REGULATING HATE SPEECH IN EUROPE: PROMOTING TOLERANCE IN DIVERSE SOCIETIES

Ljubinka Andonovska, Ph.D. Candidate
Faculty of Law "Iustinianus Primus", Skopje, North Macedonia

Abstract
A long-standing global economic downturn, supplemented by a massive migration movement towards Europe and the promulgation of online media, has brought to the surface a growing concern for the old issue of hate speech. It is the purpose of this paper to analyze the efforts of the European Union to regulate the dissemination of hate speech as regards the right to freedom of expression and the right to equality, with a focus on regulating traditional and new media, including social media, which are seen as enablers of hate speech. In addition to mere regulation, the prevention of incitement to violence or hatred, and of public provocation to commit a terrorist offence, are fields where the European Commission has been experimenting with soft measures in partnership with the key players from the private sector.

Key words
EU, hate speech, fundamental human rights

Introduction

It is the aim of this paper to outline the legal underpinnings in international and EU human rights law related to the right to freedom of expression and the right to equality, and to analyze how these two fundamental human rights are reconciled. In an attempt to compare and contrast the EU policy on hate speech with international law, the dichotomy with the legal standards prevailing in the United States of America is discussed. Furthermore, as per the guidelines contained in the Rabat Plan of Action, prepared under the auspices of the High Commissioner for Human Rights, this paper

will point out initiatives other than criminal litigation, aimed at nurturing social consciousness, tolerance and public discussion. It is not the purpose of this paper to analyze each individual type or category of hate speech and the regulation, i.e. response, which is considered most proper. Additionally, individual state regulations and specific transposition of international law will not be analyzed. It is also outside of the scope of this paper to analyze specific instances of case law and relevant court jurisprudence.

The right to freedom of expression

The right to freedom of expression is regarded as a fundamental, inherent and inalienable human right, protected both by various international conventions and by national constitutions. The right of everyone to freely disseminate ideas, factual information, as well as value judgments, complemented by the so-called "right of the public to know", i.e. people's right to receive information disseminated by others, is regarded as a basic tenant of a democratic society. It is widely accepted and theoretically undisputed that a confrontation of opinions and argumentation leads to the advancement of society and to social progress. As per the United Nations Human Rights Committee, the treaty body of independent experts monitoring the States' compliance with the International Covenant on Civil and Political Rights (ICCPR), freedom of opinion and freedom of expression "constitute the foundation stone for every free and democratic society" (Human Rights Committee, 2011). Moreover, freedom of expression is regarded as a necessary condition for enabling transparency and accountability, which are, in turn, essential for the promotion and protection of human rights.

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR) (United Nations, 1948). Although the UDHR is not strictly binding on the States, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948 (Zamfir, 2018). Article 19 of the ICCPR gives the right to freedom of expression legal force. The UN Human Rights Committee explicitely states that this right extends to the expression and receipt of communications of every form of idea and opinion capable of transmission to others, and even encompasses expression that may be regarded as deeply offensive (Human Rights Committee, 2011). Moreover, under the protection of the ICCPR fall all forms of expression (spoken, written and sign language; non-verbal expression, such as images and art) and the means

of their dissemination (including books, newspapers, pamphlets, posters, banners, dress, etc.; i.e. all forms of audio-visual, as well as electronic and internet-based modes of expression).

Therefore, it can be concluded that the scope of the right to freedom of expression in international law is broad. It requires the States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. However, the ICCPR provides for some possible limitations of the right to freedom of expression, which render it fundamental but not absolute – "carries with it special duties and responsibilities" (ICCPR, 1966). Under Article 19(3) of the ICCPR, a State may limit the right to freedom of expression in exceptional circumstances, provided that the limitation is (1) stipulated by law which provides clear conduct guidelines for individuals, and (2) "necessary" for the respect of the rights and reputations of others, and for the protection of national security, public order, public health or morals (Human Rights Committee, 2011). Further qualifying the right to free speech, articles 20(1) and (2) of the ICCPR explicitely outlaw any propaganda for war, as well as any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

At the European level, the right to freedom of expression is explicitely protected by Article 10 of the European Convention on Human Rights, in similar terms as in the ICCPR (Council of Europe, 1950). However, article 10(2) broadens the scope of permissible limitations and constraints, specifically outlining the interests of national security, territorial integrity, public safety, the prevention of disorder or crime, the prevention of health or morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence, and the maintenance of the authority and impartiality of the judiciary, as being superior to the right to freedom of expression.

