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**Words that Hurt (1): Normative and
Institutional Considerations in the
Regulation of Hate Speech in Europe.**

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WORDS THAT HURT (1): NORMATIVE AND INSTITUTIONAL CONSIDERATIONS IN THE REGULATION OF HATE SPEECH IN EUROPE

Europe is experiencing at present intense dilemmas in regulating hate speech and online harassment. Free speech exercise can be offensive and even contribute to a climate of prejudice and discrimination against minorities. Often, the media exacerbate the tendency by reporting negatively about minorities. The first working paper on this topic engages with the normative dimensions of the balance between the need to control and limit incitement to violence in reconciliation with the fundamental right to freedom of expression.

Three distinct aspects of hate speech are covered: the first relates to the role of freedom of expression as a tool of inclusiveness. With the limits of liberal tolerance being unclear, just like the definition of hate speech itself, legal actors and systems are torn between criminalising the speaker's motive alone or in conjunction with the effects of the speech. A survey of recent related European Court of Human Rights case-law demonstrates these ambiguities. The second aspect covered looks at the challenges of the regulation of the freedom of expression in the digital age, with emphasis of the online dimensions of the phenomenon from a legal perspective. The final aspect of the paper proposes an actor-based analysis of hate speech, as it emerges from the current regulatory frameworks applied. This section deals not only with the role of the State but also with that of equality bodies, political parties and private businesses in providing more efficient networks of protection of minorities from such violent expressions of hatred.

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1. Hate Speech v Free Speech

Europe is experiencing at present an intense dilemma in regulating hate speech and online harassment. Speech can be offensive and even contribute to a climate of prejudice and discrimination against minorities. Often, the media exacerbate the tendency by reporting negatively about minorities. They find themselves caught between a market-based approach that promotes their business interests and their public interest mission, which includes the promotion of values such as pluralism, participation and diversity.



The issue that emerges asks for ways to balance the need to control and limit incitement to violence, in reconciliation with the fundamental right to freedom of expression.² In other words, the question has shifted from whether there should be limits to freedom of expression to where these limits should be placed. From the Salman Rushdie controversy, to the Danish cartoons protests or the Charlie Hebdo events, it is becoming increasingly unclear where the line between the legitimate defence of freedom of speech needs to be drawn, as opposed to its misuse towards discrimination or populist agenda promotion.

Global and regional human rights instruments, such as Article 19 of the United Nations Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights or Article 10 of the European Convention of Human Rights and Fundamental Freedoms, address “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.”³ Underlying this disturbing trend is the perceived fear of the general population about the targeted groups, with emphasis on a discourse that claims that these particular groups refuse to accept ‘our values’. This begs of course the related question as to how one can go about limiting hate speech without encroaching on freedom of expression.

On a global scale, there is a basic distinction between two models regulating hate speech: one approach, currently prevailing in the US, advocates for the narrowest possible restrictions to the freedom of expression of individuals and the media, justifiable only when an imminent threat of violence arising from the speech in question can be foreseen and when there are no other reasonable means to prevent such violence. The other approach, influenced by the legacy of World War II, is directed at penalising speech, which might promote hatred. With the rise of populist and far-right parties in Europe, such concerns are becoming pressing.

In analytical terms, the right to freedom of expression, as an essential principle characterising a democratic society,⁴ can be unpacked in three distinct layers: a speaker’s right to express themselves, a listener’s right to be protected from harmful expressions and a third-party’s right not to allow hateful expressions in the public sphere (McGonagle, 2009, p. 9) . The right is also an integral part of an individual’s right to self-development (Barendt, 2005, p. 13), within what is labelled the ‘marketplace of ideas’, understood here as a place for the exchange of competing ideas and beliefs (Barendt, 2005, pp. 11-12). In this sense, expressions that are included in this



‘marketplace’ are susceptible of shaping public opinion on all types of issues occupying the public sphere. As such, the State has the duty to create a favourable environment for participation of all those wishing to be part of the public debate.⁵

By analogy, there is also differentiation between different categories of expression: political, artistic and commercial (McGonagle, 2009, p. 13). Political expression⁶ tends to enjoy a wider margin compared to commercial, on the basis of its function in society, yet there are no clear guidelines on how to treat expressions that may belong to more than one category.⁷

