), the court made it clear that criminal hate speech laws which outlaw incitement to hatred do not have to be limited to calls to violence - and thus allowing for a broader interpretation than the EU framework.<sup>30</sup>

Whilst the ECtHR does not set out a definition of hate speech, and neither does it compel the enactment of hate speech laws, it has gone as far as recommending that signatory countries review their domestic legislation to ensure that it complies with the need for hate speech

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<sup>29</sup> *Féret v. Belgium*, App. no. 15615/07, (ECHR, 16 July 2009), para. 73

<sup>30</sup> *Vejdeland and Others v. Sweden*, App. no. 1813/07 (ECtHR, 9 February 2012)



provisions, and urges signatories to ratify the ICERD (Council of Europe, Committee of Ministers, Recommendation on Hate Speech, 1997). Thus, overall, the European Court of Human Rights does appear to be in favour of hate speech laws so long as they are enacted with close regard for Article 10.

### 3.5 ECRI General Policy Recommendations

Although the ECHR and the ECtHR do not impose positive obligations on states to create hate speech legislation, ECRI, the Council of Europe's human rights monitoring body against racism and intolerance, has issued an extensive list of recommendations in relation to hate speech in their [General Policy Recommendation No 15 on Combatting Hate Speech](#) (GPR 15). This is a comprehensive document that makes several recommendations to member states on measures they can adopt which will help to combat hate speech.

This report will highlight some of the recommendations which relate to hate speech laws, the regulation of online hate and the measures needed to ensure the effective implementation and enforcement of those laws. In this chapter and in Chapter Two, we will focus on recommendations 8 and 10 which relate to the creation of effective hate speech laws. Recommendations in relation to the regulation of online hate will be discussed in Chapter Three, and recommendations in relation to the implementation of the law will be summarised in Chapter Four.

#### 3.5.1 Recommendations 8 and 10

Recommendation 8 asserts that States should:

**clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who are targeted by it while respecting the right to freedom of expression and opinion**

Meanwhile, Recommendation 10 deals with criminal provisions and suggests that states:

**take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected**

To begin with, it is important to note that the distinction made here between civil and administrative provisions on the one hand, and criminal proceedings on the other, reiterates the point made above that to adequately deal with hate speech, it is not enough to have one single catch-all provision, and that instead a raft of measures is needed. The administrative and civil proceedings are required to deal with the use of hate speech that can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination. Whereas the

criminal provisions will deal with the same set of behaviour but which is enacted in the 'public' context, and where no less restrictive measure would be effective. Therefore, it clearly envisages the criminal law only being used to deal with the most serious form of hate speech offences, with the civil and administrative law dealing with other forms of hate speech.

### 3.5.2 Civil and administrative provisions

Focussing on Recommendation 8, it is clear from the explanatory memorandum that accompanies GPR 15 that in order for legislation to be compatible with freedom of expression, the law needs to be clearly constructed around the potential harm that the speech might cause rather than simply on the content. Thus, the law needs to be directed at hate speech which is intended to incite acts of violence, intimidation, hostility and discrimination<sup>31</sup> or where the speech could reasonably be expected to lead to such harm.<sup>32</sup> Therefore, as is the case with the ICERD, the ICCPR and the EU framework, it is not *all* expressions of hate that are outlawed, but only those which can cause certain harms.

It is also recommended that there are a selection of remedies available to deal with hate speech. This can range from personal compensation, to token awards to groups whose reputation has been affected by the speech<sup>33</sup> as well as removal of publications, enjoining dissemination.<sup>34</sup> This recognises both the need for effective remedies (mere judicial pronouncement may not be enough), but also the need to ensure that judges have oversight - ideally before the use of such powers but can be after the use - of this in order to ensure compatibility with freedom of expression.

From the point of view of the existing Armenian legislation, again this highlights the gap in civil and administrative provisions, as well as legislation in relation to the dissemination of material. By using civil and administrative provisions to hold individuals to account, it is also possible to have a number of different remedies available to deal with hate speech that are not focussed purely on the punishment of the individual but rather in redressing the harm involved - for example, by requiring the material to be removed from the public sphere, or by requiring the individual to carry out actions to make amends to the victim.

### 3.5.3. Criminal law

As the Criminal Law is reserved for the most serious offences, GPR 15 discusses this at length.

Firstly, it is clear that the criminal law should only be used where no other less restrictive measure would be effective. This reiterates the point made above that the criminal law needs

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<sup>31</sup> ECRI General Policy Recommendation No. 15 (GPR 15), para 148

<sup>32</sup> GPR 15, para 152

<sup>33</sup> GPR 15, para 147

<sup>34</sup> GPR 15, para 152

to be used as a last resort, and administrative and civil provisions should be used where possible to cover most instances of hate speech.<sup>35</sup>

However, the criminal law does have a role to play in combatting hate speech and can be used in the most serious instances of hate speech which are deemed to be those where the speech is made in public<sup>36</sup> and where there is an intention or recklessness or a reasonable expectation or likelihood that the speech used will incite acts of violence, intimidation, hostility or discrimination.<sup>37</sup> It is important that the law is set out clearly and precisely in order to make it compatible with freedom of expression<sup>38</sup> but also it should not contain too many restrictions on its use which may make it difficult for prosecutors to use.<sup>39</sup>

This articulation of what kind of behaviour should be covered by the criminal law is important in two respects.

Firstly, it highlights again the gap in the Armenian legislation in relation to incitement to discrimination.

Secondly, it is helpful in illustrating where the dividing line between criminal and administrative provisions should lie. Acts that fall below the threshold outlined by this part of the recommendation can be outlawed, but not through the criminal law.

Another important part of the recommendation that needs to be emphasised is the fact that hate speech offences cannot be used to target official policies, political opposition or religious belief.<sup>40</sup> Freedom of expression is very important to democratic processes; and citizens should be free to express their political opinions without the fear of prosecution. It is crucial that hate speech laws are not used by the State to stifle political dissent or to silence opposition. This is without doubt, a point that needs to be taken on board by all those involved in the regulation of hate speech and must form a core part of the drafting of hate speech offences, as well as their implementation and enforcement.

However, it must also be stressed that this part of GPR 15 does not mean that politicians and those in the public sphere can engage in hate speech with impunity. This part of GPR 15 underlines the fact that the law needs to be clear that hate speech involves the incitement to hatred/discrimination/violence against certain groups and is not a blanket ban on any speech that happens to be hateful. Clearly any politician or public person who expresses opinions that fall into this definition of hate speech can be prosecuted.

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<sup>35</sup> GPR 15, para 171

<sup>36</sup> GPR 15, para 173 and para 176

<sup>37</sup> GPR 15, para 173 and para 176

<sup>38</sup> GPR 15, para 175

<sup>39</sup> GPR 15, para 177

<sup>40</sup> GPR 15, para 62-64 and 180

## 4. Conclusion

From the above analysis, we can establish that there are some gaps in the Armenian legislation in relation to hate speech.

- There are no provisions for the incitement to discrimination
- There are no administrative or civil provisions in relation to hate speech
- There are gaps and ambiguities in relation to offences which cover the dissemination of material which incites hatred/discrimination or violence against protected groups

In the next chapter, we will look at ways in which the existing Armenian legislation can be strengthened in order to comply with international frameworks, and we will use examples from other countries to show the different ways this can be achieved.

# Chapter Two. Reforming Armenian hate speech laws

In the previous chapter we identified a number of gaps in the Armenian legislation in relation to hate speech with particular reference to international obligations and ECRI's GPR 15. We also observed that there are several different types of hate speech, and that there is a certain amount of choice in terms of how to legislate for it. It was also noted that hate speech cannot be dealt with effectively through the use of one law, but that a variety of different measures need to be taken in order to ensure that the different manifestations of hate speech are appropriately dealt with.

Using the international frameworks as a baseline and using examples from the countries studied as part of this report, this chapter will put forward recommendations for reform of the Armenian legislation on hate speech.

## 1. Hate speech provisions

Two issues were highlighted in the previous chapter.

Firstly, the Armenian legislation only uses the criminal law to regulate hate speech. GPR 15 makes it clear that the criminal law should only be used as a last resort, and that civil and administrative provisions might more appropriately deal with less serious instances of hate speech. Civil law provisions can either appear under the Civil Code or in specially enacted legislation such as the Audio-visual Media Law or in the Law on Electronic Communications.

Secondly, it was pointed out that the existing Armenian criminal provisions do not cover all the harms required under the international and European frameworks which seem to coalesce broadly around the ideas of incitement to hatred, discrimination, violence and dissemination. In what follows, we will examine how different states have translated these provisions into their criminal law, administrative law and civil law. This comparative analysis will result in a number of proposals for action by the Armenian authorities.

### 1.1 Criminal law provisions

The Criminal Law is the most serious mechanism available to a state. A criminal offence punishes an individual for the harm they have caused or the wrong they have committed, sometimes with imprisonment, and there is great stigma attached to a criminal conviction. As such, GPR 15 has made it clear that the Criminal Law should only be used as a last resort when other lesser forms of regulation will not be effective. Thus, the threshold for criminal convictions must be high. GPR 15 recommends that this is achieved by requiring a 'public' element to be attached to the hate speech, and to limit the offence to cases of incitement to hatred, violence and discrimination.

### 1.1.1 Public nature of the offence

When examining the legislation in the countries studied, the need for the hate speech to be aired in ‘public’ is core to almost all of the countries looked at as part of this study. The provisions in Denmark,<sup>41</sup> Germany,<sup>42</sup> France,<sup>43</sup> Romania,<sup>44</sup> Montenegro<sup>45</sup>, and the Republic of Moldova<sup>46</sup> include an explicit requirement that the speech is expressed in ‘public’ as part of the wording of their criminal law provisions. The Serbian provision uses the term ‘among the peoples and ethnic communities living in Serbia’ which serves the same purpose.<sup>47</sup> The Spanish provisions, which are amongst the most detailed and comprehensive we looked at, include a ladder of offences dealing with hate speech. Some of these offences explicitly include the word ‘public’ in them,<sup>48</sup> and all the offences under Article 510 are more seriously punished if they affect the public peace.<sup>49</sup> In the UK, the offence can be committed publicly or in private, but an exception is made for speech that takes place in a dwelling.<sup>50</sup> The legislation in Ukraine was the only exception where there is no mention of the public nature of the offence.<sup>51</sup>

**Recommendation 1:** Currently, under Article 226, whilst public statements are punished more severely than private statements, it remains the case that private statements are included in the offence. In this respect, the Armenian criminal legislation is currently over-broad. In order to comply with GPR 15, it is recommended that *Article 226 should be limited to public statements* in all instances, thus making the “public” element a substantive part of the offence rather than an aggravating feature to be taken into account at sentencing. This recommendation should be seen in relation to having sufficient civil and administrative legislation in place to deal with less severe cases which is discussed in more detail below under recommendations 5 and 6.

### 1.1.2 Criminalising dissemination of hate speech

Another gap in the Armenian criminal law that was highlighted in the previous chapter was the lack of explicit reference to the “dissemination” of material. Whilst acts of dissemination might be covered by Art 226 and 226.2 under as an ‘action aimed at...’ racial hostility, it remains at the discretion of the judge to read this into the statute. As a legal system with civil law traditions, the elements of a crime are better defined clearly in the statutory norms rather than left to interpretation by the courts. It should also be noted that dissemination offences go

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<sup>41</sup> Art 266b of the Danish Penal Code

<sup>42</sup> Article 130, (1) 1 and 2, German Criminal Code

<sup>43</sup> Article 24, Freedom of the Press Law, 1881 (France)

<sup>44</sup> Art. 369 Romanian Criminal Code

<sup>45</sup> Art 370 Montenegrin Criminal Code

<sup>46</sup> Article 346, Moldovan Criminal Code

<sup>47</sup> Article 317 Serbian Criminal Code

<sup>48</sup> For example, Art 510.1c and 510.2b, Spanish Criminal Code

<sup>49</sup> Under Art 510 4 of the Spanish Criminal Code

<sup>50</sup> Article 18(2), Public Order Act 1986

<sup>51</sup> Article 161, Ukrainian Criminal Code

beyond any regulation of the media as they include the sharing of material by private citizens or groups that are not covered by any provisions which might relate to the media.

In the countries studied, most have criminal provisions explicitly relating to the dissemination of material: Denmark,<sup>52</sup> Serbia<sup>53</sup>, Ukraine,<sup>54</sup> Spain,<sup>55</sup> Germany,<sup>56</sup> UK,<sup>57</sup> France<sup>58</sup> and the Republic of Moldova.<sup>59</sup> Romania and Montenegro were exceptions, although like the Armenian legislation, some forms of dissemination can be implicitly covered by the relevant hate speech provisions.

