

essay competition
online hate speech:
right or crime?

Online Hate Speech: Hate or Crime?

Legal issues in the virtual world - Who is responsible for online hate speech and what legislation exists that can be applied to react, counter or punish forms of hate speech online?

List of Abbreviations

ACHPR – African Charter on Human and Peoples’ Rights

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CERD – Convention on the Elimination of all Forms of Racial Discrimination

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

ICCPR – International Covenant on Civil and Political Rights

ISP – Internet service providers

OSCE – Organization for Security and Co-operation in Europe

UDHR – Universal Declaration on Human Rights

UN – United Nations

Introduction

“Do offensive neo-Nazi skinheads have the right to propagate their odious ideology via the internet?”

That question was posed by the representative of United States Mission to the OSCE in her statement at the Conference on Hate Speech. The first answer that probably pops into many minds would be “no way”. However, the speech continues: “Our courts have answered that they do. Does a person have the right to publish potentially offensive material that can be viewed by millions of people? Here again, the answer is of course.”¹

That is an example of the fact that the issue of hate speech regulation is by no means black and white. Free speech is a vital human right, it is the cornerstone of any democracy. So any kind of restrictions on free speech must remain an exception. On the other hand, hate speech can have dreadful consequences that violate rights of other people, in some cases leading up to hateful and violent action. The question of how to balance freedom of expression with the need to prohibit hate speech is especially important and difficult in the virtual world of Internet, where all information spreads as quickly and easily as never before.

This essay will examine the concept of online hate speech and highlight the specific issues connected to it. It describes international, regional and national approaches to Internet hate speech regulation, compares legislations of different countries, bringing out the problems caused by clashes in national laws. The essay finally reviews different mechanisms for combating hate speech and attempts to answer who is responsible for leading the fight.

¹ United States Mission to the OSCE: U.S. Perspectives on Hate Speech and Government Regulation. Conference on Hate Speech, Budapest, April 1, 2006.

The concept of online hate speech

Before discussing the legislation regarding online hate speech, the first step should be to define the term itself. The meaning behind hate speech is not as self-evident as it may seem. Posting malicious online comments that insult a person or a group of people might seem hateful, but it is not the function of hate speech regulations to protect against hurt feelings.

Even the European Court of Human Rights has recognised the right of individuals to “offend, shock or disturb” others.² So most offensive speech is actually protected by the right to freedom of expression. On the other hand, the Court has also noted in its case law that “it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance...”³ Therefore there has to be a line drawn somewhere between where the “right to offend” other people ends and illegal hate speech starts.

However, there is no real internationally agreed definition of hate speech. Often used definition is the one outlined in the Council of Europe’s Committee of Ministers’ Recommendation 97(20): “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.”⁴

This definition could also be applied to online hate speech. However, many social media sites provide their own understanding of hate speech. Facebook, for example, answers the question of what they consider to be hate speech as follows: “Content that attacks people based on their actual or perceived race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease is not allowed.” They also add a significant note: “We do, however, allow clear attempts at humor or satire that might otherwise be considered a possible threat or attack. This includes content that many people may find to be in bad taste.”⁵

² European Court of Human Rights judgement: *Handyside v. the United Kingdom* (no. 5493/72), 7.12.1976, § 49.

³ European Court of Human Rights judgement *Erbakan v. Turkey* (no. 59405/00), 06.07.2006, § 56.

⁴ Council of Europe. Committee of Ministers. Recommendation 97(20) on “hate speech”. October 30, 1997.

⁵ Facebook Help Centre: What does Facebook consider to be hate speech? Available at: <http://www.facebook.com/help/135402139904490/>.

Twitter does not provide its own definition, but simply forbids to “publish or post direct, specific threats of violence against others.”⁶ YouTube website clearly says it does not permit hate speech, which it defines as “speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation/gender identity.”⁷ Google also makes a special mention on hate speech in its User Content and Conduct Policy: “Do not distribute content that promotes hatred or violence towards groups of people based on their race or ethnic origin, religion, disability, gender, age, veteran status, or sexual orientation/gender identity.”⁸ Overall, the prohibited content seems to be similar, with some difference in which specific groups have been brought out.

