MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Miisa Kreander

THE WIDENING DEFINITION OF HATE SPEECH – HOW WELL INTENDED HATE SPEECH LAWS UNDERMINE DEMOCRACY AND THE RULE OF LAW

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Author: Miisa Kreander

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Abstract:

Liberal European democracies are standing at a crossroads: on the one hand, freedom of speech ought to be protected and cherished, but on the other hand, the importance of protecting vulnerable groups from harm and discrimination cannot be dismissed. Finding a middle ground has turned out to be difficult, but recent trends demonstrate that European liberal democracies have chosen to incorporate more measures to tackle so-called "hate speech", to better protect minorities and those who are most vulnerable in society. This development has led to a narrowing space for free speech, and it brings into question whether controversial expressions are sufficiently protected on the national and international level in Europe.

In this thesis, especially the case law of the European Court of Human Rights (ECtHR) is examined with the aim to illustrate how the definition of hate speech has widened in terms of its application. A combination of a broadened interpretation of terms such as incitement and the increased number of protected characteristics or groups in hate speech legislation has lowered the threshold of unlawful expression of hatred. The increase of vulnerable groups in need of special protection from hatred by law introduces a dilemma, since it is increasingly difficult to leave out certain groups while granting protection to others. A closer look at the Court's case law also reveals regular inconsistencies and contradictions in the application of the law, which have led to unforeseeable judgements. This, in turn, has repercussions for legal certainty and the principle of equality, which are fundamental elements of the rule of law.

National legislation and case law as well as initiatives by the European Union (EU) to regulate hate speech are discussed in order to get a better understanding of the latest developments of the subject matter. Through a critical analysis of European jurisprudence and laws, the thesis seeks to demonstrate the unintended consequences and problems that relate to the increasing regulation of freedom of expression. In addition, the risk of possible politicisation of hate speech laws is debated due to the continuously widening interpretation of hate speech. Furthermore, the thesis wishes to shed light on future issues for free speech and democracy in case censorious measures are widely implemented as well as alternatives to the current legislative measures.

Keywords: Hate Speech, Rule of Law, Democracy, Legal certainty, Principle of equality	
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ABBREVIATIONS AND ACRONYMS

CoE	**Council of Europe**
DSA	**The Digital Services Act**
ECHR	**European Convention on Human Rights**
ECtHR / the (European) Court	**European Court of Human Rights**
EU	**European Union**
ICCPR	**International Covenant on Civil and Political Rights**
ICERD	**International Convention on the Elimination of All Forms of Racial Discrimination**
LGBTQI	**Lesbian, Gay, Bisexual, Transsexual, Queer/ Questioning, Intersex**
NetzDG	**German Network Enforcement Act**
OHCHR	**The Office of the United Nations High Commissioner for Human Rights**
OIC	**Organisation of the Islamic Conference**
RPA	**Rabat Plan of Action**
UDHR	**Universal Declaration of Human Rights**
UN	**United Nations**
UNHCR	**The UN Human Rights Committee**

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1. Introduction

1.1 Hate Speech Laws and Unintended Consequences

How free should freedom of speech be? This is a question that has been debated throughout much of recorded history,[1] yet still remains a controversy today. The nature of this debate, however, has changed over time, and more recent developments appear to have emerged surrounding the topic of "hate speech". The extent to which hateful utterances should be allowed to be expressed publicly lacks a clear consensus. However, the urge to limit unwanted and hateful speech by law appears to be ever-growing globally, but also in Europe, without much thought given to either the unintended consequences or alternatives. This goes against the notion that limitations on free speech should be the exception while the enjoyment of the right to freedom of expression should be the rule.[2] For Europe, which once originated Enlightenment values such as freedom of speech,[3] the legislation and case law regarding hate speech appears to display both inconsistencies and increasingly little tolerance for uncomfortable speech. The crux of this issue may be found in the fundamental contradiction that liberal democracies are confronted with. On the one hand, liberal states aspire to cherish and protect freedom of speech, but, on the other hand, citizens ought to be treated equally and protected from discrimination.[4] Moreover, the confusion in European jurisprudence is seemingly linked to the increasing collective desire to further protect minorities, whether they be racial, ethnic, religious or sexual, from hate and discrimination that has been all too present in history. This desire, in turn, has created new and rapidly evolving social norms; what was a commonly held opinion yesterday is a taboo today. When these norms, based on new understandings of morality, are turned into law, challenges appear. For instance, the line between speech that constitutes disagreement in opinion, strong criticism, or political incorrectness directed towards or spoken about a minority, and speech that is outright "incitement" to hostility, hatred or violence is unclear. However, this distinction is crucial,

[1] See Jacob Mchangama, *Free Speech: A Global History From Socrates to Social Media*, Basic Books, London, 2022.
[2] This view is noted in *Sunday Times v. United Kingdom*, App. No. 6538/74, (ECtHR 26 April 1979), para. 65.
[3] Some of the more prominent thinkers on free speech, among other Enlightenment ideas, during the Enlightenment era include Voltaire, Baron de Montesquieu, Immanuel Kant and Denis Diderot. For a comprehensive description, see Mchangama (2022), pps. 93-145.
[4] See also Jeroen Temperman, *Religious hatred and international law: the prohibition of incitement to violence or discrimination*. Cambridge University Press, 2016, p. 1.

since, as once so eloquently articulated by the English appeal judge Stephen Sedley, "Freedom only to speak inoffensively is not worth having".[5]

According to the Democracy Index by the Economist Intelligence Unit, civil liberties have declined in Western countries, along with authoritarian regimes. The decline has occurred over the previous decade, and the infringements were especially related to free speech and religious freedom.[6] Similarly, the Varieties of Democracy (V-Dem Institute), a research institute that analyses global democracy, saw a record of 35 countries suffering significant deteriorations in freedom of expression in 2021. The research also displays that toxic polarisation and the respect for counterarguments have gotten worse in more than 32 countries. The number of countries suffering significant deteriorations a decade earlier, in 2011, was only five.[7] Free speech is especially deteriorating in authoritarian countries like Taliban-led Afghanistan and China under the Chinese Communist Party, but also in European states like Hungary and Poland, where media pluralism and minority voices have been targeted by illiberal regimes.[8] Yet, neither authoritarian regimes nor the Eastern European examples explain the entirety of the retreat of freedom of expression. As liberal democracies have become concerned about the threat of hate speech and disinformation to democracy, especially in a digital age, they, too, have taken increased measures to combat and suppress unwanted expressions.

No single widely accepted definition for "hate speech" exists, and the way in which hateful expressions are restricted in different jurisdictions varies. As Malik states, "if you look across the world, there is no consistency about what constitutes hate speech".[9] In Germany, there are prohibitions on expressions that are seen as violations on "the human dignity of others by insulting, maliciously maligning or defaming" groups based on a number of characteristics[10], while in Denmark the same applies to statements "by which a group of people are threatened, derided or degraded because of their race, colour of skin, national or ethnic background, belief

[5] Redmond-Bate v Director of Public Prosecutions [1999] EWHC Admin 732.
[6] Democracy Index 2021: The China challenge, the Economist Intelligence Unit (EIU), See especially pps. 7 and 26.
[7] Democracy Report 2022: Autocratization Changing Nature? V-Dem Institute. p. 6.
[8] Democracy Report 2022: Autocratization Changing Nature? p. 28 and Mchangama (2022), p. 329-335.
[9] Kenan Malik and Peter Molnar, "Interview with Kenan Malik", in Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech : Rethinking Regulation and Responses*, Cambridge University Press, 2012. *ProQuest Ebook Central,* (Hereinafter Malik), p. 81.
[10] German Criminal Code published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844), Section 130 (1), Incitement of masses.

or sexual orientation"[11] and in Finland if "a certain group is threatened, defamed or insulted on the basis of race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis".[12] The Committee of Ministers of the Council of Europe, on the other hand, has stated that:

> 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.[13]

This particular definition is also often referred to by the European Court of Human Rights (ECtHR), although the Council of Europe (CoE) has also acknowledged that "there is no universally accepted definition of 'hate speech'".[14] In this research, the term is, however, used in its broad sense, including the varieties of speech that may cause or incite hatred, discrimination, hostility and violence. Subsequently, the term "hate speech laws" is used in an equally broad manner, referring to the laws that prohibit or restrict such speech. However, since even the more avid defenders of freedom of speech would recognise the necessity of restricting specific incitements to violence, the focus in this research is on more controversial expressions, which may not directly lead to violence, but have the possibility of leading to hatred.

In today's Europe, expressions ranging from blasphemous utterances to citing and interpreting the Bible, have the potential to be settled in a court of law. Simultaneously, there has been an expansion of characteristics and groups of people added to the category of hate speech victims. Expressions that promote or incite hatred based on race, ethnicity and religion have increasingly been accompanied by new categories such as sexual orientation, gender and gender identity. However, this raises questions on how it is justified to stop there, and who is to decide what categories of people have earned their place to be protected from hate due to a specific identity. Limiting hateful speech directed at various minorities is mostly well intended, but has the potential to lead to unintended and harmful consequences, too.

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[11] Section 266 (b) of The Danish Criminal Code, Straffeloven, available at: https://danskelove.dk/straffeloven/266b (Accessed 24 March 2022).

[12] The Finnish Criminal Code, 1889/39 (511/2011), 11 luku 10 §.

[13] Council of Europe Council of Ministers, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech", adopted 30 October 1997. p. 107.

[14] See e.g. Council of Europe, Recommendation CM/Rec (2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users -Explanatory memorandum, 16 April 2014, Freedom of expression and information, para. 42.

Some expressions in the category of hate speech should be restricted by law: credible and true threats, fighting words and advocacy that is directed to inciting or producing imminent lawless action. However, with regard to "incitement to hatred," it is not obvious where the line for legal repercussions is or ought to be. As such, hate speech bans are easily politicised and weaponised towards one's ideological adversaries, potentially creating an impression of biased prosecution: a certain political movement, religion or ideology is being targeted while others remain unscathed despite expressing similar or worse hatred. Whether or not this particular criticism can be reasonably justified is unclear, but the public has the potential of interpreting it that way.[15] Regardless of the justifiability of the claim, such an impression amongst the public does not strengthen a nation's rule of law. For this reason, it is worth asking whether these laws are serving their purpose in increasing societal harmony and decreasing hatred towards people based on a number of both mutable and immutable characteristics.

1.2. Research Questions and Delimitations

The extent to which the subject of freedom of speech and its limits is relevant today cannot be understated. The application and interpretation of hate speech laws are rapidly evolving and under constant scrutiny across Western societies, making it increasingly unclear to know what one is and is not allowed to say. The emergence and expansion of social media platforms within the last decade has made this topic more relevant, since now almost everyone has the possibility to express their opinions publicly. Subsequently, this has created new challenges for legislators, who need to decide how to react to a changing landscape of intercommunication, which includes an overwhelming amount of content, as well as old publications that were morally acceptable at the time of writing, yet controversial today. The application of good law is not only consistent but also clear and predictable. Since this, however, does not seem to be the case in the courts of well-established Western democracies, there is reason to examine their judgments and reasoning more closely.

[15] For example, Ekmeleddin Ihsanoglu, secretary general of the Organisation of Islamic Cooperation (OIC) saw that the Danish prosecutor's decision not to prosecute *Jyllands Posten* for its Muhammad cartoons was part of "a campaign against [Muslims]" See e.g. Winfield, Richard N. and Tien, Janine. 'The Danish Cartoons Controversy: Hate speech laws and unintended consequences' in Peter Molnar (eds.) *Free Speech and Censorship Around the Globe,* , 481-494, Central European University Press, ProQuest Ebook Central, 2014. p. 484. (Hereinafter Winfield and Tien)

Equivalently to any right, freedom of speech is a right not to be taken for granted. However, it is not merely one freedom among many either, since it reinforces and enables the existence of all other freedoms and rights. Yet, it seems that freedom of speech has become politicised to a heightened extent in recent years. The support for this basic right as a right to express something offensive is increasingly considered to be a display of one's political or ideological affiliations,[16] instead of being appreciated as a universal value by those who find basic civil liberties and the fundamentals of democracy important, regardless of party politics. Although the politicisation of this subject may make it more politically sensitive, it does not decrease the importance of further research relating to freedom of speech and its limits. A free society is dependent on a free exchange of ideas, which means that checking and scrutinising the state's power to limit this freedom as well as the courts' application of hate speech laws is always important, increasingly so when the rules can justifiably be considered unclear and rapidly changing. In a civilised liberal democracy, there is also reason to question whether increased, rather than decreased, censorship truly is beneficial for the rule of law and democracy. Hence, the purpose of this research is to examine how the case law relating to hate speech in national and international courts, especially in the ECtHR, displays an increasingly widening definition of "hate speech", while simultaneously jeopardising the principle of legal certainty through inconsistent application of law. The research illustrates how the definition of hate speech has widened in two different ways in terms of its application or interpretation by courts: 1) by lowering the threshold of what constitutes unlawful expressions of hatred, *inter alia*, by broadening the definition of key principles or standards and 2) by increasing the number of protected groups and characteristics in hate speech legislation. Notably, the aim of this thesis is not to adopt a position on which groups deserve or do not deserve to be protected from hate speech by law, but to identify the problems that an increasing number of categories of hate speech victims present. Both the ECtHR jurisprudence and the general European trends that seek to increasingly regulate freedom of expression are examined through a critical lens. Also

[16] Indications of a left-right political divide regarding hate speech is illustrated, for instance, by a 2015 survey on freedom of speech, which shows that nearly twice as many Democrats say the government should be able to stop speech against minorities (35%) compared with Republicans (18%) See Jacob Poushter, '40% of Millennials OK with limiting speech offensive to minorities', *Pew Research Center*, 20 November 2015. Also in Europe, left-wing parties often call for stricter laws to combat hate speech. For example, in Finland, the Green Party advocates for more legal measures against hate speech, see e.g. Kirjallinen Kysymys KK 161/2021 vp, 'Kirjallinen kysymys vihapuheeseen puuttumisesta lainsäädännön keinoin' by Iiris Suomela vihr ym., Eduskunta.fi. The right-wing Finns Party, on the other hand, has called for the abolition of the national "hate speech" law. See e.g. Tommi Parkkonen, 'Perussuomalaiset haluaa muuttaa lakipykälän kiihottamisesta kansanryhmää vastaan: "Vähättelee oikeita rikoksia"', *Iltalehti*, 7 November 2019.

the unintended consequences linked to restrictions on hate speech, including rule of law problems and the undermining of democracy, are examined thoroughly in this thesis as well as the underlying causes for such restrictions. The rule of law problems discussed in this thesis refer especially to those that relate to legal certainty, prohibition of arbitrariness and equality in legislation (principle of equality).[17] Finally, the thesis introduces both civil society resolutions and the United Nations (UN) framework, the Rabat Plan of Action (RPA), as alternatives to the current application and interpretations of hate speech laws.

Many reasons to limit freedom of expression can be listed: national security, the right to privacy, the elimination of child pornography and to protect people from threats of violence, their reputation or intellectual property. For the intents and purposes of this research, these reasons will be excluded, unless they are closely related to specific hate speech cases. Instead, the focus is on expressions that are considered or suspected to be incitement to hatred, discrimination or intolerance based on religion, ethnicity, race, sexual orientation or a comparable characteristic, as well as those that are deemed offensive or defamatory because of these reasons. Relatively new phenomena that have been introduced along with the prominence of the internet, such as doxing (or doxxing) and "trolling" on the internet are also excluded, because they often constitute a form of online harassment, instead of utterances that would be prosecuted under national hate speech laws in a court of law. In other words, the focus of this thesis is to identify the problems related to excessively regulating statements that are legitimately held opinions, criticism, blasphemy, satire or any form of artistic expressions that have been considered to constitute a form of illegal expression of hatred. Furthermore, the focus of this research is on hate speech laws in liberal democracies, specifically in Europe. The American approach to free speech differs from most other liberal democracies due to the country's strong First Amendment right to freedom of speech.[18] Hence, this research is excluding the United States, since the arguments do not apply to a country that lacks hate speech laws.

[17] These three elements are also mentioned in the definition of rule of law by the Helsinki Rule of Law Centre. See website of the Rule of Law Centre, University of Helsinki.
[18] The US is a well-known exception in not having adopted legislation that forbids 'hate speech'. See e.g. Robert M. O'Neil. 'Hate speech, fighting words, and beyond - why American law is unique'. *Albany law review,* Vol. *76*, 2012, 467-499.

1.3 Method and Material

As concluded by Article 38 (1) of the Statute of the International Court of Justice, the sources of international law, and therefore of this research, are a) international conventions, b) international custom, c) general principles of law recognized by civilised nations, and as a subsidiary means d) judicial decisions and the teachings of the most highly qualified publicists of the various nations.[19] More specifically, the sources of this research are those which include relevant provisions regarding freedom of speech and hate speech. No recognised "hate speech laws" exist *per se*, but rather provisions that restrict certain types of speech due to their hateful nature. Hence, a closer look is being directed towards the European Convention on Human Rights (ECHR), the International Covenant of Civil and Political Rights (ICCPR) as well as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). However, since the purpose of this research is to both examine and scrutinise the application of law, the role of both international and national case law is significant. Therefore, the courts' reasoning behind allegations of incitement to hatred, hostility and discrimination along with defamation when it is closely connected to hate speech, is analysed in this research. Especially the case law of the ECtHR is being examined, as well as national case law, which illustrates a shift in the application of hate speech laws. Books, academic journals and databases have been used as complementary sources in the examination of those ECtHR cases that are not available in English. The thesis also examines very recent and current legal interferences to alleged hate speech, such as the trial of the Finnish politician Päivi Räsänen. Here, the reporting in newspaper articles and press releases are used as primary sources, since first-hand material, such as the decision of the Helsinki District Court, has not been available during the time of writing. Similarly, material from media companies is used when it is necessary to display, *inter alia*, the nature of public discourse or to inform about the existence of specific cases related to hate speech. The thesis aims to use separate court decisions together with international conventions to display the status quo and trends regarding freedom of speech, and to clarify the limitations to this particular right in liberal democracies in general and within their judicial institutions in particular.