Given that the media serve as important fora for public dialogue, with their role enhanced by digital technologies, it becomes essential to consider how freedom of expression may be reconciled with the regulation of hate expressions in this area of public life. The value of media pluralism represents the guarantee for public debate, which undoubtedly can (and does) involve disagreement and confrontation. In the quest for balancing competing interests it becomes important to consider the majority-minority dimensions of the matter. In the words of the ECtHR:

“Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”⁸

In this context, the task of the State is to act as *guarantor* of pluralism⁹ with the aim to allow the dissemination of knowledge about the various groups present in a given society so as to ease social tensions. Council of Europe Recommendation (2007) 2 on media pluralism and diversity of media content sets two important principles in that respect: the need for States to ensure a sufficient variety of media outlets both public and private and also, the need to define and implement an active policy in that direction to ensure that this kind of variety becomes available to the public.

Equally, both Recommendations (97) 20¹⁰ and (97) 21¹¹ on hate speech and the role of media in promoting tolerance respectively highlight the contribution that media can make towards tolerance among different ethnic, cultural and religious groups. The latter text outlines possible avenues for reflection on the position of the media and suggests among others:

- Reporting factually and accurately on acts of racism and intolerance



- Avoiding derogatory stereotypical depiction of members of cultural, ethnic or religious communities in publications and programme services
- Depicting cultural, ethnic and religious communities in a balanced and objective manner and in a way which also reflects the perspectives of these communities
- Challenging the assumptions of intolerant remarks and how these correspond to the multi-ethnic, multicultural character of readers/viewers/listeners
- Considering the influence of the source of information on reporting¹²

On the policy and regulatory level and with an eye for guaranteeing *human dignity*¹³ for all, the main axes of intervention in Europe are thus the prevention and prohibition of hate speech in its various forms in tandem with the promotion of tolerance and inter-group dialogue. The examples of France, Germany and the United Kingdom are illustrative of how this tension is transposed in the national context: all mentioned countries are either discussing or have already proceeded with the regulation of social networks towards a requirement to measure, improve or block online hate speech and harassment, including “fake news” (Ingram, 2018).

The German case of the recently implemented *Enforcement on Social Networks Act*¹⁴ has been considered as pioneering in that respect: it requires social networks, such as Facebook, Twitter, Snapchat or YouTube, to remove specific kinds of content within 24 hours or otherwise face fines that could raise as high as 50 million euros. From the perspective of free speech, the line is at times difficult to draw.¹⁵ ECRI General Policy Recommendation No.15 on hate speech identifies hate speech as “the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons” covering protected characteristics such as race, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation, or other personal characteristics or status. The Recommendation stresses the proportional use of sanctions to avoid unnecessary restrictions to the freedom of expression. ECRI’s¹⁶ GP Recommendation No.6¹⁷ focuses more specifically on the dissemination of racist, xenophobic and anti-Semitic material via the Internet with emphasis on the impact that such expressions have on public discourse.

The contrast with the US is obvious where, by virtue of the First Amendment, even hateful speech is endowed with significant legislative protection. The balancing act between free



speech and social order is performed in different terms: The European system is oriented more towards the balancing between private and public interests while ensuring that equality and dignity are maintained for all yet within a context where democratic principles are upheld (Tulkens, 2012, p.1). In that light, the main question related to hate speech becomes not, what types of opinion are lawful but rather which type of speech is compatible with democracy (Tulkens, 2012, p.3).

On this point, the older ECtHR case of *Jersild v Denmark* illustrates how the media may struggle with reporting hate speech: the Danish television programme broadcasting extreme racist youth discourse was found liable for transmitting unlawful expression. The Strasbourg court found that the journalist's right to freedom of expression had been violated because the programme was made in the public interest to expose a problem and not to propagate hate speech.

