

Hate speech, freedom of expression and non-discrimination



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Outline

I. Defining hate speech

- A. What is hate speech?
- B. Freedom of expression and hate speech
- C. Non-discrimination and hate speech

II. Legal framework

- A. Non-discrimination law
- B. General human rights treaties

III. Protecting against hate speech

- A. Hate speech in criminal, administrative and civil law
- B. Effective remedies

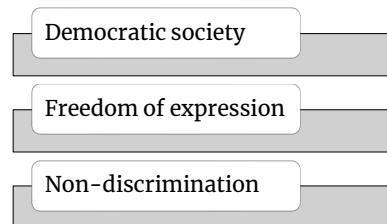
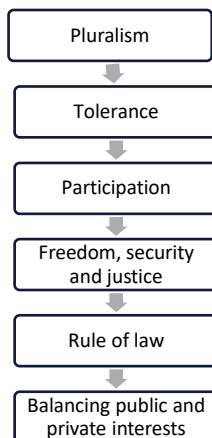
What is “hate speech”?

- Broad concept encompassing speech act (oral communication, written, pamphlets, books, poems, symbols, cartoons, signs)
- “...rejects core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society”
[UN Committee on the Elimination of Racial Discrimination \(CERD\) \(General Recommendation No. 35\)](#)
- “... 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”
[European Committee against Racism and Intolerance \(ECRI\) \(General Policy Recommendation No. 15\)](#)
- “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance ...”
[Committee of Ministers of the Council of Europe Recommendation No R 97\(20\) 30.10.1997](#)



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Freedom of expression and hate speech in a democratic society



“... tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of 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 ...”

ECHR, *Erbakan v. Turkey* (2006)



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Non-discrimination and hate speech

Anti-discrimination law

- United Nations human rights treaties
- Article 14 and Protocol No. 12 ECHR
- EU Charter of Fundamental Rights and EU equal treatment directives 2000/43/EC, 2004/113/EC, 2006/54/EC and 2010/41/EU
- EU Victims directive

Obligation to protect against discrimination and protected characteristics

- Antisemitism
- Anti-muslim
- Religious minorities and other beliefs
- Antigypsyism
- Anti-Black racism
- Migrants, refugees and asylum seekers
- Sex and gender
- Sexual orientation



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Legal framework and criminalisation of hate speech

- International Convention on the Elimination of All Forms of Racial Discrimination, Article 4
- EU, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law
- Commission proposal to include hate speech in EU crimes Article 83(1) TFEU
- CoE, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (2003) (see reservation by Romania concerning racist and xenophobic motivated insult)

See also Recommendation CM/Rec(2022)161 Council of Europe Committee of Ministers to member States on combating hate speech



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Protecting against hate speech

Offences

- *Public incitement to violence or hatred* directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin
- *Incitement to violence or hatred by public dissemination or distribution* of tracts, pictures or other material
- *Publicly condoning, denying or grossly trivialising crimes of genocide*, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group



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Standards in applying criminal legislation on hate speech

- “Criminalisation should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.” [CERD General Recommendation 35, para. 12](#)
- Factors to consider :
 - i) the content and form of speech
 - ii) the economic, social and political climate
 - iii) the position or status of the speaker
 - iv) the reach of the speech
 - v) the objectives of the speech (protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions)
- Incitement: “the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question”



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Hate speech criminal conviction and human rights

- **Abuse of freedom of expression:** speech which negates the fundamental values of the ECHR = guillotine effect (exceptional use)
→ “... a qualified Holocaust denial showing disdain to its victims and running counter to established historical facts” ECHR, *Pastörs v. Germany* (2019)
- **As a restriction to freedom of expression,** necessary in the interests of national security, public safety, the prevention of disorder or crime, the protection of health or morals and *the protection of the rights and freedoms of others* (Article 10 ECHR)
→ Leaflets “Stand up against the Islamification of Belgium”, “Stop the sham integration policy” and “Send non-European job-seekers home”
“comments liable to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public” ECHR, *Féret v. Belgium* (2009)



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Online hate speech

- Liability of Internet news portals of failure to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties, ECHR [GC] *Delfi AS v. Estonia* (2015)
- Focus on the content of comments and the nature of the portal (commercial, profit, economic interests)
- Criminal conviction for posting racist video and audio files involving neo-Nazis, racial epithets, people of apparently Caucasian descent and calls to extremism on a popular online social network, ECHR *Kilin v Russia* (2021)
- EU Code of conduct on countering illegal hate speech online



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Hate speech, protection of private life and non-discrimination

Civil and administrative law cases

- Negative stereotyping of a group of certain level = harmful, offensive but lower threshold (not a crime)
- Harm: group's sense of identity and the feelings of self-worth and self-confidence of members of the group
- Factors to take into account:
 - (a) the characteristics of the group (e.g. size, degree of homogeneity, particular vulnerability or history of stigmatisation, and position *vis-à-vis* society as a whole)
 - (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype)
 - (c) the form and context in which the statements were made, their reach (which may depend on where and how they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity.

[ECHR Budinova and Chaprazov v. Bulgaria \(2021\)](#); [Behar and Gutman v. Bulgaria \(2021\)](#)



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Protecting against hate speech

Effective legal system

A. Legislation and legal remedies

- Civil law remedies, general tort law, anti-discrimination law and administrative offences law
- Legislation regarding online hate speech
- Criminal law as *ultima ratio* (direct or indirect verbal assaults and physical threats)
- Regulation to provide internet users for the possibility to report online hate speech
- Legislation to remove online hate speech

B. Bias motivation and positive obligations

- All reasonable steps to unmask any bias motive and to establish whether or not hatred or prejudice may have also played a role – follow bias indicators, examine the content, address the motive
- Violation of obligation to investigate if reluctance or prejudicial attitude and failure to acknowledge the motive
- Take into account discriminatory motivation behind the hateful statements when balancing the right to private life and freedom of expression



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Victims support and protection from secondary victimization

- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime
- Appropriate information, support and protection to participate in criminal proceedings.
- Online hate speech and special support
- Legal aid and support
- Psychological support



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