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“Welches (Völker)recht gilt im Cyberspace?“

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Strategien für den Umgang mit Hate Speech im Internet

PPT in englischer Sprache

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Part I:

**What does “hate speech“ mean
and how does European and
international law react?**

„But isn't it allowed to say this any more?“

- On the day after 9/11 a poster was shown with the burning Twin Towers and the words : **"Islam out of Britain – Protect the British People"** (ECtHR *Norwood/UK*)
- **"Jews are responsible for all the evil in Russia, they have no national dignity"** (ECtHR *Pavel Ivanov/Russia*)
- German politician *Thilo Sarrazin*: **"The Turks conquer Germany just as the Kosovars conquered Kosovo: by a higher birth rate. But I would like it more, if it would be Jews from Eastern Europe with a 15% higher IQ than the German population."**
- **"Homosexuality has a morally destructive effect on the substance of society."** (ECtHR *Vejdeland/Sweden*)

Threats caused by hate speech

- Call to commit **acts of violence** against (often disadvantaged) groups or individuals
- **Disregard** of prevalent **moral principles** or **social beliefs**
- **Disrespect, mockery** or **denigration**
 - of **cultural or ethnic characteristics of people** or their **religious values/beliefs**,
 - of **vulnerable groups** due to **certain (supposed) collective characteristics**,
 - of **individuals**.
- What does the **European and international legal framework** look like? →

EU framework decision 2008/913/JI against racism/xenophobia

- Postulates **criminal protection against certain forms and expressions of racism and xenophobia**
 - Incitement to violence and hatred, and distribution of any such writings according to the criteria of "race", color, religion, descent, national or ethnic origin
 - Publicly condoning, denying, or grossly trivialising crimes of genocide, crimes against humanity and war crimes
- **Responsibility also of legal persons**
 - Political parties and internet providers (ECtHR *Refah Partisi v. Turkey*, *Delfi AS v. Estonia*)
 - Sanctions which may include prohibition to act and liquidation of those legal persons

CoE Recommendation 1997/20 on Hate Speech

- **"Hate speech" includes forms of expression,**
 - which spread, promote, justify or incite racial hatred, xenophobia or antisemitism,
 - or other forms of intolerance based on hatred, including aggressive xenophobia or discrimination and hostility against minorities.
- **Proper legislation and enforcement needed**
- **Restrictions of freedom of expression**
 - must be narrowly circumscribed and based on objective criteria, and
 - may comprise individual criminal sanctions and civil liability of legal persons.

Further European documents

- **Additional Protocol 2003 to the Convention on Cybercrime – "Budapest Convention"**
 - States have to provide measures and sanctions against the dissemination of racist and xenophobic material through a computer system.
- **Council of Europe Framework Convention for the Protection of National Minorities, 1995**
 - Requires measures to protect against discrimination, hostility and violent acts out of ethnic, cultural, linguistic or religious grounds.

International law and hate speech

- **Article 20 UN Covenant on Civil and Political Rights**
 - requires the prohibition by law of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (including war propaganda).
- **Article 4 UN Convention on Racial Discrimination**
 - requires the prohibition of any propaganda and organization, which is based on the assumption of racial superiority or which attempts to justify or promote racial hatred and racial discrimination;
 - States have to take positive measures to eradicate all incitement to racial discrimination.

Freedom of expression (Art 10 ECHR)

- **Art 10 European Convention of Human Rights (ECHR) protects the right**
 - to form and to have an opinion,
 - as well as any interpersonal communication or manifestation,
 - including the dissemination and reception of information (active & passive freedom of information).
- **Any form of communication** is included
 - language, sounds, image, symbols, factual behavior, etc.
- **Value judgments and notifications about facts** are basically free, however may be restricted in the interest of the other or in the general interest.

Meaning of the freedom of expression

- Freedom of expression pursuant to **Art 10 ECHR** belongs, according to the case-law of the ECtHR, to the **foundations of a democratic society**,
 - which not only applies to **information and ideas** that are favourably received or regarded as inoffensive or as a matter of indifference, **but also to those that offend, shock or disturb**.
 - This is demanded by **pluralism, tolerance and open-mindedness in a democratic society**, for which lively, open discussions are essential.

Sensitive balancing required

- **Different approaches:**
 - **Extensive liberality** (e.g. **USA, Sweden**): Freedom of expression prevails unless there is a call for violence.
 - In many European States **more severe restriction of freedom of expression** due to attention to affected people, based on international and European standards.
 - Sanctions are possible and necessary when it comes to the **protection against incitement, defamation and denigration of people and their characteristics**.
- The **restriction of the freedom of expression**, in particular by means of criminal law, is an act of sensitive **balancing**.
- It should only be the ***ultima ratio*** and it has to be in any case proportionate to the pursued objective.