**Recommendation 2:** For the avoidance of doubt, and in order to comply with the obligations under the ICCPR, ICERD and GPR 15, and in order to bring Armenia in line with the majority of countries studied, it is recommended that explicit reference is made to the criminalising of the dissemination and distribution of material which expresses hate.

### 1.1.3 Articulation of harm

It was noted in the previous chapter that the type of harm that is included in the ICCPR, ICERD, EU Framework and GPR 15 coalesce around incitement to hatred, violence and discrimination. When examining the legislation in the countries studied, it is clear that there is a fair amount of variation in how this is transposed into criminal provisions. It should also be noted that the variations may also be partially down to vagaries in translation. Below is a list of countries and the type of harm covered by the legislation:

**Denmark:** threaten, insult or degrade<sup>60</sup>

**Romania:** incitement to hatred or discrimination<sup>61</sup>

**Serbia:** instigating or exacerbating hatred or intolerance, propagating ideas of superiority, or intolerance, instigating discrimination<sup>62</sup>

**Ukraine:** inciting enmity and hatred, humiliation or national honour and dignity, insulting of citizens' feelings (in relation to religious convictions)<sup>63</sup>

**Spain:** fostering, promoting or inciting hatred, hostility, discrimination or violence<sup>64</sup>

**Germany:** inciting hatred or abuse or violence, attacking dignity, sowing contempt or defaming a group<sup>65</sup>

**Moldova:** inciting hostility or discord, humiliation of national honour and dignity, direct or indirect limitation of rights<sup>66</sup>

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<sup>52</sup> Art 266b of the Danish Penal Code

<sup>53</sup> Art 387 Serbian Criminal Code

<sup>54</sup> Art 300 Ukrainian Criminal Code

<sup>55</sup> Art 510 Spanish Criminal Code

<sup>56</sup> Article 130, 2. 1 German Criminal Code

<sup>57</sup> Article 19, Public Order Act 1986 (England, Scotland, Wales)

<sup>58</sup> Article 23 and 24, Freedom of the Press Law, 1881 (France)

<sup>59</sup> Article 346, Moldovan Criminal Code

<sup>60</sup> Art 266b of the Danish Penal Code

<sup>61</sup> Art. 369 Romanian Criminal Code

<sup>62</sup> Art 317 and 387, Serbian Criminal Code

<sup>63</sup> Article 161, Ukrainian Criminal Code

<sup>64</sup> Article 510, Spanish Criminal Code

<sup>65</sup> Article 130, (1) 1 and 2, German Criminal Code

<sup>66</sup> Article 346, Moldovan Criminal Code

**Montenegro:** incitement to violence and hatred, spreading hatred and intolerance<sup>67</sup>

**France:** inciting or provoking racial hatred, violence and discrimination<sup>68</sup>

**UK:** threatening or abusive words stirring up hatred<sup>69</sup>

Currently, the Armenian legislation covers the 'incitement of ... enmity...racial superiority or humiliation of national dignity'<sup>70</sup> and 'public calls for violence'.<sup>71</sup> In terms of how this compares to international obligations, the wording of 'public calls for violence' is narrower than the requirement for 'incitement to violence'. This is because 'incitement to violence' includes language which may not explicitly 'call' someone to violence but does incite someone to violence. Furthermore, it is clear that incitement to discrimination is currently missing from the legislation. However, Article 314 of the Draft Criminal Code currently before the Armenian parliament could potentially fill this gap. This new offence is aimed at acts which instigate hostility, hatred or intolerance, and thus covers a wider set of behaviours than Article 226.

**Recommendation 3:** The Armenian legislation should include a clearer element on 'incitement to violence' to ensure that this covers more nuanced encouragement to commit violence that may not be covered by the 'public calls for violence' under Article 226.2. In addition to this, the inclusion of intolerance to the Article 314 of the Draft Criminal Code is welcomed. For the avoidance of doubt, it is recommended that the word 'discrimination' is also included rather than assume discrimination is covered by the word 'intolerance'.

GPR 15 permits a large degree of flexibility in how countries word their hate speech laws as long as the basic forms of hate speech are covered, namely incitement to hatred, discrimination or violence. Thus, it is open to the Armenian government to enact laws that cover a broader range of behaviour than this should they wish to, such as Denmark's inclusion of 'insult' or Moldova's use of 'discord.' However, for an example of a set of laws that are clear and precise, and which cover the basis forms of harm as articulated in international obligations, the Romanian law is a good example.<sup>72</sup> These provisions can be found in the Appendix.

#### 1.1.4 Subjective element of the offence

Another issue that needs to be addressed is the subjective element of the criminal offence. The EU Framework decision which is exclusively aimed at criminal provisions, states that it is *intentional* conduct that needs to be criminalised. This is in order to limit the ambit of the criminal offence to behaviour that is the most serious. ICERD and ICCPR are silent on the issue of the subjective mindset of the defendant. GPR 15 does allow for a wider range of subjectivity by also including recklessness for criminal behaviour. Recklessness is consistent with criminal liability in Armenia and covers a state of mind where a defendant realises the public danger of inciting hatred, foresees the dangerous outcome of such acts, and lets it to happen. A less subjective state of mind would include situations where a defendant uses speech without the intention or recklessness to incite hatred or violence or discrimination but

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<sup>67</sup> Art 370 Montenegrin Criminal Code

<sup>68</sup> Article 23 and 24, Freedom of the Press Law, 1881 (France)

<sup>69</sup> Part III, Public Order Act 1986 (England, Scotland, Wales)

<sup>70</sup> Art 226 Armenian Criminal Code

<sup>71</sup> Art 226.2 Armenian Criminal Code

<sup>72</sup> Art. 369 Romanian Criminal Code



where it is clear from the circumstances that the speech incites hatred and as such it poses danger to society.

States vary in how they deal with subjective states of mind needed for criminal liability. For example, Ukraine specifically uses the word 'wilful' in its legislation, Moldova uses 'deliberate' and some iterations of the UK legislation require intention. Overall, however, most states do not make specific reference to the subjective state of mind of the defendant. This could be due to an omission, or it could be that the issue of subjectivity is dealt with in more general provisions within the various Criminal Codes and Acts. As such, no real pattern emerges from a study of the countries we looked at. However, it is worth the Armenian government using this as an opportunity to reflect on the current provisions where there is no reference to the subjective state of mind of the defendant.

**Recommendation 4:** In order for the law to be more consistent with the EU Framework and GPR 15, and also to make a distinction between criminal provision and administrative provisions (which will be discussed below) it is suggested that the hate speech provisions under the Criminal Law are framed in order to limit them to instances where the defendant has intention or recklessness as to the inciting of hatred or violence or discrimination. This would mean that the Criminal Law would capture the most serious instances of hate speech and would allow less serious subjective states of mind to be dealt with in the administrative law. Where material is likely to have this effect - but it is not within the intention or recklessness of the defendant that it should have this effect - we would recommend the use of the administrative law as it shows that the focus is on the potential impact that the material might have on the public peace rather than on trying to punish the criminal mind of the defendant.

## 1.2 Administrative law

Whilst there are variations between states about what behaviour is covered by administrative offences, generally speaking they are offences that do not meet the high threshold of public harm needed to be criminal, but which nevertheless require sanction by the state, usually in the form of fines. In Armenia, the sanctions imposed for administrative offences are less severe than those for criminal sanctions, and include warnings, fines, seizure or confiscation of the tool used to commit the offence, deprivation or permit.<sup>73</sup> This reflects the fact that the rationale behind administrative sanctions is the regulation of public order and public behaviour rather than the punishment or deterrence of the offender, which is the goal of criminal sanctions.

From a hate speech point of view, we saw in the previous chapter that GPR 15 makes an explicit distinction between administrative and criminal law offences, with the former being seen as less onerous on the individual and thus better suited to less serious forms of hate speech. This is also implicit in the EU Framework. Administrative provisions can therefore be seen as a useful tool against hate speech which may not reach the strict criminal threshold as

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<sup>73</sup> Indeed, since 2006 administrative detention (which was between 3-15) days has been abolished on the recommendation of the Council of Europe

outlined above, but which is nevertheless harmful to a peaceful, diverse, equal and cohesive society.

Whilst all the countries we looked at had criminal offences in place for hate speech, only a small handful also used administrative provisions (Romania, Serbia, Montenegro). However, some experts, such as from Ukraine and Spain, expressed a desire and preference for administrative procedures. Overall, the threshold for criminal offences is high in all the jurisdictions studied, and the country experts did not believe that criminal offences were used a great deal. As such, administrative provisions can be a good alternative to onerous criminal provisions and can certainly provide a broader approach to the regulation of hate speech than is the case currently. These lesser offences can also be helpful in trying to maintain a balance between freedom of expression and protecting society and individuals from hate speech, as the burden imposed on individuals is far less than with criminal offences.

Besides, there are particular benefits to the use of administrative sanctions in the Armenian context. Administrative proceedings are a well-regulated area of the law in Armenia with substantial court practice and case law, a comprehensive statutory basis in the form of the Law on the Fundamentals of Administration and Administrative Proceedings. In addition to this, administrative proceedings in Armenia are fast and dynamic, and can ensure a speedy outcome or result which is often crucial in cases involving hate speech.

There are also areas in Armenia where administrative laws for hate speech already exist, albeit in a very limited way. For example, as already mentioned in the previous chapter, the Law on Audio-visual Media lays out hate speech provisions which enable the relevant regulatory body (in this case, the Television and Radio Commission, TRC) to sanction radio and TV companies for spreading hate content. In June 2019 the TRC imposed an administrative fine on “Tsayg” TV, in the amount of 500,000 AMD which is roughly 1,000 USD, for spreading religious hate content on the basis of article 22(1)(1(2) of the former Law on Television and Radio Broadcasting which made it an offence to incite national, racial and religious hostility or divisiveness.<sup>74</sup> However, this example is an outlier, and in reality such sanctions are rarely imposed and so this area of administrative law is under-developed.

As such, this report recommends that the Armenian government gives serious consideration to the introduction of administrative offences to deal with less serious forms of hate speech. The key question here is what the ambit of the administrative offences should be, and how should these relate to the stricter criminal offences.

When examining the three countries with administrative provisions - Romania, Serbia and Montenegro, it is clear that the administrative provisions cover a wider range of behaviour than the more narrowly focussed criminal offences.

For example, in Romania, the administrative provisions are ones which are enshrined in their Anti-Discrimination Law. This includes behaviour which amounts to discrimination and has the purpose of restricting or removing the rights of certain groups, or any speech which amounts to harassment and which can create an intimidating, hostile, degrading or offensive environment, or any behaviour manifested in public which has the characteristics of instigating

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<sup>74</sup> This law was recently replaced with the Audio-visual Media Law

hatred, violating dignity or creating a hostile environment against certain groups.<sup>75</sup> These provisions are a direct transposition of EU Directives 43/200 and 78/2000.

What is important to note here is that it includes both public and private speech. There is also no need to show that the behaviour incited others to hatred or discrimination or violence - it is enough to show that the speech would have the effect of discriminating against someone or of creating a hostile environment for certain groups of people. There is also no need to show that someone intended their behaviour to have that effect, or that they were reckless towards it having that effect - it is enough to show that it *could* have that effect. As such, there is a clear distinction between criminal offences - which have a much higher threshold - and these lesser offences which are easier to prove, but also have a less severe sanction and impact on the rights of the individual.

Like the Romanian legislation, Serbian discrimination law is the basis of the administrative provisions. Under Article 5 of the Prohibition of Discrimination Act, discrimination is an administrative offence, and this is fleshed out in Article 11 which forbids the expression of ideas, information or opinions which incite discrimination or hatred or violence in public places. Here, the essence of Article 11 is about the incitement to discrimination, hatred or violence in a public place, which is similar to the relevant Serbian criminal provisions, but is applied to a wider group (the criminal provisions are limited to race).

Montenegro takes a different approach to its administrative provision as it has created a stand-alone offence which is not linked to discrimination provisions as is the case in Serbia and Romania. Under article 19 of the Law on Public Order and Peace, it is a misdemeanour to insult someone on grounds of national, racial or religious or ethnic origins or other personal characteristics. This contrasts very clearly with the criminal provision which is based on incitement to hatred and violence.<sup>76</sup>

This provision is similar to the Moldovan administrative offence which also prohibits insults against others, but does not limit these insults to protected groups.<sup>77</sup> This provision is also focussed on speech that is *insulting*, and so speech that may be hateful or discriminatory but which is not also insulting is not covered by the offence. As such, this is both very broad and too narrow, and the Montenegrin approach which stipulates which groups it applies to (race, nationality, religion, ethnicity, other personal characteristic) is to be preferred. However, the use of the word 'insult' may not really capture the harm that is being outlawed. Whilst GPR 15 does allow for hate speech provisions to be subsumed into other laws such as those covering 'insult',<sup>78</sup> ideally the law would be clearer than this. For this reason, the Serbian approach has much to recommend it as its wording mirrors closely that which is required under international law - incitement to discrimination, hatred or violence.

