‘HATE SPEECH’ LAWS
WHAT IS ‘HATE SPEECH’ AND WHY DISCUSS IT?

The simple answer is that nobody knows for sure. The term ‘hate speech’ is not directly mentioned by any of the major international human rights documents and treaties, and has not been defined by the European Court of Human Rights or other international courts. In fact, a non-binding fact sheet by the European Court of Human Rights accepts that there is no universally accepted definition of the expression “hate speech”: allowing international bodies to simply create their own definition. The European Union Agency for Fundamental Rights even uses the term ‘hate speech’ in different ways in different documents.1

The Council of Europe’s Committee of Ministers defines ‘hate speech’ as follows: “the term “hate speech” 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”.3

There are two major reasons to tackle the issue of ‘hate speech’. First, it is being increasingly discussed in the European context. Second, there is growing uncertainty around what ‘hate speech’ actually means and how it interacts with fundamental human rights such as freedom of expression and freedom of religion or belief.

This uncertainty has led to a situation in which ‘hate speech’ laws are loosely drafted and arbitrarily enforced. In the absence of a clear-cut and coherent understanding of what it is, studies, conferences and declarations profess to derive authoritative conclusions on so-called ‘hate speech’. For example: ‘A survey in Britain showed that a vast majority of “hate speech” is being perpetrated, not by extremists or radicals, but by regular people’.4 ‘The identification of … “hate speech” is sometimes difficult … It can also be concealed in statements which at a first glance may seem to be rational or normal’.5

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At the national level, growing attempts are made to pass more expansive ‘hate speech’ laws, often under the argument that hateful speech is connected with and conducive to violence and should therefore be banned. But there is no relevant evidence showing that ‘disturbing’, ‘offensive’, ‘insulting’ or ‘hateful’ speech alone leads to violence or that laws banning such speech are effective in reducing, combating or eradicating violence.

On 1 April 2013, a new amendment to Hungary’s Constitution was introduced, stating that ‘the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community’.

The overzealous drafting and application of ‘hate speech’ domestically is also illustrated by the Danish Criminal Code, which enshrines that insulting the flag of the United Nations carries a two year prison sentence.

At the international level, the International Covenant on Civil and Political Rights states that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. The Convention on the Elimination of all Forms of Racial Discrimination calls upon states to declare ‘an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin’.

At the regional level, the European Court of Human Rights affirms the importance of freedom of expression as:

‘one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man (...) it 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”’.
Hatespeech laws lead to increasing litigation
Because of their subjectivity and ambiguity, ‘hate speech’ laws open the door to baseless litigation and the criminalization of ‘rational’ or ‘normal’ speech on unclear and unsubstantiated grounds. Even if the courts ultimately rule that a person accused of ‘hate speech’ is innocent of the crime, the stigmatization and hardship endured by having to fight the criminal accusations can last a lifetime and destroy a reputation.

‘Hate speech’ laws increase state power
‘Hate speech’ can end up meaning whatever state authorities arbitrarily decide. This confers an extraordinary amount of power on the state to police the speech of its citizens. And once the premise that the state can give or take away the right to speak freely is accepted, there is no logical stopping point.

As British Prime Minister David Cameron recently commented regarding the introduction of so-called ‘Extremism Disruption Orders’:

‘For too long, we have been a passively tolerant society, saying to our citizens: as long as you obey the law, we will leave you alone. It’s often meant we have stood neutral between different values. And that’s helped foster a narrative of extremism and grievance. This government will conclusively turn the page on this failed approach’.

Once the state is empowered to take away the right to freedom of speech, even obeying the law is no guarantee the state will ‘leave you alone’.

‘Hate speech’ laws are essentially subjective
‘Hate speech’ laws rely heavily on subjective and unclear terms. This is evident in the Council of Europe’s definition of ‘hate speech’, which is full of ambiguous concepts such as: ‘promote’, ‘justify’, ‘other forms of hatred or intolerance’, ‘hostility’, and ‘aggressive’. ‘Hate speech’ is labelled so by the hearer, making it essentially subjective, vague and elusive, and based more on the hearer’s subjective perceptions and feelings than the speech itself.

‘Hate speech’ laws work through approximations
‘Hate speech’ laws call for legal action on alleged hatred, perceived links, purported motivation (even when it cannot be deduced from what is said), and potential intent to label speech as violent or discriminatory. A recent publication admits that ‘even if it eschews clear definitions, ‘hate speech’ (be it conveyed through text, images or sound) can be identified by approximation through the degrading or dehumanizing functions that it serves’. Approximations in legal prosecutions can lead to disastrous effects.