„Proportionality test“

- **Based on Art 10 ECHR it has to be examined whether any interference**
 - is justified “in a **democratic society**” (which is characterised by pluralism, tolerance and openness),
 - contributes to **reach certain aims** (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals, for protection of the reputation or rights of others)
 - arises out of a “**urgent social need**”,
 - is the **less intrusive means** to reach the aim,
 - is proportionate regarding the pursued aim → **principle of proportionality.**

ECtHR Case-law on Art 10 ECHR

- **Hate speech against minorities**

- *Soulas/France* (“Colonisation of Europe by Muslims”; no violation)
- *Le Pen/France* (“Muslims are a latent threat for the dignity and security of the French population”; no violation, inadmissible)
- *Vejdeland/Sweden* (leaflets against homosexuals)

- **Blasphemy**

- *Otto Preminger Institut/Austria* (satiric movie “Council of Love” showing Jesus Christ as a horny guy, in love with Maria; no violation)
- *Aydin Tatlav/Turkey* (“Islam has the effect to legitimise social injustice with god’s will”; violation)
- *Giniewski/France* (criticising the Pope because of his behavior during the Holocaust; violation)
- Mohammed cartoons? → CoE Venice Commission: solely blasphemy must not be prosecuted!

- **Incitements to violence**

- *Leroy/France*, “9/11 – What we dreamt of it, Hamas did it!” (no violation)
- Cases on Kurdish separatist propaganda

Misuse of freedom of speech

- **Art 17 ECHR:**

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

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- **No rights of others** and no **fundamental value** of the ECHR must be questioned by referring to their freedoms, especially freedom of expression, association and assembly
- If this is the case, the person in question will **lose the invoked right of the ECHR.**
- **Form of a “guillotine” or “disputatious democracy”?**

ECtHR case-law on Art 17 ECHR

- **Verbal attacks on Muslims and Jews**
 - Poster “Islam out of Britain” after 9/11 (*Norwood/UK*, 2004)
 - “Jews responsible for all evil in Russia (*Pavel Ivanov/Russia*, 2007) →
 - **Underlying values** like tolerance, social peace and non-discrimination
- **Demand for introduction of Sharia contrary to democracy**
 - Prohibition of parties advocating for Islamic caliphate and introduction of Sharia (*Hizb ut-Tahrir v. Germany*, 2012; *Refah Partisi v. Turkey*, 2003)
- **Holocaust denial**
 - *Garaudy/France*, 2003: denial or distortion of established historical facts
 - Attacks on victims and descendants are incompatible with democracy because contrary to justice and peace.
 - **But:** Statement that deportations and massacres suffered by Armenians in the Ottoman Empire in 1915 had not amounted to genocide must be free; no authority of ECtHR to decide on this legal point; no violation of Art 10 and Art 17 ECHR not applicable (*Perinçek v. Switzerland*, 2015)

Part II:

**What could and should be done
to combat hate speech
in the Internet?**

Limits and scope of state responsibilities to balance an open and secure Internet

- According to international and European human rights standards, the **freedom of opinion, expression and information** is an indispensable condition for the full development of human beings, to participate in public debates, including in the internet, and therefore a **cornerstone for every free and democratic society.**
- Insofar, **States are obliged to guarantee this right** – namely to respect, protect and promote it. That includes also the **right to use the existing technologies (ICT) and to have free access to them.**
- However, **these rights may be restricted** if this is necessary in a democratic society in order to preserve public interests and freedoms and rights of others.

Risks to the free and open use of Internet

The threats are:

- **attacks against its technical infrastructure** and its use by States, companies and individuals, damages or misappropriations of data bases, blocking of websites, extortions etc;
- **spreading fake news, untrue or half-true information** – “just for fun” or to earn money, or in order to track certain ideological, political or other objectives intending to affect or manipulate people;
- **invocations to commit terrorist acts** or other violent acts;
- recruiting of terrorists, financing and **promoting radical, violent, fundamentalist movements and organisations**;
- **hate speech against certain groups** in order to stir damnation and marginalisation;
- **mobbing and stalking of individuals** – have to be taken into account when it comes to a regulation of the Internet.

Opposing rights and interests

- Respective expressions and information quite often interferes with following rights and interests:
 - maintenance of the **fundamentals, principles and basic values** of a State and its society,
 - **stability and functioning of a State** and its institutions,
 - **State integrity and national security**,
 - **public safety and prevention of disorder or crime**,
 - **fundamental rights of citizens**, *inter alia* personal integrity, privacy, protection against defamation, right to (objective) information, etc.
- On the other side, often **critical (and no hate speech!) internet accounts, blogs and websites are blocked by authoritarian States** what is clearly in contrast to freedom of expression.

