

Tackling Hate Speech

a practical guideline on moderating Online Hate Speech



The owner or editor of a website [the moderator] can be made responsible for its content. He or she therefore has the right to moderate statements that are published online by users. Assessing whether statements should be removed is a current challenge. Legal mechanisms can indicate whether expressions should be moderated. However, these sources are sometimes difficult to apply.

The European Law Students' Association (ELSA) Conference on Online Hate Speech, Oslo 3rd - 8th December 2013, assembled participants from 18 countries to address online hate speech. One of the aims was to make legal mechanisms on hate speech more comprehensible for the general public. Through a number of cases on hate speech, the European Court of Human Rights points out elements that indicate whether an expression is protected under the European Convention of Human Rights. These

elements can serve as a guiding tool when moderating websites and help to judge if the expression is still protected by the right to freedom of speech or not. Due to lack of time for workshop, the participants of the Final Conference on Online Hate Speech granted the working group on the "Guideline for moderating "hate speech" online" the following mandate: to correct substantial wrong information in the draft, to add footnotes and to create an annex which explains the cases which are mentioned here, to improve grammatical errors, to change the layout and to work on the implantation of the Guideline.

Working Group on the Guideline to moderating Online Hate Speech

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The European Law Students' Association

Freedom of Expression, the right to express ones opinions, beliefs or ideas, is one of the core values of a democratic society.

When assessing the legality of an expression online, the speaker's freedom of speech is the fundamental starting point. However, there are other values that have to be protected by society and law. Therefore one's freedom of expression online can be limited in certain circumstances, such as hateful expressions.

The online speaker has the right to exaggerate or even provoke in a way that may shock or offend others. The value of free exchange of opinions and beliefs in society has to be weighed against other people's right to dignity, respect and integrity.

A, THE PLATFORM

- I. As one of the main tasks of media is to inform about issues of public interest, including controversial and political ones, the content provided should only be limited if it is not serving this purpose.
- II. A disclaimer by the owner of the homepage, stating that he or she does not share the opinion of individual statements which are posted on their webpage, does not exclude the owner's legal liability¹.
- III. The moderator can delete any comment, especially when they attempt to side-track or hijack the topic with a hateful statement. It is wise to establish a policy stating the cases in which the owner might act.
- IV. Audiovisual media should be subject to a stricter assessment because of its ability to convey powerful messages².

B, CONTENT AND IMPACT OF THE STATEMENT

- I. The right to the freedom of expression should be prioritized when;
 - the statement is aimed at informing or spreading ideas on matters of public interest³;
 - it contributes to an ongoing public debate⁴;
 - is of interest to political discourse/campaign or⁴;
 - the statement is part of an ongoing debate among historians⁵.
- II. Special consideration should be paid to the context in which the expression is made. If it is part of an otherwise balanced debate the threshold for moderation should be higher⁶.
- III. The right to freedom of expression should be limited when the expression
 - is generally incompatible with values such as tolerance, social peace, public safety and freedom from discrimination
 - may significantly insult or offend morals or religious convictions⁷;
 - the expression advocates racially discriminatory policies, racial hatred or calls for violence, hostility or hatred⁸;
 - concerns historical or cultural events that are particularly sensitive (e.g. holocaust denial).
 - creates prejudices or reinforces existing prejudices

C, STATUS OF THE ONLINE SPEAKER

- I. Freedom of expression includes the right to information.
- II. If a person has a fundamental role in a political debate or acts as a provider of information, such as a journalist, reporter and others, then his or her freedom of expression should be less limited than that of a private individual⁹.
- III. Public officials, people with a higher public standing or of public interest (e.g. teacher, doctors, police officers, musicians) and providers of information are exempt from their special status if they spread messages that are likely to incite intolerance if the statement is made in their representative position¹⁰.

D, STATUS OF THE TARGETED PERSON

- I. Politicians should bare the wider level of criticism. Therefore reasonable criticism targeting politicians or the government should not be removed or have any consequences such as banning the speaker from the website¹¹.
- II. Non-elected public officials, public figures and civil servants (e.g. police officers) acting with profession should not have to tolerate the same level of criticism as politicians¹². They would never have to tolerate more criticism than another individual¹³. However when acting outside of their professional role they may expect the same level of enjoyment of the right to respect for their private and family private individuals.