A significant step towards clarifying the definitions of online hate speech is the Council of Europe’s Additional Protocol to the Convention on Cybercrime. It defines online hate speech as “any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.”⁹

The need for regulation

It is clear that already defining online hate speech raises a lot of different issues and the definitions stir a lot of negative reactions. It does not take much imagination to see how countless online texts and artistic works, and even extracts from Bible and Quran could possibly be covered by the definitions. Many advocates for freedom of expression also fear that the laws limiting speech can be easily misused by authorities to silence critics. So one might ask, is it worth it? Do we definitely need this protection from simply hateful words?

The answer lies in the belief on which the ban against hate speech is based – that hate speech does more than merely express ideas or dissent, it promotes fear, intimidation and harassment of individuals. This may result in serious violation of human dignity, up to causing depression and

⁶ The Twitter Rules. Content Boundaries and Use of Twitter. Available at: <https://support.twitter.com/articles/18311-the-twitter-rules>.

⁷ Youtube Community Guidelines. Available at: http://www.youtube.com/t/community_guidelines.

⁸ Google User Content and Conduct Policy. Available at: <http://www.google.com/intl/en-US/+policy/content.html>.

⁹ Council of Europe. Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. January 28, 2003.

possibly suicide attempts of the hate speech victims. Not to mention, it can be an incitement to murder and even genocide of those against whom it is targeted.

The examples are not difficult to find. A very direct link between online hate speech and real violent actions was made in the case of Benjamin Smith, the killer who went on a racially motivated shooting spree in Illinois and Indiana over in 1999. Months before the murders, he told a documentary filmmaker: “It wasn’t really until I got on the Internet, read some literature of these groups that...it all really came together. It’s a slow, gradual process to become racially conscious.”¹⁰

International and regional legislation

The international community seems to agree at least up to some degree that hate speech needs to be regulated, because the first international treaty to deal with the issue of hate speech was adopted already in 1965 by the UN General Assembly – the International Convention on the Elimination of all Forms of Racial Discrimination (CERD). International Covenant on Civil and Political Rights (ICCPR) also makes an attempt to tackle this issue, stating that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”¹¹

As for the main regional human rights treaties – the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Rights (ACHPR) – they all guarantee the right to freedom of expression, but only ACHR specifically provides for the banning of hate speech.¹²

Regarding internet specifically, already mentioned Additional Protocol to the Convention on Cybercrime, which was adopted in 2003 and entered into force in 2006, is of particular importance. It obliges State Parties to adopt legislative and other measures to establish as criminal offences under its domestic law against online hate speech.

¹⁰ Charles Dixon. Hate Speech And The Internet: A Vehicle For Violence? January 14, 2011.

¹¹ Article 20, International Covenant on Civil and Political Rights. UN General Assembly, 1966.

¹² Toby Mendel. Hate Speech Rules Under International Law. Centre for Law and Democracy. February, 2010.

Council of Europe tries to achieve greater unity in its Member States legislation also by its recommendations, through which the Committee of Ministers can define guidelines for the Member States policies or legislation.¹³

Clashes between national laws

Although these efforts at unifying the legislation have paid off in the Europe area, where there are not that many significant differences, the clashes between national laws of European countries and United States are still complicating the situation.

The United States' approach is strongly influenced by the First Amendment of the federal Constitution, and hate speech, being considered close to political speech, falls under its protection most of the time.¹⁴

In most other countries, hate speech does not receive the same constitutional protection as it does in the United States. In Germany, for example, it is illegal to promote Nazi ideology. In many European countries, it is illegal to deny the reality of the Holocaust. In Denmark, France, Britain, Germany and Canada people have been prosecuted for crimes involving hate speech on the Internet.¹⁵

There are also some extreme examples of national laws, especially when it comes to hate speech directed at religious groups. For example, under the Bangladesh cyber laws, a blogger or Internet writer can face up to ten years in jail for defaming a religion.¹⁶ However, this is contradictory to the most international treaties, which view hate speech as directed to individuals and groups, not belief systems.

¹³ Anne Weber. Manual on hate speech. Council of Europe Publishing. September, 2009.

¹⁴ Yulia A. Timofeeva. Hate speech online: Restricted or Protected? Journal of Transnational Law & Policy, Vol. 12:2. Spring, 2003.

¹⁵ The Legal Project. European Hate Speech Laws. Available at: <http://www.legal-project.org/issues/european-hate-speech-laws>.

¹⁶ Bangladesh protesters demand blasphemy law. Available at: <http://www.aljazeera.com/news/asia/2013/04/20134661058364976.html>.