[19] Statute of the International Court of Justice, 24.10.1945, 33 UNTS 993, art. 38 (1).

2. Hate speech legislation

2.1 Free Speech and Hate speech as Defined by International Law

In order to understand the international framework regarding hate speech, it is necessary to examine the international provisions regarding freedom of speech. Freedom of expression is a fundamental human right that is protected in all major human rights systems and in national constitutions of liberal democracies.[20] This right, however, is not absolute[21] and is therefore subject to a number of restrictions, such as those limiting hate speech. The extent to which hateful utterances should be tolerated has turned out to be a difficult problem to solve. This is reflected both in the drafting history of some of the most important provisions regarding freedom of speech in international law, as well as in recent public debates that have arisen from some controversial court cases.[22] However, it is worth noting that in liberal democracies the discussion focuses on *how* extensive the right to free speech should be, instead of focusing on *if* it should exist altogether.[23] There is no universally accepted definition of hate speech in international law, which has largely contributed to the confusion on the permissible limits of speech. Yet, there are several references to hate speech in international law contexts both implicitly and explicitly (e.g., in resolutions, recommendations, case law, directives etc.).

The Universal Declaration of Human Rights (UDHR), which is non-binding yet mostly considered to be customary law,[24] simply secures freedom of opinion and expression. Article 19 of the declaration guarantees the right to freedom of expression as a "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[25] Thus, the UDHR does not specifically provide for restrictions on hate speech or incitement to hatred. However, it provides a general limitation clause in Article 29, according to which the rights and freedoms in the declaration "may in no case be exercised contrary to the purposes and principles of the United Nations."[26] This clause

[20] Toby Mendel, 'Hate Speech Rules Under International Law', *Centre for Law and Democracy*, February 2010, p.1.
[21] *Ibid.*
[22] See e.g. 'Ex-Interior Minister's incitement trial begins in Helsinki', *Yle News*, 24 January 2022.
[23] Eric Barendt. Freedom of Speech. Second edition. New York: Oxford University Press, 2005, p. 1.
[24] See e.g. The Universal Declaration of Human Rights and its relevance for the European Union, European Parliament.
[25] Universal Declaration of Human Rights, adopted by United Nations General Assembly Resolution 217 A (III), 10 December 1948, UN Doc. A/RES/3/217/A (Hereinafter UDHR), art. 19.
[26] UDHR, art. 29 (3).

applies to all rights in the Declaration, including freedom of expression.[27] When this Article was drafted there were frequent discussions of hate speech restrictions, as the drafters tried to decide how much intolerance ought to be tolerated under the principle of freedom of expression. Here, the Soviet Union was the primary advocate for hate speech laws, while the United States and the United Kingdom sought to guarantee an extensive protection to freedom of expression.[28]

The International Covenant on Civil and Political Rights, on the other hand, is a legally binding human rights convention and it is ratified by most states.[29] Article 19 of the ICCPR guarantees the right to freedom of expression as follows:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[30]

However, according to the ICCPR, this right "carries with it special duties and responsibilities" which is why it can be limited where the restrictions are "provided by law" and when they are necessary "for respect of the rights or reputation of others" or "for the protection of national security or of public order (ordre public), or of public health or morals."[31] In addition to including a right to freedom of expression, the ICCPR also provides an obligation to prohibit hate speech. In the consequent Article 20 (2), the ICCPR directly prohibits certain forms of expression: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[32] The history regarding the Article's drafting starting in the aftermath of the Second World War to its adoption in 1966, reveals heated negotiations about its contents. The proponents of hate speech prohibitions were mostly communist states in Eastern Europe, with the Soviet Union having the leading role in the pursuit of a broader definition against "incitement to hatred."[33] Prohibitions were justified by referring to the recently experienced World War II and the Holocaust. Eventually, colonialism and the Apartheid system were also used to justify prohibitions against racial and

[27] UDHR, art. 29.
[28] Mchangama, Jacob. 'The problem with hate speech laws', *The review of faith & international affairs*, Vol. 13:1, 2015, 75-82. p. 76.
[29] See The United Nations treaty collection, Status of the ICCPR.
[30] International Covenant on Civil and Political Rights, New York 16.12.1966, 993 UNTS 3 (Hereinafter ICCPR), art. 19.
[31] *Ibid.*
[32] *Ibid.* art. 20
[33] Mchangama (2015), p. 76.

religious hatred. The opponents, on the other hand, saw that the terms "hatred" and "hostility" are too vague and risk being exploited by totalitarian states and undermining freedom of speech.[34] Especially Eleanor Roosevelt, the former First Lady of the United States and the first chair of the Commission on Human Rights, became a voice for principled free speech against the Soviet bloc by stating in 1950 that the Soviet proposal

> would be extremely dangerous...since any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited… It [is] equally difficult to differentiate between the various feelings from hatred to ill-feeling and mere dislike.[35]

With such concerns in mind, many countries introduced reservations to this Article, with the United States having a very extensive one, stating that "Article 20 does not authorise or require legislation or other action by the United States that would restrict the right to free speech and association protected by the Constitution and laws of the United States."[36] Additionally, when Article 20 (2) was put to vote, not a single member of the CoE at the time voted in favour of its adoption and no other Western democracy voted with the majority.[37] This underlines how caution, as well as resistance, used to be the primary attitudes towards hate speech bans in European democracies.

Article 19 and 20 of the ICCPR received attention during the drafting process also because of the possible conflict with each other. They were kept separately since Article 19 guarantees freedom of expression while Article 20 includes an obligation to restrict speech.[38] Nonetheless, these two Articles were put next to each other to emphasise their close relationship. The UN Human Rights Committee (UNHRC) also stated that, according to its interpretations, these two Articles are compatible with each other. For this reason, any law that seeks to implement the provisions of Article 20 (2) must not overstep the permissible scope of restrictions on freedom of speech allowed by Article 19 (3).[39]

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[34] *Ibid*. p. 76.
[35] Eleanor Roosevelt quoted in Mchangama (2022), p. 293.
[36] See University of Minnesota, Human Rights library U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).
[37] Voted against: Belgium, Denmark, The Netherlands, Sweden, UK, Iceland, Ireland, Turkey. Abstained: France, Italy, Greece, Cyprus, Austria. See e.g. Jacob Mchangama and Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' *Human Rights Law Review*, 2021, 21, 1008-1042, p. 1012.
[38] Mendel (2010), p. 3.
[39] *Ibid.,* p. 3.

The International Convention on the Elimination of All Forms of Racial Discrimination, was the first international treaty to directly address the issue of hate speech. This treaty is one of the vaguest and most far-reaching international treaties that restricts freedom of speech, including provisions that directly prohibit, amongst others, racist speech. Adopted in 1965, the text of Article 4 (a) includes an obligation to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and [...] incitement to [violent] acts against any race or group of persons of another colour or ethnic origin."[40] Due to the Convention's focus on racial discrimination, it does not guarantee the right to freedom of expression. However, the Article was softened by introducing a requirement of using due regard to the rights in the UDHR in its implementation.[41] Here, it is important to remember that the reason behind this treaty was World War II, and it was agreed upon at a time that was characterised by a struggle against Apartheid in South Africa as well as decolonisation. Similarly to the ICCPR, this treaty, due to its restrictions on free speech, was heavily supported by the Soviet Union and its satellite states, while many Western countries expressed concern regarding its vague and broad formulations.[42]

The European Convention on Human Rights guarantees the right to freedom of expression in Article 10, and it is largely similar to the ICCPR:

> Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[43]

This Convention does not refer to hate speech, but it clearly accepts possible restrictions to freedom of speech in the second paragraph if they are "prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[44] Although the

[40] International Convention on the Elimination of All Forms of Racial Discrimination, New York 21 December 1965 (Hereinafter ICERD), art 4.
[41] Mchangama (2015), p. 77.
[42] See e.g. Afshin Ellian, 'Exploring the limits of freedom: Heresy in a free society' in Afshin Ellian and Gelijn Molier (eds.), *Freedom of Speech under Attack*, Eleven International Publishing, 2015. ProQuest Ebook Central, p. 241-242. (Hereinafter Ellian)
[43] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art. 10. (Hereinafter ECHR)
[44] ECHR, art. 10.

ECHR does not require a direct ban on hate speech, the jurisprudence of the Strasbourg Court has clearly shown that all forms of hate speech do not deserve protection.

The European Court of Human Rights has held Article 10 as a pillar of robust political debate for over three decades.[45] When some of the first limitations to freedom of speech were addressed by the Court, it emphasised that restrictions to this right ought to be exceptional, while freedom of speech should be the rule. In *Handyside v the United Kingdom* in 1976*,* the Court's approach, according to which freedom of speech should be the rule, not the exception, was expressed as follows:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), 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.[46]

The Court has, however, moved further away from this liberal position, shifting to a less tolerant stance towards speech that is offensive, insulting or blasphemous, especially in political contexts.[47] Since *Handyside,* the ECtHR has repeatedly excluded hate speech from the protections of Article 10, *inter alia*, by stating that there is an obligation to avoid being "gratuitously offensive to others".[48] By doing this, it has assented to measures taken by States Parties to counter "hate speech". In the 2004 *Gündüz v Turkey* the Court held that:

> There can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.[49]

The reference to the low threshold of "insulting" as well as the duty not to be "gratuitously offensive to others" raises concerns about freedom of speech, due to the deeply subjective nature of both insult and taking offence. However, the Court has not specifically defined hate speech and it rarely distinguishes between "incitement" and "offence."[50] For this reason, the

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[45] Tom Zwart, 'Changing Course by Stealth: How the European Court of Human Rights has been moving the goalpost in the area of political free speech' in Afshin Ellian and Gelijn Molier (eds), *Freedom of Speech under Attack*. p. 121 (Hereinafter Zwart).
[46] *Handyside v The United Kingdom*, App. No. 5493/72 (ECtHR 7 December 1976), para. 49.
[47] Zwart, p. 121.
[48] See, e.g. *Otto-Preminger-Institut v. Austria,* App. No. 13470/87 (ECtHR 20 September 1994), para. 49. (Hereinafter *Otto-Preminger v Austria*)
[49] *Gündüz v Turkey*, App. No. 35071/97 (ECtHR 4 December 2003), para. 41.
[50] Mchangama (2015), p. 78.

Court has made some controversial convictions, going as far as prohibiting blasphemous utterances in, for instance, *Otto-Preminger v Austria* and *E.S. v Austria.* These cases will be discussed in detail later in this thesis.

Hate speech is not, however, merely being examined through Article 10 of the Convention. One of the most common and far-reaching provisions to combat hate speech, amongst other phenomena, is Article 17 of the ECHR.[51] This Article contains an anti-abuse clause that holds that no conventionally guaranteed rights can be used to undermine or destroy the rights and freedoms of others:

> 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 set forth herein or at their limitation to a greater extent than is provided for in the Convention. [52]

This Article can be applied either exclusively or through the joint application of Articles 10 (2) and 17. Article 17 is used by the Court when the hate speech in question negates the fundamental values of the Convention,[53] meaning that it can deny certain expressions *ab initio*.[54] Article 10 (2), on the other hand, is used when the speech in question, although considered hate speech, is not severe enough to destroy the fundamental values of the Convention.[55]

The drafters' purpose with Article 17 was to avoid extremist anti-democratic forces using the Convention to destroy democracy. Here, especially the misuse of fundamental freedoms with the purpose to install totalitarian regimes in the first half of the 20th century was taken into account.[56] Article 17 was modelled after the equivalent Article 5 (1) in the ICCPR, which was adopted to hinder the growth of totalitarian ideologies such as Nazism and fascism. These Articles are modelled after a doctrine of militant democracy, initially developed by Karl Loewenstein. According to this doctrine "democracy and democratic tolerance have been used

[51] Koen Lemmens, 'Hate Speech In the Case Law of the European Court of Human Rights: Good intentions make bad law?' in *Freedom of Speech under Attack*, p. 144.
[52] ECHR, art. 17.
[53] European Court of Human Rights, Press Unit, 'Factsheet – Hate speech', February 2022. (Hereinafter ECtHR Factsheet)
[54] Mchangama and Alkiviadou, p. 1013.
[55] ECtHR Factsheet.
[56] Lemmens, p. 144.

for their own destruction."[57] For this reason, according to Loewenstein, it might sometimes be necessary to risk violating fundamental principles to rescue democracy from becoming illiberal.[58] However, an analysis of the *travaux préparatoires* reveals that the drafters did not spend much time on Article 17. The provision is drafted in a very black and white way: An applicant's claim is inadmissible if he is found to be an enemy of the Convention, or alternatively, the Court decides to examine the application, provided that the applicant is not an abuser of the Convention.[59] In other words, when the Court uses Article 17, it does not examine the case in light of the standards set forth in Article 10 (2). Subsequently, Article 17 is often referred to as the "guillotine provision.[60] Lemmens argues that this approach is curious because it is at odds with the general philosophy of the Convention, which is focused on proportionality. He continues by stating that the Court's task is to, at the very least, assess whether the national authorities have struck a fair balance between competing rights, but that Article 17 does not allow for such a balance.[61] Thus, the anti-abuse clause has left little room for discussion, meaning that there is a serious risk that the Article is used against groups of people without paying much attention to their fundamental rights.[62]

2.2. Key Principles in Determining the Offence of Hate Speech

Although the standards by which international and national courts determine hate speech vary from case to case, there are some key elements in international law on how to impose constraints on what can be banned as hate speech. As argued and exemplified by Mendel, there are three key aspects in determining hate speech in international law: 1) intent, 2) incitement and 3) proscribed results.[63]

Intent

In Article 20 (2) of the ICCPR, there is a requirement for "advocacy of hatred", which can be understood as an intent requirement. This means that only expressions uttered with the intent

[57] Loewenstein quoted in Mchangama and Alkiviadou, p.1014.
[58] Paraphrasing Loewenstein in Mchangama and Alkiviadou, p.1014.
[59] Lemmens, p. 145.
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*
[63] Mendel (2010), p. 4-5.

of inciting hatred should be excluded from protection.[64] In *Jersild v Denmark*, the importance of including intent in determining what constitutes a hate speech crime was emphasised. In this case, the applicant, a journalist, had made a television programme that included hateful expressions by racist extremists, intending to expose racism in Denmark. Jersild was convicted for exposing these statements in Denmark, but the ECtHR held, although not unanimously, that the conviction by the Danish courts was a breach of his freedom of expression. The Court highlighted that the programme was part of a serious Danish news programme and was intended for a well-informed audience.[65] The Court also stated that taken in the context as a whole, the applicant's intent was not disseminating racist opinions, but to counter them through exposure.[66] Here, it is worth mentioning that Article 4 of ICERD does not include a similar requirement for advocacy of hatred. Therefore, in *Jersild,* The UN Committee on the Elimination of all Forms of Racial Discrimination, which monitors the implementation of the Convention, was divided in its response.[67] The Committee stated that "Whilst some members welcomed it as 'the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression', other members considered that "in such cases the facts needed to be considered in relation to both rights."[68] In other words, the ICERD lacks an intent requirement.

However, as Mendel observes, in *Faurisson vs France* the UNHRC did not come to a similar conclusion. In this case, a professor had made statements in which he doubted the existence of gas chambers in Nazi death camps. The Committee concluded that the expressions were of nature as to raise anti-Semitic feelings and thus, the restriction of the author's freedom of speech was permissible. Evatt, Kreztmer and Klein expressed concern in their concurring opinions, stating that the law pursuant to which the author of the complaint was convicted did "not link liability either to the intent of the author or to the prejudice that it causes to respect for the rights or reputations of others."[69] The UNHRC still concluded that, based on the facts, the author had been motivated by a desire to promote hatred towards the Jewish community, which is why the French conviction was legitimate.[70]

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[64] *Ibid.* p. 5.
[65] *Jersild v Denmark,* App. No. 15890/89 (ECtHR 23 September 1994), para. 34.
[66] *Ibid.* para. 28.
[67] Mendel (2010), p. 5.
[68] *Jersild v Denmark,* para 21.
[69] *Robert Faurisson v France*, 8 November 1986, Communication No. 550/1993, U.N, Doc. CCPR/C/58/D/550/1993 (1996) UN Human Rights Committee (HRC), para. 9.
[70] See *Robert Faurisson v France* and Mendel (2010), p. 5-6.