The cases

Across this guideline we added some endnotes. Each number indicates a principle which is drawn from a specific case from the European Court of Human Rights. All cases are listed afterwards in the „Annex“ in order of appearance.

- 1, *Delfi v. Estonia**
- 2, *Jesil v. Denmark*
- 3, *Jersild v. Denmark; Lehideux and Isorni v. France*;
- 4, *Erbakan v. Turkey*
- 5, *Lehideux and Isorni v. France*
- 6, *Jersild v. Denmark*
- 7, *Wingrove v. The United Kingdom*
- 8, *Glimmerveen and Hagenbeek v. the Neatherlands; Sürek v. Turkey; Pavel Ivanov v. Russia*
- 9, *Incal v. Turkey*
- 10, *Seurot v. France*
- 11, *Lingens v. Austria; Castells v. Spain*.
- 12, *Pedersen and Baadsgard v. Denmark*.
- 13, *Pedersen and Baadsgard v. Denmark*.

Annex

Delfi AS v. Estonia*

ECHR – Article 10

The applicant is a company registered in Estonia which owns one of the largest internet news sites in the country. This particular case concerned the liability of an Internet news portal for offensive comments that were posted by readers. The portal owners complained that being held liable for the comments of its readers violated its right to freedom of expression. The Estonian Courts held that the applicants were liable for these statements. The European Court of Human Rights considered these decisions, justified and proportionate restriction on the portal's right to freedom of expression, because the comments were highly offensive and the portal failed to prevent them from going public and profited, from their existence, while allowing their authors to remain anonymous. The portal owners claimed that an EU Directive on Electronic Commerce, as transposed into Estonian National Law, had made it exempt from liability but the Court found that it was for national courts to resolve issues of interpretation of domestic law, and therefore did not address the issue under EU law and therefore had been a breach of Article 10 of the ECHR.

**This case is currently pending as it was forwarded to the Grand Chamber of the ECHR and is waiting for a final decision.*

Jersild v. Denmark

ECHR - Article 10

The Danish Broadcasting Corporation broadcasted a programme edited and produced by the applicant, which described the attitude to racism of a group of people who called themselves –“The Greenjackets”. The racist remarks made by the persons interviewed, who have also been convicted, were clearly not protected by Article 10. However, even with regards to the manner in which the applicant had prepared the news, the feature was such as to justify also his conviction

and punishment for a criminal offence under the Penal Code. The Court considered that the programme was not in conflict with Article 10 of the ECHR, because when considering the duties and responsibilities of a journalist, the potential impact of the Danish medium was an important factor. It is not for the Court or for national courts to influence which techniques of reporting should be adopted by journalists which clearly indicates that there had been a violation of Article 10.

Lehideux and Isorni v. France

ECHR - Article 10 and 17

In this particular case, the applicants created an article, which was published in a daily newspaper in which they publicly defend war crimes and the crimes of collaboration in Philippe Pétain's Vichy France. The Government considered that the publication glorifying Philippe Pétain's Vichy France, violated the spirit of the Convention and the essential values of democratic society, and argued that the application of the applicant was accordingly in line with Article 17 of the European Convention of Human Rights. The Court considered that the conviction interfered with the applicants right to exercise their right to freedom of expression, which is envisaged by law and that it pursued several of the legitimate aims set forth in Article 10(2), because the applicants explicitly stated their disapproval of Nazi atrocities. Thus, the Court considered the applicant's criminal conviction disproportionate and as such unnecessary in a democratic society and therefore proclaimed that there had been a breach of Article 10 of the ECHR.

