

Freedom of Expression and Hate Speech The European Approach

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„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*)

Delicate 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 **delicate balancing**.
- It should only be the ***ultima ratio*** and it has to be in any case proportionate to the pursued objective.

Freedom of expression (Art 10 ECHR)

- **Art 10 European Convention of Human Rights (ECHR, ratified by Serbia 2004) 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 jurisdiction of the European Court of Human Rights (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.

Art 10 ECHR and hate speech (I)

- **Threats caused by hate speech:**
 - Call to commit **acts of violence** against (often disadvantaged) groups
 - **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**.

Art 10 ECHR and hate speech (II)

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 Art 10 ECHR**
 - must be narrowly circumscribed and based on objective criteria, and
 - may comprise individual criminal sanctions and civil liability of legal persons.

International law and hate speech

- **Article 20 UN Covenant on Civil and Political Rights** (ratified by Serbia in 2001)
 - 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** (ratified by Serbia in 2001)
 - 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.

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

Further European documents

- **Additional Protocol 2003 to the Convention on Cybercrime – "Budapest Convention"** (ratified by Serbia in 2009)
 - 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** (ratified by Serbia in 2009)
 - Requires measures to protect against discrimination, hostility and violent acts out of ethnic, cultural, linguistic or religious grounds.

„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** (such as national security, territorial integrity, public security, maintenance of order, prevention of crimes, protection of health or moral, protection of the rights of the 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, see later)

- **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

ECtHR *Vejdeland v. Sweden* 2012 (I)

- Applicants, members of “National Youth”, faced **criminal charges for distributing leaflets in a school** with a statement on “homosexual propaganda”.
- Leaflets **emphasized** the “deviant sexual proclivity” of homosexuality and its “morally destructive effect” on society, drew **causal links** between “homosexuals’ promiscuous lifestyle” and spreading of HIV, and **criticised** “homosexual lobby” trying to play down pedophilia.
- Applicants sentenced (suspended or probationary) and fined because of **agitation against a “national or ethnic group”**.
- In their complaint to the Court, they claimed the **breach of their freedom of expression under Art 10 ECHR** → no intention to express contempt for homosexuals as a group, purpose of their activity had been to **start a debate** about the lack of objectivity in the education in Swedish schools.

ECtHR *Vejdeland v. Sweden* 2012 (II)

- The **Court rejected the application**, finding that the interference with the right to freedom of expression was justified for the protection of the reputation and rights of others.
- **In particular, the Court stressed that**
 - incitement to hatred did not necessarily entail a call for an act of violence or other criminal acts;
 - discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”;
 - national authorities could legitimately combat speech holding up to ridicule or slandering specific groups of the population;
 - although the statements in question did not as such incite to violence, they were “serious and prejudicial allegations.”
 - pupils concerned were at an impressionable age, and that they had no opportunity to decline to accept the leaflets left in their locker;
 - the sentences against the applicants were not excessive.

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.”
- **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)

Thank you for your attention!

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