Incitement

The question of what constitutes incitement is controversial and determining the existence of this aspect often causes the most controversial hate speech convictions by international courts. Insults, caused offence and strongly worded criticism are sometimes seen as equivalent to incitement. An expression of concern has been made, for instance, by The UN High Commissioner for Human Rights regarding the lack of a clear definition of incitement in international law.[71] International courts determine the presence of incitement by looking at many different factors, but two things, in particular, are often emphasised: causation and context.[72]

Causation

Establishing a causal relationship between something said and something done is difficult. It also goes without saying that inciting an act is not the same as causing it. Still, it is common for international courts to look for causal relationships and "likely impact" when assessing whether or not a statement incites hatred. In *Ross v Canada* a teacher had made some anti-Semitic statements and was removed from the classroom as a consequence.[73] The Canadian Supreme Court held that "it is possible to reasonably anticipate the causal relationship" between a "poisoned environment" in the school board and the publications by the teacher.[74] The UNHRC found this to be sufficient to cover the necessity part of the test for restrictions on freedom of expression, thus removing him from his teaching position.[75]

The ECtHR has also used this approach, for instance, in *Erbakan v Turkey*, where a politician was convicted for a speech where he made distinctions between religions, races and regions, targeting non-believers and other political parties. The Court concluded that the impugned statements had not given rise to, nor were they likely to give rise to actual harm or imminent danger.[76] Often, however, international courts look at what the likely impact might be instead

[71] UN Human Rights Council, Study of the United Nations High Commissioner for Human Rights compiling existing legislations and jurisprudence concerning defamation of and contempt for religions, 5 September 2008, A/HRC/9/25, 5 September 2008, para. 24.
[72] Mendel (2010), p. 6.
[73] *Malcolm Ross v Canada,* 26 October 2000, UN Human Rights Committee (HRC), CCPR/C/70/D/736/1997.
[74] *Ibid.*
[75] *Ross v Canada* and Mendel (2010), p. 6.
[76] *Erbakan v Turkey,* App. No. 59405/00 (ECtHR 6 October 2006), para. 68.

of looking at the direct causal perspective.[77] This was evident in *Faurisson*, when the UNHRC stated the author's expressions "were of nature as to raise or strengthen anti-semitic feelings."[78] Similar reasoning can be witnessed in the case law of the European Court and Commission, where many claims of a breach of the right to freedom of expression were rejected as inadmissible because of the focus on impact.[79] Little or no evidence or reasoning was given in most of these cases to sufficiently substantiate the claimed impact. Instead, the Court has been quick to equate a racist statement with a statement that is likely to undermine other rights, especially equality.[80] Similarly, in some cases, the Court has referred to the likelihood of the expressions fostering anti-Semitism, as well as the negative impact on justice and peace.[81] Mendel argues that the causality link between these hateful expressions and the likely impact is often weak, while the aims that are claimed to be protected, such as justice, peace and freedom of hatred, are vague.[82] Hence, in *Ross* the standard to determine causality was "possible to reasonably anticipate" and in *Faurisson* "of a nature to raise", while in many other cases no standard was even mentioned.[83]

Thus, the problem of linking violence to speech is one of the biggest issues when debating hate speech laws. Whenever hate crimes occur, there is an attempt to establish the link between hate speech and the subsequent violence, but the question of how to prove this link remains.[84] In most cases, the link is mostly speculative, but sometimes, the causal link between hateful speech and committed crimes is relatively clear. For instance, there is a widespread consensus that in the Rwandan genocide hate speech contributed to the atrocities, or at the very least, it played a part. This is illustrated by a study, which shows that there were 65 to 75 per cent more killings of Tutsis by Hutus in villages that received dehumanising messages, such as "exterminate the cockroaches", via the Radio Télévision Libre des Mille Collines.[85] However,

[77] Mendel (2010), p. 7.
[78] *Robert Faurisson v France*, para. 9.6.
[79] Mendel (2010), p. 7.
[80] See e.g. *Glimmerveen and Hagenbeek v. Netherlands*, 11 October 1979, App. No. 8406/78 and *Kühnen v. Germany*, 12 May 1988, App. No. 12194/86 and Mendel, p. 7.
[81] See e.g. *Garaudy v France*, App No. 65831/01 (ECtHR 7 July 2003)
[82] Mendel (2010), p. 7.
[83] *Ibid.*
[84] Lemmens, p. 139.
[85] See David Yanagizawa-Drott, 'Propaganda and Conflict: Evidence from the Rwandan Genocide', *The Quarterly Journal of Economics*, Volume 129, Issue 4, November 2014, Pages 1947–1994 and Timothy Garton Ash, Free speech – Ten principles for a connected world. London, Great Britain: Atlantic books Ltd, 2016. p. 135.

when it comes to most hate speech cases, it is worth asking whether the balancing point between free speech and the prevention of violence has been put in the right place.

Context

The Context in which expressions are made is of great importance since an expression can be dangerous in one context and harmless in another. Whether a statement is likely to incite hatred depends therefore largely on context, which in turn can be a significant factor with regard to identifying both intent and causation. Many hate speech cases do, therefore, refer to contextual factors.[86] In *Faurisson*, the UNHRC referred to a statement according to which Holocaust denial is "the principal vehicle for anti-semitism." In the concurring opinion by Evatt, Kretzmer and Klein it was also pointed out that Holocaust denial "may constitute a form of incitement to anti-Semitism" which is a consequence, *inter alia*, "of the context, in which it is implied, under the guise of impartial academic research."[87]

Similarly, in *Ross,* it was emphasised that the author had been a teacher:

> In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students.[88]

Two cases from Turkey also illustrate how the European Court takes context into account in its decisions. In *Zana v Turkey*, the applicant was convicted for supporting the activities of an illegal armed organisation, by defending an act punishable by law as a serious crime.[89] The Court concluded that there was no breach of Article 10 of the Convention when it took into account that the statements were made by a former mayor of the largest city in south-eastern Turkey, during a time when the statements were likely to exacerbate an already explosive situation in the area.[90] *In Incal v Turkey*, the Court distinguished an otherwise similar situation by referring to context, stating that "Here the Court does not discern anything which would warrant the conclusion that Mr Incal was in any way responsible for the problems of terrorism in Turkey, and more specifically in Izmir."[91] Therefore, the Court found that the circumstances

[86] Mendel (2010), p. 8.
[87] *Faurisson v France*, para 6.
[88] *Ross v Canada*.
[89] *Zana v Turkey,* App. No. 18954/91 (ECtHR 25 November 1997), paras. 17 and 13.
[90] *Ibid.,* paras. 59-61.
[91] *Incal v Turkey*, App. No. 22678/93 (ECtHR 9 June 1998), para. 58.

were not comparable with *Zana*, meaning that there had been a breach of the applicant's freedom of expression.[92]

Proscribed Results

Both Article 4 (a) of the ICERD and Article 20 (2) of the ICCPR prohibit statements inciting different proscribed results: violence, discrimination, hatred or hostility. ICERD goes as far as to prohibit all ideas based on superiority. Both violence and discrimination are illegal themselves, making the prohibition of incitement to either more of a general rule, which prohibits the offence of incitement to crime.[93] However, hatred as such is a state of mind and an opinion rather than a specific punishable act, which means that it is certainly protected by international law.[94] Incitement to hatred is, therefore, an independent offence, even if hatred itself is not. Most states accept the international law standard according to which the prohibition of incitement to hatred is acceptable, the United States being the notable exception. The reason for favourable attitudes towards banning incitement to hatred is at least partly pre-emptive, the goal being to prevent the manifestation of hatred before concrete acts are taken.[95]

As observed by Mendel, both the UNHRC and the European Court tend to focus more on whether the statements in question are of racist nature, or on how much harm they may have on the rights of others, instead of defining hate as such.[96] Trying to distinguish hate speech from merely offensive speech has often been the topic of academic research. One line of reasoning has been distinguishing between expressions that target *ideas* and hateful expressions that target *human beings*.[97] This distinction, however, erodes occasionally. In *E.S v Austria*, the European Court introduced defamation of a religious object of veneration as grounds to limit speech, simultaneously introducing a standard according to which the Court has the authority to decide what is factually true according to religious texts.[98] Similarly, a "defamation of religions resolution" was approved by the UNHRC, and later by the UN General Assembly for over a decade, starting in 1999. The resolution was originally introduced by the Organisation

[92] *Ibid.* paras. 58-59.
[93] Mendel, (2010), p. 9.
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.,* p. 10.
[97] *Ibid.,* p. 10.
[98] *E.S. v Austria*, App. No. 38450/12, (ECtHR 25 October 2018), paras. 53-55.

of the Islamic Conference (OIC) to create international legitimacy for national laws prohibiting defamation of religions.[99] Although resolutions are non-binding, they still carry political weight. Notably, despite the efforts to blur the distinction between hate targeted towards ideas versus humans, the resolution was later changed from defamation of *religions* to defamation of *religious persons*,[100] thus bringing the focus back on the rights of people, rather than on ideas.

The lack of a proper definition of hate speech has contributed to the challenge of determining what reaches the status of unlawful hateful expressions. Scheffler argues that the shortcoming of hate speech legislation on the national level is a logical consequence of the shortcomings on the international level. She argues that countries are struggling with defining hate speech standards narrowly and clearly, because of the failures to define incitement concepts sufficiently on the international level.[101]

2.3. Vulnerabilisation in the Context of Freedom of Speech

A key aspect regarding hate speech laws is the question of which group characteristics should be protected from hateful and discriminatory speech. The underlying assumption is that there are vulnerable categories in need of special protection, since their needs and rights are not sufficiently covered by the more general laws.[102] Those eligible to be categorised as vulnerable have traditionally been considered "marginalised", "disadvantaged" or "discriminated" against.[103] As demonstrated in the chapters above, the law on freedom of speech recognises the need for special protection for peoples based on a number of both immutable characteristics (e.g., race), as well as mutable ones (e.g., religion). Although offering special protection to those who are most vulnerable in society is important, doing so without caution entails certain risks. This is particularly the case concerning limitations made on the right to freedom of speech on the grounds of protecting vulnerable groups from hateful expressions.

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[99] Asma T. Uddin, 'The UN Defamation of Religions Resolution and Domestic Blasphemy Laws in Pakistan: Creating a Culture of Impunity' in Peter Molnar (eds.) *Free Speech and Censorship Around the Globe*, 495-507, Central European University Press, ProQuest Ebook Central, 2014, p. 501.

[100] Caleb Holzaepfel, 'Can I say that? How an international blasphemy law pits freedom of religion against freedom of speech.' *Emory international law review.* Vol. 28, nr. 1, 2014, p. 597-648.

[101] Andrea Scheffler, "The Inherent Danger of Hate Speech Legislation." *A Case Study from Rwanda and Kenya on the Failure of a Preventative Measure,* Friedrich-Ebert-Stiftung, (eds. Le Pelley, Mareike), Windhoek, 2015, p. 64.

[102] See e.g. Ingrid Nifosi-Sutton, 'The Protection of Vulnerable Groups under International Human Rights Law' (1st ed.). Routledge, 2017, p. 20.

[103] Viljam Engström, Mikaela Heikkilä and Maija Mustaniemi-Laakso, 'Vulnerabilisation: Between Mainstreaming and Human Rights Overreach', *Netherlands Quarterly of Human Rights,* 5 April 2022, p. 1.

According to Engström, Heikkilä and Mustaniemi-Laakso, there is an ongoing process of "vulnerabilisation" of international protection.[104] This process, which has continually adopted an increasing number of groups to be entitled to special protection by law, signals that such protection will be granted to those who have successfully convinced others about their status as a vulnerable group. In other words, the creation of vulnerable groups that are entitled to enhanced protection can result in a "vulnerability contest", where vulnerability serves as a gatekeeper for such protection.[105] The importance of the vulnerability label for protection has, therefore, created a perverse incentive that encourages groups to engage in a type of race to the bottom to be vulnerable enough to gain special protection. In the context of freedom of speech, this incentive can be taken advantage of by identity lobbyists to gain enhanced protection from hurtful speech, while simultaneously creating a longer list of societal taboos, covering a growing number of groups and characteristics. If this type of development is not approached with caution, the conclusion drawn by anyone who wants to impose a legally enforced taboo will be the achievement of a label as an "oppressed" or "marginalised" group for their vulnerability to be recognised. A society that takes freedom of speech seriously, however, has as few taboos as possible and refrains from widening the definition of hate speech excessively. It can also be argued that this kind of "vulnerabilisation" aims at only mitigating the effects of injustices, instead of providing tools for addressing their causes.[106]

As observed by Ash, people have used their freedom in increasingly liberal democracies to define even more subtle and fluid variations of identity, such as the LGBTQI, which has seen a multiplication of categories of sexual orientation and gender identity.[107] By labelling these relatively new categories as vulnerable, they, too, can be considered in need of enhanced protection by law. This has been done successfully at least in Sweden, where gender identity has recently been added as a protected category in the national "hate speech" legislation.[108] This particular addition to the Swedish law is logical, because it is easy to make a convincing

[104] *Ibid.*, p. 3.
[105] *Ibid.*, p. 27.
[106] See Engström, Heikkilä and Mustaniemi-Laakso, p. 20, David Chandler and Julian Reid, *The Neoliberal Subject: Resilience, Adaptation and Vulnerability,* Rowman & Littlefield International, 2016; and John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy,* OUP 2018, 252-253.
[107] Ash, p. 223.
[108] See Prop. 2017/18:59: 'Ett utvidgat straffrättsligt skydd för transpersoner', available at: https://lagen.nu/prop/2017/18:59 (Accessed 24 February 2022)

case of the group's vulnerability, and difficult to justify the lack of gender identity as a protected category, while sexual orientation is one. Similarly, the lack of sexual orientation as a protected category would be difficult to justify when racial hatred is criminalised. As would be the lack of protection for Muslims and Christians when Jews are protected from anti-Semitism and Holocaust denial, and so on. The range of potential protected characteristics and is getting longer and more complicated as groups compete for recognition by the law.[109] As Islam, Christianity, Judaism, gender identity and sexualities are protected, it brings forth the question of why that same protection is not also extended to disability, age, obesity and class, as well as other religions such as Scientology and Mormonism, or to atheists who lack a religion altogether. All of these groups can make a convincing case about their vulnerability, and it is increasingly difficult to draw the line. However, as argued by Ash, when this goes beyond normal interest group lobbying, it becomes closer to the heckler's veto.[110] This term was coined by an American free speech scholar to describe how the loud and persistent hecklers at a public meeting can silence a speaker.[111] In other words, by using the heckler's veto successfully, those who make the most noise about their disadvantages and discrimination, either real or perceived, will prevail and silence their opponents. An argument can be made that neither national nor international courts, such as the ECtHR, are completely immune to this, as will be displayed in the following chapters.

3. A Widening Definition of "Hate Speech" in ECtHR Jurisprudence?

According to a database created in the Framework of the Future of Free Speech project, between the years 1979 and 2020, there were a total of 60 hate speech-related cases brought to the ECtHR. The database reveals that 62 per cent of the cases brought by the utterers resulted in the applicant's loss. Out of the losing cases 51,43 per cent were found to be manifestly ill-founded, while in 34,29 per cent there was a finding of a non-violation of Article 10 and 14,29 per cent were found incompatible *ratione materiae.* The same database also illustrates that the amount of hate speech cases brought to the Court per year has risen steadily, especially since the year 2009.[112] Therefore, the database demonstrates that it is more common for the Court to

[109] Ash, p. 215.
[110] Ash, p. 225.
[111] See Ash, p. 130 and 403: The term was coined by Harry Kalven Jr in the 1964 book *The negro and the First Amendment.*
[112] Hate speech case database, *The Future of Free Speech.* The database was created in the framework of the Future of Free Speech project, a collaboration between Danish think tank Justitia, the University of Aarhus and

take a restrictive approach to hate speech. In order to comprehend and clarify the Court's approach, some of these cases will be discussed in more detail below. The categories that are discussed are 1) Blasphemy and religious hate, 2) Hate based on ethnicity, race and immigrant background, 3) genocide denial and anti-Semitism and 4) sexual orientation. Notably, religious hate and hate directed towards immigrants (or Muslims) are discussed in separate categories because the former category deals with utterances directed towards *religions*, while the latter deals with speech directed towards *people* or the phenomena of immigration.

On a closer examination of the Court's case law, it soon becomes clear that as it has not developed a specific definition of hate speech, the Court tends to define the meaning of the term on a case-by-case basis. At the same time, the Court displays some inconsistencies in its reasoning, making it increasingly difficult for European citizens and states to know where free speech ends and hate speech begins. Both the inconsistencies and the increasingly widening definition of hate speech are problematic in terms of legal certainty when the limits of hate speech are blurred. The ECtHR has expressed that taking into account the fundamental importance of tolerance and respect for the equal dignity of all human beings it may be necessary "to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance"[113], which may explain why the Court has adopted a rather low threshold for hate speech convictions.

3.1. Blasphemy and Religious Hate

In recent decades, especially since 9/11 and the increase of Muslim immigration to Europe, the Court has dealt with several cases of speech targeted towards the religion of Islam and Muslims. Unlike cases relating to anti-Semitism, this form of hatred has commonly been dealt with under Article 10. The notable exception here is the case of *Norwood v the United Kingdom* where a regional organizer for the British National Party (BNP) displayed a poster of the Twin Towers in flames, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and a star in a prohibition sign, shortly after the 9/11 attacks.[114] The ECtHR agreed with the domestic Courts that the expressions constituted "a general, vehement attack against

the University of Columbia, available at: https://futurefreespeech.com/hate-speech-case-database/ (Accessed 16 March 2022)

[113] Quotation of *Erbakan v Turkey* in ECtHR Factsheet.