**Recommendation 5:** It is recommended that a new stand-alone administrative offence should be created which outlaws speech aimed at incitement to discrimination, violence and hatred but which does not require the high thresholds normally required of the criminal law, such as intention or recklessness, or the public element. This offence can also be used to broaden out

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<sup>75</sup> Article 2 par 1 and 5 and Article 15 of Government Ordinance (GO) n. 137/2000

<sup>76</sup> Article 370 Montenegrin Criminal Code

<sup>77</sup> Article 69, Moldovan Contravention Code

<sup>78</sup> GPR 15, para 120

the kind of behaviour captured by hate speech offences to reflect particular issues relating to Armenian culture and history that are considered particularly serious such as relations with Azerbaijan.

### 1.3 Civil law

The use of the civil law to deal with hate speech usually takes the form of anti-discrimination legislation which would make inciting or encouraging discrimination a basis upon which individuals can found a civil law claim against other individuals, employers, or other entities.

For example, in Montenegro there are provisions about inciting discrimination<sup>79</sup> and as seen above, in Serbia and Romania, the anti-discrimination provisions are also administrative offences.

Currently, Armenia does not have anti-discrimination legislation. At the time of writing, the draft law on Ensuring Legal Equality, which if adopted would constitute a comprehensive framework for anti-discrimination law, is still under review, and it is still unclear when it will be adopted. The [www.e-draft.am](http://www.e-draft.am) public portal shows that the last discussion on the draft was held in June 2019 and so it has been over a year since the draft law was suspended.

The absence of non-discrimination law is a major gap in the legal framework of Armenia and this substantially weakens redress mechanisms against discrimination, hate speech and hate crime. Whilst the enactment of non-discrimination provisions more generally is not within the purview of this report, it is important to emphasise that robust anti-discrimination laws can provide the important 'cultural' framework that demonstrates a strong commitment by the state towards equality, and can therefore, make the enforcement of hate speech laws more effective. For example, the country expert from Spain pointed out that the lack of strong anti-discrimination law in Spain has meant that the impetus to make good use of the existing hate speech legislation is missing, and this has resulted in the under-use of the provisions.

The reason for this is that the existence of anti-discrimination law in a legal system demonstrates a recognition by the state that inequalities exist in society which need to be addressed through legislative action. It signals to all those involved in the process of law, such as judges and the police, that the state takes seriously its responsibility towards marginalised groups. It creates a narrative that encourages us all to reflect on how a person or group's position in society has an impact on their life experiences and the opportunities available to them, and how those in powerful positions – whether as employers or as representatives of the state – must act in order to even out those inequalities. In the context of hate speech, it is imperative to have an awareness of the experience of marginalised groups in order to fully appreciate why hate speech against them is particularly damaging and why that speech needs to be eliminated. Understanding the link between hate speech and inequality is crucial to the effective regulation of hate speech.

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<sup>79</sup> Article 9a, Law on the Prohibition of Discrimination, 2014, Montenegro

This is reflected in the Armenian experience, and can be seen in the tendency by public bodies and their supporters in the private sector, to define hate speech so broadly that it includes all sorts of speech that they may find annoying or disturbing, such as bullying or trolling between political rivals and their supporters. As outlined in the previous chapter, hate speech refers specifically to hateful speech aimed at groups which have historically suffered inequality and disadvantage, and is not about any speech we may find hateful, insulting or disturbing. It is crucial to understand this distinction, not least because limiting the definition along the lines suggested in the ICERD, the ICCPR, the EU Framework and GPR 15, way ensures freedom of expression is respected, and that hate speech laws are not oppressive or used in a manner which is unjustifiable.

**Recommendation 6:** The Armenian government is urged to consider enacting its draft anti-discrimination legislation as part of a multi-pronged approach to tackling inequalities in society that are exacerbated by and caused by hate speech. It is encouraged to highlight the link between inequality and hate speech in order to ensure the effectiveness of hate speech legislation.

## 2. Categories of protected characteristics

In the previous section, we highlighted the importance of understanding the link between hate speech laws and structural and social inequalities which exist in society. For this reason, which characteristics are protected by hate speech legislation is a fundamental aspect of the law and demonstrates the state's commitment to protecting such groups from the harm resulting from such underlying discrimination.

Currently, under Armenian law, Article 226 applies only to nationality, race and religion. Article 226.2 is much wider and includes sex, race, colour, ethnic or social origin, genetic characteristics, language, religion, ideology, political or other views, affiliation to a national minority, property status, origin, disability, age or other person or social ground. The characteristics articulated under Art 226.2 mirror those under Article 29 of the Armenian Constitution.

Under the proposed draft criminal code, the picture becomes even more complicated. Articles 198 (discrimination) and Article 315 (public calls for violence) also adopt the Article 29 characteristics. However, Article 314 (instigating hostility, hatred and intolerance) would apply to nationality, ethnicity, race, political ideology and religion. This makes it wider than Article 226, but narrower than Article 29 of the Constitution. Therefore, there are essentially three different sets of characteristics protected under the different legislation without any clear rationale as to why this should be the case.

As a matter of practicality, it would make sense to harmonise the protected characteristics in order to make the legislation clearer. Although there are some arguments that a shorter list might be more effective as it is simpler for the police to target specific characteristics, it would

seem to make sense to adopt the broader list of characteristics as laid out in the Armenian Constitution as this list is fundamental to Armenian law.

However, there are two characteristics that are palpably missing from the list, and they are sexual orientation and gender identity. Whilst both could be included in the part of Article 29 that refers to 'any other personal or social ground', a lack of explicit reference to sexual orientation and gender identity could have real implications for the targeting of hate speech against the LGBT community.

Whilst sexual orientation and gender identity are not included in ICERD, or the ICCPR or the EU Framework, it is clear that a general consensus is forming that hate speech provisions should also protect these characteristics. In *Vejdeland and Others v. Sweden* (2012), the ECtHR stated that sexual orientation should be protected by hate speech legislation as homophobic speech is as serious as racist speech.<sup>80</sup> The European Parliament: Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, 2014 (2013/2183(INI)) has stated that sexual orientation and gender identity should be protected in hate speech legislation. It is also clear from ECRI's report on Armenia that sexual orientation and gender identity should also be included,<sup>81</sup> and GPR 15 states that sexual orientation and gender identity should be protected against hate speech.<sup>82</sup>

In terms of the countries studied, around half included explicit reference to sexual orientation in their hate speech provisions, such as France, UK, Denmark, Spain and Belgium. In Romanian sexual orientation is an aggravating factor in hate crime legislation and is explicitly included in the list of anti-discrimination provisions (discussed above). Montenegro does not mention sexual orientation in hate speech laws, but it is covered by general hate crime provisions. Serbia, Ukraine and Germany have a similar approach to Armenia in that sexual orientation is not specifically covered in the legislation, but they have an open category of characteristics that would allow sexual orientation to be included. Moldova's approach is patchy where sexual orientation is included in hate speech provisions in their Audio-visual code<sup>83</sup> but is absent in the other (offline) hate speech offences.

**Recommendation 7:** Including sexual orientation and gender identity directly in the legislation would send a clear signal of commitment from the Armenian state that it wants to ensure equality for all its citizens, and it would certainly strengthen the implementation of the law against these types of hate speech. This is also the preferred option under GPR 15. Whilst the open category of characteristics currently used in Armenia means that sexual orientation and gender identity are, in principle covered by the legislation, it is clear that this approach would fall short of the level of protection that most countries are opting for and which ECRI's country report recommends.

## A note about gender

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<sup>80</sup> *Vejdeland and Others v. Sweden*, App. no. 1813/07 (ECtHR, 9 February 2012), para. 55.

<sup>81</sup> ECRI Report on Armenia (fifth monitoring cycle), Adopted on 28 June 2016

<sup>82</sup> GPR 15, page 14

<sup>83</sup> Art 1 and Art 11 of the Code of Audiovisual Media Services, Moldova

The discussion above has focussed on sexual orientation and gender identity. However, another important characteristic that is missing from the Armenian legislation is gender. Including gender as a protected characteristic is increasing in importance, particularly in the context of online hate speech, where misogynistic comments and attacks are prevalent. Including gender as a protected characteristic has also been the focus of recent legislative proposals in the UK. Most recently (September 2020) the Law Commission published a consultation report recommending that gender be added to the list of protected characteristics in hate crime and hate speech offences in England and Wales.<sup>84</sup>

Including gender as a protected characteristic is a complex topic which requires separate discussion and analysis which is not possible within the scope of this report. There are a number of issues that would need to be considered in depth. For instance, if gender is added to hate crime offences, this would have implications for sexual offences. There is also a concern that the prevalence of misogynistic hate crime and hate speech would mean that including gender in hate legislation would overwhelm the system and distract authorities from dealing with the full spectrum of protected characteristics. There are questions, therefore, about whether misogynistic hate should instead be dealt with in separate offences outside of the hate crime regime. There is also a discussion about whether it is gender or misogyny which should form the basis of the protected characteristic. Furthermore, it may also be the case that gender can be interpreted widely enough to also include gender identity. Given the complexity of these arguments, this topic will not be covered in this report, although it is suggested that the Armenian authorities do keep this issue under review with a view to adding gender in the future.

### 3. Other offences which regulate hate speech

As mentioned in Chapter One, there are many types of offences that can come within a broader definition of hate speech. In this chapter, we have predominantly been focussing on offences which explicitly refer to the incitement of hatred or violence or discrimination against minorities, and thus form the core strategy against hate speech. However, there are many other areas which also need careful consideration when trying to ensure a comprehensive and cohesive approach to regulating hate speech. It falls outside the scope of this report to discuss these areas in any detail, but it is worth pointing out that once principal hate speech laws have been enacted, it will also be necessary to ensure that the core aims of the legislation are fed through into other areas.

One area of interest is the regulation of the media. In the next chapter, we will touch on the regulation of *social media*, but here the focus is on traditional media.

The media plays a very important role in setting the general tone of public debates and in fostering an environment of inclusivity, equality and peace. Therefore, the importance of ensuring that the media, and particularly news outlets, are sensitive to the language they use when talking about minority groups, cannot be overstated.

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<sup>84</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/10/Hate-crime-final-report.pdf>

In the context of Armenia, the audio-visual communication sphere (which includes, radio, terrestrial and cable television) is regulated by several pieces of legislation, including the Law on Audio-visual Media. Under Article 9 of this Law, there is a prohibition against programmes which show national, racial and religious hostility and divisiveness. Clearly this list of protected characteristics is narrower than Article 29 of the Constitution, and the law should be reformed to bring it in line with Article 29.

Another important area of concern here is the rhetoric and language adopted by politicians in both parliamentary debates and public speaking. It is very clear from GPR 15 that criticism of politicians or of political ideas or policies are *not* hate speech in and of themselves. In a healthy democracy, it is important that the public is able to hold politicians to account for their decisions in a robust and dynamic manner, and politicians should be able to engage in political debates with political opponents without fear of prosecution. However, this does not mean that politicians can engage in speech which would fall within the definition of hate speech as defined in this chapter - namely speech that incites violence, discrimination or hostility towards certain groups. One option is to consider codes of conduct for politicians to encourage them to think carefully about the language they use and how they express themselves in public.

There may also be some instances where a state may decide to enact more targeted legislation to deal with specific issues. GPR15 includes within its definition of hate speech “the public denial, trivialisation, justification or condoning of crimes of genocide, crimes against humanity and war crimes. A number of countries such as France, Germany, Romania and also Armenia already have offences which deal specifically with denial of genocide or the Holocaust.<sup>85</sup> However, it should be pointed out that in ECRI’s [fifth cycle monitoring country report](#), there are some gaps in the Armenian legislation in relation to GPR15 which have yet to be filled.