Erbakan v. Turkey

ECHR - Article 10 and 6

The applicant, a former Prime Minister of Turkey, gave a public speech from which no official recording was made. More than four years later, criminal proceedings against him were initiated for having incited the people

to hatred or hostility through comments made in his speech about distinctions between religions, races and regions. The Court considered that by using religious terminology in his speech, he had reduced religious diversity to a simple division between “believers” and “non-believers” and had called for a political front to be formed on the basis of religious affiliation. The Court pointed out that combating all forms of intolerance was an integral part of human rights protection and that it was crucial that politicians should avoid making comments in their speeches that are likely to boost intolerance. The Court considered that the criminal proceedings initiated against the applicant had not been reasonably proportionate with regards to the legitimate aims pursued in regard of the interest of a democratic society, which are in this case ensuring and maintaining freedom of political debate. On these grounds the Court ruled out that there had been a violation of Article 10 of the ECHR.

Wingrove v. United Kingdom

ECHR – Article 10

The applicant wrote a script for a movie titled “Visions of Ecstasy”. The idea for the film was derived from the life and writings of St Teresa of Avila. The plot of the film concerns a youthful actress dressed as a nun which represents St. Theresa. It begins with the nun, dressed in a black robe, stabbing her hand with a nail and spraying blood over her naked breasts and clothing. The script made no attempt to explain the historical background of St. Theresa. The film was submitted to the British Board of Film Classification to ensure that it might lawfully be distributed to the general public. The Board rejected the application for a classification certificate. The refusal by the British Board of Film Classification to grant a distribution certificate for the applicant’s video work was, according to the European Court of Human Rights, an ‘interference’ with applicant’s right to freedom of expression. The Court noted that in these circumstances it was not unreasonable for the British authorities to consider that the video could have reached people to whom it would

have caused an offence. Therefore, had been no violation of Article 10 of the ECHR.

Glimmerveen & Hagenbeek v. The Netherlands

ECHR - Article 10

In this case, the two Dutch applicants were convicted and sentenced for possessing leaflets with intendment for distribution to the general public, which the Court regarded as inciting racial discrimination. In the leaflets the applicants advocated an ethnical homogenous society, and also made reference to “our white people” and the need to come to power in order to remove from the country „hundreds of thousands of Muslims, Turks and other guest workers who, are not at all needed here“. This incitement of racial discrimination was in relation to Article 10 of the ECHR. On an analysis of the language used in those leaflets, the Court decided that the writings of the leaflet represented racially discriminatory views of the applicants which are strictly forbidden in the ECHR. The Court also noted that if Dutch authorities, allowed the applicants to proclaim freely, their ideas would certainly encourage the discrimination prohibited by the provisions of the European Convention on Human Rights. Therefore the applicants claim under Article 10 of the ECHR was unsuccessful.

Surek v. Turkey

ECHR – Article 10

The applicants have been convicted on charges of non-public incitement to hatred and hostility by the national Turkish courts. Regarding the situation in South-East Turkey at that time, the need for the authorities to be familiar with acts directed to boosting additional violence the Court accepted that the applicants’ conviction can be considered to be in line with the aims envisaged by the Turkish Government at the time. The Court noted that there is little scope under Article 10 Paragraph (2) for limitations on political speech or debates on matters of public interest. Furthermore, the

limits of permissible criticism are wider with regards to the Government than in relation to a private citizen or even a politician. In a democratic society, the actions or of the Government must be subject to the close scrutiny of not only the legislative and judicial authorities but also of the public opinion. The Court noted that the severity of the penalty imposed is a factor to be taken into consideration when examining the proportionality of the interference. According to this the Court held that there had been a violation of freedom of expression, stipulated in Article 10 of the ECHR.

Pavel Ivanov v. Russia

ECHR – Article 10

The applicant, owner of a Russian newspaper, was convicted of public incitement to ethnic, racial and religious hatred through the use of media. He authored and published a series of articles portraying the Jews as the source of evil in Russia, calling for their exclusion from social life. The Court had no doubts to the anti-Semitic rhetoric of the applicant. The Court agreed with the judgment made by the domestic courts that through his publications he had sought to incite hatred towards the Jewish people. Such a general attack on one ethnic group is directed against the Convention's underlying values therefore the applicant could not benefit from the protection of Article 10 of the ECHR.

