



Addressing
hate speech
in the media:
the role of regulatory
authorities and
the judiciary

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**The Legal Framework for Addressing
“Hate Speech” in Europe**

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The Legal Framework for Addressing “Hate Speech” in Europe

- 1. What is “hate speech”?**
- 2. What are the limits of freedom of expression under the ECHR?**
- 3. How and why do these standards matter for regulatory authorities and judiciaries?**
- 4. Key Recommendations**
- 5. Sources**

1. Defining “hate speech”

1. No international definition of “hate speech”

- Article 19, International Covenant on Civil and Political, 1966 (freedom of opinion and expression)
- Article 20, International Covenant on Civil and Political Rights, 1966
 - “Any **advocacy** of national, racial or religious **hatred** that **constitutes incitement to discrimination, hostility or violence** shall be prohibited by law”
- Article 4, International Convention on the Elimination of Racial Discrimination, 1965
 - States “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”
- Key soft law instruments:
 - General Comment No 34, Human Rights Committee on Article 19, ICCPR (2012)
 - Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (2012)

2. Council of Europe (non-binding) definitions exist

- Committee of Ministers of the Council of Europe Recommendation No R 97(20) 30.10.1997 on “hate speech”
 - “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”
- European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No 15 on “hate speech” 8.12.2016
 - “the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation”

3. EU approach to “hate speech”

- Council framework decision on “combating certain forms and expressions of racism and xenophobia by means of criminal law” 2008/913/JHA, 28.11.2008
 - Intentional conduct:
 - “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”
 - “publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court...” and in “Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945 ...”
 - “Member States may choose to punish only conduct which is *either* carried out in a manner likely to disturb public order or which is threatening, abusive or insulting” (emphasis added)
 - Basis for European Commission, Code of Conduct on Countering Illegal Hate Speech 31.05.2016: voluntary commitment by Facebook, YouTube, Twitter, Microsoft, and Instagram to counter spread of hate speech online

2. The limits of freedom of expression

1. Key treaty provision on freedom of expression (and its limits)

- Article 10, European Convention on Human Rights, 1950

“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.”

2. General approach of European Court of Human Rights to “hate speech”

- ECtHR uses term “hate speech” throughout its case-law
 - Yet no precise meaning of and no specific test/criteria for it (problematic)
 - Instead, a case-by-case approach applied
 - ECtHR jurisprudence reflects freedom of expression and equality (and human dignity) as essential for democratic and pluralistic society envisaged by ECHR
- “**freedom of expression...is applicable** not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also **to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society.**”
Handyside v UK (1976)
 - “...[T]olerance and respect for the **equal dignity of all human beings constitute foundations of a democratic, pluralistic society.** That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent **all forms of expression which spread, incite, promote or justify hatred based on intolerance** ..., provided that any .. ‘restrictions’... imposed are proportionate to the legitimate aim pursued.” Erbakan v Turkey (2006)

3. Application of “abuse of rights clause”

- Article 17, ECHR

“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 right and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

- “Guillotine provision”
- Prevents consistent substantive engagement and analysis of speech restrictions under Article 10 ECHR (three part test)

- Under Article 17 ECHR, ECtHR has found inadmissible and no violation of Article 10 ECHR in relation to following cases involving criminal convictions:
 - of a BNP (extreme right wing party) member for **anti-Muslim hate speech** displaying poster depicting Twin Towers in flame with the words “Islam out of Britain – Protect the British People” in window of his flat Norwood v UK (2004)
 - of school teacher for **incitement to racial hatred** for article in school newspaper Seurot v France (2004)
 - of owner and editor of newspaper for **incitement to racial hatred (anti-Semitic)** Pavel Ivanov v Russia (2007)
 - of author for **Holocaust denial** (incitement of hatred against Jews) Garaudy v France (2003)
 - of comedian for **anti-Semitic insults through performance** M’Bala M’Bala v France (2015)
 - for expressions of **support of totalitarian doctrines** or calling for restoration of totalitarian regime, **Nazi ideology** or activities Communist Party of Germany v Federal Republic of Germany (1957), BH, MW, HP, GK v Austria (1989), Honsik v Austria (1995), Nachtmann v Austria (1998), Schimanek v Austria (2000)
- But inconsistency reliance on Article 17 ECHR
- See following convictions which were assessed under Article 10 ECHR and violations of provision were found
 - of individual for displaying striped Arpád flag with controversial historical connotations near a demonstration against racism and hatred Fáber v Hungary (2012)
 - of authors who had publicly defending war crimes and crimes of collaboration in a daily newspaper (decision partly based on fact 40 years had passed) Lehideux v Isorni v France (1998)

