

Hate speech: is there coherence in the complexity? Not on our watch: Equality bodies fighting hate speech Equinet/UNAR Seminar

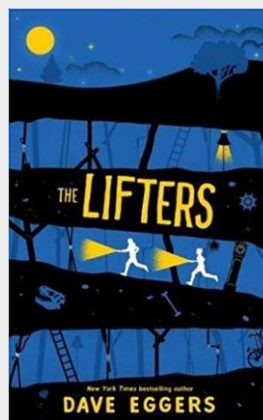
Dr. Tarlach McGonagle

Rome, 19 November 2018

1

Hate speech: multiple levels of complexity

- Conceptual/definitional
- Normative
- Practical
- Role of Equality bodies



2

Article 19, ICCPR

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20, ICCPR

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

Human Rights Committee's General Comment No. 34

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

Article 4(a), ICERD: Offences punishable by law

- all dissemination of ideas based on racial superiority;
- all dissemination of ideas based on racial hatred;
- incitement to racial discrimination;
- all acts of violence against any race or group of persons of another colour or ethnic origin;
- incitement to such acts;
- the provision of any assistance to racist activities, including the financing thereof.

Article 4, ICERD (contd.)

- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Selected challenges when drafting General Recommendation (GR) No. 35

- To synchronize Article 4 with contemporary interpretations of the freedom of expression guarantees in other international human rights standards;
- To (re-)align the term, racist hate speech, with all relevant provisions of the Convention (and not only Article 4);
- To differentiate between various types of racist hate speech;
- To appreciate and reflect the roles that the media, the Internet and public debate can play in combating racist hate speech.

Article 7, ICERD

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence

In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others.

Rabat's threshold test for criminalised expression

- Context
- Speaker
- Intent
- Content or form
- Extent of speech
- Likelihood, including imminence

11

Article 10, ECHR

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.

12

***Handyside* judgment: tolerance and democratic society**

“[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 is no ‘democratic society’.”

Handyside, para. 49.

Instituut voor Informatierecht - IVIR

13

13

Article 17 – Prohibition of abuse of rights

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

Instituut voor Informatierecht - IVIR

14

14

“Hate speech”... or not?

- *Jersild v. Denmark* (1994) – “Green jackets” – role/freedom of media
- *Garaudy v. France* (2003) – Holocaust denial
- *Seurot v. France* (2004) – article by teacher in school newspaper about immigrants
- *Norwood v. United Kingdom* (2004) – member of extreme right-wing party, poster in window very offensive for Muslims
- *Féret v. België* (2009) – Member of Parliament, anti-immigrant pamphlets in election period
- *Vejdeland v. Zweden* (2012) – homophobic pamphlets distributed in school
- *Perinçek v. Switzerland* (2015) – Armenian genocide

Instituut voor Informatierecht - IVIR

15

- These judgments can be found via the HUDOC database of the ECtHRs:

15

No ECHR protection for:

- Racism
- Nazism
- Neo-Nazism
- Holocaust denial
- “Hate speech”
- *Homophobic speech*

Instituut voor Informatierecht - IVIR

16

16

The Council of Europe versus “hate speech”

- ECHR/ECtHRs
- Committee of Ministers
- Parliamentary Assembly
- Commissioner for Human Rights
- Framework Convention for the Protection of National Minorities
- European Commission against Racism and Intolerance (ECRI)
- Additional Protocol to the Cybercrime Convention

Hate speech: an approximation of a definition

For the purposes of the Council of Europe’s Committee of Ministers’ Recommendation (97) 20 to Member States on “Hate Speech”:

“[...] the term “hate speech” shall be understood as covering 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.”

ECRI GPR No. 15 on Combating Hate Speech

“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 and the justification of all the preceding types of expression, on the ground of “race”, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status”

EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law

Article 1: Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

- (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;
- (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes [...]

Time to rethink?

- Expanding contours of hate speech (new focuses)
- Analogous types of speech (activities)
 - Terrorism (incl. incitement, apology, glorification)
 - Radicalisation (incl. strategic communication)
- Fluctuations in tolerance (incl. globalization, populism, exclusionary nationalism)
- ICT-driven developments (incl. participatory potential, new gatekeepers, new functionalities and roles)
- Changing criteria for liability for online hate speech

21



22

New forms of hate speech (activities)?

- dissemination of propaganda, other types of (mis-)information, conspiracy theories and hate spam;
- exchange of information and ideas, e.g. via social media networks, discussion groups, listservs and communities of interest;
- search engine optimisation techniques, such as hyperlinking strategies and algorithmic manipulation designed to generate better search results;
- attracting inadvertent users by “usurping domain names” and “using misleading meta-tags”;
- organisational purposes such as the coordination of activities, planning of events, training, recruitment drives;
- commercial ends such as fund-raising, the sale of publications, videos, memorabilia and paraphernalia;
- trolling, use of bots and other such disruptive practices;
- pursuit of various offences against the person and other criminal or invasive behaviour, e.g. the targeting of (potential) victims, cyber-bullying, cyber-stalking.

Instituut voor Informatierecht - IVIR

23

23

Emerging and possible responses

- Revision and refinement of intermediary liability
- Sanctions
- Fact-checking
- Counter-information and counter speech
- Media and information literacy
- Funding initiatives
- Civil society

Instituut voor Informatierecht - IVIR

24

24

Thank you for your attention.

Contact

Dr. Tarlach McGonagle

Website: <https://www.ivir.nl/employee/mcgonagle/>

E-mail: T.McGonagle@uva.nl

Twitter: @tarlachmc