The EU has included freedom of expression and information in the Charter of Fundamental Rights of the European Union (Article 11).

The right to equality and non-discrimination

The Universal Declaration of Human Rights provides for the rights to equality and non-discrimination in Articles 1, 2 and 7. Article 2 explicitely states that "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" shall not be grounds

for discrimination. Article 7 states that "all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". These provisions have been translated into legal obligations in Articles 2(1) and 26 of the ICCPR, which poses an obligation to the signatories to guarantee equality in the enjoyment of human rights. At the European level, the European Convention on Human Rights prohibits discrimination in Article 14 and in Protocol No. 12.

In sum, the international human rights law requires the States to jointly protect and promote the rights to freedom of expression and the right to equality: one right cannot be prioritized over the other, and any tensions between them must be resolved within the boundaries of the international human rights law (Article 19, 2018).

Freedom of expression online

At the international level, the United Nations Human Rights Council has acknowledged that the "same rights that people have offline must also be protected online", including that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as offline communications (HRC, 2012).

Even though as per international human rights law it is the obligation of governments to protect and advance human rights, this responsibility extends to private business enterprises, as well (Guiding Principles on Business and Human Rights, 2011). However, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) has explicitely underlined that any censorship measures should never be delegated to private entities, recognizing that "private intermediaries are typically ill-equipped to make determinations of content illegality" (Report of the Special Rapporteur on FOE, 2011). The Special Rapporteur believes that no one should be held liable for content on the Internet of which they are not the author. The report explicitely hints to the danger of potential self-censorship by private companies, stating that

> *"holding intermediaries liable for the content disseminated or created by their users severely undermines the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and over-broad private censorship, often without transparency and the due process of the law".*

In a Joint Declaration (2017), the United Nations, the OSCE, the Organization of American States, and the African Commission on Human and People's Rights, emphasize that

> *"intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that".*

The four organizations express concerns related to the measures taken by intermediaries to limit access to content through untransparent content-removal processes, which fail to respect minimum due process standards. They call for clear, predetermined policies by intermediaries which intend to restrict third-party content, based on objectively justifiable criteria.

The European Union, in the e-Commerce Directive (2000), has adopted a version of a so-called "notice-and-takedown" regime, whereby it protects intermediaries from liability, provided that they take down unlawful material promptly when they are made aware of its existence. The Directive prohibits Member States from imposing general obligations on intermediaries to monitor activity on their services. This approach has been sharply criticized for its lack of clear legal basis and basic procedural fairness (Article 19, 2018). The Special Rapporteur on FOE recommended that any demands, requests, and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19(3) of the ICCPR.

Hate Speech

There is no universally aceepted, standard and uniform definition of the term 'hate speech' in international law, which challenges the uniformity of hate speech laws and makes it impossible to homogenize the practice of prohibiting such speech (Cohen, 2014). The European Court of Human Rights (2013) itself proclaims that "[t]here is no universally accepted definition of the expression 'hate speech'". The Council of Europe also acknowledges that "no universally accepted definition of the term 'hate speech' exists, despite its frequent usage" (Weber, 2009). Moreover, the attempts by many international entities, such as the Fundamental Rights Agency of the European

Union, for example, and governments to define hate speech authoritatively have resulted in contradictory and incoherent notions (Cohen, 2014).

The UN's International Committee on the Elimination of Racial Discrimination (2013) defines 'hate speech' as "a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society".