2. Regulating Hate Speech and the Quest for Inclusiveness

Three main justifications have been put forward justifying hate speech regulation: first, hate speech laws prevent breaches of public order; second, they protect targeted groups in terms of their feelings but also safety; and third, they reflect what at any given time a society deems unacceptable (Buyse, 2014, p. 493). There is a real threat, nevertheless, in the overreliance on hate speech to silence opponents or in their use to 'chill' speech, with explicit repercussion for the free and open debate within democratic societies.¹⁸

A contrario, overprotecting speech carries a high social cost insofar as it not only causes significant harm to the dignity of minorities but it also damages, sometimes seriously, the public good of inclusiveness (Stevens, 2012). It is debatable whether and how hate speech laws foster racial and religious tolerance or non-discrimination (McChangama, 2010). On the other hand, and with the limits of liberal tolerance being unclear, just like the definition of hate speech itself – which varies from one context to the other – legal actors and systems are torn between criminalising the speaker's motive alone or in conjunction with the effects of the speech. The example of religious hate speech is illustrative in that respect: while in the European context Article 9 ECHR does not include the right not to be offended in one's religious feelings,¹⁹ expressions that are gratuitously offensive to others are not protected,²⁰ precisely because the purpose for such expressions is to cause offence.²¹



A more reflective reading of the post-2008 case law of the European Court for Human Rights (ECtHR) informs a more socio-legal reading of the phenomenon: in *Soulas and Others v. France*, regarding the conviction of two authors for a book inciting to violence against Muslim civilisation, the Court used the margin of appreciation to suggest that historic and socio-political context matters in the determination of hate speech. The aim pursued by the speaker or author, the content of the expression, the context in which the statements were disseminated, the status of the speaker in the society and the potential impact of the remarks are some of the most relevant factors to be assessed in determining whether speech should be limited.²² Additionally, the historical background and socio-political context of the country in question, as well as the level of distribution of the statement, affect the evaluation of the situation in each case, with emphasis often placed on the potentially tense political and social background.

In the *Leroy v. France* case, this time concerning a cartoon representing the attack on the World Trade Center with a caption reading “We have all dreamt of it ... Hamas did it”, the Court positioned itself on the issue of glorification of violence, moving a step further in its argumentation, and taking account of the harmful effects of the statement while endorsing a victimisation approach, finding no violation of Article 10 (Tulkens, 2012, p. 12). Speech can thus according to the ECtHR be restricted when the expression incites to hatred and violence is likely to follow imminently.²³

In *Féret v. Belgium* (2009), the Court, through the case of a member of parliament distributing leaflets outside parliament with racist and xenophobic content, during an election period, conceded that speech, which can provoke action, is in itself a form of action (Tulkens, 2012, p. 12-13), especially as there was recognition of an additional duty on politicians not to foster intolerance.²⁴

The social implications of hate speech are far from negligible: the effects of hate speech are not only felt on other equally important rights such as the right to equality or that to expression. They impact the levels of democratic discourse. The question thus becomes this: what should a democratic society do when some groups seek to use their freedom of expression to advocate the denial of equality, discrimination and exclusion of others (Boyle, 2001, p. 491)? Limiting speech may allow the proliferation of subjective readings of restrictive freedom of expression laws that create “martyrs” of those calling for hatred and discrimination. Even worse, when discriminatory statements are not found to justify conviction, their authors claim being “vindicated” (Amnesty International, 2012, p. 8). The deeper roots of advocating hatred remain



untouched in either case. In the words of the joint submission of UN Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression, on freedom of religion or belief, and on racism, racial discrimination, xenophobia and related intolerance:

“Hate speech is but a symptom, the external manifestation of something much more profound which is intolerance and bigotry. Therefore, legal responses, such as restrictions on freedom of expression alone, are far from sufficient to bring about real changes in mindsets, perceptions and discourse.”²⁵

3. Hate Speech and the Media in the Digital Age

We no longer live in times of *digital dualism*: the virtual world is today a reflection of the real world (Mahdawi, 2013). The Internet holds undeniably uncountable opportunities for multi-directional communicative activities.²⁶ When used to spread hate speech, it can become a dangerous instrument. State-funded media have an obligation under international law to uphold non-discrimination, including on grounds of race, nationality and religion, in their coverage. This duty is connected to the State’s duty to promote pluralism and diversity in society by fostering a media environment that represents society as a whole. In the case of private media, the same duty is usually regulated through codes of conduct, as an ethical consideration, although in some cases, national legislation may cover them in the context of the prohibition of hate speech. In broader terms, however, the media framework in any given country should be viewed in its actual political context, including for some cases, attempts by States to control media freedom (ARTICLE 19 Report, 2018, p. 28).