Finally, GPR 15 highlights the fact that in order for hate speech to be properly regulated, it is also important to create offences for the creation or leading of a group which promotes or supports the use of hate speech, for participating in the activities of such a group with the intention of contributing to the use of hate speech for which criminal sanctions can be imposed and intentionally instigating, aiding or abetting the use of such hate speech or attempting to use it.<sup>86</sup>

Article 63 of the general part of the Criminal Code provides a list of aggravating grounds for the crimes defined by the Code, and one such grounds is the committal of crimes “*by a group of people, an organised group or criminal organisation*”. Thus, this ground accompanies hate speech provisions in the Code. For example, section 2(4) of article 226 can be aggravated if committed by an “by organised group”. Section 2(1) of article 226.2 defines the commission of the offence “by a group of individuals with prior agreement or by an organised group” as aggravating grounds of the main crimes under both articles. The same approach is demonstrated by article 314 and 315 of the draft criminal code as both articles stipulate the aggravation of the main crime by a group of people with prior agreement. Thus, Armenian law already covers part of the recommendation. However, it could be strengthened to include the

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<sup>85</sup> Gayssot Act 1990 (France), Article 130(3) German Criminal Code, Ordonata De Urgenta nr. 31 (Romania), Article 397.1 Armenian Criminal Code

<sup>86</sup> GPR 7, para 18g and para 20



more inchoate elements of the recommendation – namely the outlawing of the creation or leading of a group which or participating in the activities of a group with the intention of contributing to the use of hate speech.

**Recommendation 8:** Ensure that all laws relating to hate speech, such as the Law on Audio-visual Media are harmonised in terms of the characteristics protected in line with recommendation 7 of this report.

**Recommendation 9:** Strengthen the law in relation to group activities in order to comply more clearly with GPR 15.

## 4. Conclusion

This chapter has identified specific gaps in the Armenian legislation and compared it to the practice in other countries. It is clear that no one country can be used as an ideal example of hate speech legislation. However, through this comparative analysis, certain factors emerge as needing attention.

A number of recommendations have been made as follows:

1. In relation to criminal provisions:
  - Article 226 should be amended to ensure it only covers ‘public’ statements
  - An offence against the dissemination of material which incites hatred, violence and discrimination should be created
  - Article 226.2 needs to be amended so that it more clearly includes ‘incitement to violence’ rather than just ‘public calls for violence’
  - The incitement to discrimination offence under Article 314 of the Draft Criminal Code should be accepted and enacted
  - For a clear articulation of the harm caused by hate speech, the wording of the Romanian law on hate speech is recommended<sup>87</sup>
  - Article 226 should be limited to cases where the defendant intended or was reckless as to harm their speech might cause
2. In addition to this, a stand-alone administrative offence should be created which outlaws speech aimed at incitement to discrimination, violence and hatred, but which does not need to be committed either intentionally or recklessly.
3. In relation to the civil law, the Armenian government is urged to enact its draft anti-discrimination legislation.

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<sup>87</sup> Article 369 Romanian Penal Code

4. All offences, both criminal and administrative should cover the protected characteristics included in Article 29 of the Constitution, with the addition of sexual orientation. This should also be reflected in any laws, such as those in the audio-visual sphere, which outlaw hate speech in certain areas.
5. Consideration should be given to the creation of a Code of Conduct to be followed by politicians to ensure that hate speech is not engaged with by those with a high public profile, or within Parliament.
6. Strengthen the law in relation to group activities in order to comply more clearly with GPR 15.

## Chapter Three. Regulating online hate

Tackling the phenomenon of online hate is a particularly important but complex aspect of the fight against hate speech. The use of the internet to spread hateful speech is a relatively new manifestation and brings with it enormous challenges.

There are a number of characteristics of online hate speech that make it particularly difficult to control. Factors such as the anonymity of those generating the speech, the speed with which hate can spread around the world, as well as jurisdictional issues when the perpetrator lives in a different country or uses servers abroad, make the issue especially complicated. The sheer amount of hate speech that appears online also means that traditional policing methods are not best suited to keeping it under control.

As a result of these factors, there has been a shift away from trying to control the behaviour of the individual perpetrators of online hate, and a move instead towards holding platforms that display the hateful material responsible. In practice, this has been focussed mainly on social media companies which have both the technical means to physically remove material from the internet fairly easily (something that is not open to the police), and they also have the financial means to contribute towards the cost of policing this. The question of social media liability is playing itself out against a wider debate about the responsibility of internet companies more generally which have, until now, enjoyed little or no regulation, and which has enabled them to grow and make huge profits without being held accountable for the harm that their companies might be generating.

Thus, from the point of view of legal reform in this area, this makes it clear that there are two distinct issues that we need to deal with.

On the one hand, we need to ensure that existing hate speech offences which focus on the behaviour of individual perpetrators apply equally to the online world. This is often referred to as making sure that 'what is a crime offline is also a crime online'.

At the same time, there is a more complicated issue that needs to be addressed in relation to holding internet companies responsible for the material that appears on their platforms. Many states are currently grappling with this controversial issue, and this is an area that is still very much in development.

This chapter will first consider some preliminary issues in relation to these two points, before moving on to compare the Armenian legislation with the relevant international framework obligations, and will make suggestions for reform. The chapter will conclude with a discussion of the emerging trends in the regulation of online hate speech.

### 1. 'What is a crime offline, should be a crime online'

Ensuring that existing hate offences can also be used for hate speech that appears online is a fairly conventional approach to the regulation of online hate as it is based on the established idea of punishing the perpetrator for their speech. To a certain extent, this is a fairly straightforward issue to deal with as it requires us to consider how to ensure that the law is framed in such a way that it can be used for online as well as offline material. Countries such as Spain, for example, have included explicit reference to online material in their hate speech offences, thus making it very clear that online material is also caught.<sup>88</sup>

However, in order to ensure the offences are as effective online as they are offline, there are a couple of issues that need further thought.

Firstly, as was mentioned in the previous Chapter, for criminal liability, according to GPR 15, there needs to be a requirement that the behaviour was committed 'publicly'. The issue of what constitutes a 'public' space on the internet, however, is not necessarily straightforward. An argument could be made that anything that appears on the internet is 'public'. However, this is too broad and can create problems with freedom of expression. The purpose of requiring a 'public' element for criminal offences is to recognise that private speech must be free from state control, and it is only speech that causes harm to society that should be criminalised. It cannot, therefore, be the case that everything that appears on the internet is automatically considered 'public'. For example, personal emails sent over the internet, or person to person messages on WhatsApp, cannot be treated the same as messages posted on newspaper websites or on social media platforms such as Twitter and Facebook. Therefore, further thought needs to be given as to what should count as 'public' on the internet.

A second issue is to do with jurisdiction. This is a complicated matter on the internet as it involves taking account of where the hate speech was viewed, which country the perpetrator was in when the material was uploaded, where the server that was used is located and where the intended victim/s are based. From the point of view of legal regulation, it is important to delineate the boundaries of what is justiciable.

At the moment, none of the countries studied have a clear answer to these questions. However, the UK is currently undergoing a review of its online communications offences and part of the consultation processes, both in England and Wales, and in Northern Ireland, are engaged in a discussion about how to further define the word 'public' on the internet and also to define the boundaries of jurisdiction.<sup>89</sup> As such, the Armenian government should take note of the outcomes of these consultations which will be available in the next few months, and consider what is appropriate within the Armenian context.

## 2. Responsibility of Internet companies

The second aspect of the regulation of online hate speech is more difficult as this is to do with how to hold online platforms - namely social media companies - responsible for the material they host.

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<sup>88</sup> Article 510.3 of the Spanish Criminal Code

<sup>89</sup> Law Commission: <https://www.lawcom.gov.uk/project/hate-crime/>; Northern Irish Consultation Paper: <https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20Paper%20Feb%202020.pdf>

Until recently, the main way in which social media companies were held responsible for the material that appears on their platforms was through self-regulation and voluntary schemes. A recent report by Brown details the vast array of governance models that have emerged in this area in recent years.<sup>90</sup>

One such voluntary scheme is the EU Voluntary Code of Conduct.<sup>91</sup> This was established in 2016 by the European Commission in agreement with some of the giant social media companies such as Facebook, Twitter and YouTube. A voluntary code of conduct was set up which the companies promised to abide by. Their compliance with the Code is evaluated through regular monitoring exercises set up in collaboration with a network of organisations within the EU. These organisations flag up potentially illegal material to the companies through their regular complaints process, and the companies' responses are assessed. This Code of Conduct was very much in the spirit of the EU eCommerce Directive established in 2000<sup>92</sup> which protects companies from liability for the material that appears on their platforms unless they have been notified of its illegal nature. As such, there is no obligation on companies to proactively look for illegal material on their platforms, although they are required to act once they have been notified of any illegal material. This is known as 'notice and take-down'.

Whilst this voluntary conduct has been fairly successful, as we will see below, we can observe an emerging shift away from voluntary codes towards greater state regulation of the internet through legal norms. This is particularly prevalent in relation to hate speech. This is an important trend that the Armenian government needs to take note of in order to ensure that its response to online hate is in line with emerging developments.

### 3. Current Armenian laws governing the Internet

Under Article 12 of the Law on Electronic Communications, the regulator has the authority to suspend the licence or request that the court suspends the licence of an internet service provider or other internet operator if this is necessary 'for national security or for the public interest'. Under Article 51, an operator or service provider is liable for wilfully allowing the use of its network or service to be used by another to spread violent speech, threats or malicious speech against other persons. As they stand, these articles seem overly broad and ambiguous, and arguably do not meet the requirement of legal certainty.

There are further issues with these offences. First, whilst Article 51 can be used against hate speech that incites violent speech, it is not so clear that it covers speech that incites discrimination or hatred. It can, therefore, be seen that the speech covered here is narrower in scope than Article 226 and 226.2, and narrower than what is required under international frameworks as discussed in the previous chapter. It is possible that Article 12 could be broadly interpreted to include incitement to discrimination, violence and hatred, but as pointed out

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<sup>90</sup> Brown, 'Models of Governance of Online Hate Speech' Council of Europe - <https://rm.coe.int/models-of-governance-of-online-hate-speech/16809e671d>

<sup>91</sup> [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en)

<sup>92</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>

above, Article 12 is too wide and arguably lacks certainty. A second point to note is how blunt the penalties are under Article 51 and Article 12. The only option open to the state under these Articles is to revoke or suspend a licence. This is a very heavy-handed approach which means that it is unlikely to be used other than in the most extreme cases. It was pointed out in the introduction that hate speech is extensive across most social media, and so Article 12 and 51 are too heavy-handed to be useful in the fight against online hate speech. As will be seen below, there are other more nuanced ways in which a state can try to regulate online hate speech in a way that is likely to be more effective.

## 4. International frameworks and obligations

The ICCPR and ICERD and the EU framework do not make reference to the internet, but it can be assumed that states should ensure that what is a crime offline is also a crime online. As mentioned above, there needs to be explicit reference in the offences that they apply online as well, and thought needs to be given to what will constitute a 'public' place on the internet, and also what the parameters of jurisdiction will be.

### 4.1. Additional Protocol to the Cybercrime Convention Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems

However, in addition to ensuring that existing offences apply online, it is also important to ensure compliance with the Additional Protocol to the Cybercrime Convention Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems. This is a Council of Europe initiative, and it outlines how states can ensure that material of a racist and xenophobic nature is outlawed. Armenia has signed up to this Protocol.

There are four main sets of behaviour that need to be covered by legislation according to the Additional Protocol. These are all offences that need to be committed intentionally and without right. Below we outline these offences and discuss to what extent Armenian law currently fulfils these criteria:

#### 1. **Distributing, or otherwise making available, racist and xenophobic material to the public through a computer system**

Arguably Article 12 and Article 51 do not satisfy this. Article 51 is too narrowly focussed on violent material, and so would not be wide enough. Also both Article 12 and 51 are aimed at holding an internet service provider or operator liable. What is needed under the Additional Protocol is for an individual to be held accountable for disseminating material on the internet.

**Recommendation 10:** In the previous chapter we recommended the creation of an offence of dissemination of hate speech material. We recommend that this offence is drafted in such a way that it clearly also applies to material distributed over the internet in order to satisfy this.

2. **threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.**

Under Armenian law, there is currently no single offence that will cover this. There are multiple offences that cover threats in the offline world. For example, Article 137 of the Criminal Code makes it an offence to make threats to murder or inflict grievous bodily harm or to destroy property. However, there is no explicit reference in this, or other offences involving threats, making it clear that these offences can also be committed online.

**Recommendation 11:** Complying with this part of the Protocol could be achieved in two ways. Either a new stand-alone offence could be created to cover threats made through a computer system, or instead, an amendment could be added to each of the existing offences involving threats to make it clear that they also apply online.

3. **insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.**

If the recommendations for reform of Art 226 put forward in the previous chapter are adopted, then this offence would be covered by the new offence.