4. Key cases on relationship between freedom of expression and “hate speech” under Article 10 ECHR

- **Media exposure of racism is not “hate speech”:** Jersild v Denmark (1994)
- Facts: Applicant journalist Jens Olaf Jersild convicted for aiding and abetting dissemination of racist statements in televised interview of extreme right wing group “Greenjackets”
- ECtHR judgment:
 - Violation of Article 10 ECHR as conviction was not necessary in a democratic society
 - Considerations:
 - **Journalistic autonomy:** Not for ECtHR/national courts to substitute their own views for those of the press as to techniques of reporting
 - **Form:** “Potential impact of the medium”
 - **Context:**
 - Applicant taken knew in advance that racist statements were likely to be made, had encouraged them, had edited the item, without his involvement they would not have been disseminated or punished
 - Introduction invited viewer to see programme in context of Danish debate on racism, item broadcast was serious Danish news programme, intended for well-informed audience; film showed “racist statements were part of a generally anti-social attitude of the Greenjackets”
 - **Intention:**
 - Purpose was not racist
 - Reporting sought to “**expose, analyse and explain**” this group

- **Defending Sharia is not “hate speech”**: Günduz v Turkey (2003)
- Facts: Applicant, leader of Islamic sect, convicted for incitement to religious hatred for comments during a live studio debate, condemning democratic principles, calling for introduction of Sharia law;
- ECtHR judgment:
 - Violation of Article 10 ECHR
 - Considerations:
 - **Context**: animated public discussion which sought to present unorthodox views, topic of (in)compatibility of democracy and Islam were of public debate and general interest
 - Significantly, “mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as ‘hate speech’”

- **Homophobic “hate speech” (ie beyond race and religion): Vejdeland and others v Sweden (2012)**
- Facts: Applicants convicted for distributing approx. 100 leaflets which were offensive to gay people, including in or on pupils’ lockers (homosexuality as “deviant sexual proclivity, “morally destructive”, responsible for HIV/AIDS); they claimed their purpose was to start a debate
- ECtHR judgment:
 - No violation of Article 10 ECHR
 - Statements had constituted “serious and prejudicial statements”, even if they had not been a direct call for hateful acts
 - Emphasis that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour
 - Interference with freedom of expression was reasonably regarded as necessary in a democratic society for the protection of the rights of others

- **News portals may be liable for online “hate speech” by third-parties**

- **MTE and Index v Hungary (2016)**

- Facts: Applicants, self-regulatory body of Internet content providers and Internet news portal, complained about obligation imposed upon them to moderate contents of comments made by readers on their websites, including offensive and vulgar ones following opinion criticizing misleading practices of two real estate sites
- ECtHR judgment:
 - Violation of Article 10 ECHR
 - While Internet news portals were not publishers, but had to assume certain responsibilities
 - But Hungarian authorities had not carried out proper balancing between competing rights - right to freedom of expression and right to respect for commercial reputation
 - Contrast with Delfi

- **Delfi v Estonia (2015)**

- ECtHR upheld liability of commercially-run Internet portal for offensive comments of readers because case involved pivotal elements of “hate speech” and incitement to violence (ie unlawful speech)

3. Importance of standards on “hate speech”

1. As a matter of law

- States required to give international human rights treaties, including ECHR, domestic legal effect
- ECtHR judgments are binding on states (including its courts and regulatory authorities)

2. As substantive policy guidance

- Reflection upon, interpretation and adjudication of ECHR protection on freedom of expression through ECtHR jurisprudence can help to assess approaches of state (including regulatory authorities and courts) and non-state actors

3. Actual work of regulatory authorities and judiciaries

- A pressing contemporary issue across societies
- Issue of “hate speech” covered by media laws, criminal codes, codes of conduct/ethics
- Some regulatory authorities have power to issue sanctions for breaches of rules, others do not
- Variability of regulatory authorities’ complaints mechanisms (scope, accessibility, outcomes/sanctions)
- Courts deciding cases on criminal incitement and “hate speech”, with a lack of understanding of relevant human rights standards

4. Key recommendations

1. Independence and trust

- Regulatory authorities must be independent from government in law, fact and through financial arrangements, is publicly accountable, and operates transparently
- Courts must be independent and have trust

2. Judicial training

- Judiciary (as well as law enforcement agencies and other key state actors) should be provided with training on standards on “hate speech”, particularly on issues concerning online “hate speech”

3. Regulatory authorities

- Regulators should develop, publish and apply clear policy guidelines on “hate speech”, promote an easily accessible complaint procedure, promote awareness of their role

4. Comprehensive toolbox of responses to “hate speech” (general considerations)

- Legal measures
 - Criminal sanctions
 - Civil and administrative remedies
 - Comprehensive non-discrimination law
- Non-legal measures
 - Public policy framework promoting pluralism and diversity in the media, including through adoption of voluntary codes, self-regulation
 - Policies, practices nurturing social consciousness of public officials especially police, security forces, members of judiciary
 - Ethical guidelines for political parties regarding conduct of their representatives

5. Useful sources

- European Court of Human Rights Factsheet on hate speech, June 2018
- ARTICLE 19, *Responding to 'hate speech': Comparative overview of six EU countries* (2018)
- Council of Europe, Media Regulatory Authorities and Hate Speech, June 2017
- Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (2012)

Thank you!

Hvala vam!