The complexity of the new digital regulatory environment on hate speech is due to the fact that Internet users that wish to propagate hate speech have the possibility to select jurisdictions by selecting Internet Service Providers (ISPs). Given that national laws vary in the degree to which they tolerate hate speech, this is a question of strategically choosing favourable jurisdictions (e.g. the US) in order to avoid or limit their exposure to legal liability. By analogy, websites blocked in one jurisdiction, can relocate to another jurisdiction using the same rationale (McGonagle, 2012, p. 27). Connected to this question is the issue of liability: as different actors are involved in the creation and dissemination of hateful speech, it is open to debate to what extent they are all equally liable for the content (McGonagle, 2012, p. 28). As crucial is the question of over-prosecuting hate speech in light of the risks that it would carry for the general level of freedom of expression in the public sphere.²⁷



New technologies in the field of human rights protection have acquired an essential role both for services of law enforcement as well as other actors involved in hate speech regulation. The ongoing struggle is to reconcile data privacy concerns with protection of human rights.

In 2016, Facebook, Microsoft, Twitter and YouTube subscribed together with the European Commission and EU Member States to a commitment to tackle illegal hate speech online. This commitment has taken the form of a code of conduct.²⁸ The code defines illegal hate speech as “all 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.”²⁹

The initiative signalled a clear willingness to expand the previously available criminal law sanctions introduced by States, complementing them with action taken by online intermediaries and social media platforms. The list of commitments undertaken by the IT companies is wide and includes, among others, the following duties:

- To put in place clear and effective processes to be notified of, review and eventually remove illegal hate speech content whenever needed
- To review the majority of such notifications within less than 24 hours
- To educate and raise awareness with their users about the types of speech/content not permitted
- To provide information on the procedures for submitting notices in collaboration with Member State authorities in an effort to improve communication between the two sets of actors
- To encourage the provision of notices and flagging up of content inciting to violence and hateful conduct by experts
- To provide regular training to their staff on current societal development with an eye for further improvements
- To intensify cooperation between IT companies and other social media platforms
- To identify and promote independent counter-narratives, ideas and initiatives that encourage critical thinking
- To deliver best practice training on countering hateful rhetoric and prejudice and increase the scale of outreach.



Following the agreement reached towards a Code of Conduct, there have been a number of monitoring cycles within the EU during which the cooperation partners have reviewed their activities.³⁰ The essence of the partnership between States and private actors suggests not only the urgency and breadth of the phenomenon of hate speech in Europe but it also invites reflection on the role and expectations from state authorities in the digital age.

At the same time, the major trends in online hate speech phenomena signal the emerging relevance of multi-ground discrimination within hatred phenomena: hate speech and incidents more broadly are grounded on more than one motive (e.g. race, religion, etc) (eMore Report, 2018, p. 7). Intersectional approaches to hate speech are thus becoming a necessity (eMore Report, 2018, pp. 9-10). At the same time, there is a shifting emphasis towards the study of the impact of hate speech (as opposed to its grounds only) in order to show how more disadvantage arises from the way society relates to particular individuals, rather than their inherent characteristics (eMore Report, at p. 7). Just as importantly, racism, xenophobia, discrimination against nationality, ethnicity and religious faith remain the main motives behind hate speech, with groups such as the Roma and the Sinti being consistently attacked, and anti-Semitism and Islamophobia expanding (eMore, Report, 2018, pp. 7-8).³¹ Interestingly, race and religion in many respects appear to often ‘merge’ when drawing the lines of inclusion and exclusion of individuals and groups.³² A further alarming trend concerns how ‘haters’ are challenging the line between what is legal and illegal in skilful ways: the language used is either trivialised or manipulated to express unacceptable ideas in ‘acceptable’ terms, avoiding censorship (eMore Report, 2018, p. 8).