**Recommendation 12:** It is recommended that in addition to the amendments to Article 226 put forward in the previous chapter (such as limiting its use to 'public' statement), for the avoidance of doubt, there should also be an additional reference to its applicability in the online world.

4. **distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.**

This is already an offence under Article 397.1 of the Armenian Criminal Code.

Overall, the requirements under the Additional Protocol fall into the category of making sure that what is a crime offline is also a crime online.

## 4.2 GPR 15

As was outlined in the previous chapter, Article 8 and 10 of GPR 15 put forward recommendations on how states can ensure hate speech laws are robust and effective.

Article 10 of GPR 15 which relates to criminal offences, requires that ‘the scope of these offences is defined in a manner that permits their application to keep pace with technological developments’. This reinforces the point made above about the need to ensure that what is a crime online is a crime offline.

Article 8, however, is much more detailed, and touches on the responsibility of internet platforms for hate speech. The requirements are much more extensive, and necessitate re-thinking liability for online hate speech, with a clear steer towards shifting accountability to platform providers.

Article 8 recommends that states determine the particular responsibilities of internet service providers, web fora and hosts, online intermediaries, social media platforms, online intermediaries, moderators of blogs and others performing similar roles.

The explanatory notes to Article 8 flesh out in more detail what this might mean. Paragraphs 10-13 and 15 of GPR No. 7 are referred to, which recommend ‘the need for specific powers to require the deletion of certain hate speech, the blocking of sites using hate speech, and the publication of an acknowledgement that hate speech had been published, as well as to enjoin the dissemination of hate speech and to compel the disclosure of the identities of those using it.’

Clearly these recommendations go beyond the powers currently available to the regulator under Articles 12 and 51, and emphasise the need for a more nuanced approach to regulating online hate than is currently the case under Armenian law. The powers under Article 12 and 51 are limited and do not allow the regulator the discretion to adopt different strategies to reduce the impact of illegal material.

Paragraph 150 of GPR 15 elaborates on the factors to be taken into account when determining to what degree these online intermediaries should take responsibility. It suggests that factors such ‘as whether or not they were aware that their facilities were being used for this purpose, whether or not they had and used techniques to identify such use and those responsible for it and whether or not they acted promptly to stop this from continuing once they became aware that this was occurring.’

Furthermore, GPR 15 highlights the case of *Delphi* where the ECtHR found no violation of freedom of expression when a company in Estonia was found liable for hate speech that appeared on its internet news portal. The company itself had clearly not generated the hate speech but had not removed the material when it was brought to its attention. This demonstrates that holding news portals responsible for hate speech on their platforms is compatible with freedom of expression so long as the penalty is proportionate. In this case, the penalty came in the form of a fine, and part of what convinced the ECtHR that the penalty



did not contravene freedom of expression was because it did not impose too heavy a burden on the company and did not affect its business operations.

Para 151 does envisage loss of licence or franchise as a potential penalty, but Under Article 12 and 51 of the Armenian law, the only penalty available is the removal of a licence. This could very likely be seen to be disproportionate given the decision in *Delphi*. In addition to this, para 151 points out that when imposing an administrative sanction, including loss of licence or franchise, particular circumstances need to be taken into account such as whether or not previous warnings about the failures have been taken on board by the internet companies.

This demonstrates that Art 12 and 51 need to be amended to become more specific in terms of what kinds of speech are outlawed, but also more nuanced in terms of the penalties that can be meted out.

**Recommendation 13:** Article 12 and 51 need to be reformed so that they comply with freedom of expression. Firstly, this will require more specific references to the types of speech that are outlawed. The wording should mirror that used in the offences which apply to individual perpetrators as outlined in the previous chapter. This should include reference to the same protected characteristics. Secondly, the penalties available to the regulator need to be expanded upon to include fines and other measures to enforce compliance with the law. Regulating internet companies is an emerging area that will be discussed in more detail below.

## 5. Regulating social media companies and online hate speech

### 5.1 Germany and NetzDG

Germany has been at the forefront of developments in the regulation of social media platforms and hate speech. In 2017, the German government introduced the Network Enforcement Act (known as NetzDG law) which imposes large fines on social media companies if they do not remove hate speech quickly enough from their platforms. This law was introduced because the German government believed that self-regulation and voluntary Codes of Conduct were insufficient to force these companies to take seriously their responsibilities towards illegal material. The law does not require companies to pro-actively search for illegal material, but they are required to remove material when notified of its illegality. Thus, the German approach is effectively about making the 'notice and take-down' system more effective.

#### 5.1.1 Detailed Summary of the German Law

**Section 1** outlines the scope of the provisions and determines which telemedia service providers are covered by the Act. It applies to companies with 2 million or more users, and so is clearly aimed at the internet giants such as Facebook and Twitter.

Under **section 2 and 3** of the Act, the law imposes two main obligations on internet service providers: first, a duty to report on the handling of complaints (section 2) and secondly, a duty to provide an effective and transparent procedure for handling complaints (section 3).

### **The reporting obligation under section 2**

This requires internet service providers who receive more than 100 complaints a year to produce half yearly reports in German on how they handle complaints about unlawful content. The Act outlines 9 different elements that the reports *must* contain such as a description of the mechanisms for submitting complaints about unlawful content, the criteria for deciding whether content is to be deleted or blocked, and the number of complaints resulting in deletion or blocking.

### **The complaints procedure under section 3**

The second obligation under section 3 is to maintain an effective and transparent procedure for handling complaints and to make this process clear to users. This procedure will require social networking companies to take down material that is illegal, and to notify the complainant about decisions made in this respect.

The Act makes a distinction between ‘manifestly unlawful’ material and material that is merely ‘unlawful’. If the materials is manifestly unlawful, it must be removed or blocked within 24 hours of the complaint being reported; whereas if it is merely ‘unlawful’, the social networks have up to a week within which to make a decision whether to remove or block the material.

There are exceptions to both of these timescales. In the case of manifestly unlawful material, a longer period of time can be agreed with the competent law enforcement authority. In the case of merely ‘unlawful content’, the deadline can be extended if the decision whether to delete or block warrants further investigation or if the decision is delegated to a ‘self-regulation institution’.

Section 3(4) also imposes an obligation on the social network’s management to conduct monthly checks to ensure the smooth running of the complaints procedure. This requires them to deal with any organisational deficiencies in a timely manner, and to offer training and support programmes (in German) to those tasked with the processing of complaints. This monitoring task can also be delegated to an outside agency.

**Section 4** outlines the regulatory fines which can be imposed for contravening any of the obligations outlined under section 2 and 3. These fines can be up to 5 million euros. If the administrative authority wishes to impose a fine on the basis that material which is unlawful was not removed or blocked, it needs to first acquire a preliminary ruling from the appropriate court on the unlawfulness of the material. The court’s decision will be binding and incontestable.

**Section 5** deals with issues relating to the naming of a person who can be held liable for all the above obligations in the Federal Republic of Germany, and **section 6** deals with transitional provisions.

**Article 2** makes amendments to the Telemedia Act 2007 and outlines the obligations of service providers insofar as the disclosure of subscriber data for the enforcement of civil law in concerned.

### 5.1.2 Conclusion

Depending on your point of view, the German law has been lauded as a great step forward towards greater regulation of the internet giants, or as a dangerous tool of state control of freedom of expression. Whilst many feared that the German law would lead to over-moderation and over-zealous removal of material, initial reports suggest that this is not the case<sup>93</sup> and that the law does appear to have been applied cautiously. Nevertheless, there are still concerns over freedom of expression, and when a similar law (the so-called Avia Law) was passed by the French Parliament, it was struck down as incompatible with freedom of expression by the Constitutional Court.

Whilst the German law has certainly proved to be effective, at least insofar as it has forced social media companies to take *some* responsibility for the material on their platforms, it clearly has not solved the problem of online hate. As will be outlined below, more recent developments suggest that the German law is only a first step towards tackling online hate, and there is more than can be done.

## 5.2 Recent developments and future directions

More recently, the EU in June 2020 began a consultation of their Digital Services Act which will replace aspects of the eCommerce Directive which was enacted twenty years ago. Some of the key elements of the eCommerce Directive, such as limiting liability of social media companies to 'notice and take-down', is being considered. Under the new Act, greater regulation of social media companies for the harms that flow from the business-models is envisaged. This could mean that the liability of social media companies goes beyond what is currently the case under the NetzDG law.

It should also be noted that in April 2019, the UK published its Online Harms White Paper which advocates a whole package of measures aimed at forcing internet companies to take more responsibility for the harmful effects of their platforms. It is proposed that a duty of care will be imposed on companies, and that an Internet regulator will be set up to oversee this duty of care and to create codes of conduct which will potentially force companies to be pro-active in the policing of their platforms. Currently, the UK Parliament is in the process of passing a law to set up the new regulator, so it will be some time before the details of how this regulator will act are known. Nevertheless, it is clear that the general thrust of policy in Europe

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<sup>93</sup> CEPS Report, 2018 - <https://www.ceps.eu/ceps-publications/germanys-netzdg-key-test-combatting-online-hate/>

is towards greater regulation and even the possibility of requiring proactive policing of websites.

At the moment, we are still in the emerging stages of this new approach to regulating social media platforms. Nevertheless, it is worth the Armenian government taking note of these trends and considering at least in the meantime of reforming art 12 and 51 in the ways outlined above.

# Chapter Four. Enforcement and implementation

In the previous chapters, we put forward some suggestions for how to legislate for hate speech. However, it is clear from our discussions with the country experts, that legislation is only the first step in ensuring that hate speech is properly regulated.

There are a number of other elements that are required to ensure that the policing and implementation of hate speech laws is both successful and fair. These elements are also mirrored in GPR 15 which sets out a number of recommendations to states in relation to the enforcement and implementation of hate speech laws. This section will focus on some of these recommendations.

## 1. Standing and enforcement

In relation to the civil and administrative provisions, Article 8d of GPR 15 outlines who should have standing for hate speech offences. It suggests that as well as the effective participation of those individually targeted by hate speech, standing should also be given to equality bodies.

Some countries already give standing to their designated equality bodies in varying degrees to help with the enforcement of hate speech laws. For example, in Romania, the national equality body has the power to enforce discrimination laws, including those relating to discriminatory speech and can also apply fines for any contraventions. The equality body also has the power to investigate matters to an extent, and to impose fines for contraventions. Its decisions can be contested in court, but it has the power to make first instance decisions. In Serbia, complaints about administrative infringements can be submitted to the Commissioner for the Protection of Equality (this is the national equality body that has been set up in line with ECRI Standards). The Commissioner can decide on the complaint, whether that be against the state, a private individual or employer or enterprise. However, unlike the situation in Romania, the decision comes in the form of a recommendation which does not have legal power as such, but clearly has clout given that the Commissioner can publish the fact of the infringement and the recommendation in the media. In Moldova, the situation is currently broadly similar to Serbia, but there are draft proposals in place to give more powers to the equality body to sanction this kind of speech. In Georgia, the Ombudsman can address recommendations to relevant judicial bodies, to examine the legality of court decisions which have already entered into force, if, on the basis of examination, the ombudsman considers that violation of human rights committed during the legal proceedings could have a substantial impact on the final decision of the court.

In Armenia, there is no designated national equality body. The draft non-discrimination law, the Law on Ensuring Equality, envisages the creation of such body which will be located within the Human Rights Defender's Office (Ombudsman's office), and will be under the mandate of the Ombudsman. Under the draft legislation, any complaints filed would be examined first by the Ombudsman who would have the legal authority to make any relevant site visits or request

information from state bodies to enable the Human Rights Defender to reach a decision about whether to refuse the complaint, or to pass it on to the relevant state body, with recommendations on how to solve the complaint. The recommendation will not have binding force as it is not an administrative act.

Thus, the draft law is closer to the Serbian model under which the equality body can issue non-binding recommendations to state bodies.

**Recommendation 14:** Adopt the draft Law on Ensuring Equality including the ability of the Ombudsman's office to deal with initial complaints brought under the law.

## 2. Training

Under paragraph 8f of GPR 15, it is stated that countries should provide appropriate training for judges, lawyers and officials who deal with cases involving hate speech, and should be able to share good practice between them.

All the country experts we spoke to agreed that there was a need to ensure that the relevant criminal justice actors - the police, judges, prosecutors and defence lawyers - were given proper training, and that without this, there could not be effective enforcement of the law. For example, the expert from Ukraine pointed out that when their Anti-Discrimination Laws were introduced in 2012, it was crucial that all criminal justice actors were given training specifically on the law itself, but also on background context such as the role of the ECtHR and the ECHR. Since this training has been initiated, judges are more likely to refer to ECtHR decisions and to show an awareness and understanding of the impact of discrimination and hate speech on victims and society. Training can be undertaken by equality bodies in order to ensure that the training is contextual. For example, in Moldova, training is undertaken by the Ombudsman Office and the Equality Office. In Romania, the national equality body has also been involved in training.