[114] *Norwood v The United Kingdom*, App. No. 23131/03 (ECtHR 16 November 2004), The Law.

a religious group, linking the group as a whole with a grave act of terrorism".[115] Subsequently, the Court concluded that the expression was not protected by Article 10, but that it was incompatible *ratione materiae* under Article 17.[116] Here, the Court equated the phrase "Islam out of Britain" as an attack on Muslims rather than on the religion of Islam. Although this is possible, it is by no means obvious. This position was also emphasised by the applicant, who held that criticism of religion is not the same as an attack on its followers.[117] Instead of addressing this statement by the applicant, the Court assumed the worst possible motive behind the applicant's expressions. Although the applicant did not mention ethnicity, race or origins, the Court assumed that the applicant was attacking all Muslims in the United Kingdom, using religion to cover racial and ethnic dimensions. As Lemmens argues, this displays a real risk that the Court takes the role of a kind of thought police, where the Court does not judge what has been said, but what the Court *believes* the intentions behind the statements were.[118]

Additionally, the Court did not explain how the facts met the threshold of Article 17. The Court ought to have at least assessed the statements under Article 10 to determine whether the statements were legitimately convicted by the British Courts. Now, what could have been strongly worded, and rather provocative, criticism of a religion, was made unacceptable by using "the guillotine", instead of addressing the facts. Mchangama and Alkiviadou argue that this case has a chilling effect on freedom of speech, since not only were the statements not analysed, but the conviction also blurred the line of acceptable criticism of religion.[119] The Courts ought to be careful not to grant rights to religions or other ideologies since people are holders of rights, not religions or other world views.[120] As such, there ought to be a right to criticise them freely. Mchangama and Alkiviadou also argue that the temporal proximity between this case and the attacks on the twin towers may have led to a different outcome in *Norwood* compared to similar cases. The authors argue that this is unacceptable since the fundamental right to free speech should not be governed by *ad hoc* sensitivity but by legal certainty.[121]

[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] Lemmens, p. 154.
[119] Mchangama and Alkiviadou, p.1029.
[120] See also Lemmens, pps. 154-155.
[121] Mchangama and Alkividaou, p. 1030.

In the 1994 *Otto-Preminger-Institut v Austria,* the Court widened its definition of "hate speech" by a rather questionable ruling, since it concluded that states may curb free speech to protect the religious feelings of believers. Here, the European Court found that the Austrian courts had rightly seized a film that displayed Jesus as an idiot, the Abrahamic God as a Senile man and Virgin Mary as a character who manifested erotic tensions with the Devil. In this case the Court saw, for the first time, that Article 9 of the Convention, which guarantees the right to freedom of religion, also includes the right to have one's religious feelings respected:

> *The respect for the religious feelings of believers as guaranteed in Article 9* (art. 9) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. [122]

Such a right is not, however, proclaimed in Article 9 of the Convention, which was also reiterated by the dissenting judges Palm, Pekkanen and Makarczyk.[123] However, since the Court found a right not to be insulted in one's religious feelings embedded in Article 9, it argued that there was a conflict between freedom of speech and freedom of religion.[124] According to Temperman, there is no perpetual and inevitable "clash" between these two rights, but that such an interpretation by the Court is in fact both flawed and hazardous. To limit the right to freedom of speech, in order to guarantee freedom of religion as a right to respect for one's religious feelings makes it necessary to extend the right of freedom of religion excessively. Temperman points out that this is not only jeopardising the fundamental right to freedom of expression, but that it is a threat to freedom of religion in itself. This is because the very exercise of one's religion in a certain fashion might be considered heretical by another person.[125] This approach also extends the protection of the religious category in the vulnerable group significantly, and raises questions as to why the protection of religious feelings is more important than, say, non-religious or secular feelings.

The Court also pointed out that "in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them".[126] Yet, The Court did not provide any

[122] *Otto-Premineger v Austria*, para, 47. (emphasis added)
[123] *Ibid.*, Joint dissenting opinion of judges Palm, Pekkanen and Makarczyk, para 6.
[124] *Ibid.*, para, 55.
[125] Jeroen Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law', *Netherlands Quarterly of Human Rights,* Vol. 26/4, 517-545, 2008. p. 544.
[126] *Otto-Preminger v Austria*, para. 47.

explanation as to how exactly the blasphemous expressions made in the film jeopardised the right of others' to practise or manifest their beliefs. It would have been expected that the Court would at least have explained how the blasphemous utterances were so severe that freedom of speech would impede or threaten to impede the freedom of religion of others.[127]

The Court also introduced a standard according to which the "duties and responsibilities" in Article 10 (2) may include an "obligation to avoid being gratuitously offensive to others" in the context of religious opinions and beliefs[128] and thus, the state can "legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas".[129] It goes without saying that mocking, criticising or insulting a religion and its religious figures will always be deemed offensive by someone, and what is considered to be "offensive" by others is purely subjective. A standard according to which the unacceptability of speech is determined by its "gratuitously offensive" nature also lowers the threshold of proclaiming something as unacceptable speech. It takes us closer to the "I'm offended" veto,[130] while taking us, to a paradoxical degree, further away from *Handyside* and the right to "*offend*, shock and disturb". In this case, as in many others relating to hate speech, the Court referred to a wide margin of appreciation, which gives a generous allowance for states to have different interpretations of human rights obligations.

Another recent development in the field of religious hatred has been the introduction of a standard according to which the defamation of religious persons is unacceptable in the eyes of the Court. This ruling was made in *E.S. v Austria,* in which a woman had held several seminars entitled "Basic information on Islam" at the Austrian right-wing Freedom Party Education Institute. The seminars were only open to the members of the party and invited guests, but it was also advertised on the party's website as well as by distributing leaflets.[131] E.S. was ultimately charged in the Austrian courts due to two statements she made during the seminars. In the first statement, she claimed that the idealisation of the Prophet Muhammed within the Muslim community constituted a problem. She explained how Muhammed was a warlord who had many women and who liked to have sex with children, and how this was incompatible with modern value systems. The second charge was for her reference to the religious text Al-

[127] Temperman (2008), p. 536.
[128] *Otto-Premineger v Austria,* para. 49.
[129] *Ibid.*, para. 47.
[130] The term is coined by Ash, p. 218.
[131] *E.S. v Austria,* The Facts.

Bukhari, in which the relationship with the Prophet and the girl Aisha is explained, as well as their marriage when she was six years old and the consummation of that marriage when she was nine. E.S. then cited herself in a conversation with her sister about the nature of the relationship of a 56-year-old man and an underage girl, asking "What do we call it if not paedophilia"?[132] The person who requested a preliminary investigation about these statements was an undercover journalist.[133]

In this case, not only did the Court refer to the obligation to avoid "being gratuitously offensive to others", but also to its previous case law on defamation.[134] Although the Court's jurisprudence on defamation has often emphasised the difference between value judgements and facts, in *E.S.* it was applied to a *religious figure*, instead of a real and alive *person.* The Court also pointed out that the claims by the applicant lacked evidence[135] and were "partly based on untrue facts",[136] thus taking a stand on what is considered a factual interpretation according to religious Islamic scripture. Here, it is important to remember that defamation laws are made to protect people and not religious characters that are cherished by any given ideology. When it comes to facts about people, they can be empirically proven either true or false. The same cannot be done with disputed religious ideas or persons based on religious scripture, especially if that person has been dead for over 1400 years.[137] Taking into account that the law can only deal with empirical truth claims, this sort of interpretation is entirely beyond the scope of a state[138] or a secular Court of law. As such, determining what is "fact", what is the "truth" or the proper "objective" information on Islam is hardly relevant. Despite this fundamental rule of law problem and poor argumentation, the Court found no violation of Article 10.

Despite not being directly relevant to this research, it is worth mentioning that the Regional Austrian court argued that having sex with a child within the institution of marriage cannot be equated to paedophilia,[139] and that it was relevant to point out that the child Aisha's eventual

[132] *Ibid.,* para. 13.
[133] *Ibid.,* paras. 8-9.
[134] *Ibid.* See para 48, The Court referred to *Jerusalem v Austria* and *Feldek v. Slovakia*.
[135] *Ibid.* paras. 54–55.
[136] *Ibid.* para. 53.
[137] This is also observed by Stijn Smet in 'Free Speech versus Religious Feelings, the Sequel: Defamation of the Prophet Muhammed in E.S. v Austria'. *European Constitutional law review*. Vol. 15, nr. 1, 2019, Cambridge University Press, pps. 7-8.
[138] Uddin, p. 503.
[139] *E.S. v Austria,* para. 15.

and inevitable ageing to adulthood during the marriage was proof of the Prophet's lack of paedophilic tendencies, thus meaning that the Prophet was "wrongfully accused" by the applicant.[140] In other words, the Austrian Court found that it had to make excuses for paedophilia to defend the Prophet from "defamation", although such an approach is hardly necessary to defend the religion of Islam or Muslims. Even if child marriages were considered acceptable in the past and practised across cultures, religions and locations,[141] in today's society, the phenomenon can be condemned across the board, instead of justifying it in an attempt to prove a point. Such a belittling attitude towards paedophilia is in itself concerning (not to mention offensive to many victims of child sexual abuse), and one can only hope that the excuses made by the Austrian Court will not be referred to in any future cases relating to sexual violence against children. Additionally, this position completely disregards the vulnerability of children in general, and that of girls in particular. This instance also suggests that Western courts (and Western societies at large) might have a tendency for overcorrection regarding the attempt to be more inclusive and tolerant, or perhaps even appeasing, to minorities.

In *E.S.*, the Court also pointed out that states may restrict speech that they find to constitute an "abusive attack" on the Prophet Muhammed.[142] Thus, not only did the Court find that criticising or "defaming" the Prophet can constitute an "abusive attack" in a secular Court, but that a religious object of veneration deserves protection from such "abusive" words. The question here is the following: why should a religious object of veneration, regardless of religion, be protected from such words in a secular society? In a similarly concerning manner, the Court equated the problematisation and critique of a religious object of veneration as something that is "likely to incite religious intolerance".[143] This case shows how the definition of unlawful hate speech has widened considerably. What is essentially blasphemy can now be seen as hate speech, simultaneously blurring the lines of acceptable criticism of religions as well as their religious objects of veneration. Thus, the question of what constitutes an "insult to religions" and what "just criticism" remains, and as pointed out by Holzaepfel, the distinction is too subjective to justify international blasphemy laws.[144]

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[140] *Ibid*., para. 14.
[141] *Ibid*., The prevalence of child marriages e.g. in Europe was noted by the Regional Court, see para. 15.
[142] *E.S. v Austria* para. 43.
[143] *Ibid.,* para. 43.
[144] Holzaepfel, The problem of Scope in Blasphemy Laws.

The Court also took into account the context in which the statements were made in *E.S.* and that the subject matter was "of a particularly sensitive nature", which is why the domestic authorities would be in a better position to evaluate which statements were likely to disturb religious peace.[145] This proclaimed result of the speech is rather vague, and as with most hate speech cases, the Court did not explain how religious peace was threatened or who was likely to conduct the disturbance. It is also questionable whether the "sensitive nature" of the subject at hand should be a reason to curb freedom of speech. It is possible to argue that the heckler's veto has been used successfully in this instance since the subject has been labelled too sensitive to be open for discussion and debate. There is also reason to doubt that the religious figures of other religions would be granted such protection in the West today, simply because it is not considered sensitive, or at least not sensitive enough, to make similar claims about equivalent objects of veneration.

3.2 Ethnicity, Race and Immigrant Background

Taking into account the historical atrocities of the 20th century, there is no problem in understanding why European countries have developed hate speech laws protecting people based on race, religious background and ethnicity. However, on a closer examination of the ECtHR jurisprudence, it becomes evident that there has been an extension on the scope of Article 17 in this field. At the same, the threshold of what constitutes hate speech has lowered.

Within the time span of approximately two decades, the ECtHR has watered down its definition of incitement considerably. In *Soulas v France*, the Court saw that it was justified to censor an author of an academic book on the negative aspects of mass immigration in France. The author claimed, *inter alia,* that an "ethnic civil war" was the only solution to the problems in this particular area. No calls for violence, armed resistance or insurrection were uttered, but the Court held that the statements could induce a feeling of rejection.[146] Consequently, the Court held that there was no violation of Article 10, while simultaneously departing from its existing case law very suddenly and dramatically. The Court also found that the impugned statements could potentially incite aggression against a particular group, yet it left the nexus between the statements and the alleged incitement of aggression unsubstantiated. Here, the Court

[145] *E.S. v Austria* para. 50.
[146] *Soulas v France,* App. No. 15948/03 (ECtHR 10 July 2008) only available in French. See also Tom Zwart, p. 128-129.

emphasised that since the book was easy to read and addressed a wide audience, the potential harm of its contents was enhanced.[147] The Court also found the size of the audience and the outreach of the expressions to be of importance in *Karatas v Turkey*, where the alleged propaganda was expressed through poetry, which meant, according to the Court, that the audience would be very small.[148] On the other hand, in *Lilliendahl* discussed below, these factors were irrelevant to the Court.[149]

Compared to *Soulas,* the Court went even further in December 2009 in *Féret v Belgium*, where the applicant was found to be guilty of incitement without inciting violence or any other criminal act. In this case, a political leader in a nationalist Belgian party had published pamphlets according to which immigrants should be returned to their country of origin and that the Islamization of Belgium needed to be stopped.[150] The Court found no violation of the applicant's freedom of speech, emphasising that tolerance and the equal dignity of all human beings constitute a foundation of a democratic and pluralistic society. Hence, state authorities may consider that punishing or preventing expressions that propagate, incite, encourage or justify hatred based on intolerance fills the "necessary in a democratic society" part of the test.[151] The Court's approach in *Féret* showed that insults, offence, personal attacks and ridicule directed towards specific groups will suffice to limit expression. In other words, these circumstances justify state authorities to give precedence to the battle against racism over irresponsible free speech which violates the dignity or the security of parts of the population.[152] This judgement could have easily been dismissed as a one-off deviation, but in the 2012 *Vejdeland v Sweden* case, the Court confirmed its position.[153] Here, the Court reiterated that inciting hatred does not necessarily require calls for violence or other criminal acts.[154] The threshold of unacceptable speech has, therefore, fallen significantly since *Handyside,* where it was emphasised that speech that "shock, offend or disturb" ought to be tolerated. At the same time, by watering down the protection of political speech, the Court deviated from its own

[147] *Soulas v France* and an English translation of para 43 and 48 of *Soulas* in Mchangama and Alkiviadou, p. 1031.
[148] *Karatas v Turkey,* App. No. 23168/94 (ECtHR 8 July 1999), para 52.
[149] See also Mchangama and Alkiviadou, p 1031.
[150] *Féret v Belgium*, App. No. 15615/07. (ECHR 16 July 2009) only available in French. See also Zwart p. 129-130.
[151] Zwart, p.129-130.
[152] *Féret v Belgium* para. 73 and Zwart, p. 130.
[153] Zwart, p. 129-130.
[154] *Vejdeland and others v Sweden,* App. No. 18183/07 (ECHR 9 February 2012).

principles, according to which free speech is important for everybody, but especially important for elected representatives of the people.[155]

In *Féret* the Court also rejected the Belgian government's request for the enforcement of Article 17, without explaining the difference to *Norwood.* The ECtHR also argued that "To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions".[156] The nexus between the speech and the vague proscribed results, namely the undermining of trust in democratic institutions, was not explained by the Court. The dissenters in *Féret* also warned about a slippery slope, arguing that loosening the direct link between acts of violence and discrimination would limit the protection of political speech. They also found it difficult to extend the scope of racism to aspects of religion and culture.[157]

In 2010, the Court dealt with *Le Pen,* where a right-wing politician had made some allegedly disparaging comments about Muslims in an interview with the Le Monde newspaper. Le Pen claimed *inter alia* that "'the day there are no longer 5 million but 25 million Muslims in France, they will be in charge'[158], for which he was fined 10 000 Euro for provoking discrimination. The Court found the case to be manifestly ill-founded under Article 10, since the remarks were likely to give rise to feelings of rejection and hostility.[159] However, no explanation was given as to the difference between this case and *Féret* or *Soulas*, where the merits were at least examined under Article 10. It seems, therefore, that the Court's approach in *Le Pen* was more severe, even though the impugned statements were similarly provocative.[160]

The arbitrary application of hate speech standards is especially highlighted when comparing two cases. In *Atamanchuk v Russia* a journalist and politician was convicted for referring to non-Russians as criminals. The Court came to the following conclusion:

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[155] This position is held in e.g. *Castells v Spain,* App. No. 11798/85 (ECHR 23 April 1992), para 42.
[156] See *Feret v Belgium,* para. 77 and Mchangama and Alkiviadou, p. 1030.
[157] Lemmens, p 152.
[158] *Le Pen v France* App. No. 18788/09, (ECtHR 20 April 2010) only available in French. See also English translations e.g. in Mchangama and Alkiviadou, p. 1031 and in the Hate speech case database, *The Future of Free Speech:* Le Pen v France.
[159] *Le Pen v France,* Mchangama and Alkiviadou, p. 1031 and the Hate speech case database, *The Future of Free Speech:* Le Pen v France.
[160] Lemmens, p. 151.

> Inciting hatred does not necessarily involve an explicit call for violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner.[161]

Here, insults were enough to prohibit speech, while also being incorporated in the framework of inciting hatred.[162] However, in *Ibragim Ibragimov and Others v Russia,* the Court found that banning a Muslim scholar's book that allegedly contained extremism was not legitimate. The Court stated that 'merely because a remark may be perceived as offensive or insulting by particular individuals or groups does not mean that it constitutes "hate speech." Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression".[163] The difference between these two cases is that the former was targeting people based on ethnicity, while the latter was targeting non-believers. This does not only demonstrate how difficult it is to predict the Court's principles for unlawful speech because it keeps contradicting itself, but that the threshold for hate speech is lower when the speech is targeting people based on ethnicity. At the same time, it illustrates that non-believers may not only enjoy less protection from hate speech when compared to people who are targeted because of their ethnicity, but also compared to religious people, or at the very least, it can be perceived that way. This, in turn, suggests that there is a certain hierarchy of protection depending on what characteristic is targeted.