Finally, the empirical realities of hate speech online indicate that anonymity in the digital environment facilitates the spreading of such expressions, usually within social networks and by anonymous sources. At the same time, this same anonymity also encourages reporting (eMore Report, 2018, p. 64).

4. An Actor-Based Analysis of Hate Speech

A multilateral approach to tackling hate speech involves a vast variety of actors that include law enforcement (prosecutors, judges, lawyers); the media; NGOs; schools and universities; national equality bodies; European institutions; research institutions; as well as national parliaments and ministries. The interactions among these actors ideally revolve around the following strategies of intervention (EQUINET, 2018):

- Continuous and long-term training of law enforcement authorities in order to promote a robust understanding of the legal framework on hate speech
- Interaction with and information of journalists and social media managers about the implications of their (in)-actions
- Awareness raising and advocacy with the help of NGOs for public use
- Empirical Research on the features of hate speech
- Involvement of equality bodies mentioned in the European Commission's Code of Conduct on countering illegal hate speech online, acting as 'trusted flaggers'
- Involvement of national parliaments and government ministries
- Enablement of educational institutions to address hate speech
- Engagement of political parties on hate speech
- Enhancement of legislation on hate speech to ensure uniform approaches (e.g. coverage of all grounds, introduction of multi-annual action plans) (EQUINET, 2018, p.3).³³

4.1 The Role of Equality Bodies in Combatting Hate Speech

National human rights institutions play a pivotal role in the monitoring and implementation of hate speech regulations. Within a number of European states, equality bodies either have an explicit mandate (e.g. the Ombudsman in Cyprus, the Commissioner for Protection of Equality in Serbia or the Institute for Equality between Women and Men in Belgium) in relation to hate speech or have interpreted their mandate as including hate speech. Their role is broad as it covers providing assistance to victims of hate speech, receiving complaints, carrying out investigations as well as issuing recommendations and guidance on the implementation aspects of a given legal framework.

In essence, these bodies function as an alternative route to challenging hate speech. This is because at the root of the work of equality bodies lies the strategic consideration of the need to address the roots of hate speech in connection to broader cultural phenomena that reject diversity and equality. By extension, the role of such bodies becomes the conceptualisation and dissemination of alternative narratives in order to combat hate speech (EQUINET, 2018, p. 11). Common strategies to do so involve media monitoring as a tool for casework, research work, public survey on diversity and attitudes to diversity (EQUINET, 2018, p. 17). Examples of good practices related to such approaches include for instance the recent report of the

Equality and Human Rights Commission in Britain that explores patterns and processes of hate crime, with emphasis on the explanations behind such crimes on the social psychological level (i.e. intergroup emotions and perceived threats) as well as on the structural one (i.e. marginalisation of certain groups through social processes) (Walters et al., 2016); or the 2017 study of the Danish Institute for Human Rights on ‘Hate Speech in the Public Online Debate’ surveying online media and social networks on the topics that steer hate speech, the nature and consequences of hate speech online and the targets of it (Zuleta et al., 2017).

4.2 Political Parties and Public Authorities

There are a variety of institutions and actors that partake in facilitating the expansion of hate speech and xenophobia in European societies. The first one among them is political parties, in particular though not exclusively centre-right ones, that wish to capitalise on “electorates of protest”. To do so, they use the fears of voters in order to win their electoral support. Alongside centre-right parties, far-right parties, radicals and populists also use similar strategies. Their aim is to move closer to the centre by abandoning their critical stance towards women, LGBTQ or Jewish people and creating common enemies, such as immigrants (Engel et al., 2018, p. 67).

Council of Europe Recommendation (97) 20 stresses how local, regional and central public institutions and officials have “a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech(...)”³⁴ This duty is enhanced by the use of new types of information and communication technologies where the expression of political views happens more and more online.

At the same time, ECRI’s 2015 General Policy Recommendation on combating hate speech recommends that governments “provide support for self-regulation by public and private institutions (including elected bodies, political parties, educational institutions and cultural and sports organisations).”³⁵ This type of public-private self-regulation is clearly a new direction that suggests a shift in the duty to address hate speech currently spreading across multiple stakeholders.