‘Hate speech’ laws restrict freedom of speech
‘Hate speech’ laws shrink the boundaries of free speech and create a chilling effect on it. Given the vague nature of ‘hate speech’, citizens look to avoid engaging in ‘sensitive’ or possibly ‘offensive’ topics for fear that this might be qualified as ‘hate speech’ and lead to a criminal investigation. This unduly restricts personal liberty, as individuals should be able to freely express their thoughts, ideas and personal convictions. It also stifles debate, differences of opinion or unpopular views and creates a climate of suspicion and mistrust.

Who decides what is ‘hate speech’?
‘Hate speech’ laws require the judicial assessment of the content of certain speech, but resort to unclear (moral and legal) criteria for this assessment. The vague wording of ‘hate speech’ laws results in highly subjective assessments and means that they are inconsistently interpreted and arbitrarily enforced.

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Freedom of expression can be legitimately restricted in very limited and specific situations, involving incitement to imminent physical violence. For example, one person going out on the street and saying: ‘Let’s burn to death all the X people living in neighbourhood Y!’ would meet the high threshold of when speech can be legitimately limited.

But limits on speech should remain an exception that is narrowly construed, well-defined, proportionate, legitimate, pursuing a clear aim, and must ensure that less restrictive means do not exist. In other words, limitations should be mindful of safeguarding the free exchange of ideas and opinions. ‘Hate speech’ laws do not meet these standards because they are open to vagueness, arbitrariness, and often illegitimately restrict free speech.

The following examples show the extent to which ‘hate speech’ can be stretched to cover neutral and artistic expressions (1, 2), personal opinions and religious and moral stances (3, 4). They also outline how the concept of ‘hate speech’ can be arbitrarily enforced on vague and subjective grounds, such as personal sensitivities.

1. In 2007 the police urged a British evangelist, Julian Hurst, not to hand out Easter leaflets that featured a picture of a daffodil flower and said: ‘New Life, Fresh Hope’. This is because a member of the public considered it offensive that the church would hand out Easter leaflets in a part of the town where there was ‘obviously a sizeable gay community’.

2. In December 2010, a 63-year-old retiree, Helmut Griese, was charged under the Austrian Criminal Code for ‘disparagement of religious symbols’, a law that is generally used against neo-Nazis who desecrate Jewish graves. Griese was yodelling in his garden out of pleasure. His Muslim neighbours contended that the yodelling was an attempt to mock and imitate the Muezzin’s call to prayer. To avoid a costly legal battle, Griese agreed to pay the €700 fine.

3. In 2012 Alex Aan, an Indonesian civil servant, was sentenced to two and a half years in prison for posting on Facebook that ‘God does not exist’. Aan was charged under the Indonesian Electronic Information and Transaction Law for disseminating information ‘aimed at inciting religious hostility’ and under the Criminal Code provisions regulating blasphemy. Many human rights organisations advocated for Aan’s release, which was achieved in January 2014, after he had spent 19 months in jail.

4. In 2012 Irish Bishop Philip Boyce was investigated for ‘hate speech’ after preaching an ‘offensive’ homily. His statement that the church was being ‘attacked from the outside by the arrows of a secular and godless culture’ was enough to trigger a police investigation at the request of a leading atheist campaigner. Although his sermon might have been mildly offensive to some parts of society, it should have been allowed as part of a healthy debate on the current moral state of the culture.
ENDNOTES

1. ‘Factsheet - Hate speech’, Council of Europe, February 2012, 1.


3. Appendix to Council of Europe’s Committee of Ministers Recommendation (97)20, 30 October 1997, emphasis added.

4. Eirik Rise et al., IGLYO, ‘Online Hate Speech’ (2013), 4, emphasis added.


6. Article IX (5), 1 April 2013, emphasis added. See also European Commission against Racism and Intolerance Report on Hungary, 2015, 11.

7. Danish Criminal Code, para 110(e).

8. The International Covenant on Civil and Political Rights 1976, article 20.2.


11. Iginio Gagliardone et al., ‘Countering Online Hate Speech’ (2015), 10, emphasis added.

WHAT DO WE RECOMMEND?

1. Ideas and opinions should be freely expressed in a democratic society, as it is inevitable that individuals or groups will be offended by ideas and opinions they profoundly disagree with. Limitations on speech should be exceptional and must be narrowly construed, well-defined, proportionate, legitimate, pursuing a clear aim and must ensure that less restrictive means do not exist.

2. Any limitation on speech should be assessed objectively, by looking into the context in which it is carried out and not by taking into consideration subjective elements such as the perception of the hearer.

3. ‘Hate speech’ laws should be limited to situations involving incitement to imminent physical violence and should not include the vague concepts of incitement to discrimination or hatred. Incitement to imminent violence should be well defined and targeted.

4. ‘Hate speech’ laws should not be over-reaching, meaning that they should not cover and ban ‘offensive’ or ‘disturbing’ speech. Such speech should be allowed for meaningful public debate and to engage citizens in democratic processes.

5. Any national laws that do not meet the high threshold of when speech can be legitimately restricted should be repealed.