3.3. Genocide Denial and Anti-Semitism

Holocaust denial has been outlawed in many European States,[164] and the European Court has systematically refused to offer protection to ideas related to National Socialism, anti-Semitism and Holocaust denial. In these types of cases, numerous applications have been found manifestly ill-founded or incompatible *ratione materiae* with the Convention. Specifically, the use of Article 17 is heightened in cases related to historical revisionism, anti-Semitism and genocide denial. This indicates of a certain hierarchy of protection developed by the Court, where especially Holocaust denial has a special status.[165] The reason why the Court has extended the scope of Article 17 to such speech is understandable to an extent, when taking

[161] *Atamanchuk v Russia,* App. No. 4493/11 (ECtHR 11 February 2020), para. 52.
[162] Mchangama and Alkiviadou, p.1015-1016.
[163] *Ibragim Ibragimov and Others v Russia,* Application Nos. 1413/08 and 28621/11, (ECtHR 4 February 2019), para. 115.
[164] Lemmens, p.157.
[165] Mchangama and Alkividaou, p. 1021.

into consideration the historical context and the close relationship between anti-Semitism and Holocaust denial, as well as Nazism. The Court has wanted to protect the post-war democracies against the development of totalitarian groups, which often use racist, anti-Semitic and discriminatory doctrines as a basis.[166] Mchangama and Alkividaou argue that although Holocaust denial and negation has been systemically precluded from the protection of the European Convention, it is difficult to reconcile with the Court's approach in other cases,[167] where the Court has held that "it is an integral part of freedom of expression to seek historical truth"[168] and that 'it is not its role to arbitrate the underlying historical issues".[169] For instance, in *Garaudy v France*, the applicant had been convicted for disputing the existence of the Holocaust in a book. The Court found that the claims fell in the category of aims prohibited in Article 17 of the Convention by stating the following:

> There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. [...] Denying crimes against humanity is [...] one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.[170]

However, the Court does not only display inconsistencies with regard to its role as the arbiter of historical facts, but also in other areas. This became evident in *Perinçek v Switzerland*, which was referred to the Grand Chamber in June 2014. Here, the Court found a violation of Article 10 after the Swiss courts had convicted a Turkish politician who described the Armenian genocide as "an international lie" during various conferences in Switzerland.[171] The Court observed that there was a lack of a general consensus about the exact qualification of the atrocities in 1915 and whether the denial of the Armenian genocide was punishable by national law by other state parties.[172] The Court also mentioned that "taking into account the overall

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[166] Hannes Cannie and Dirk Voorhof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' *Netherlands Quarterly of Human Rights,* Vol. 29/1, 54–83, 2011 p. 63.
[167] Mchangama and Alkividaou, p. 1021.
[168] *Giniewski v France* App. No. 64016/00 (ECtHR 31 January 2006), para. 51 and *Chauvy and Others v France* App. No. 64915/01 (ECtHR 29 September 2004), para. 69.
[169] *Ibid.*
[170] *Garaudy v France*, App No. 65831/01 (ECtHR 7 July 2013) only available in French. An excerpt of an official English translation in Tarlah McGonagle, 'A Survey and Critical Analysis of Council of Europe Strategies for Countering "Hate Speech" in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Cambridge University Press, 2012. *ProQuest Ebook Central*. p. 462.
[171] *Perinçek v Switzerland,* App. No. 27510/08, (ECtHR 15 October 2015), The Facts.
[172] *Ibid.,* paras. 256-257.

thrust of his statements, [the Court] does not perceive them as a form of incitement to hatred or intolerance. The applicant did not express contempt or hatred for the victims of the events of 1915..." and that "he did not call the Armenians liars, use abusive terms with respect to them, or attempt to stereotype them".[173] This approach, namely examining whether the denialism in question constitutes incitement to hatred, has not been looked for in cases related to the Holocaust. Instead, the Court has recognised that the link between Holocaust denial and hatred or intolerance has "invariably been presumed".[174] In other words, according to the Court, Holocaust denial should always be equated to incitement to hatred, and it is always harmful and anti-Semitic. The harmfulness and hateful nature of denying other genocides, on the other hand, must be proven.

Although the Court did not explain why its reasoning differed in matters concerning the Holocaust and the Armenian genocide, it found time and geographical factors to be relevant. The Court pointed out that the events in Armenia had happened about 90 years ago[175] and that incitement to hatred and intolerance was not to be expected because the statements were made in Switzerland about something that happened in the Ottoman Empire,[176] thus referring to the context in which the expressions were uttered. These types of contextual distinctions are also lacking in the case law relating to National Socialism and Holocaust denial.[177] This difference in approach was found to be concerning in the partly dissenting opinion by judges Vučinić and Pinto de Albuquerque, who observed the following after the Second Chamber had concluded that there was a violation of Article 10: "The suffering of an Armenian under the genocidal Ottoman State policy is not worth less than the suffering of a Jewish person under the genocidal Nazi State policy."[178] Mchangama and Alkiviadou also argue that the "sharp contrast in standards indirectly disparages the memory of the victims of the Armenian Genocide in comparison to the victims of the Holocaust".[179] Undoubtedly, this kind of judgement has the potential of giving an impression that Jews are entitled to more protection against hatred compared to the Armenians. Taking into account that one of the main principles of the rule of law is equal treatment under the law, regardless of factors such as ethnicity, this type of

[173] *Ibid.,* para 233.
[174] See Mchangama and Alkiviadou, p. 1022 and *Perinçek v Switzerland* 2015*,* para. 234.
[175] *Perinçek v Switzerland* (2015) para 250.
[176] *Ibid.,* para. 233.
[177] Observed by Mchangama and Alkiviadou, p. 1022.
[178] *Perinçek v Switzerland,* App. No. 27510/08 (ECtHR Second Chamber 17 December 2013)*,* joint partly dissenting opinion of judges Vučinić and Pinto de Albuquerque, para 22.
[179] Mchangama and Alkiviadou, p. 1023.

conclusion and reasoning by the Courts can certainly give the impression that this is not the case. Mchangama and Alkiviadou also notice that although the Court has not identified the prohibition of Holocaust denial as a positive obligation, the Court's approach creates a double standard according to which the Holocaust alone is protected from denial and trivialization. The dangers of such an arbitrary and unprincipled approach, in turn, are highlighted by the tendency of illiberal regimes like Russia to adopt memorial laws protecting specific nationalist versions of historical truth.[180]

The incoherent approach to hate speech by the Court has also led to other problematic convictions. In *Willem v France,* a Mayor was convicted for advocating the boycotting of Israeli products in solidarity with the Palestinians,[181] while in *Witzsch v Germany* the applicant was convicted for denying the culpability of the Nazi Party and the intention of Hitler to murder the Jews in a private letter.[182] In *Nix v Germany*, on the other hand, the Court came uncomfortably close to prohibiting criticism of governmental institutions, when a German citizen had posted a picture of the former SS chief Heinrich Himmler wearing a swastika armband, with the purpose of accusing a public employment agency of racially discriminating against his mix-raced daughter.[183] This judgement was made even if it was clear that the applicant was not sympathetic to the Nazi ideology, but was in fact accusing the agency of behaving like Nazis towards his daughter.

3.4. Sexual Orientation

Unlike cases that concern hate speech targeting people based on ethnicity, race and religious convictions, the ECtHR case law on hate speech targeted towards sexual minorities is relatively recent and limited. The need to include sexual minorities as a protected group has become *du jour* in many European countries as a consequence of the acknowledgement of their vulnerability and history as a marginalised group. The ECtHR has, therefore, ruled that hate speech that targets people based on their sexual orientation can also be subject to restrictions. This was first decided in *Vejdeland and Others v Sweden* (2012), in which four Swedish citizens in an upper secondary school had distributed leaflets containing statements against

[180] *Ibid.*
[181] *Willem v France,* App. No. 10883/05 (ECtHR 10 December 2009), En fait. Only available in French.
[182] *Witzsch v Germany,* App. No. 7485/03 (ECtHR 13 December 2005), The circumstances of the case.
[183] *Nix v Germany*, App. No. 35285/16 (ECtHR 13 March 2018), The Facts.

homosexuality. The leaflets were deposited in pupils' lockers, and they contained disparaging and homophobic allegations, referring to homosexuality as a "deviant sexual proclivity" and claiming that HIV and AIDS were largely a consequence of homosexuals' promiscuous lifestyle. The leaflets also included allegations about how the "homosexual lobby" tried to play down paedophilia.[184] The applicants pointed out that they did not intend to express contempt towards homosexuals as a group, but to start a debate about the lack of objectivity in the education dispensed in Swedish schools.[185] As in *Feret,* the Court saw that incitement to hatred need not necessarily advocate for violence or call for criminal acts.[186] The Court also stressed that "discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour".[187] The Court then took into account the Swedish Supreme Court's reasoning on whether a "pressing social need existed" to interfere with the applicant's freedom of expression, in which it had stated the obligation to avoid statements that are unwarrantably offensive to others. This was followed by an emphasis on how the leaflets were distributed, i.e. left on or in the pupil's lockers, thereby imposing their contents on the pupils.[188] The Court found that the reasons given by the Swedish Supreme Court to justify the restrictive measures were both relevant and sufficient.[189] In a concurring opinion, judge Zupančič hesitated in agreeing with the majority, but came eventually to the same conclusion based on the facts of the case. He pointed out that the Swedish court may demonstrate "oversensitivity" with regard to their approach to hate speech and that it might have gone too far "in limiting freedom of speech by overestimating the importance of what was being said."[190]

The case where we have come closest to a conceptual understanding of hate speech is *Lilliendahl v Iceland,* in which the Court posed for the first time the direct question of whether the applicant's statement amounted to hate speech within the meaning of its case law.[191] Here, the applicant had been convicted for posting homophobic comments underneath an online news article, which informed about an approved proposal to strengthen education and counselling in elementary and secondary schools on matters concerning those who identify as being part of

[184] *Vejdeland and Others v Sweden*, para. 7-8.
[185] *Ibid.,* para. 10.
[186] *Ibid.,* para. 55.
[187] *Ibid.,* para. 55.
[188] *Ibid.,* para. 57.
[189] *Ibid.,* para. 59.
[190] *Ibid.,* Concurring opinion of judge Boštan M. Zupančič paras. 6 and 12.
[191] Mchangama and Alkiviadou, p. 1016-1017.

the LGBT community.[192] In this case, the Court found that hate speech falls into two categories: 1) "gravest form of hate speech" (leaving out the definition of what constitutes such speech) and 2) "less grave forms of hate speech". According to the Court, the former is excluded from any protection through Article 17, while the latter does not fall entirely outside the protection of Article 10, but is still permitted to be restricted by the Contracting States.[193] In this case, the Court referred to insults, ridicule and slander as reasons to restrict "prejudicial speech within the context of permitted restrictions on freedom of expression."[194] The Court does not make further elaborations on what the context of permitted restrictions may be, which would have been expected considering the very low threshold of insult and ridicule as well as the fundamental nature of freedom of expression.[195] Mchangama and Alkiviadou argue that the position by the Court demonstrates that its threshold for "hate speech" is in fact low, since insults and "prejudicial" speech can be prohibited.[196] The Court also states that "in cases concerning speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute 'hate speech', that conclusion has been based on an assessment of the content of the expression and the manner of its delivery."[197] Mchangama and Alkiviadou argue that the Court often uses this kind of ambits to suit the State's decision in relation to protected and unprotected speech.[198]

3.5. The Main Findings

In the light of the above analysis, a few things become clear. First, the lack of an authoritative definition of "hate speech" by the ECtHR has been one of the more consistent problems in its jurisprudence. Second, the development of acceptable speech has moved significantly from *Handyside* and the right to offend, shock and disturb. Instead, quite paradoxically, the Court highlights increasingly that insults, ridicule and slander suffice to restrict speech, and that there is a duty not to be offensive to others. At the same time, there has been a watering down of what is considered incitement to hatred, since no actual inciting is required for an expression to be considered incitement. As such, the threshold of the Court has fallen to a low standard,

[192] *Lilliendahl v Iceland,* App. No. 29297/18, (ECtHR 2 May 2020), para. 4-5.
[193] *Ibid.,* para. 34-35.
[194] *Ibid.,* para 36.
[195] Mchangama and Alkiviadou, p. 1017.
[196] *Ibid*., p. 1017.
[197] *Lilliendahl v Iceland,* para. 36.
[198] Mchangama and Alkiviadou, p. 1017.

which is far from incitement to violence. Regarding the protection of religions and religious persons, it appears that the Court has a low tolerance for both harsh criticism of religion, especially of Islam, as well as outright blasphemy. The Court set a precedence according to which the critique of Islam and its religious figures is equivalent to stirring up prejudice against Muslims and jeopardizing religious peace. Simultaneously, the Court has introduced a right not to be offended in one's religious feelings, as well as a prohibition of the defamation of religious objects of veneration. This development, where the threshold of acceptable speech has gotten lower, can have a chilling effect on freedom of speech since it is increasingly difficult to know what kind of criticism of religion is acceptable.

Even the key standards discussed in chapter two are applied randomly. Sometimes the intent of the speaker matters, other times it does not, or alternatively, it is presumed. Sometimes mere insults are enough to restrict speech, other times they are not. Sometimes the size of the audience and the manner by which the speech is delivered matters, other times it does not. Sometimes genocide denial is in itself equated to prejudice and hatred (i.e., Holocaust denial), other times it is not (the Armenian genocide). Sometimes non-violent advocacy is enough to restrict speech, other times it is not. Although it is reasonable and necessary to examine every case on its own merits and contextual matters should be taken into account, this should take place against clearly defined legal tests.[199] When such tests are absent in the Court's case law, its approach in hate speech cases appears to be subjective and haphazard. The inconsistencies displayed in the Court's case law also undermine both legal certainty and the principle of equality. Also the proscribed results or aims that the Court is claiming to protect such as peace, tolerance and democracy are so broad that they are almost meaningless.[200]

Although the Court examines most hate speech cases through article 10, its usage of Article 17 seems to exceed the Court's own standard, according to which Article 17 should only be applied on "an exceptional basis" and in "extreme circumstances".[201] Moreover, the application of Article 17 appears arbitrary, and the Court does not explain why it chose to enforce it in *Norwood*, but not in *Le Pen* or *Féret.* It can also be argued that the possibility to use Article 17 as a tool to set aside substantial principles to avoid addressing and examining the impugned statements sufficiently, is problematic, even when addressing the most reprehensible kinds of

[199] See also Mchangama and Alkiviadou, p. 1032.
[200] *Ibid.,* p. 1033.
[201] See e.g. *Paksas v Lithuania*, App. No. 34932/04, (ECtHR 6 January 2011), para. 87.

speech. This view is reiterated by Cannie and Voorhof who argue that "applying the abuse clause in order to deal with and legitimise the criminalisation of the *worst* kinds of speech is not a desirable project for the future development of democracy in Europe" since "it eliminates substantial (procedural) guarantees for applicants seeking to safeguard their right to freedom of expression".[202]

The growing number of vulnerable groups viewed as hate speech victims is also contributing to the widening definition of hate by introducing new subjects deserving special protection from the law. As several national legislations have adopted an increasing number of protected characteristics, cases concerning hate speech directed towards those groups have naturally followed to international courts as well. There has been a shift from the traditional issues in the field of hate speech, namely anti-Semitism, Holocaust denial and racism, to religious hatred, blasphemy as well as sexual orientation. Western societies may have a reason to ask themselves whether this is exaggerated and if they are, in fact, falling into the trap of the heckler's veto, or perhaps the "I'm offended veto" concerning the prosecution of hate speech.[203]

4. Recent Developments in Law and Practice

4.1. New Dimensions of Law? The European Union as the Next Hate Speech Legislator

In December 2021, the European Commission proposed an initiative to extend the list of "EU crimes" to hate speech. The Commission cited its worries about the sharp rise of hate speech both offline and online,[204] and that hate has moved to the mainstream, "targeting individuals and groups of people sharing or perceived as sharing 'a common characteristic', such as race, ethnicity, language, religion, nationality, age, sex, sexual orientation, gender identity, gender expression, sex characteristics or any other fundamental characteristic, or a combination of such characteristics."[205] The Commission President Ursula Von der Leyen addressed the need "to extend the list of EU crimes to all forms of hate crime and hate speech, whether because of

[202] Cannie and Voorhof, p. 82.
[203] See also Lemmens, p. 161.
[204] See 'The Commission proposes to extend the list of 'EU crimes' to hate speech and hate crime', Press release, European Commission, 9 December 2021, Brussels, https://ec.europa.eu/, (Hereinafter EU Crime Press Release)
[205] European Commission, 'Communication From the Commission to the European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime', COM(2021) 777 Final, Brussels 9 December 2021, p. 1. (Hereinafter Communication from the Commission)

race, religion, gender or sexuality."[206] This initiative would make hate speech a crime under EU law, meaning that the EU would define hate speech throughout all of its member states. The Vice president for Values and Transparency Věra Jourová, said that "Hate has no place in Europe. It goes against our fundamental values and principles. We need EU action to make sure that hate is criminalised the same way everywhere in Europe."[207] The Commission also cited research which shows that anti-Semitic hate speech dramatically increased in French and German accounts during the pandemic (starting in 2020).[208] Yet, the Commission failed to address that these countries already have a zero-tolerance policy towards anti-Semitic hate speech and Holocaust denial. Hate directed towards other identities, such as the LGBTQI, is also widely criminalised in many European countries. The question that arises is thus the following: Why would an EU-level hate speech law be an efficient tool in decreasing hate speech towards various identities, both online and offline, when the already existing national laws, no matter how comprehensive, are failing to do so?