4.3 The Media

It is now established that the press holds an eminent role in furthering public debate in a democratic society. According to the findings in the ECtHR case of *Castells v. Spain*, “[i]t is (...) incumbent on it [the press] to impart information and ideas on political questions and on



other matters of political interest”,³⁶ without suffering under the weight of criminal law restricting the right of the public to be informed.

With the help of recently adopted *codes of conduct* containing ethical standards applicable to hate speech, the media across most countries have attempted to contribute to the limitation of expressions of hatred both in traditional as well as online fora. There is, however, limited evidence to suggest that noticeable improvements have been achieved through these efforts (ARTICLE 19, 2018, p. 7).

In the same direction, access to the media to communicate anti-hate speech messages, including the counter and alternative narratives mentioned above has emerged as an essential tool. Media, both written and online, very often ignore or misevaluate the implications of spreading hate speech. As such, indifference to the phenomenon not only is socially irresponsible, it also hinders the work of other actors involved in this process, such as law-enforcement agencies or equality bodies. It also challenges the low levels of reporting of hate speech incidents despite the widespread nature of the phenomenon. It is noticeable that election periods are moments where hate speech peaks (EQUINET, 2018, p. 17).

4.4 Private Businesses

It is becoming a well-established principle that business enterprises also have a responsibility to respect human rights. On this basis, it should be nevertheless clarified that it is not the duty of private entities to apply censorship measures. In his June 2016 Report to the Human Rights Committee, the Special Rapporteur on Freedom of Expression requested that States should abstain from delegating their duty to the private sector to determine content illegality of expression. He added that notice and take-down frameworks run the risk of over-board regulation.³⁷ The criteria for joint work in combatting hate speech between the state and the private sector, especially in the digital sector, should rely on validly enacted law, subject to external and independent oversight and through necessary and proportionate means.³⁸ One of the most salient legal questions in this respect concerns the extent to which private business actors (e.g. social networks) should be held responsible for any third party content related to their services.³⁹ The EU E-commerce Directive⁴⁰ expressly prohibits Member States from imposing liability on intermediaries where these do not have actual knowledge of the illegal activity/information and upon obtaining that knowledge act expeditiously to remove access to the disputed content. Instead the practice of ‘notice-and –takedown’ procedures has emerged



with unclear legal basis and procedural transparency (ARTICLE 19 Report, 2018, p. 14) . The EU's recent non-binding Code of Conduct is a further demonstration of the trend to shift pressure on private actors to engage in oversight of content outside clear legal benchmarks and standards. A recent illustration of that struggle is identified in the preliminary ruling introduced by the Austrian Supreme Court concerning a case of online hate speech to the European Court of Justice (CJEU). The case concerns the former Austrian Green Party Leader Eva Glawisching who was subjected to online offensive comments posted by a fake account on Facebook in 2016. It seeks to determine the limits of the E-commerce Directive vis-à-vis the extent of Facebook's duty to remove all harmful materials. The proceedings are currently pending.

5. Concluding Remarks

Faced with the growing spread of expressions of hate, whether in person, in writing or online, the questions remain: what is acceptable to say? Who determines that? Does this task of determining belong to the majority or it is instead an entirely subjective exercise where what is acceptable to one may not be to others?

Alternative ways of dealing with hate speech in all its forms, aside from legal regulation, are inevitably surfacing as 'hot topics'. Counter-speech, defined as speech that affirms the values threatened by hate speech and that challenges the assumptions on which hate speech is based,⁴¹ is one option. It is sourced not only from the need to condemn hate speech but as importantly from that of promoting pluralism, equality, diversity and tolerance. This option, especially when coming from those minorities targeted by it, points towards a special form of empowerment that nevertheless requires at present the 'support of community media and their representation in the mainstream media.'⁴² Ultimately, however, education plays a determinant role on shaping the values of any given society: it is only through education on the values of tolerance, human rights, cultural differences and equality that a meaningful defence mechanism will be developed from within societies to limit hate speech. As such, "[t]he strategic response to hate speech is more speech: more speech that educates about cultural differences; more speech that promotes diversity; more speech to empower and give voice to minorities (...). More speech can be the best strategy to reach out to individuals, changing the way they think and not merely what they do."⁴³



Notes

¹ The present working paper is work in progress. All errors remain the author's. For comments and suggestions please contact the author at topidi@ecmi.de

² See Article 19 of the ICCPR as well as Article 10 of the ECHR on freedom of expression.