Paragraph 10g of GPR 15 in relation to criminal provisions also talks about the need for effective co-operation and co-ordination between police and prosecution authorities. This will require top-down training provided by the Ministry of Justice in order to ensure that effective mechanisms are in place to ensure co-operation is efficient and successful.

In Armenia, there has been some training on racism and non-discrimination in recent years undertaken by the Judicial Academy which provides training for those new to the profession but also to existing judges, prosecutors and investigators. The School of Advocates has also added courses to its curriculum for new advocates. However, this is not enough and more targeted training on hate speech laws is required.

Meanwhile, the Police Academy operates separately from the Ministry of Justice and does not have any training on racism. However, it often cooperates with human rights NGOs and they jointly run human rights training courses which does include some sessions on non-

discrimination. Again, this is not sufficiently targeted at the enforcement of hate speech provisions.

**Recommendation 15:** Hate speech training should be a core part of the training curriculum for all current and prospective judges, prosecutors and investigators, in order to ensure that they understand the legislation, its importance and the impact of hate speech on victims and society more generally. The same approach should be adopted by the Police Academy.

### 3. Collection of data and statistics

Paragraph 10 f of GPR15 recommends that states monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these. Under para 10 c, statistics are required to ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs. These recommendations underpin the importance of collecting data and statistics on the use of hate speech provisions.

In most of the interviews we conducted, country experts were unable to give us a clear idea of how many successful prosecutions for hate speech there were in their countries. Without clear statistics, it is not possible to fulfil these GPR recommendations. There were exceptions to this. In Germany, Denmark and the UK where statistics are regularly collected by the police and also by prosecuting authorities, it is much easier to gain an understanding of the effectiveness of hate speech provisions, and this can provide an understanding of how the law is implemented and where there may be problems.

**Recommendation 16:** set up a nation-wide disaggregated data collection system to ensure that an appropriate evaluation and monitoring of the offences can be undertaken.

### 4. Underreporting

A number of country experts highlighted the problem of underreporting. This was based on anecdotal evidence as there was an absence of official statistics to help understand either the scale of the problem and/or the number of prosecutions. However, the belief of many NGOs was that victims of hate speech were simply not reporting to the authorities. It is clear that hate speech laws need to be advertised clearly, and other agencies, such as NGOs can be crucial to improving reporting rates. This can occur both in terms of these agencies being a first port of call for victims, but also that these agencies can themselves report cases to the police. As already mentioned above, this is particularly important with hate speech when often there is no identifiable victim. Another way to encourage reporting is to allow victims to report online. This is something that is already possible in Denmark and the UK and is an option that is currently being pursued by France.

**Recommendation 17:** Consider ways of improving the reporting of hate speech offences through collaboration with NGOs, and also consider online option.

## 5. Additional measures

Beyond the recommendations regarding criminal, civil and administrative measures, GPR No. 15, points out that legislative frameworks alone are insufficient to comprehensively address hate speech. Additional measures against the use of hate speech should comprise efforts that involve:

- a) ensuring that hate speech laws are implemented scrupulously and at all levels;
- b) identifying and removing the conditions in society that are conducive to hate speech, including through raising public awareness, education and counter speech;
- c) protecting and providing support to those who are targeted by hate speech, including through legal advice, counselling and the provision of effective redress mechanisms
- d) promoting self-regulation and taking regulatory action;

A number of country experts pointed to an array of non-legislative measures adopted to raise greater awareness of hate speech. To take just one example, in the Republic of Moldova, a number of online campaigns have been organised this year to tackle online hate speech. These campaigns have focussed on explaining what hate speech is, information about affected groups as well as outlining how victims can report hate crime.

**Recommendation 18:** Consider non-legislative measures such as awareness raising campaigns to help tackle online hate speech.

## 6. Conclusion

This report has highlighted a number of areas where Armenian law can be strengthened in its approach to hate speech. In many cases, existing legislation can be amended to make it more compliant with international obligations, and to bring it closer in line with existing practice in other jurisdictions. In other cases, Armenian law will need more extensive reform in order to ensure it creates an effective legislative framework for combating hate speech.



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# Appendix

This appendix includes the hate speech legislation from the countries studied and which are mentioned in this report.

## 1. International norms

### European Convention of Human Rights

#### Article 10 - Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### Article 17

Prohibition of abuse of rights Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

### International Covenant on Civil and Political Rights

#### **Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

### **Article 20**

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

## ECRI General Policy Recommendation N°15 on Combating Hate Speech

Available at the following link: <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>

## International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

### Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

...

## EU Framework Decision 2008/913/JHA

### Article 1 Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
  - (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

## 2. National norms

### Armenia

#### Constitution of Armenia

##### Article 29 Prohibition of Discrimination

Discrimination based on sex, race, skin colour, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances shall be prohibited.

##### Article 42. Freedom of Expression of Opinion

1. Everyone shall have the right to freely express his or her opinion. This right shall include freedom to hold own opinion, as well as to seek, receive and disseminate information and ideas through any media, without the interference of state or local self-government bodies and regardless of state frontiers.
2. The freedom of the press, radio, television and other means of information shall be guaranteed. The State shall guarantee the activities of independent public television and radio offering diversity of informational, educational, cultural and entertainment programmes.
3. Freedom of expression of opinion may be restricted only by law, for the purpose of state security, protecting public order, health and morals or the honour and good reputation of others and other basic rights and freedoms thereof

##### Article 77. Prohibition of Abuse of Basic Rights and Freedoms

The use of basic rights and freedoms for the purpose of violent overthrow of the constitutional order, incitement of national, racial or religious hatred or propaganda of violence or war shall be prohibited

#### Criminal Code

##### Article 226. Inciting national, racial or religious hatred.

1. Actions aimed at the incitement of national, racial or religious hatred, at racial superiority or humiliation of national dignity, are punished with a fine in the amount of 200 to 500 minimal salaries, or with imprisonment for the term of 2-4 years.
2. The actions envisaged in part 1 of this Article committed:
  - 1) publicly or by mass media,
  - 2) with violence or threat of violence;
  - 3) by abuse of official position;
  - 3) by an organized group,

## Article 226.2. Public calls for violence, publicly justifying or advocating violence

1. Public calls for violence against a person or a group of persons based on sex, race, color, ethnic or social origin, genetic characteristics, language, religion, ideology, political or other views, affiliation to national minority, property status, origin, disability, age or other personal or social ground, publicly justifying or advocating such violence, in the absence of elements of crimes under the Articles 225 part 4 (Active disobedience to the legal requirements of the representative of authorities during mass disorder, or calls for violence against people or for mass disorder), 226 (Inciting national, racial or religious enmity), 226.1 (Public calls for terrorism, financing of terrorism and international terrorism, publicly justifying or advocating the commission of these crimes), 301 (Public calls to seize the power, violate the territorial integrity or to violently overthrow the constitutional order), 385 (Public calls for aggressive war), 397.1 (denying, mitigating, approving or justifying genocide and other crimes against peace and human security), are punished with a fine in the amount of 50 to 150 times minimal salaries (50.000-150.000), or with detention for up to 2 months or with imprisonment for up to 1 year.
2. The actions envisaged in part 1 of this Article committed:
  - 1) by a group of persons with a prior consent or by an organized group,
  - 2) by abuse of official position,are punished with a fine in the amount of 150 to 350 times minimal salaries (150.000-350.000), or with detention for the term of 2-3 months or with imprisonment for the term of 1-3 years with or without deprivation of the right to hold certain positions or to engage in certain activities for the term of 1-3 years.

## Article 397<sup>1</sup>. Negation, mitigation, approval or justification of Genocide and other crimes against peace and human security

Negating, mitigating, approving or justifying genocide and other crimes against peace and human security envisaged by other articles of this chapter by the means of distributing materials through the computer system or otherwise making it available to the public aimed at incitement hatred, discrimination, or violence against a person or group of persons on the grounds of racial, skin color, national or ethnic origin or religious belonging, is punishable by a fine in the amount of 100 to 300 minimal salaries, or by imprisonment of up to 4 years.

## Draft Criminal Code

### **ARTICLE 198. Discrimination**

1. Discrimination – a differential treatment, which is degrading the person's honor and dignity or the rights and freedoms or by which the person gets advantages, absent of any objective grounds or reasonable explanation, on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion, outlook, political or other opinions, being a national minority, property situation, birth, health, disability, age or other personal or social circumstances shall be punished with a fine for maximum twenty times of minimal salary, or

public works for maximum eighty hours, or limitation of freedom for a term of maximum two years.

2. Discrimination that has been exercised by the use of authority or official powers or influence conditioned thereof shall be punished with a fine from twenty to fifty times of minimal salary, or public works from eighty to one hundred and fifty hours, or deprivation of the right to occupy certain posts or exercise certain activity` for a term of maximum five years, or limitation of freedom for a term of maximum three years, or short-term imprisonment for a term of maximum two months, or imprisonment for a term of maximum two years.

#### **ARTICLE 314 Instigation of National, Ethnic, Racial, Political, Ideological or Religious Hostility, Hatred or Intolerance**

1. An act aimed at the instigation of national, ethnic, racial, political, ideological or religious hostility, hatred or intolerance, as well as hatred, intolerance and animosity towards another social group

shall be punished with a fine from twenty to thirty times of minimal salary, or public works from one hundred to two hundred hours, or limitation of freedom for a term of maximum two years, or imprisonment for a term of maximum three years.

2. Any crime established in Part 1 of this Article, which was committed by:

- 1) Use of mass communication means or publicly displayed works;
- 2) Use of authority or official powers or influence conditioned thereof, or
- 4) By a group of people with a prior agreement

shall be punished with imprisonment from three to six years.

#### **ARTICLE 315 Public calls of violence, publicly justifying or advocating violence**

Public calls for violence or publicly justifying or advocating calls of violence against a person or a group of person on the ground of sex, race, color of skin, ethnic or social origin, genetic features, language, religion, views, political or other views, national minority, property status or origin, disability, age, or by other personal or social circumstance, if elements of articles 313(2), 314, 290, 404, 138, 139 and 152 are missing, is subject to liability by ten times of minimum salary, public works for up to 100 hours or by imprisonment for 1 year.

The same crime committed by prior agreement by a group of people or by use of official power or status, is liable to fine in the amount of 30-40 times of minimum salary, or public work for 100 to 150 hours, or limitation of personal freedom of 2 years or detention for 2 months, or imprisonment for up one year

#### **Law on Electronic Communications**

##### **Article 12. Suspension or revocation of licenses and permissions**

...

2....The regulator shall have authority to suspend the license or request the court to revoke the license if:

- 1) ...
- 2) The suspension or the revocation is necessary for the national security or for the public interest.

Article 51. Improper use of services and infrastructures

The operator or the service provider who intentionally allows that its network or services be used by any person to cheat others or for purpose of use of violence, malice, threat or blackmail is subject to a fine envisaged under article 63 of this law which shall not exceed 5 mln drams

## Law on Audiovisual Media

Article 9 Prohibition of abuse of audiovisual programs

1. It is prohibited to use the audiovisual programs:

- 1) *for instigation of national, racial and religious hostility or for spread of conflicts,*
- 2) *to campaign a war,*
- 3) *to spread calls that are prohibited under the Criminal Code of Armenia,*
- 4)
- 5) *with purpose of broadcasting programs involving or glorifying worship of violence and cruelty*
- 6) ...

## Denmark

### Danish Penal Code

§ 266 b (1) Any person "who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.  
(2) In determining the punishment it shall be considered a particularly aggravating circumstance if the conduct is of a propagandistic nature.

## France

### French Penal Code

#### Article 23

- Amended by [Law n ° 2004-575 of June 21, 2004 - art. 2 JORF June 22, 2004](#)

Those who, either by speeches, cries or threats uttered in public places or meetings, or by writings, prints, drawings, engravings, paintings, emblems, images or any other, will be punished as accomplices of an action qualified as a crime or misdemeanor. support for writing, speech or image sold or distributed, offered for sale or exhibited in public places or meetings, either through placards or posters exposed to the public, or by any means of communication to the public. public by electronic means, will have directly provoked the author or the authors to commit the said action, if the provocation has been followed.

This provision will also be applicable when the provocation has been followed only by an attempted crime provided for in article 2 of the penal code.