The Committee of Ministers within the Council of Europe, within its Reccommendation No. R97(20) on Hate Speech, has proposed that the term shall be understood

> *"as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism 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".*

The preamble to the aforemention document references the Declaration of the heads of state and government of the Member States of the Council of Europe, adopted in Vienna on 9 October 1993, which highlighted grave concern about the

> *"resurgence of racism, xenophobia and anti-Semitism and the development of a climate of intolerance, and contained an undertaking to combat all ideologies, policies and practices constituting an incitement to racial hatred, violence and discrimination, as well as any action or language likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds".*

The recommendation, also, acknowledges "the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression so as to avoid the risk of undermining democracy on the grounds of defending it".

Under the auspices of the Office of the United Nations High Commissioner for Human Rights (OHCHR), with the aim of reconciling the relationship between freedom of expression and incitement to hatred, a series of expert workshops were organized to analyze "legislation, jurisprudence, and national policies with regard to the prohibition of national, racial or religious hatred as reflected in international human rights law" (Rabat Plan of Action, 2013). The OHCHR has repeatedly stated that balancing freedom of expres-

sion and the prohibition of incitement to hatred "is no simple task". In October 2012, at a wrap-up expert meeting in Rabat, Morocco, the Rabat Plan of Action was adopted, as further guidance "in the real world when weighing freedom of expression against the prohibition of incitement to hatred".

In the Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, three principles were laid out:

1. The precise definition of hate speech as expression intended to incite hatred is contextual, i.e. circumstances, such as local conditions, history, cultural and political tensions, must be taken into account for each individual case.
2. The sole purpose of any imposed restrictions must be to protect individuals and communities belonging to certain groups which hold specific beliefs or opinions from hostility, discrimination or violence. However, the right to freedom of expression entails the possibility to freely scrutinize, debate and criticize the belief systems, the opinions and the institutions themselves.
3. In view of sanctions, a typology of hate speech scaled according to its severety is proposed: hate speech that must be prohibited (tailored to preventing the exceptional and irreversible harms the speaker intends and is able to incite), hate speech that may be prohibited (restrict expression in limited and exceptional circumstances, complying with the three-part test under Article 19(3) of the ICCPR), and lawful hate speech, i.e. hate speech that does not meet the threshold of severity at which restrictions on expression are justified and thus must be protected.

The Rabat Plan of Action proposes a six-part threshold test to assess the severity of expressions to be considered as criminal offences:

1. **Context**: Placing the speech act within the social, political and economic conditions prevailing at the time the speech was delivered and disseminated;
2. **Speaker**: Taking into account the speaker's position or status in the society, specifically in view of the audience to whom the speech is directed;
3. **Intent**: Negligence and recklessness are not sufficient for an act to be an offence, as Article 20 of the ICPPR underlines "advocacy" and "incitement";

4. **Content and form**: A content analysis of the delivered speech, including an analysis of its resonance with the audience, is necessary in order to determine incitement;
5. **Extent of the speech act**: Factors such as the frequency, the quantity and the extent of the communications, as well as the means of dissemination must be taken into account;
6. **Likelihood**, including imminence: The action advocated through the speech does not have to actually occur in order for the speech to amount to a crime. Nevertheless, some degree of risk of harm as a direct consequence of the incitement must be identified.

The European Convention on Human Rights does not in itself contain any obligation on the States to prohibit any form of expression. However, international courts have reinforced the understanding that limitations on speech are affirmatively allowed, if not required, under international agreements. The European Commission on Human Rights has interpreted the ECHR in particular not just to allow restrictions but also, like the ICCPR and ICERD, affirmatively to require them (Farrior, 1966).

Within the frame of the European Union, Framework Decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law" (2008) of the European Council requires that the States sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties", i.e. to criminalize hate speech. The obligations entailed in this Decision are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and do not comply with the requirements of Article 19(3) of the ICCPR. The European Commission has even signaled that the Framework Decision has not been enforced vigorously enough and that it is considering legal proceedings against Member States that offer too strong protection for freedom of expression (Commissioner Jourova, 2015). The fact that Holocaust denial was considered a criminal offense in 13 Member States in 2015 speaks to the fact that the Framework Decision has not been transposed uniformly across Member States.