The above proposition comes as an additional measure, since the EU has already taken Union-wide steps to combat hate speech. In 2016, the Commission introduced a voluntary Code of Conduct on Countering Illegal Hate Speech Online, the purpose of which is to assure that social media companies assume greater responsibility for removing online hate speech.[209] The purpose of the code is to fight hate speech as defined by the 2008 Framework Decision on combating certain forms and expressions of racism and xenophobia.[210] The Code was signed by Google (Youtube), Facebook, Twitter and Microsoft in 2016 and was later joined by Instagram, Snapchat and TikTok.[211] These IT Companies agreed, *inter alia*, to review "the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary".[212] The Human Rights Watch identified this step by the EU to be a part of a "domino effect" set in motion by the German Network Enforcement Act, also known as the NetzDG, which was approved by the German parliament

[206] *Ibid.*
[207] EU Crime Press Release.
[208] Communication From the Commission, p. 17.
[209] 'Code of Conduct on Countering Illegal Hate Speech Online', European Commission, (Hereinafter EU Code of Conduct).
[210] *Ibid.*
[211] See 'Code of Conduct on Countering Illegal Hate Speech Online: The robust response provided by the European Union', European Commission, https://ec.europa.eu/.
[212] EU Code of Conduct, p. 2.

in 2017.[213] Similarly to the EU Code of Conduct, the NetzDG requires various social media platforms to remove "illegal content", ranging from insulting specific groups to threats of violence within 24 hours, at a risk of 50 million Euro fines. This pressure incentivized social media companies to "play it safe" and delete enormous amounts of legal content.[214] Additionally, this German law has been directly or indirectly cited at least by Russia, Venezuela, Singapore, the Philippines and Kenya.[215] In other words, despite being unintentional, the law has been replicated by authoritarian states to legitimise their own censorship laws. Additionally, this German model has received criticism from David Kaye, the United Nations special rapporteur on freedom of expression, for being at odds with international human rights standards and for placing the responsibility to regulate freedom of expression on private companies.[216]

Despite this sort of concerns, the EU has introduced the Digital Services Act (DSA), which reached political agreement on 23 April 2022.[217] The DSA is a legislative package which aims to regulate online services, and due to it being a legally binding regulation, it is a step further in increasing the role of the EU as a speech moderator. The issues that the DSA attempts to address are numerous, complicated and nuanced, one of them being the moderation of illegal content, including hate speech. The DSA builds upon, *inter alia*, the Code of Conduct against illegal hate speech, which was discussed above.[218] As such, the DSA's content regarding hate speech is similar, and it imposes an obligation for Big Tech platforms to remove illegal content shortly after it has been posted.[219] Thus, the law is likely to cause similar problems as the NetzDG, its predecessor, but only on an EU-wide scale. Taking into account that the NetzDG was used as a blueprint by authoritarian states to silence dissent, there would have been reason

[213] 'Germany: Flawed Social Media Law, NetzDG is Wrong Response to Online Abuse', *Human Rights Watch*, 14 February 2018.
[214] *Ibid.*
[215] *Ibid.*
[216] David Kaye in 'Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' OHCHR, Reference: OL DEU 1/2017, 1 June 2017.
[217] 'The Digital Services Act package', European Commission, 25 April 2022, https://ec.europa.eu/.
[218] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, European Commission, Brussels 15 December 2020, COM (2020) 825 final, 2020/0361.
[219] See 'Commission welcomes political agreement on rules ensuring a safe and accountable online environment', European Commission, Press release, 23 April, https://ec.europa.eu/ and Asha Allen, 'The Digital Services Act: Political Agreement reached, Long Road Ahead Awaits', Center for Democracy and Technology, 26 April 2022.

for the EU to pause and reflect before expanding initiatives similar to the German model throughout the Union.

4.2. A Scope Creep of Hate Speech Standards on the National Level: The Trial of Päivi Räsänen and the Scottish Hate Crime Bill

The relatively recent addition of sexual minorities as a vulnerable group in need of heightened protection from hateful speech is well-motivated, due to the problems they have been subject to in the past, and continue to do until this day (although to a lesser extent in the West). However, as explained above, the level of protection that certain protected groups are getting or feel entitled to is growing, perhaps to an unwarrantedly high degree. Regarding homosexuality and other LGBTQI rights, it is important to remember that even in Western countries, gay rights are relatively recently accomplished and so are the progressive and accepting attitudes towards them. Especially the gay liberation movement, which grew substantial in the 1970s,[220] has been incredibly successful in changing the public opinion towards homosexuals in Western countries. As recently as 50 years ago, the societal position of homosexuals in the West was completely different. For instance, in Finland, homosexual activities were considered a crime until 1971, and homosexuality was listed as a psychiatric disease until 1981.[221] Similar laws were common in other European countries at the time.[222] Today, on the other hand, the vast majority are accepting of homosexuality in Western Europe and in Northern America. Compared to 2002, many countries have seen a double-digit increase in acceptance of homosexuality in 2019. Acceptable attitudes are as high as 94 per cent in Sweden, 72 per cent in the U.S. and between 86 and 89 per cent in Germany, France and Spain.[223] Similarly, by the year 2019, same-sex marriage has become legal in a growing number of countries within a short time span, especially in Western Europe.[224] Thus, it is reasonable to

[220] See e.g. Stephen Valocchi, "Collective action frames in the gay liberation movement, 1969-1973." *Frames of protest: Social movements and the framing perspective* (2005): 53-67 in Johnston, Hank and Noakes, John A. (eds.) *Frames of protest: Social movements and the framing perspective,* Rowman & Littlefield Publishers Inc. United States of America, 2005. Books.google.fi.
[221] See e.g. Sateenkaarihistoria Suomessa, Seta, seta.fi.
[222] E.g. Homosexuality was legalised 1967 in England and Wales, 1971 in Austria, 1978 in Spain, 1982 in France and 1994 in Germany. Homosexuality has not been considered an illness in France since 1981 and in Poland since 1989 in Poland. See Anne Fleischmann, 'Legalising homosexuality: Germany did it 25 years ago - what about other European countries?', *Euronews,* 14 June 2019.
[223] Jacob Pousher and Nicholas Kent. 'The global Divide on Homosexuality Persists', *Pew Research Center.* 25 June 2020.
[224] See David Masci and Drew Desilver, 'A global snapshot of same-sex marriage', *Pew Research Center.* 29 October 2019. Most countries that have legalised same-sex marriage, did so in the 2010's. For an exhaustive list

argue that there has been tremendous progress concerning equal rights and increasing dignity for homosexuals and members of the LGBTQI community within the period of not even one full lifetime. However, as the rules of the game have shifted rapidly from a historical perspective, not everyone is up to speed with the changed mores of the age. A minority in the West still feel alienated from the relatively new societal norms that were completely different not so long ago, often emphasising conservative and religious convictions as reasons for disagreement.

This trend, namely the recognition of sexual minorities as a protected group, can also be seen in national trials, where the threshold for the prosecution of "hate speech" targeting homosexuals has lowered considerably. This is illustrated, for instance, by the recent trial in Finland, where Päivi Räsänen, a member of parliament from the Christian Democratic Party faces charges of incitement against a minority group after she referred to homosexuality as a sin according to her interpretation of the Bible.[225] At the time of writing, the Helsinki District Court decided to dismiss all charges against Räsänen. The Prosecutor General, on the other hand, has announced that she is taking the case to the Court of Appeal, and thus, the decision is not yet lawful and it will likely be handled by the higher courts.[226] Regardless of the final outcome her prosecution and trial remain significant for freedom of speech, and it displays how the interpretation of the meaning of "hate speech" keeps shifting and the threshold for prosecution is getting lower. It can also be claimed that in hate speech trials, the legal process itself becomes the punishment since the defendant is dragged through the courts for years, subject to lengthy police investigations and all the distress that such a process causes.[227]

Päivi Räsänen received three charges. The first was a tweet from 2019 where she posted verses from the Bible together with criticism of the Finnish Evangelical Lutheran church's involvement with the Pride parade, which she insinuated to be a display of shame and sin.[228]

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of countries and the year of legalisation of same-sex marriage see Fact Sheet, 'Same-Sex Marriage Around the World', *Pew Research Center,* 28 October 2019.

[225] 'Päivi Räsäselle ja Luther-säätiön Juhana Pohjolalle syytteet kiihottamisesta kansanryhmää vastaan', Syyttäjälaitos, Tiedote 29.4.2021.

[226] Jukka Savolainen, 'Helsingin käräjäoikeus hylkäsi syytteet Päivi Räsästä vastaan kiihottamisesta kansanryhmää vastaan', Käräjäoikeuden mediatiedote 30.3.2022, edilex.fi.

[227] This point is often highlighted by Paul Coleman, who has been involved in many hate speech cases, including the trial of Räsänen. See e.g. 'Prosecutor to continue "campaign" against Finnish MP after major free speech victory', ADF International, https://adfinternational.org/ (Accessed 10 May 2022)

[228] An English translation from the original language (Finnish), see 'Ex-Interior Minister's incitement trial begins in Helsinki', *Yle news*, 24 January 2022.

The second charge relates to her comments made in a TV interview in which she claimed, *inter alia* that the latest research had shown that there was little to no genetic inheritance in homosexuality, adding that human genetics have "eroded" over millennia and is, therefore, "not necessarily what it was when we were created." In the police interview it was pointed out to Räsänen that there was a possibility to interpret these expressions as saying that homosexuality is a genetic degeneration. Lastly, her third charge relates to a pamphlet she wrote in 2004, in which she criticised the "normalisation of homosexuality" and stated that "the earlier a young person has homosexual experiences, the more difficult it is, according to research, to get rid of this tendency later on". She also used the term "psychosexual disorder".[229] The contents of the pamphlet were later published on the websites of the Luther Foundation Finland and the Evangelical Lutheran Mission Diocese of Finland. In other words, the third charge is for a 15-year-old blog post, which a third party, the Luther Foundation, has held available on their website. The Finnish Prosecutor General has held that the prescriptive period has not run out although the text has been written 15 years ago and is not available on Räsänen's personal website. Instead, the prosecutor has held that the prescriptive period has not even started yet, since the text has been held available to the public by a third party.[230] The 2004 blog post by Räsänen was also written at a time when sexual orientation was not included as a protected group in the law restricting speech which can be seen as "incitement against a minority group". Sexual orientation was added as a protected characteristic seven years later, in 2011.[231] This case has the potential of introducing a dangerous precedent, where the uncontroversial and clearly legal opinions of today may be prosecuted a few years later, simply because they are still available on the internet today. It is questionable whether a society that prosecutes people for over a decade old blog posts held available by a third party, can uphold a healthy atmosphere for conversation, absent from excessive self-censorship. Instead, there is a possibility of creating an environment where the line between allowed and illegal speech is so unclear that people avoid all speech that is in the grey area, even when it would be protected by law. Such an example can be found at least in Germany. The NetzDG, which was discussed above, created a situation where social media companies deleted massive amounts of content that was in the legal "grey area" in fear of prosecution and 50 million euro fines.

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[229] *Ibid.*

[230] See e.g. Kaisa Uusitalo, Veli-Pekka Hämäläinen 'Päivi Räsäsen kirjoituksesta aloitetaan esitutkinta – Epäillään kiihottamisesta kansanryhmää vastaan'. *Yle Uutiset*, 4 November 2019.

[231] Sexual orientation was added as a protected characteristic by the 1.6.2011/511 change in the national criminal law. See 511/2011.

Here, it is important to emphasise that although the District Court acquitted Räsänen, the final lawful decision by the higher Finnish courts remains unknown. Regardless of the final outcome, the case displays how the grounds for prosecution under the national "hate speech" law has gone as low as posting a verse from the Bible together with questioning how shame and sin (displayed at the Pride) is in line with the teachings of the church. According to the prosecutor, expressing such opinions and making such religious interpretations are derogatory and discriminatory towards homosexuals and violate their equality and dignity, and are likely to fuel intolerance, contempt and hatred.[232] This is a particularly wide interpretation of hate speech by the Prosecutor General, especially when taking into account that this is not a rare or unprecedented position among Christians historically.[233] This also bring to question the predictability of the law, since it would have been unreasonable to assume that those subject to the law were aware that quoting a passage from the Bible would result in an indictment for hate speech. It is also notable that the prosecutor decided to proceed with investigating Räsänen's statements although the police had already concluded that her statements were covered by the right to freedom of expression. Although not completely exceptional, it is rare that the Prosecutor General orders the police to start a pretrial investigation after the police has already concluded that there is no reason to do so.[234]

In this case, it will be disclosed for the first time whether or not quoting the Bible can be considered a crime in Finland. This case displays a particular trend, especially because the trial of Räsänen is not an isolated example of indicting a person for their religious views on sexual morality. In the United Kingdom, a Christian street pastor was also tried for preaching about the biblical definition of marriage, which the police considered to be "hate speech".[235] The limits of allowed and non-allowed opinions are increasingly moving, creating a more narrow range of acceptable speech. Malik argues that hate speech restrictions are not a means of tackling bigotry, but about making certain, often obnoxious, ideas illegitimate and illegal by rebranding them as immoral. He argues that it is dangerous to make ideas illegitimate instead of politically challenging them.[236] This problem is amplified by the speed by which socially

[232] 'US professors criticise Finnish prosecutor over Räsänen charges', *Yle news*, 1 June 2021.
[233] See e.g. Brundage, James A. *Law, sex, and Christian society in medieval Europe*. University of Chicago Press, 2009.
[234] Jesse Mäntysalo, 'Päivi Räsästä vastaan käydään oikeutta lausunnoista, joita poliisi ei pitänyt rikoksina – esitutkinta aloitettiin valtakunnansyyttäjän vaatimuksesta', *Yle News*, 25 January 2022.
[235] The preacher was ultimately cleared of all charges. See Anugrah Kumar, 'Street preacher cleared of 'hate speech' charges for preaching from the Bible', *The Christian Post,* April 18 2022.
[236] Malik, p. 81.

acceptable ideas are changing, leaving many people behind and confused about the new rules. Like in Räsänen's case, she is still holding a traditionally conservative Christian view that sees homosexuality, among many other things, as a sin. As presented in the statistics above, the vast majority in Western Europe have an accepting opinion about homosexuality, making Räsänen a representative of a view held only by a tiny minority, which has been constantly shrinking in the last decades. As such, the prosecution of a Christian interpretation of homosexuality, which is gradually dissipating within increasingly secular Western societies regardless, is absurd and problematic for freedom of religion, opinion and expression. Here, her criticism and dissent from the majority view was interpreted as an equivalent to incitement to hatred by the prosecutor, and there is no reason why this could not be extended to other moral and controversial societal issues. Unlike many authoritarian, and all totalitarian regimes, a liberal democracy should tolerate the expression of more than one opinion or view about morality. There is a risk that this sort of development takes us closer to a new form of paternalism, where the state considers itself to be the arbiter of true morality according to whatever the current popular source of public morality happens to be. Therefore, those who express contrarian views are seen as a type of blasphemers against these new moral norms that are held by the state, the majority population or those in positions of power.

Regarding Räsänen's influence on public opinion about homosexuality (or anything else for that matter), there is reason to remember that she is a political representative of one of the smallest political parties in Finland,[237] representing Christian views of morality in an increasingly secular society. Thinking that her opinion on homosexuality would skew the opinions of any significant number of people to her way of thinking, subsequently creating increased hatred towards homosexuals,[238] is not credible. The fact that she is prosecuted for her views, on the other hand, does have an unintended consequence, known as the Streisand Effect.[239] If she was not prosecuted, the number of people who would be aware of her statements would be minimal. But due to the amount of publicity she has gotten in both national

[237] In 2022, the party has five parliamentary seats out of 200. See 'Eduskuntaryhmien voimasuhteet', Eduskunta, Eduskunta.fi, (Accessed 14 April 2022). Additionally, the latest poll, made 2.2.-1.3.2022 shows that the support for the Christian Democratic Party is at 3,1 percent. See Jyrki Hara, 'Ylen kannatusmittaus: Kokoomus vahvistaa etumatkaansa demareihin, vihreät vajoaa edelleen', *Yle Uutiset*, 3 March 2022.
[238] The Prosecutor General has claimed that Räsänen is an "opinion leader" and that she could "increase homophobia in society". See, Päivi Happonen, "Räsänen voi lisätä homofobiaa yhteiskunnassa", sanoo syyttäjä – Räsänen poistui oikeudesta rauhallisin mielin: "Syytteet oli helppo kumota", *Yle Uutiset*, 14 February 2022.
[239] According to the Marriam-Webster dictionary "The Streisand effect is a phenomenon whereby the attempt to suppress something only brings more attention or notoriety to it." The term is named after the singer Barbra Streisand. See "The Streisand Effect", *Merriam-Webster.com*. Merriam Webster dictionary.

and international media, her opinions and the ongoing trial are now widespread. Thus, the prosecution has created a situation where her allegedly hateful views are now being distributed to a far larger audience than otherwise. Such an unintended consequence does not only apply to Räsänen's trial, but rather inevitably, to many other hate speech cases, too. In 2010, the right-wing Dutch politician Geert Wilders was prosecuted under the national hate speech laws for making disparaging comments about the religion of Islam and Muslims. This resulted, predictably, in giving him massive free publicity and an increase of 15 seats for his party in the parliamentary elections in June 2010, while he could pose as a heroic free speech champion.[240] A similar instance was that of the prosecution of the Finnish politician Jussi Halla-aho, who was convicted under the Finnish hate speech and blasphemy law after calling Islam a "paedophilia religion" in 2012.[241] Again, his political party increased parliamentary seats from five seats in 2007 to 39 seats in 2011.[242] This makes it clear that the trial did not, at the very least, impact his personal or his party's campaign negatively.[243] As such, it is to be expected that the trial of Räsänen will benefit her politically. From these instances, it is easy to make the conclusion that using the law against such expressions often has the exact opposite effect than what was intended by the hate speech laws.