Incal v. Turkey

ECHR – Article 10

The applicant was a member of the executive committee of a political party in Turkey. That party was dissolved by the Constitutional Court of Turkish Republic. The executive committee decided to distribute a leaflet criticising the measures taken by the Turkish authorities. The leaflet contained separatist propaganda capable of inciting the people to rebel against the Government's aims and commit criminal offences. The Court considered that the applicant's conviction was in line with one of the aims set out in Article 10, Paragraph

(2), which it is applicable not only to information or ideas, that are favourably received or regarded as non offensive, but also to those that offend, shock or disturb. Freedom of expression is particularly important for political parties. The Court noted that the relevant provisions in the leaflet criticised certain governmental measures. The limits of permissible criticism are wider with regards to the Government than in relation to a private citizen, or even to a politician.

Seurot v. France

ECHR - Article 10

In this case, the two Dutch applicants were convicted and sentenced for possessing leaflets with intendment for distribution to the general public, which the Court regarded as inciting racial discrimination. In the leaflets the applicants advocated an ethnical homogenous society, and also made reference to “our white people” and the need to come to power in order to remove from the country „hundreds of thousands of Muslims, Turks and other guest workers who, are not at all needed here“. This incitement of racial discrimination was in relation to Article 10 of the ECHR. On an analysis of the language used in those leaflets, the Court decided that the writings of the leaflet represented racially discriminatory views of the applicants which are strictly forbidden in the ECHR. The Court also noted that if Dutch authorities, allowed the applicants to proclaim freely, their ideas would certainly encourage the discrimination prohibited by the provisions of the European Convention on Human Rights. Therefore the applicants claim under Article 10 of the ECHR was unsuccessful.

Lingens v. Austria

ECHR - Article 10

The applicant had written articles in which he criticised the behavior of the President of the Austrian Liberal Party, calling him “opportunist” and “immoral”. The Court ruled that the Austrian Courts mistakenly

imposed a burden on the applicant to provide evidence of the value of the judgments as well as facts in the article since, unlike facts, value judgments or proof of the truth, in this case are incapable of proof. As such, this burden of proving the truth of value judgments was itself an infringement on the freedom of expression secured by Article 10 and the Court concluded that the right of Article 10 of the ECHR was breached.

Castells v. Spain

ECHR Article 10

Mr Castells, a Spanish lawyer and senator, published an article entitled “Outrageous Impunity”. The prosecuting authorities initiated criminal proceedings against Mr Castells for insulting the Government of Spain. His defence lawyers argued that the disputed article contained accurate information and did not express his personal opinion, but merely the views of the general public. He maintained further that the national court had violated his right to freedom of expression as well as the principle of the presumption of innocence by refusing to allow him to adduce evidentiary material to court’s main hearing. The Court noted that the freedom of political debate was not absolute in nature. However the limits of permissible criticism were wider with regard to the Government, than to a private citizen, or even a politician. The interference had therefore not been necessary in a democratic society and accordingly, there had been been a violation of Article 10 of the ECHR.

Pedersen and Baadsgard v. Denmark

ECHR - Article 10 and 6

This case is connected to the programmes produced by the two applicants- journalists about the trial of a person, who had been sentenced to 12 year’s imprisonment after being found guilty of killing his wife. The programmes criticised the manner that the police handled the investigation and explored whether there had been a oversight of evidentiary material and highlighted the alleged failure of the

police’s Chief Superintendent. The two journalists were charged with defamation of the Chief Superintendent and later convicted. The Supreme Court upheld their convictions, stating that the applicants lacked a sufficient factual basis for the allegations against the named Chief Superintendent. The journalists responded by claiming that the judgment of the Supreme Court was a disproportionate interference with their right to freedom of expression. The European Court of Human Rights, noted that the applicants were not convicted for alerting the public to possible failings in the criminal investigation made by the police, but they were convicted for making serious accusations, claiming that the Chief Superintendent had committed a criminal offence during the investigation, and therefore had not been a breach of Article 10 of the ECHR.

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ELSA is especially proud to have the **Council of Europe** and the **No Hate Speech Movement** as partners during the conference during December 2013 and now for this project as well.

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