The European Court of Human Rights has unequivocally established that certain forms of expression must be restricted in order to uphold the spirit of the European Convention as a whole (Article 19, 2018). On the other hand, the limits and risks of solely reverting to criminal law have come to the surface: the risk that trials end up giving even more visibility to hate; the danger that authorities label legitimate dissent as 'hate speech'; the pos-

sibility that broad definitions of hate speech leave too much discretion to the judiciary and end up limiting freedom of expression (Resource Centre On Media Freedom In Europe, 2018). Related to this, the European Court has strictly responded to cases where states had imposed criminal sanctions for harmful speech, underlining a breach of the proportionality principle (European Court, 1992). The European Court advocates against applying criminal sanctions as the default legal response to hate speech.

Importantly, the Rabat Plan of Action recognizes that while legislation and legal response is important, this is only one tool of many available to tackle hate speech. The OHCHR explicitely advocates for initiatives "from various sectors of society" encompassing measures that nurture social consciousness, tolerance and public discussion, in order to advance a culture of peace, tolerance and mutual respect. It is the collective responsibility of all – the government, the media and the people – to ensure that acts of incitement to hatred are "spoken out against and acted upon with the appropriate measures, in accordance with international human rights law".

In this direction, to prevent and counter the spread of illegal hate speech online, in May 2016, the European Commission agreed with Facebook, Microsoft, Twitter and YouTube a "Code of conduct on countering illegal hate speech online". Instagram, Google+, Snapchat and Dailymotion joined in 2018, and Jeuxvideo.com joined in January 2019. The Code of Conduct constitutes a non-legally binding commitment to remove "illegal hate speech", defined on the basis of the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, within 24 hours (Article 19, 2018). The technology companies have agreed to review notifications which have led to hoards of employees engaged in content review (as many as 15,000 in Facebook alone) (Directorate-General for Justice and Consumers, 2019). Additionally, the IT companies have vowed to educate and raise awareness with their users about the types of content not permitted under their rules and community guidelines.

The lack of a uniform definition of 'hate speech', as well as the fact that the Framework Decision has not been consistently transposed across Member States, hinders the proper implementation of the Code of Conduct and poses numerous practical dilemmas. Despite the platforms clearly crossing state borders, the Document calls for reviewing removal requests on the basis of national laws. The question arises whether the content uploaded in Sweden, for example, where it might be deemed illegal on grounds of it being racist and offensive should only be banned in Sweden, or also in

Denmark, where it could freely be disseminated. In the case of Holocaust denial expression, for example, it is unclear whether this content should only be banned if uploaded in one of the 13 countries which have outlawed this type of speech, or it should be prohibited from dissemination in these 13 countries, but freely disseminated in the rest of the states. This uncertainty raises concerns about intermediaries implementing preventive censorship, and thus undermining the right to freedom of expression.

Critics of the Code of Conduct emphasize that the European Commission has essentially privatized internet censorship without the related accountability, publicity and legal safeguards that arise from proper legal procedures (Article 19, 2018). It is claimed that this could hurt the credibility of the European Union in its global campaign for freedom of speech.

Proper evaluation of the effectiveness of measures aimed at curbing hate speech has been again hindered by the lack of a shared definition of hate speech, which makes data gathering at the European level scarce or uneven at best. There is yet to appear a systematized, scientific study linking measures to combat hate speech to trends in the occurrence of hate speech or hate crimes. However, despite the lack of accurate data, there seems to be consensus that online hate is on the rise in terms of both occurrence and range of employed strategies (Resource Centre on Media Freedom in Europe, 2018). For instance, the 2015 report by the European Commission against Racism and Intolerance, a body of the Council of Europe, cited the rise of hate speech online among the year's main trends.