³ Council of Europe, Committee of Ministers, Recommendation No. R(97) 20 on 'Hate Speech'.

⁴ ECtHR, *Handyside v. the United Kingdom*, Appl. No. 5493/72, 7 December 1976 at para.49 states: "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."

⁵ *Dink v. Turkey*, Appl. Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, at para.137.

⁶ See *Lingens v Austria*, Appl. N. 9815/82, 8 July 1986, at para.44, where the Court discussing the necessity of a fine imposed on a journalist found: "In the context on political debate such a sentence [as the fine imposed on applicant] would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its as purveyor of information and public watchdog."

⁷ A common example here may be cartoons that include both artistic as well as political dimensions of expression.

⁸ ECtHR, *Young, James and Webster v. UK* (1981) at para.63.

⁹ This conception of the role of the State can be contrasted with the Venice Commission's report on the relationship between freedom of expression and freedom of religion that affirms that "it is not exclusively or even primarily for the Courts to find the right balance between freedom of religion and freedom of expression, but rather for society at large, through rational discussions between all parts of society, including believers and non-believers." [Cf. Venice Commission Report: The issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Venice 17-18 October 2008.]

¹⁰ Committee of Ministers, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on 'Hate Speech', adopted on 30 October 1997 at the 607th meeting of the Ministers' Deputies.

¹¹ Committee of Ministers, Recommendation No. R (97)21 of the Committee of Ministers to Member States on the Media and the Promotion of a Culture of Tolerance, adopted on 30 October 1997 at the 607th meeting of the Ministers' Deputies.

¹² Appendix to Recommendation No. R(97) 21.

¹³ See also Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting.

¹⁴ The new law is called *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG)*.

¹⁵ See for example the case of Twitter removing an account belonging to the satirical magazine *Titanic* for tweets designed to parody anti-Muslim sentiment (<https://www.reuters.com/article/us-germany-hatecrime/german-hate-speech-law-tested-as-twitter-blocks-satire-account-idUSKBN1ES1AT>). Inversely, see the case of suspension of Beatrix von Storch's account from the right-wing Alternative for Germany party, within the same network for



making racist comments about Muslims (<http://www.dw.com/en/afd-politicaln-censored-under-new-german-hate-speech-law-for-anti-muslim-tweet-a-41992679>).

¹⁶ The European Commission Against Racism and Intolerance is the specialised Council of Europe monitoring body dealing with racism, xenophobia, anti-Semitism and intolerance. It also collects examples of ‘good practices’ for combatting racism and intolerance, including in the media.

¹⁷ ECRI General Policy Recommendation No.6 combatting the dissemination of racist, xenophobic and anti-Semitic material via the Internet, adopted on 15 December 2005.

¹⁸ See for example on this point the case of Koç and Tambaş v. Turkey, Appl. N. 50934/99, 21 March 2006, at para.39, where the ECtHR noted that the (suspended) sentence imposed on candidates had the effect of censoring their expression as journalists who had to refrain from publishing anything in the future contrary to the interests of the state.

¹⁹ ECtHR, *Giniewski v France*, Appl. N. 64915/01, 29 June 2004, at para.53, where the applicant was convicted for publicly defaming a religious group, the Court found a violation of freedom of expression. See also *Öllinger v Austria*, Appl. N. 76900/01, 29 June 2006, at para.39, where the Court stated that “those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism.”

²⁰ See for example *Otto-Preminger- Institut v Austria*, at para.49.

²¹ In that respect see *Gündüz v. Turkey*, Appl. No.35071/97, 4 December 2003, at paras. 43-44; *Le Pen v. France*, Appl. N. 18788/09, 20 April 2010.

²² *Perinçek v. Switzerland*, Appl. N. 27510/08, 15 October 2015 (Grand Chamber), at para.208.