The trial of Päivi Räsänen indicates that the threshold for prosecution of hate speech has gotten lower, mostly because of a wider interpretation of the existing hate speech law. Yet, the scope creep in hate speech standards can also be witnessed in legislation. Perhaps one of the most illustrative examples of this is the 2020 Scottish Hate Crime and Public Order Bill. The Bill is incorporating the "aggravation of offences by prejudice" in Scottish law, thus extending the framework of stirring up hatred, which referred only to racial hatred previously.[244] The Bill introduces age as a new protected characteristic, which will be added to the long list of categories that include race, disability, religion, sexual orientation, transgender identity and variations in sex characteristics.[245] Notably, the bill also proposed the abolition of the old Scottish blasphemy law,[246] yet, by introducing new heresies at the same time, this change rings

[240] See e.g. Mchangama (2015), p. 81.
[241] KKO:2012:58
[242] See the election results at 'Vaalien tulos-ja tietopalvelu', Oikeusministeriö: Eduskuntavaalit 17.4.2011 and Eduskuntavaalit 18.3.2007, available at: https://tulospalvelu.vaalit.fi/ (Accessed 3 April 2022)
[243] *Ibid.* In 2007 Jussi Halla-Aho did not have a seat in the parliament. In the following parliamentary election 2011, he received 15 074 votes, making him the second most popular candidate in terms of individual votes in his party that year.
[244] Hate Crime and Public order (Scotland) Bill (SP Bill 67), 23 April 2020.
[245] *Ibid.,* p. 2.
[246] *Ibid.,* p. 2.

hollow. The content of the Hate Crime Bill has also raised concerns that it would apply to speech uttered in private homes and spaces.[247]

4.3. Challenges with the Internet

The rise and prominence of the internet and social media has brought new societal challenges to managing hate speech. These new challenges have been considered wide enough for the EU to get involved in its regulation, as was discussed in the earlier chapter. Determining the responsibilities of companies vis-à-vis governments is difficult, and it is unclear which forms of statements are best moderated through sensible company policies, and which should be interfered with by law. However, now it is possible for anyone to get their opinions out to the public on a plethora of different forums, for better or worse. On the one hand, the internet and social media offer the possibility for equal speech and a revitalised democracy by giving everyone a voice, independent of big media institutions and authoritarian states who are prone to censor dissent. Yet, on the other hand, the threshold for posting hateful and offensive speech has gone down due to anonymity and the simplicity of expressing hate without real-life consequences.[248] There is also an enhanced ability to coordinate hateful incitement and target members of minority groups who would not have encountered, for example, a Neo-Nazi pamphlet or a white-supremacist blog otherwise.[249] Thus, the positive side of the internet, which includes easy access to an endless amount of truthful and educational information and ideas, is being counterbalanced by hateful rhetoric and lies. At the same time, the amount of content is overwhelming, and it is increasingly difficult to moderate and prosecute even the worst cases of online abuse. Jeffrey Goldberg, the editor of the Atlantic, referred to Twitter as a "cesspool for anti-Semites, homophobes and racists".[250] However, the often enhanced visibility of hateful content ought to be taken into account, since, as concluded by a 2020 study, hate speech is a "relatively rare phenomenon".[251] The study found that "only a fraction of a percentage of tweets in the American Twittersphere contain hate speech" and that the popularity of hate speech was equally minimal when studying Ethiopian Facebook pages.[252] In

[247] 'MSPs approve Scotland's controversial hate crime law', *BBC*, 11 March 2021.
[248] Communication from the Commission, p. 2.
[249] A summary of the findings by Daryl Johnson, *Hateland: A Long Hard Look at America's Extremist Heart* (Amherst, NY, Prometheus, 2019) in Mchangama (2022), p. 358.
[250] Ryan Lizza, 'Twitter's Anti-Semitism Problem', *The New Yorker*, 19 October 2016.
[251] Alexandra A. Siegel, 'Online Hate Speech' in Nathaniel Persily and Joshua A. Tucker (eds) '*Social Media and Democracy: The State of the Field, Prospects for Reform*', Cambridge University Press, 2020, p.66.
[252] *Ibid.*

fact, Siegel points out that although online hate speech is problematic, the exaggeration of its prevalence is in itself misleading and potentially problematic – increasingly so in countries whose civil and political liberties are already under threat.[253] Despite such exaggerations, sometimes online hate speech has real and severe consequences for those who are targeted by it. Studies suggest that hate speech, or the fear of hate speech, may lead to self-censorship, disproportionately affecting minorities, but also politicians and researchers.[254]

Subsequently, the challenge of online hate speech needs to be addressed. Yet, as argued by Ash, the new reality weakens rather than strengthens the case of hate speech laws.[255] First, the sheer amount of content means that the law struggles to identify and prosecute even clear instances of incitement to violence, harassment and the online equivalent to "fighting words". Second, if the state attempts to prosecute speech of more general offensive nature, it will only catch a fraction of them.[256] Only prosecuting some people, while leaving others unscathed results in an arbitrary application of law, which further undermines both legal certainty and the principle of equality.[257] Additionally, as the German Network Enforcement Act discussed above illustrated, the internet censorship laws which are enforced in the West are creating legitimacy to censor dissent by authoritarian regimes. Instead of unwittingly helping repressive regimes, liberal democracies should provide a counterweight to such authoritarian tendencies by renewing their commitment to free speech both online and offline, and leading by example.

The Päivi Räsänen Trial also revealed another problem with regard to hate speech and the internet. Once you post something on the internet it may stay there for years, or indefinitely, unless the expression is actively deleted. As such, the following questions come to mind: If a person expresses an opinion online that is both clearly legal and relatively uncontroversial today, yet considered hateful and possibly illegal five, ten or twenty years later, should the person in question be prosecuted, provided that it is still available on the internet? Secondly, should the person be prosecuted even if that statement is not held available to the public by him or her personally, but by someone else? As discussed above, the Finnish Prosecutor General

[253] *Ibid.*
[254] See e.g. Esa Väliverronen and Sampsa Saikkonen. "Freedom of Expression Challenged: Scientists' Perspectives on Hidden Forms of Suppression and Self-Censorship." *Science, Technology, & Human Values* 46, no. 6, November 2021: 1172–1200 and Mchangama (2022) p.370.
[255] Ash, p. 220.
[256] *Ibid.*, p. 220-221.
[257] *Ibid*., p. 220-221.

certainly seems to think that the answer to these questions is "yes", but it is hardly obvious. There is a risk that such an approach leads to increasing self-censorship since one has to be careful not to break any future hate speech laws.

In the digital age, the management of hateful content is complicated, and the outcome of providing a voice for billions of people on numerous platforms remains unknown. The challenges posed by the internet are still very new, which contributes to the fact that societies do not yet have all the answers to solving all possible problems, including online harassment. However, many of the internet-related challenges imply that the available resources to combat hate speech online by law should be used with care. As articulated by Molnar, "content-based bans on speech…especially in the internet era, seem like jumping on a shadow. Legal prohibition should be reserved for incitement that causes imminent danger."[258] The tools offered by social media companies, such as blocking other users or certain words can also be used to mitigate the visibility of hateful content. The internet era might also inevitably mean that individuals need to learn to live with slightly higher degrees of offence and adopt a thicker skin because neither the law nor social media companies can shield everyone from every unwanted comment directed towards them. This applies especially to those who choose more visible careers that are prone to be subject to more criticism and hate, such as politicians. With the facts at hand, the most effective method to deal with offensive material online, as long as it does not constitute danger, credible threats, harassment or incitement to violence, may be to ignore it. Arguably, what Ash calls "ignoring the sewage" is what most people are already doing most of time anyway.[259]

5. The Price of Hate Speech Laws for Democracy and the Rule of Law

5.1. The Politicisation and Weaponisation of Hate Speech Laws

Concerning the application of hate speech laws, there is a real risk that their usage becomes highly politicised. The law gives policymakers, community leaders and other people with influence the power to use hate speech laws to silence political opponents or dissent. Such an

[258] Peter Molnar, 'Responding to "Hate Speech" with Art, Education, and the Imminent Danger Test' in Michael Herz, and Peter Molnar (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Cambridge University Press, 2012. *ProQuest Ebook Central*, p. 192.
[259] Ash, p. 230.

example can, at least, be found in India, the world's largest democracy. The Indian hate speech law has created perverse results since it is routinely used by Community leaders to make political capital out of demanding the prosecution of someone who has allegedly offended their community.[260] In fact, a former Indian attorney general, Mr Soli Sorabjee concluded that:

> Experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.[261]

Hence, in India, these laws do not encourage harmony in the multicultural society, but have created an incentive to stir up discord.[262] Also in Rwanda, hate speech legislation has become a tool to repress the opposition for criticising government policies.[263] However, the politicisation of hate speech laws is in no way particular only to India and Rwanda. The similarities in European democracies are displayed in the demands by politicians and interest group lobbyists to increase the number of protected groups due to their vulnerability status. Especially here, the heckler's veto seems to work, since, as put by Ash, "sometimes these groups win legal bans not due through the strength of their arguments but through the argument of their strength."[264]

The perception of biased prosecution and its consequences can also be witnessed in Europe. A case study that focused on the Dutch politician Geert Wilders, found that hate speech prosecutions can potentially damage the democratic system they are intended to defend.[265] The authors state that hate speech trials might be perceived by some as politically motivated assaults on democratic rights to free speech and representation. This, according to the authors, leads to some parts of the population feeling alienated "from liberal democracy in general and the legal system in particular."[266] The study also reveals that the prosecution of Wilders did not only damage political support among his electorate, but also among a substantial number of other

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[260] *Ibid.,* p. 225
[261] Quote in The report of the House of Lords Select Committee on Religious Offences in England and Wales, HL Paper 95-I, 10 April 2003, para. 52.
[262] Ash, p. 225.
[263] Scheffler, pps. 68-71.
[264] Ash, p. 225.
[265] Roderik Rekker and Joost van Spanje. "Hate Speech Prosecution of Politicians and Its Effect on Support for the Legal System and Democracy." *British Journal of Political Science* 52, no. 2 (2022): 886–907.
[266] *Ibid.*

citizens, too. The lack of political support, in turn, is often believed to be problematic for democracy because it reduces democratic participation.[267]

A similar perception of political bias has been interpreted by some in the public discussion of the trial of Päivi Räsänen.[268] After the end of her trial, especially the interpretations of Räsänen's statements made by the prosecutor raised concerns about whether they were made within reasonable limits.[269] The prosecutor, however, stated that her interpretations of Räsänen's statement were "objective", even when the interpretation by the District Court and media outlets differed significantly.[270] The trial of Päivi Räsänen brings forward some of the risks related to vague hate speech laws, but also some specific concerns related to the legal process. Policing hate speech in the era of internet and social media usually requires that the statements are brought to the attention of the police by report of an offence. Due to the pure number of reported statements, only some will be investigated further by the police and an even smaller number will be prosecuted and trialled. The selection of cases is of paramount importance because often the hate speech cases are controversial and reach the court of appeal or even the Supreme Court and the ECtHR. For the defendant, this means years and years of process and high legal fees, distress and negative publicity, which is often much worse than the actual verdict. That said the trial of Päivi Räsänen is of interest for this thesis because 1) Räsänen´s statements were picked from a larger audience having same or similar conservative, religious opinions, 2) the Prosecutor General chose to prosecute even if the police concluded that no crime occurred, 3) the Prosecutor General used largely her own interpretation of what was said by Räsänen in the prosecution letter and 4) Räsänen citing the bible in the context of a statement was included in the prosecuted crimes. In other words, the legal system that allows the Prosecutor General to select which statements are prosecuted (and inevitably refrain from prosecuting others that are similar), especially in the internet era, coupled with vague hate speech laws and their increasingly broad interpretation, is susceptible to giving too much weight to the perceptions and interpretations of one person. This case underlines how important

[267] *Ibid*. In this study the term "political support" referred to "citizens' evaluations of their political system and its institutions".
[268] See e.g. Ivan Puopolo, 'Syyttäjä jahtaa Päivi Räsästä omilla tulkinnoillaan, kukaan muu ei näe rikosta', *Verkkouutiset*, 5 April 2022.
[269] After a lot of media attention, the Prosecution Authority released a press release addressing concerns related to the interpretations she had made during the trial. See 'Valtakunnansyyttäjän tiedote Räsäsen ja Pohjolan syytteitä koskevasta Helsingin käräjäoikeuden tuomiosta', Tiedote, 1 April 2022, Syyttäjälaitos.fi.
[270] 'Valtakunnansyyttäjän tiedote Räsäsen ja Pohjolan syytteitä koskevasta Helsingin käräjäoikeuden tuomiosta'and Jesse Mäntysalo, 'Syyttäjä laittoi Päivi Räsäsen suuhun sanoja, joita tämä ei ollut lausunut – Yle kävi läpi virheelliset väitteet', *Yle Uutiset*, 31 March 2022.

it is to have well-defined hate speech laws, and to prepare and make the case on objective grounds, also for the general public to understand, and not to appease the loudest activists and interest groups that seek to silence different opinions, religious and moral views. Moreover, the rule of law concept requires that legal processes are not driven arbitrarily, and legal certainty will be followed. It is equally important that the process and argumentations in hate speech cases leave no room for doubt on political or ideological bias anywhere along the process, especially because only the perception of biased or politically driven conduct in hate speech prosecutions can be enough to sow distrust in the legal system and democracy, as the case study about Wilders illustrated. It remains open for further debate how well the trial of Päivi Räsänen will endure those requirements now and going forward.

The politicisation of hate speech may not always entail using the law as a weapon towards political opponents, but their mere existence may enable politicisation. Winfield and Tien argue that such an example of an unintended consequence of hate speech laws is illustrated by the Danish Cartoons controversy. Shortly after the newspaper, *Jyllands-Posten,* published the infamous cartoons of the Prophet Mohammad in 2005, a group of Muslim clerics protested and insisted that they should be retracted. The controversy was, initially, only between the editors and the clerics.[271] However, the government could not avoid becoming entangled with the affair a month later, when eleven Muslim groups in Denmark filed a criminal complaint against the magazine under the broadly worded Danish hate speech law according to which "insulting or degrading a group of persons on account of their race…or belief" is prohibited, as well as the equally broad national blasphemy law, which "punishes any person who in public, ridicules or insults the dogmas or worship of any lawfully existing religious community.[272] Instead of remaining a private exchange, as argued by Winfield and Tien, the controversy transformed into a politicised issue with the government. The mere existence of the statutes in the Danish criminal law forced the government to get involved, thus creating the following choice: either the prosecutor would dismiss the complaint and favour the Danish majority, or alternatively, prosecute the magazine and favour the Muslim groups.[273] Thus, the government was obligated to formally respond, creating a situation in which both action and inaction in the matter would cause an impression of unfair treatment in some part of the population. When the prosecutor

[271] Winfield and Tien, p. 482.
[272] The Danish Criminal Code is called Straffeloven. English translations of the laws at the time of the Cartoon controversy by Winfield and Tien p. 482-483.
[273] *Ibid.*, p. 483.

finally decided not to indict, violence erupted. In other words, violence did not erupt after the publication of the cartoons themselves, but after the prosecutor's decision not to indict the magazine. As a consequence of the mere existence of a broad national hate speech and blasphemy law, the controversy became a legal, political and governmental crisis.[274]

5.2. Double Standards: Free Speech for Me but Not for Thee

Many argue for the right to express their opinions without any restrictions, while failing to extend it to one's adversaries or ideological opponents. The examples of such double standards are numerous. As observed by Ash, this often applies to identity lobbyists who proclaim support for equality in modern democracies, yet tend to display double standards at the same time.[275] For example, the 2006 Secretary General of the Muslim Council of Britain, who denounced the publication of the Danish cartoons of Muhammed, shortly after declared that gays are "harmful" and "spread disease".[276] Similarly, two members of the Anti-Defamation League in the United States argued that leaving up "The innocence of Muslims" video was correct, while also saying that Facebook should take down Holocaust denial because it is hate speech.[277]

Similar double standards can also be observed by those who have been indicted under national hate speech and defamation laws. The right-wing Dutch politician Geert Wilders who was on trial for his Muslim-bating and harsh attacks on Islam, presented himself as a type of free speech champion due to his prosecution,[278] yet had called for the banning of the Qur'an in Holland.[279] Neither is it uncommon to highlight the importance of the freedom to express fundamentalist religious views, while advocating for stricter expressions that offend religious feelings.[280] In Finland, on the other hand, a Finnish Journalist, Johanna Vehkoo, was indicted under the national defamation law for having called a city Councillor from Oulu a "nazi", a "nazi clown" and a "well-known racist" on Facebook to a limited audience.[281] Vehkoo had