Enforcing the law

The outlined differences in national legal systems create a real challenge when it comes to online hate speech. The Internet is a global medium, and much material that can be viewed in the countries with stricter regulation is actually outside the jurisdiction of the courts of those countries. If some extremist content could be illegal and subject to removal in an European country, it cannot always be removed because their servers are often located in US where there are no legal grounds for its removal.

A ready example of this kind of complications is the case in 2000, when France prosecuted the Sunnyvale-based Yahoo for selling Nazi memorabilia online. In France, it is illegal to display such items unless they are in a theatrical or museum setting. A French court ruled at the time that Yahoo had to make the auction site inaccessible to French users or pay a fine. Although it never legally accepted the French ruling, Yahoo eventually removed the auction.¹⁷

Twitter has also been in the centre of this kind of disputes. For example, during the Arab Spring uprisings opposition groups used Twitter heavily, while the governments they sought to overthrow wanted Twitter to block them. Although in this situation Twitter did not comply with the governments' requests, it has done so on other occasions – it blocked a neo-Nazi group's account in Germany and one in Britain, belonging to a right-wing member of the European Parliament who tweeted support for discrimination against gays.¹⁸

However, as other this type of websites, Twitter takes action only upon reports or requests, it does not have any kind of filter system of its own and it does not take responsibility for hateful tweets. It is also not possible to impose a monitoring obligation on the Internet service providers (ISPs), since it is forbidden by the European Union's Directive on Electronic Commerce, which defines the different roles and liabilities of ISPs.¹⁹ Commercial ISPs may voluntarily agree to prohibit users from posting hate speech over their services, but there is no way of forcing them to have a regular monitoring mechanism.

¹⁷ Yulia A. Timofeeva. Hate speech online: Restricted or Protected? *Journal of Transnational Law & Policy*, Vol. 12:2. Spring, 2003.

¹⁸ Anita Huslin. Twitter Blocks 'Offensive' Accounts In Germany, U.K.; Deletes Tweets In France. Available at: <http://www.npr.org/blogs/thertwo-way/2012/10/19/163243194/twitter-blocks-offensive-accounts-in-germany-u-k-deletes-tweets-in-france>.

¹⁹ European Parliament and the Council of the European Union. Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. June 8, 2000.

So the question remains, who is responsible for monitoring and enforcing the hate speech regulations online? There is really no one specific to point a finger at. However, there are plenty of initiatives working towards these goals, INHOPE and INACH can be brought out as successful examples.

INHOPE is the International Association of Internet Hotlines. Internet hotlines provide a mechanism for receiving complaints from the public about alleged illegal content on the Internet. Hotlines must have effective transparent procedures for dealing with complaints and need the support of government, industry, law enforcement, and Internet users in the countries of operation. INHOPE coordinates a network of Internet Hotlines all over the world, supporting them in responding to reports of illegal content.²⁰

The International Network Against Cyber Hate (INACH) works to ‘counter and address all forms of online discrimination’ through a network of 18 organizations from different parts of the globe’. They have done significant work in collecting information from different countries, facilitating meetings and encouraging sharing of information as well as offering their own expertise on the issue of cyberhate.²¹

So it could be concluded that a lot of this law enforcement takes place through voluntary international cooperation. Since it is obviously not possible for the authorities of countries to monitor the whole Internet, it is important to also include regular Internet users in the fight against hate speech. Education is an important factor in this – the more people realise that hate speech is a crime and do not consider it acceptable, the more people report it, resulting in criminals getting the punishment they deserve.

²⁰ British Institute of Human Rights. Mapping study on projects against hate speech online. Council of Europe, 2012.

²¹ British Institute of Human Rights. Mapping study on projects against hate speech online. Council of Europe, 2012.

Conclusion

After examining all this different legislation and case law, I have arrived at the position that online hate speech can not be covered by the protective blanket of freedom of expression, but must be considered a crime. For tackling this criminal behaviour, we do not need more legislative norms, since the necessary framework already exists. The unification of the legislation would be useful, but it is too unlikely to set as a goal, since the roots of the differences go back to the culture and the constitutional law of the countries.

What we need is a stronger commitment to implementing existing laws and a better understanding of the tools we have now. Given the global nature of Internet, combating online extremism presents enormous difficulties, and it cannot be done only within the borders of individual countries. Therefore, international cooperation is essential, and the work of different international associations and networks should be encouraged. Attention should also be paid to educating people about the existing legislation and mechanisms for combating online hate speech, so that each Internet user would be aware of the power they have to make a difference.

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