## **Article 24**

- **Modified by [LAW n ° 2012-954 of August 6, 2012 - art. 4](#)**

Those who, by one of the means set out in the previous article, will have directly provoked, in the event that this provocation has not been followed by, shall be punished with five years' imprisonment and a fine of 45,000 euros. to commit one of the following offenses:

1 ° Willful attacks on life, willful attacks on the integrity of the person and sexual assault, defined by Book II of the Penal Code;

2 ° Thefts, extortion and willful destruction, degradation and damage to people, defined by book III of the penal code.

Those who, by the same means, will have directly provoked to one of the crimes and misdemeanors affecting the fundamental interests of the nation provided for in Title I of Book IV of the Penal Code, will be punished with the same penalties.

Those who, by one of the means set out in article 23, have defended the crimes referred to in the first paragraph, war crimes, crimes against humanity or crimes and misdemeanors shall be punished with the same penalty. collaboration with the enemy.

Those who, by the same means, will have directly provoked the acts of terrorism provided for in Title II of Book IV of the Penal Code, or who have made an apology for them, will be punished by the penalties provided for in paragraph 1.

All seditious shouts or chants uttered in public places or meetings will be punished with the fine provided for 5th class contraventions.



Those who, by one of the means set out in article 23, will have provoked discrimination, hatred or violence against a person or a group of persons by reason of their origin or of their belonging or not belonging to an ethnic group, a nation, a race or a specific religion, will be punished with one year of imprisonment and a fine of 45,000 euros or one of these two penalties only .

Those who, by these same means, have provoked hatred or violence towards a person or a group of persons by reason of their sex, their sexual orientation or identity or their handicap or will have caused, with regard to the same people, the discrimination provided for by [articles 225-2](#) and [432-7](#) of the penal code.

In the event of a conviction for one of the facts provided for in the two preceding paragraphs, the court may also order:

1 ° Except when the responsibility of the offender is held on the basis of article 42 and the first paragraph of article 43 of this law or the first three paragraphs of [article 93-3](#) of Law n ° 82-652 of July 29, 1982 on audiovisual communication, the deprivation of the rights listed in 2 ° and 3 ° of [article 131-26](#) of the penal code for a period of five years at most;

2 ° The display or dissemination of the decision pronounced under the conditions provided for by [article 131-35](#) of the penal code.

## Germany

### German Criminal Code

#### **Section 130**

##### **Incitement of masses**

(1) Whoever, in a manner which is suitable for causing a disturbance of the public peace,

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or
2. violates the human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population

incurs a penalty of imprisonment for a term of between three months and five years.

## (2) Whoever

1. disseminates material (section 11 (3)) or makes it available to the public, or offers, supplies or makes available to a person under 18 years of age material (section 11 (3)) which

a) incites hatred against one of the groups referred to in subsection (1) no. 1, sections of the population or individuals on account of their belonging to one of the groups referred to in subsection (1) no. 1, or sections of the population,

b) calls for violent or arbitrary measures against one of the persons or bodies of persons referred to in letter (a) or

c) attacks the human dignity of one of the persons or bodies of persons referred to in letter (a) by insulting, maliciously maligning or defaming them,

2. makes content referred to in no. 1 (a) to (c) available to a person under 18 years of age or to the public through broadcasting or telemedia services or

3. produces, purchases, supplies, stocks, offers, advertises or undertakes to import or export material (section 11 (3)) of such content referred to in no. 1 (a) to (c) in order to use it or parts obtained from it within the meaning of no. 1 or 2 or to facilitate such use by another

incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(3) Whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of Crimes against International Law in a manner which is suitable for causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(4) Whoever publicly or in a meeting disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(5) Subsection (2) no. 1 and no. 3 also applies to material (section 11 (3)) of such content referred to in subsections (3) and (4). Whoever makes content referred to in subsections (3) and (4) available to a person under 18 years of age or available to the public through broadcasting or telemedia services incurs the same penalty specified in subsection (2) no. 2.

(6) In the cases under subsection (2) nos. 1 and 2, also in conjunction with subsection (5), the attempt is punishable.

(7) In the cases under subsection (2), also in conjunction with subsection (5), and in the cases under subsections (3) and (4), section 86 (3) applies accordingly.

Network Enforcement Act (Netzdurchsetzungsgesetz, NetzDG)

**Long Title:** Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken

The Bundestag has adopted the following Act:

**Article 1 Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act)**

**Section 1 Scope**

(1) This Act shall apply to telemedia service providers which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public (social networks). Platforms offering journalistic or editorial content, the responsibility for which lies with the service provider itself, shall not constitute social networks within the meaning of this Act. The same shall apply to platforms which are designed to enable individual communication or the dissemination of specific content.

(2) The provider of a social network shall be exempt from the obligations stipulated in sections 2 and 3 if the social network has fewer than two million registered users in the Federal Republic of Germany.

(3) Unlawful content shall be content within the meaning of subsection (1) which fulfils the requirements of the offences described in sections 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in connection with 184d, 185 to 187, 241 or 269 of the Criminal Code and which is not justified.

**Section 2 Reporting obligation**

(1) Providers of social networks which receive more than 100 complaints per calendar year about unlawful content shall be obliged to produce half-yearly German-language reports on the handling of complaints about unlawful content on their platforms, covering the points enumerated in subsection (2), and shall be obliged to publish these reports in the Federal Gazette and on their own website no later than one month after the half-year concerned has ended. The reports published on their own website shall be easily recognisable, directly accessible and permanently available.

(2) The reports shall cover at least the following points:

1. general observations outlining the efforts undertaken by the provider of the social network to eliminate criminally punishable activity on the platform,
2. description of the mechanisms for submitting complaints about unlawful content and the criteria applied in deciding whether to delete or block unlawful content,
3. number of incoming complaints about unlawful content in the reporting period, broken down according to whether the complaints were submitted by complaints bodies or by users, and according to the reason for the complaint,
4. organisation, personnel resources, specialist and linguistic expertise in the units responsible for processing complaints, as well as training and support of the persons responsible for processing complaints,
5. membership of industry associations with an indication as to whether these industry associations have a complaints service,

6. number of complaints for which an external body was consulted in preparation for making the decision,
7. number of complaints in the reporting period that resulted in the deletion or blocking of the content at issue, broken down according to whether the complaints were submitted by complaints bodies or by users, according to the reason for the complaint, according to whether the case fell under section 3 subsection (2) number (3) letter (a), and if so, whether the complaint was forwarded to the user, and whether the matter was referred to a recognised self-regulation institution pursuant to section 3 subsection (2) number (3) letter (b),
8. time between complaints being received by the social network and the unlawful content being deleted or blocked, broken down according to whether the complaints were submitted by complaints bodies or by users, according to the reason for the complaint, and into the periods “within 24 hours”/“within 48 hours”/“within a week”/“at some later point”,
9. measures to inform the person who submitted the complaint, and the user for whom the content at issue was saved, about the decision on the complaint.

### Section 3 **Handling of complaints about unlawful content**

(1) The provider of a social network shall maintain an effective and transparent procedure for handling complaints about unlawful content in accordance with subsections (2) and (3). The provider shall supply users with an easily recognisable, directly accessible and permanently available procedure for submitting complaints about unlawful content.

(2) The procedure shall ensure that the provider of the social network:

1. takes immediate note of the complaint and checks whether the content reported in the complaint is unlawful and subject to removal or whether access to the content must be blocked,
2. removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint; this shall not apply if the social network has reached agreement with the competent law enforcement authority on a longer period for deleting or blocking any manifestly unlawful content,
3. removes or blocks access to all unlawful content immediately, this generally being within 7 days of receiving the complaint; the 7-day time limit may be exceeded if
  - a) the decision regarding the unlawfulness of the content is dependent on the falsity of a factual allegation or is clearly dependent on other factual circumstances; in such cases, the social network can give the user an opportunity to respond to the complaint before the decision is rendered;
  - b) the social network refers the decision regarding unlawfulness to a recognised self-regulation institution pursuant to subsections (6) to (8) within 7 days of receiving the complaint and agrees to accept the decision of that institution,
4. in the case of removal, retains the content as evidence and stores it for this purpose within the scope of Directives 2000/31/EC and 2010/13/EU for a period of ten weeks,
5. immediately notifies the person submitting the complaint and the user about any decision, while also providing them with reasons for its decision,

(3) The procedure shall ensure that each complaint, along with the measure taken to redress the situation, is documented within the scope of Directives 2000/31/EC and 2010/13/EU.

(4) The handling of complaints shall be monitored via monthly checks by the social network's management. Any organisational deficiencies in dealing with incoming complaints shall be immediately rectified. The social network's management shall offer the persons tasked with the processing of complaints training courses and support programmes delivered in the German language on a regular basis, this being no less than once every six months.

(5) The procedures in accordance with subsection (1) may be monitored by an agency tasked to do so by the administrative authority named in section 4.

(6) An institution shall be recognised as a self-regulation institution within the meaning of this Act if

1. the independence and expertise of its analysts are ensured,
2. appropriate facilities are in place and prompt analysis within a 7-day period is guaranteed,
3. it has rules of procedure which regulate the scope and structure of the analysis, stipulate the submission requirements of the affiliated social networks, and provide for the possibility to review decisions,
4. a complaints service has been set up, and
5. the institution is funded by several social network providers or establishments, guaranteeing that the appropriate facilities are in place. In addition, the institution must remain open to the admission of further providers, of social networks in particular.

(7) Decisions leading to the recognition of self-regulation institutions shall be rendered by the administrative authority named in section 4.

(8) Recognition can be wholly or partly withdrawn or tied to supplementary requirements if any of the conditions for recognition are subsequently no longer met.

(9) The administrative authority named in section 4 can also stipulate that the possibility for a social network provider to refer decisions in accordance with subsection (2) number (3) letter (b) is barred for a specified period if there is a reasonable expectation that the provider in question will not fulfil the obligations under subsection (2) number (3) by affiliating itself with the system of self-regulation.

#### **Section 4 Provisions on regulatory fines**

(1) A regulatory offence shall be deemed to have been committed by any person who, intentionally or negligently,

1. in contravention of section 2(1) sentence 1, fails to produce a report, to produce it correctly, to produce it completely or to produce it in due time, or fails to publish it, to publish it correctly, to publish it completely, to publish it in the prescribed form or to publish it in due time,
2. in contravention of section 3(1) sentence 1, fails to provide, to provide correctly or to provide completely, a procedure mentioned therein for dealing with complaints submitted by complaints bodies or by users whose place of residence or seat is located in the Federal Republic of Germany,
3. in contravention of section 3(1) sentence 2, fails to supply a procedure mentioned therein or to supply it correctly,
4. in contravention of section 3(4) sentence 1, fails to monitor the handling of complaints or to monitor it correctly,

5. in contravention of section 3(4) sentence 2, fails to rectify an organisational deficiency or to rectify it in due time,
6. in contravention of section 3(4) sentence 3, fails to offer training or support or to offer them in due time, or
7. in contravention of section 5, fails to name a person authorised to receive service in the Federal Republic of Germany or fails to name a person in the Federal Republic of Germany authorised to receive information requests from German law enforcement authorities, or
8. in contravention of section 5 subsection (2), second sentence, fails to respond to requests for information while acting as the person authorised to receive service.

(2) In cases under subsection (1) numbers 7 and 8, the regulatory offence may be sanctioned with a regulatory fine of up to five hundred thousand euros, and in other cases under subsection (1) with a regulatory fine of up to five million euros. Section 30(2) sentence 3 of the Act on Regulatory Offences shall apply.

(3) The regulatory offence may be sanctioned even if it is not committed in the Federal Republic of Germany.

(4) The administrative authority within the meaning of section 36(1) number 1 of the Act on Regulatory Offences shall be the Federal Office of Justice. The Federal Ministry of Justice and Consumer Protection, in agreement with the Federal Ministry of the Interior, the Federal Ministry for Economic Affairs and Energy and the Federal Ministry of Transport and Digital Infrastructure, shall issue general administrative principles on the exercise of discretion by the regulatory fine authority in initiating regulatory fine proceedings and in calculating the fine.

(5) If the administrative authority wishes to issue a decision relying on the fact that content which has not been removed or blocked is unlawful within the meaning of section 1(3), it shall first obtain a judicial decision establishing such unlawfulness. The court with jurisdiction over the matter shall be the court that rules on the objection to the regulatory fine order. The application for a preliminary ruling shall be submitted to the court together with the social network's statement. The application can be ruled upon without an oral hearing. The decision shall not be contestable and shall be binding on the administrative authority.