²³ See *Hocaoğulları v. Turkey*, Appl. N. 77109/01, 7 March 2006, at paras.39-40, where the author declared that no revolution was possible without loss of life, inciting thus to violence, armed resistance or an uprising.

²⁴ *Erbakan v. Turkey*, Appl. N. 59405/00, 6 July 2006, at para.68.

²⁵ Joint submission of UN Special Rapporteurs on freedom of religion or belief, on the promotion and protection of the right to freedom of opinion and expression and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2011 Expert Workshop on the Prohibition of National, Racial or Religious Hatred, 9-10 February 2011, Vienna.

²⁶ The European Court of Human Rights in the case of *Ahmet Yildirim v. Turkey* recognized that: “The Internet has become one of the principal means for individuals to exercise their right to freedom of expression today: it offers essential tools for participation in activities and debates relating to questions of politics or public interest” (at para.54).

²⁷ McGonagle (2012) at 30 pertinently notes that online content is not limited by storage limitations and remains available and retrievable after its publication, increasing the likelihood of victims being confronted to the same harmful content repeatedly.

²⁸ EU Code of conduct on countering illegal hate speech online, https://ec.europa.eu/info/sites/info/files/code_of_conduct_on_countering_illegal_hate_speech_online_en.pdf

²⁹ The definition is contained in the Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law and national laws transposing it.



³⁰ The results of the most recent monitoring cycle were released on 19 January 2018 (https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612086). On average, IT companies removed 70 per cent of the prohibited content.

³¹ The results of the European Commission monitoring report published in 2018 in the context of the Code of Conduct confirm that ethnic origin (17.1%), xenophobia (16%), anti-Muslim hatred (16.4%), sexual orientation (14%) and national origin (10%) were the most widespread grounds (Cf. European Commission, Factsheet Results of the 3rd Monitoring Exercise, 2018, at 4).

³² In the case of anti-Semitism, religion, culture and national identity overlap while for anti-Muslim hatred, religion is fused with anti-migrant sentiments. For the latter, the theory of Muslim ‘invasion’ in Europe is prevailing in hate discourses, encouraged by far-right and populist rhetoric (eMORE Report, at 11).

³³ The main areas of intervention identified were the need for parity of protection of all protected characteristics in hate speech, extension of equivalent protection against online hate speech, improvements in the prosecution of hate speech (Ibid, at 20).

³⁴ Recommendation No. R(97) 20, Appendix, principle 1.

³⁵ European Commission against Racism and Intolerance, General Policy Recommendation No.15, on Combating Hate Speech, CRI (2016) 15, 2015, recommendation 6.

³⁶ At para.43.

³⁷ Report of the Special Rapporteur on Freedom of Expression, 11 May 2016, A/HRC/32/38; at paras. 44-48.

³⁸ Report of the Special Rapporteur on Freedom of Expression, 11 May 2016, A/HRC/32/38; at paras. 47. See also the Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda, adopted by the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information of 3 March 2017.

³⁹ The ECtHR case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (2 February 2016) concerning the liability of a body of internet content providers and an internet news portal for offensive online comments posted on their websites found that the internet intermediaries should not be liable for third party content and subsequently found for a violation of Article ECHR.

⁴⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1). See also ECtHR Grand Chamber case of *Delfi AS v. Estonia* Appl. N. 64569/09, 16 June 2015 which found no violation of Article 10 ECHR where a national court imposed civil liability on an online news portal for failure to remove unlawful content posted by an anonymous third party, without notice provided.

⁴¹ ECRI, General Policy Recommendation No.15, (2015) at para.88.

⁴² Joint Statement by the Special Rapporteurs on Freedom of Expression, Freedom of Religion or Belief and on Racism, Racial Discrimination, Xenophobia and Related Intolerance to the 2011 Expert Workshop on the Prohibition of National, Racial and Religious Hatred, Vienna 9-10 February 2011, www.ohchr.org/Documents/Issues/Religion/CPR3Joint_SRSubmission_for_Vienna.pdf, at 12.

⁴³ Joint Statement by the Special Rapporteurs on Freedom of Expression, Freedom of Religion or Belief and on Racism, Racial Discrimination, Xenophobia and Related Intolerance to the 2011 Expert Workshop on the



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