On 1 March 2018, the Commission issued a Recommendation on measures to effectively tackle illegal content online. The Commission has stated that its work has been motivated by concerns that the removal of illegal content online continues to be insufficiently effective, i.e. tackled without the necessary determination and resolve (European Commission, 2019). In the Recommendation, the Commission attempts to clarify which types of processes platforms should be put in place in order to speed up the detection and removal of illegal content, and "thus curb the spread of such material, while also offering a set of robust safeguards". The Commission underlines that online platforms need to assume an even greater responsibility in content governance.

Discussion

After World War II, the western Europeans, who were later joined by the eastern Europeans, built one of the strongest human rights systems in the world. It is the aftermath of World War II which is the context in which current European law on free expression was shaped. The European free-speech doctrine is based on the idea that free speech is important, but not absolute, and must be balanced against other important values. The European Convention on Human Rights was rooted in the idea of the social contract between the citizens and the state – the sacrifice of some of people's liberties in order to preserve others, for the sake of the common good. The European Convention gave rise to national laws on hate speech, intending to establish clear definitions of acceptable public discourse in order to prevent harm to racial, religious and sexual minorities.

To the contrary, the United States took a different track, with an underlying theory that bad ideas will eventually fade out in a well-functioning marketplace of ideas. In the United States, speech can almost never be restricted on the basis of viewpoint – the American free speech doctrine protects even ideas that cause deep offense or are false by consensus. Having in mind that international law was in its infancy at the time the U.S. Constitution was promulgated in 1787, international law is not embedded in American constitutional law (Sadler, 2006). There, equality, human dignity and privacy must be advanced by means that do not limit the freedom of speech. The restrictions of freedom of speech advanced by international human rights norms and the law of most European countries are prohibited under the First Amendment to the U.S. Constitution. The U.S. Supreme Court has established precedent, and then reaffirmed it numerous times, that the "bedrock principle" of the First Amendment is the protection of all ideas, no matter how harmful the Court may consider them to be and no matter how disagreeable or offensive society finds them to be (Ibid.). For the Court, ultimately, "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship" (Reno Vs. ACLU, 1997).

In a critique of the European approach as unprincipled or ineffective, it is often said that the definitions of hate speech reflect the majority opinion and national experience, rather than some neutral principles. Identifying speech which is considered insulting for the purposes of criminal prosecution is an extremely subjective undertaking. Ronald Dworkin (1995), a

prominent fundamental rights scholar, for example, embraces the belief that, "we must not endorse the principle that opinion may be banned when those in power are persuaded that it is false and that some group would be deeply and understandably wounded by its publication".

It can be said that the European position, on the other hand, is rooted in first-hand experiences that the free market of ideas can disastrously fail. Some commentators indicate that the United States arguably undermines international efforts to curb the promotion of hurtful speech (Webb, 2011).

A ban on bad speech as a substitute to open confrontation with it is harmful for society as a whole. It can be argued that the only effective counter to, for example, Holocaust denial, is knowledge – debate and education. The underlying premise of the "content-neutrality" principle in the First Amendment law, for example, is that all ideas, good and bad, must be able to compete in the marketplace of ideas, and that the remedy for bad speech is more speech, not enforced silence.

Conclusion

European regulations and courts take a values-based approach to speech, balancing principles such as dignity and equality with an individual's right of expression. When the two collide, recognized values take precedence over speech. Additionally, European governments assume the responsibility not only to avoid violating legal rights, but also to protect certain values from infringement. The European Commission has been attributing its resolute work towards regulating speech to concerns of growing occurrence of hate speech. However, there has still not been an authoritative review of the effectiveness of the measures taken to circumscribe free speech.

There is a need to specify the rules regulating hate speech online, having in mind the nature of the disseminating platforms, and special care needs to be taken with regards to preventing self-protective over-broad private censorship. Debate and education, i.e. open confrontation with bad ideas, ought to be the default course of action, and criminal penalties ought to be the last resort in cases of clear and imminent danger.

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