## **Section 5 Person authorised to receive service in the Federal Republic of Germany**

(1) Providers of social networks shall immediately name a person authorised to receive service in the Federal Republic of Germany and shall draw attention to this fact on their platform in an easily recognisable and directly accessible manner. It shall be possible to effect service on this person in procedures pursuant to section 4 or in judicial proceedings before German courts on account of the dissemination of unlawful content. The same shall also apply to the service of documents initiating such proceedings.

(2) To enable the receipt of requests for information from German law enforcement authorities, a person in the Federal Republic of Germany shall be named who is authorised to receive such requests. The person so authorised shall be obliged to respond to such requests for information pursuant to the first sentence within 48 hours of receipt. In cases where the requested information is not exhaustively provided, reasons for this shall be included in the response.

## Section 6 Transitional provisions

(1) The first issue of the report pursuant to section 2 shall be due in respect of the first half-year of 2018.

(2) The procedures pursuant to section 3 shall be introduced within three months of the entry into force of this Act. If the social network provider does not fulfil the requirements of section 1 until some later date, the procedures pursuant to section 3 shall be introduced within three months of this date.

### Article 2 Amendment of the Telemedia Act

The Telemedia Act of 26 February 2007 (Federal Law Gazette I p. 179), last amended by Article 1 of the Act of 21 July 2016 (Federal Law Gazette I p. 1766) shall be amended as follows:

1. The following subsections (3) to (5) shall be added to section 14:

“(3) Furthermore, the service provider may in individual cases disclose information about subscriber data within its possession, insofar as this is necessary for the enforcement of civil law claims arising from the violation of absolutely protected rights by unlawful content as defined in section 1 subsection (3) of the Network Enforcement Act.

(4) Before information is disclosed in accordance with subsection (3), a court order on the permissibility of such disclosure shall be obtained; this shall be requested by the injured party. Jurisdiction for issuing any such order shall lie with the regional court, regardless of the value of the claim. Territorial jurisdiction shall lie with the court in whose district the injured party has his domicile, his seat or a branch office. The decision shall be rendered by the civil division. The provisions of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction shall apply *mutatis mutandis* to the proceedings. The costs of the court order shall be borne by the injured party. The remedy of immediate complaint is admissible in respect of the regional court decision.

(5) The service provider shall be involved as an interested party in proceedings pursuant to subsection (4). It may inform the user that proceedings have been instigated.”

2. In section 15 subsection (5), the fourth sentence shall be worded as follows:

“Section 14 subsections (2) to (5) shall apply *mutatis mutandis*.”

### Article 3 Entry Into force

This Act shall enter into force on 1 October 2017.

## Republic of Moldova

### Moldovan Criminal Code

### Article 346. Deliberate Actions Aimed at Inciting National, Racial, or Religious Hostility or Discord

Deliberate actions, public calls including through mass-media either printed or electronic aimed at inciting national, racial, or religious hostility or discord, the humiliation of national honor and dignity, direct or indirect limitations of rights, or that offer direct or indirect advantages to citizens based on their national, racial, or religious affiliations shall be punished by a fine of up to 250 conventional units or by community service for 180 to 240 hours or by imprisonment for up to 3 years.

## **Moldovan Contravention Code**

### Article 69

(1) Insults made in public or words or acts that humiliate a person's honor or dignity shall be sanctioned by a fine of 20 to 60 conventional units or by unpaid community work of up to 60 hours. (2) Insults made in the media shall be sanctioned by a fine of 50 to 100 conventional units or by unpaid community work of up to 60 hours.

## Montenegro

### Montenegrin Criminal Code

## **Provoking Ethnic, Racial and Religious Hatred Article**

### **370**

(1) Whoever publicly incites to violence or hatred towards a group or a member of a group defined by virtue of race, skin colour, religion, origin, nationality or ethnic affiliation shall be punished by a prison sentence for a term from six months to five years.

(2) The penalty set out in paragraph 1 of this Article shall also be imposed on whomever publicly approves, denies the existence, or significantly reduces the gravity of the crimes of genocide, crimes against humanity and war crimes committed against a group or a member of group by virtue of their race, skin colour, religion, origin, nationality or ethnic affiliation in a manner which can lead to violence or cause hatred against a group of persons or a member of such group, where such criminal offences have been determined by a final judgment of a court in Montenegro or of an international criminal tribunal.

(3) Where the offence set forth in paragraphs 1 and 2 of this Article was committed by coercion, ill-treatment, endangering of safety, exposure to mockery of national, ethnic or religious symbols, damaging property of another person, desecrating monuments, memorials or tombs, the perpetrator shall be punished by a prison sentence for a term from one to eight years.

(4) Whoever commits the offence set forth in paragraphs 1 to 3 of this Article by abuse of office or where such offences result in riots, violence or other severe consequences to the joint life of nations, national minorities or ethnic groups living in Montenegro, shall be punished for the offence set forth in paragraph 1 of this Article by a prison sentence for a term from one to eight



years and for the offence set forth in paragraphs 2 and 3 by a prison sentence for a term from two to ten years.

## Law on Public Order and Peace

### Article 19

Insulting on the grounds of national, racial or religious origin, ethnic origin or other personal characteristic, on a place of speech, inscription, sign or otherwise

## Law on the Prohibition of Discrimination 2014

### Art. 9a

Makes it an offence to use:

“any form of expression of ideas, statements, information and opinions that spreads, stirs up, encourages or justifies discrimination, hatred or violence against a person or group of persons because of their personal characteristics, xenophobia, racial hatred, anti-semitism or other forms of hatred based on intolerance, including intolerance expressed in form of nationalism, discrimination and hostility against minorities”.

## Romania

### Romanian Penal Code

#### **Article 369 Incitement to hatred or discrimination**

inciting the public, by any means, hatred or discrimination against a class of persons shall be punished with imprisonment from six months to three years or a fine.

### Romanian Anti-Discrimination Legislation

#### **Anti-discrimination law - Government Ordinance (GO) n. 137/2000 (but is administrative)**

Art. 2, par. (1) According to the present ordinance, discrimination is understood as any differentiation, exclusion, restriction or preference, based on race, nationality, ethnic origin, language, religion, social category, opinions, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV/AIDS status, membership to a disadvantaged category, as well as any other criterion which has the purpose or effect the restriction, removal of the

recognition, use or exercise, on equal terms, of human rights and fundamental freedoms or rights recognized by law, in the political, economic, social and cultural domains, or any other domains of public life.

Art.2, par. (5) Any behaviour on the basis of race, nationality, ethnic origin, language, religion, social category, opinions, gender, sexual orientation, membership to a disadvantaged category, age, disability, refugee or asylum seeker status or any other criterion which leads to the creation of an intimidating, hostile, degrading or offensive environment, represents harassment and is administratively sanctioned

Art. 15 It represents an administrative offence, according to the present ordinance, if the law does not fall under the incidence of criminal law, any behaviour manifested in public, having the characteristics of nationalchauvinistic propaganda, of instigation to racial or national hatred, or that behaviour which has the purpose or targets the violation of dignity or creates an intimidating, hostile, degrading, humiliating or offensive atmosphere, directed against a person, a group of persons or community, based on their affiliation to a certain race, nationality, ethnicity, religion, social category or disadvantaged category, or opinions, sex or sexual orientation.

## Serbia

### Serbian Criminal Code

#### **Instigating National, Racial and Religious Hatred and Intolerance**

##### **Article 317**

(1) Whoever instigates or exacerbates national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia, shall be punished by imprisonment of six months to five years.

(2) If the offence specified in paragraph 1 of this Article is committed by coercion, maltreatment, compromising security, exposure to derision of national, ethnic or religious symbols, damage to other persons, goods, desecration of monuments, memorials or graves, the offender shall be punished by imprisonment of one to eight years.

(3) Whoever commits the offence specified in paragraphs 1 and 2 of this Article by abuse of position or authority, or if these offences result in riots, violence or other grave consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia, shall be punished for the offence specified in paragraph 1 of this Article by imprisonment of one to eight years, and for the offence specified in paragraph 2 of this Article by imprisonment of two to ten years.

#### **Racial and Other Discrimination**

## **Article 387**

(1) Whoever on grounds of race, colour, religion, nationality, ethnic origin or other personal characteristic violates fundamental human rights and freedoms guaranteed by universally accepted rules of international law and international treaties ratified by Serbia, shall be punished by imprisonment of six months to five years.

(2) The penalty specified in paragraph 1 of this Article shall be imposed on whoever persecutes organisations or individuals due to their commitment for equality of people.

(3) Whoever propagates ideas of superiority of one race over another or propagates racial intolerance or instigates racial discrimination, shall be punished by imprisonment of three months to three years. (4) Whoever disseminates/propagates or otherwise makes publicly available texts, images, or any other representation of ideas or theories that support or incite hatred, discrimination, or violence against any person or a group based on their race, skin colour, religious affiliation, nationality, ethnic origin, or some other personal characteristic shall be punished with imprisonment of three months to three years. (5) Whoever publically threatens to commit a criminal offence punishable with imprisonment of more than four years against a person or a group because of their race, skin colour, religion, nationality, ethnic origin, or some other personal characteristic 138 shall be punished with imprisonment of three months to three years.

## **Violent Behaviour at Sporting Events or Public Gatherings**

### **Article 344a**

(1) Whoever physically assaults or engages in an affray with participants in a sporting event or public gathering; perpetrates violence or causes damage to property of substantial value while coming to or leaving a sporting event or a public gathering; brings into a sports facility or throws onto sports grounds, into a group of spectators or people attending a public gathering objects, fireworks, or other explosive, flammable or harmful substances which might cause bodily injuries or endanger the health of those partaking in the sporting event or public 121 gathering; enters sports grounds or the section of the grandstand intended for supporters of the opposing team without authorization and precipitates violence, damages the sporting facility, its equipment, devices, and installations; behaves in such a way or shouts slogans or carry placards at a sporting event or public gathering as to provoke national, racial, religious, or some other type of hatred or intolerance based on some discriminatory reason which results in violence or a physical altercation with people partaking in the event or gathering shall be punished with imprisonment of six months to five years and fined.

## **Prohibition of Discrimination Act**

### **The forms of discrimination**

#### **Article 5**

The forms of discrimination are direct and indirect discrimination, as well as violation of the principle of equal rights and obligations, calling to account, associating for the purpose of exercising discrimination, hate speech and disturbing and humiliating treatment.

## **Hate speech**

### **Article 11**

It is forbidden to express ideas, information and opinions inciting discrimination, hatred or violence against an individual or a group of persons on account of his/her or their personal characteristics, in public organs and other publications, in gatherings and places accessible to the public, by writing out and displaying messages or symbols, and in other ways.

## Spain

### Spanish Criminal Code

## Ukraine

### Ukrainian Criminal Code

Article 161. Violation of citizens' equality based on their race, nationality or religious preferences

1. Wilful actions inciting national, racial or religious enmity and hatred, humiliation of national honour and dignity, or the insult of citizens' feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, colour of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, -

shall be punishable by a fine of 200 to 500 tax-free minimum incomes, or restraint of liberty for a term up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

2. The same actions accompanied with violence, deception or threats, and also committed by an official, -

shall be punishable by a fine of 500 to 1000 tax-free minimum incomes, or restraint of liberty for a term of two to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

3. Any such actions as provided for by paragraph 1 or 2 of this Article, if committed by an organized group of persons, or where they caused grave consequences, -

shall be punishable by imprisonment for a term of five to eight years.

(Article 161 in version of Law No 1707-VI (1707-17) of 05.11.2009)

### **Article 300. Importation, making or distribution of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination**

1. Importation into Ukraine for sale or distribution purposes, or making, storage, transportation or other movement for the same purposes, or sale or distribution of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and also compelling others to participate in creation of such works, -

shall be punishable by a fine up to 150 tax-free minimum incomes, or arrest for a term up to six months, or restraint of liberty for a term up to three years, with the forfeiture of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and means of their making and distribution.

2. The same actions in regard to motion pictures and video films that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and also selling works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, to minors or disseminating such works among minors, -

shall be punishable by a fine of 100 to 300 tax-free minimum incomes, or restraint of liberty for a term up to five years, with the forfeiture of motion pictures and video films that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and means of their making and showing.

3. Any such acts as provided for by paragraph 1 or 2 of this Article, if repeated, or committed by a group of persons upon their prior conspiracy, and also compelling minors to participate in the creation of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, -

shall be punishable by imprisonment of three to five years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and forfeiture of works, motion pictures and video films that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and means of their making and showing.

(Article 300 in version of Law No 1707-VI (1707-17) of 05.11.2009)

## **United Kingdom**

Public Order Act, 1986

### **Section 18**

Use of words or behaviour or display of written material.

(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

## **Section 19**

Publishing or distributing written material.

(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(3) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.