Possible reaction: the regulation of the Internet

- The question arises, whether there should be a **regulation of the Internet**, of the social media, like we do have it regarding the “classic” print & audio-visual media.
- A **possible reaction on hate speech** in the Internet could be the **deletion of respective websites and postings**.
- However, such a reaction
 - demands **European/international cooperation**,
 - must be **in accordance with fundamental and human rights requirements**, in particular with the principle of proportionality, and
 - **needs mutual administrative and/or judicial assistance** by State authorities, based on trust and legal certainty.

Legal guidelines to regulate the Internet

- **European Union**

- EU framework decision 2008 against racism/xenophobia
- EU Directive 2016/1148 re. measures for a high common level of security of network and information systems
- EU General Data Protection Regulation 2016/679 (2018)

- **Council of Europe**

- CoE Internet Governance Strategy 2016-2019
- CoE Convention on Cybercrime (the "Budapest Convention") 2001 and Additional Protocol 2003
- CoE Recommendation 1997/20 on Hate Speech

- **United Nations**

- Convention for the Suppression of Financing of Terrorism
- UN HRC Res. on human rights on the Internet, 2012

CoE Internet Governance Strategy 2016-2019

- **Internet governance** became a **political priority** after the **UN World Summit on the Information Society (WSIS)** in Geneva in 2003 and Tunis in 2005. This was reaffirmed by the WSIS+10 year review in New York in 2015.
- **Governance of the Internet** is a relatively recent phenomenon which can be considered unchartered, technical, and not the sole responsibility of governments and IGOs.
- **CoE Strategy** brings together human rights, rule of law, and democracy online in a coherent and people-centred way:
 - Internet as a shared responsibility (i.e. multi-stakeholder) which involves state and non-state actors including the private sector, civil society, the technical and academic communities.

CoE Strategy: three main pillars of action (I)

- **Building democracy online**, framed by online participation and inclusion for all, understood as public service value
 - According to World Forum for Democracy 2014 “From participation to influence: can youth revitalise democracy?”:
 - campaigning against hate speech, media and information literacy,
 - digital citizenship in school education, multilingualism,
 - online participation of youth, and digital culture.
- **Ensuring safety and security for all by actions relating to**
 - the global promotion of the Budapest Convention and Convention 108,
 - cybersecurity, mass surveillance, violent extremism and radicalisation via the Internet, monitoring online abuse.

CoE Strategy: three main pillars of action (II)

- **Respecting and protecting the human rights of everyone in the digital world**, framed by
 - freedom of expression and access to information online, effective remedies online, as well as reference to the challenges ahead such as the Internet of Things, anonymity and encryption, etc.
- **This includes, *inter alia*, actions relating to**
 - the promotion of a network of national institutions to guide and assist Internet users who seek redress and remedies,
 - the responsibilities of Internet providers,
 - safety of journalists and the protection of journalism,
 - a platform for dialogue between governments and major Internet companies on their respect for human rights online (compliance!), and
 - the challenges of mobile and electronic health.

Legal minimum requirements

- **The Internet shall be regulated only by democratically originated law.**
- **Effective remedies** on the national level shall provide **access to justice** for anybody whose rights or interests have been affected by the use of the Internet.
- States have to provide **effective sanctions** for offences against
 - confidentiality, integrity, availability of data systems and against acts of a racist and xenophobic nature committed by them.
- Only the **independent judiciary** shall control the Internet.
 - **There shall be no sole decisive competences for the police or secret services**, all their measures have to be mandated by courts.
- Elaboration of an “**CoE Convention for an Open and Secure Internet**” establishing a **regulating authority** with discretionary competence to deal with complaints against final domestic decisions (co-financed by digital service providers?).

How can civil society be involved?

- Reliable and independent **NGOs** should be promoted and supported which could take over **monitoring, reporting and applying tasks**.
- **Cyber volunteers** could play an important role in that regard, guided by regionally or internationally active NGOs which could provide assistance and knowledge in a democratically participative way.
 - Like ICANN, an US NGO that informs how to keep the Internet running smoothly (i.a. giving support at the allocation of domains).
- Such participation of civil society should be accompanied by **region-wide political and human rights education**, in particular of the youth, recalling the fundamentals, principles and values of democratic societies expressed in the internationally recognised human rights provisions.
- **No allowance for providers to exercise a content-related control**, what would amount to **pre-censorship** and would not only violate freedom of expression but also copyrights.
- Nevertheless, all **digital service providers** should adopt all necessary measures to comply with their **human rights compliance** inside their fields of responsibility.

Thank you for your attention!

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<http://bim.lgb.ac.at>