[274] *Ibid.*, p. 484.
[275] Ash, p. 226.
[276] Ash, p. 266 and 'Muslim Head says Gays "harmful", *BBC News*, 3 january 2006.
[277] Ash, p. 226.
[278] Mchangama (2015), p. 81.
[279] Ellian, p. 234.
[280] Also pointed out by Marloes van Noorloos 'The Politicisation of Hate Speech Bans in the Twenty-first-century Netherlands: Law in a Changing Context', *Journal of Ethnic and Migration Studies*, 40:2, 249-265, (2014) p. 259.
[281] Vehkoo was eventually acquitted in the Supreme Court. See KKO:2022:1.

argued that society has let hate speech go too far, without enough police, prosecutors and judges intervening, and she even wrote a book on the problems of hate speech on the internet.[282] Yet, she found it outrageous for freedom of speech when she was put on trial for defamation[283] after targeting slurs towards her own political adversary online, while pointing out the importance of being able to criticise and openly discuss the far-right.[284] However, this type of development should not come as a surprise. Predictably, the same hate speech laws and increased state-enforced censorship that one advocates for can easily be used against you and those whom the laws were originally created to protect.[285] Additionally, in connection to this case, both a media outlet and a lawyer specialised in freedom of speech found that the consequences of defamation to be haphazard.[286] Although it is clear that defamation laws should exist to protect people from reputational harms and false accusations, this particular case suggests that similarly to hate speech laws, also defamation laws ought to be drafted with significantly more care and precision, and made narrower, rather than broader. This alone might not end the abuse of these laws, but that should certainly make the state's involvement in rather childish internet squabbles and name-calling more difficult. Taking into account the amount of such conduct on the internet, the task of prosecuting everyone on their worst online behaviour would likely be a full day job at the courts. Other examples of instances where hate speech laws have been used against those whom they were meant to protect are numerous. In France, a pro-LGBT activist was fined for calling an opponent of same-sex marriage a "homophobe".[287] In Scotland, on the other hand, a feminist was charged for offending homo- and transsexuals for supporting sex-based rights for women and for arguing that there are biological differences between men and women.[288] This has also occurred in history, since when Britain introduced the British Race

[282] See the statements made by Johanna Vehkoo in Esa Salminen, 'Miksi vihapuhetta ei saada kuriin? Kolme näkökulmaa' Vihreät, 12 November 2020, Vihreät.fi.
[283] Marko Pinola and Mari Jänti 'Toimittaja tuomittiin kunnianloukkauksesta, kun hän kutsui oululaista kaupunginvaltuutettua natsiksi ja rasistiksi', *Yle Uutiset*, 12 April 2019.
[284] See e.g. Marjatta Rautio and Tiina Salumäki, 'Korkein oikeus kumosi toimittaja Johanna Vehkoon kunnianloukkaustuomion – Vehkoo: "Kyse ei ole vain minun sananvapaudestani"', *Yle Uutiset,* 11 January 2022.
[285] As was discussed in chapter 2, hate speech laws were especially created to protect liberal democracies from authoritarian ideologies such as right-wing extremism.
[286] Heikki Valkama, 'Joutuuko oikeuteen, jos kutsuu rasistia rasistiksi? Päätoimittajan mukaan toimittajia yritetään vaientaa oikeudenkäynneillä Suomessakin', *Yle Uutiset*, 23 April 2021.
[287] See e.g. Nico Lang, 'French hate crime ruling sets a dangerous precedent for LGBT people: It's now illegal to call someone a "homophobe" in France', Salon.com, 7 November 2016.
[288] Notably, the charges against her were eventually dropped. See e.g. Tom Gordon, Feminist campaigner charged with 'hate crime', *The Herald*, 3 June 2021.

Relations Act of 1965 that prohibited incitement to racial hatred, the first prosecution targeted a Black man for antiwhite hatred.[289]

As there is an increasing number of minorities that are competing for recognition by law, an interesting observation can be made. As various minorities, such as LGBT+ people, have gained acceptance and celebration in society, members of their interest groups have become some of the most vocal people for increased censorship. For instance, the Secretary General of the Finnish human rights organisation Seta, expressed that the statements made by Päivi Räsänen should be banned because "It is a high time that a generation of LGBTIQA+ kids could grow up in Finland without being exposed to the hurtful opinions about LGBTIQA+ people made by leading politicians."[290] This is a curious phenomenon, because the freedom to speak openly was one of the most important tools that minorities had in the fight against prejudice, hate and inequality[291] when their cause or identity was considered to be wrong or immoral. There are indications that as societal power dynamics change, the willingness to censor follows, only with new and different heresies each time. Yet, the possibility for minorities to censor their ideological adversaries only works as long as they hold cultural or actual power, after which the situation can be reversed to their disadvantage. In the words of Nadine Strossen: "Once you permit suppression of certain ideas because they convey prejudice against particular groups, you end up having to suppress seemingly limitless amounts of expression, because all of us are, in some way, a despised minority, whether it be political, religious, or demographic."[292] Frederick Douglass also famously said that "the right of speech is a very precious one, especially to the oppressed", yet his words and the principle behind them seem to be forgotten, especially among minorities for whom free speech is disproportionately important. Instead, many keep falling for what Mchangama calls the "Milton's curse", the selective and unprincipled defence of free speech.[293]

[289] Mchangama (2022), p. 347-348.
[290] 'Effective measures are needed to tackle hate speech against LGBTIQA+ people', Seta, News, 30 March 2022, Seta.fi.
[291] See e.g. Timothy Zick, 'The Dynamic Relationship Between Freedom of Speech and Equality' *Duke Journal of Constitutional Law & Public Policy*, Vol. 12, Issue 2, 2016, pp. 13-75.
[292] Nadine Strossen and Peter Molnar. 'Interview with Nadine Strossen' in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, p. 395.
[293] The term was coined after John Milton, due to his selective defence of free speech. See Mchangama (2022), pps. 106-107.

Another example of what could be perceived as double standards is the lack of prosecution of those who have expressed similar or worse hatred towards the very same group of people. Räsänen expressed that she views homosexuality as a sin, while quoting the Bible. However, if the logic according to which she should be prosecuted for this is applied, why are others not prosecuted for expressing similar views, who have justified similar statements by referring to other religions? In 2013 Abbas Bahmanpour, a Muslim Imam in Helsinki, expressed on a Finnish TV-show that homosexuality was a "moral vice", while comparing it to both adultery and incest. He also added that according to the Islamic Sharia law the punishment for homosexual acts is a death sentence.[294] Taking into account that homosexual intercourse is punished by death or prison in many Muslim countries even today[295] and that the Muslim population has less accepting views about homosexuals in general,[296] it becomes difficult to understand why one was prosecuted but not the other. This is also not an isolated incident, since the same argument can be applied to a number of statements one finds offensive or uncomfortable. Even if the difference in approach in this particular incident could be reasonably argued, it may also leave an impression that one political party, person, ideology or religion is being unfairly targeted by prosecutions while others remain free to express similar hatred without repercussions. When hate speech is criminalised, yet only a select few are prosecuted because of their statements that have been chosen from a plethora of hateful expressions, the following question arises: Why is one person being prosecuted but not the others? A biased or unfair prosecution, as well as the perception of such conduct, undermines the principle of equality, and therefore also the rule of law. This also has implications for how majority populations might start feeling alienated, when there is a perception that minorities are getting special treatment. This point is discussed in depth later in this thesis.

To display the type of double standards described above is not particularly uncommon, since people have a tendency to want to ban the ideas they dislike or oppose, but to allow those they agree with, support or that align with their own morals. However, if such double standards were

[294] An explanation of what was said in Finnish can be found in Antti Halonen 'VNK julkaisi suomalaisuuden päivänä videon islamilaisten johtajien ramadantervehdyksestä – kaikki miehiä: Näin kampanja kommentoi', *Iltalehti*, 12 May 2020 and in Sean Ricks 'Ylen Islam-ilta käynnisti keskustelun: "Hyväksyttekö homoseksuaalien teloittamisen?', *Yle Uutiset*, 2 November 2013.
[295] For an exhaustive list see '*Map of Countries that Criminalise LGBT People',* Human Dignity Trust, https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_lgbt (Accessed 3 April 2022)
[296] See e.g. Antje Röder and Niels Spierings, 'What Shapes Attitudes Toward Homosexuality among European Muslims? The Role of Religiosity and Destination Hostility', *International Migration Review* 56, no. 2 (June 2022): 533–61.

to be disposed in order to take seriously one of the core elements of rule of law, namely the equal treatment under the law, there is a choice to be made. So far, many liberal democracies, especially the ones in Europe, have been going in the direction of what Ash calls the "taboo ratchet" by adding more and more characteristics and groups that need to be protected from hate speech.[297] This trend, on the other hand, seems to lack an exit strategy. As hate speech based on race and ethnicity has been followed up by religion, sexual orientation, gender identity and disability (and age in Scotland), it becomes increasingly difficult to justify stopping there, instead of adding even more groups to the "taboo ratchet".

5.3. The Role of Outrage, Violence and Taking Offence

An argument can be made that the amount of outrage caused by expressions plays a significant part in the prosecution of hate speech – perhaps even more than the utterances themselves. This phenomenon is closely associated with the heckler's veto, which has already been discussed in this thesis. The role of outrage is particularly heightened regarding the prosecution of blasphemous utterances, since different religious groups react differently to utterances about their religion.[298] For this reason, today, both national courts and the ECtHR deal mostly, if not exclusively, with blasphemous or hateful utterances directed towards the religion of Islam. The amount of court cases where Christianity has been offended, on the other hand, is low since today only a few Christians or Christian institutions would get outraged enough over blasphemous utterances. Cases where the Christian religion was blasphemed, such as *Otto-Preminger*, belong in the past century for the most part.[299] Western Christianity has come to accept criticism and insults as a part of the cultural and religious paradigm, despite the fact that it used to curb blasphemy and heresy heavily in the past.[300] In the Muslim world and in the Muslim tradition, however, blasphemy is still largely seen as a criminal offence[301] and there has been several instances where violence or the threat of violence has been directed towards

[297] Ash, p. 226.
[298] E.g. South *Park*, a satirical American Cartoon displayed Jesus, Krishna, and Buddha in their episodes several times, but when the Show portrayed the Prophet Muhammad the show creators received death threats. See Dave Itzkoff, *'South Park' Episode Altered After Muslim Group's Warning,* N.Y. Times, 23 April 2010.
[299] The case of *Otto-Preminger* was handled by the Court in 1994.
[300] See e.g. Lindberg, Carter. The European Reformations, 2nd edition, Chichester, United Kingdom: Wiley-Blackwell, 2009.
[301] Angelina E. Theodorou, Which countries still outlaw apostasy and blasphemy? *Pew research center*. 29 July 2016.

those who have offended the religion of Islam.[302] However, when criticism and blasphemy of Islam is being censored because of the fear of violence, we get further away from the heckler's veto and closer to what Ash calls the "Assasin's veto", which is used to describe how a real or attributed threat of violence is used to curb free speech.[303] The effects of this have mostly been witnessed outside judicial institutions since credible threats of violence have turned out to be an effective tool to achieve self-censorship, which has been reflected, for instance, in the refusal to republish the Charlie Hebdo Cartoons.[304] However, European judicial institutions have reason to remember that both violence and threats of violence directed towards the speaker by the hearer are always the responsibility of the one who makes the threats or commits the violent acts, and they should be met with the full rigour of the law. As an example, the police in England has made the mistake of blaming the victim many times, in order to stop the hearers from taking violent offence.[305] As with the heckler's veto, succumbing to the assassin's veto has the potential of encouraging more threats of violence, when its efficacy to reach desired goals becomes evident. The argument that expressions of ridicule or criticism should be withheld because of respect for others, on the other hand, is, as described by Ash "so uncomfortably intertwined with fear of the assassin's veto."[306]

The role of taking offence, in addition to outrage and threats of violence, also has an increasing role in deciding whether certain expressions should be restricted by law. This has been especially highlighted in the case law of the ECtHR which, as discussed above, has introduced a standard according to which one should avoid being "gratuitously offensive" to others. This, in turn, may be understood as a justification to limit speech merely because of its offensiveness. The legitimisation of this standard offers the possibility to resort to the "I'm offended veto" when confronting speech that one finds to be offensive. This purely subjective standard may turn out to be problematic, since encountering different perspectives that offend someone in increasingly multicultural societies in the West is inevitable.

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[302] At least the following can be listed: The Salman Rushdie Affair, the execution of Theo van Gogh and the subsequent death threats directed towards Ayaan Hirsi Ali in the Netherlands, The Charlie Hebdo massacres, (see e.g., Ash, pps. 273, 141, 142), The beheading of Samuel Paty in France, see e.g. Kim Willsher, 'Teacher decapitated in Paris named as Samuel Paty, 47', *The Guardian,* 17 October 2020 and most recently, the riots and violence that followed in many Swedish cities after a plan to burn the Qu'ran, see e.g. 'Upplopp i flera städer - detta har hänt', *Svt Nyheter*, 15 April 2022.

[303] Ash, p. 130.

[304] See Ash, p. 143-148.

[305] The Christian fundamentalist Alison Redmond-Bate was arrested and convicted for obstructing a police officer after a hostile crowd gathered around her while she was preaching. However, her conviction was overturned on appeal. See Redmond-Bate v Director of Public Prosecutions and Ash, p. 131.

[306] Ash, p. 146.

Whether the reason to curb free speech by institutions is the amount of outrage, offence taken or threats of violence one thing becomes clear: those who want to impose a taboo, legally enforced or not, have a clear instruction manual on how to achieve this goal. Yet, it is not the sort of instruction manual a country that values the rule of law should accept. Liberal democracies who proclaim the importance of equal treatment under the law should not give special protection to any group simply because they display the most outrage when something that is important to them has been ridiculed, insulted or harshly criticised. This is particularly the case with the religion of Islam and its relation to other religions and belief systems. If only expressions that offend the religion of Islam and its followers are banned, it has the potential of creating a unique protection for Islam, which becomes immune to criticism, ridicule and insults, while other belief systems may be freely offended, ridiculed and blasphemed without consequences. The principle of equality cannot be fulfilled if the introduction of criminal sanctions is dependent on the amount of outrage the expression causes when people from different religions and groups show disproportionate amounts of outrage. Instead, this leads to a distorted result, where different amounts of protection are guaranteed to people from different religions. At the same time, this completely disregards the position of nonbelievers, who do not have the right to have their "non-religious" or "secular" feelings protected.

5.4. The Populist Problem and Right-Wing Extremism

The cases by the ECtHR discussed above demonstrate an overly restrictive approach to hate speech by the Court. It has left little room to discuss some of the most important topics and issues in Europe by not adequately protecting, for instance, political speech or controversial topics which are crucially important to discuss, such as immigration and religion. As demonstrated by some of the cases above, critical voices of Muslim immigration have been continually suppressed both in the ECtHR and in the national courts of Europe. Interesting observations of the possible harms of alienating majority populations by accommodating minorities have been observed by Jörg Friedrichs. In his research, Friedrichs explains the challenges and solutions to relations between Muslim minorities and the majority population in European democracies based on the lessons learned from India.[307] Friedrichs presents how

[307] Jörg Friedrichs, *Hindu–Muslim Relations: What Europe Might Learn from India*. Routledge India, 2018 and Jörg Friedrichs 'A warning from India for European liberals on how to manage relations with Muslim minorities', University of Oxford, Oxford department of International Development, Blog, 24 January 2019.

India could be regarded as a model for Europe in many ways, but he also highlights the warnings that have become evident in a society that is similarly multicultural as much of Europe. One of those warnings is that when trying to accommodate minorities, ruling elites must not lose touch with prevailing perceptions of fairness among the majority. Here, he is referring to the political parties' pursuit of appeasing socially conservative religious minorities, ultimately giving Muslims and other religious minorities special treatment. Friedrich explains that in India, this approach alienated the country's majority, who saw the attempt to accommodate Muslims as appeasement.[308] Both Indian secularism and multiculturalism consider that majorities should accommodate minorities rather than the other way around. This, in turn, more often than not, leads to liberals co-operating with minorities who do not share their liberal values. While trying to get the minority vote, they often turn a blind eye to fundamentally illiberal tendencies within socially conservative religious minorities, such as sex segregation and the advocation of blasphemy or hate speech bans on speech that is critical of Islam.[309] This, according to Friedrich, causes a risk of a backlash from parts of the majority, which simultaneously empowers the current wave of populism in Europe.[310] In other words, by silencing, stigmatising and criminalising critical voices towards both Islam and Muslim immigration, European countries are only contributing to the popularity of populist parties who have labelled themselves as anti-immigration parties. The European liberals' attempt to accommodate minorities has alienated significant parts of the population, whose concerns are not being addressed by any other parties except for the populist ones. Arguably, the European liberal elites and European judicial institutions will only increase the popularity of populism by doubling down in their efforts to make certain immigration critical voices illegitimate by branding them as "Islamophobic", "racist" or as "hate speech", and then using vague hate speech laws and the possibility to interpret them broadly to make those voices illegal. When taking into account predictions according to which the Muslim population in Europe will grow significantly in the near future,[311] open discussion about possible challenges ought to be encouraged and not silenced. This way, it would be more likely that the voters' grievances would also be addressed by other, more responsible parties, instead of strengthening the popular right-wing populism further. In the words of Friedrichs: "I feel that these [liberal] values are endangered by unrecognized tensions between illiberal tendencies in Europe's

[308] Friedrichs (2018), pps. 16-17 and 81-82.
[309] Friedrichs (2018) p. 83 and Friedrichs (2019).
[310] Friedrichs (2018), p. 119 and Friedrichs (2019)
[311] 'Europe's Growing Muslim Population', *Pew research Center,* 29 November 2017.

growing Muslim minorities on the one hand, and the 'nativist' or 'populist' reaction to such tendencies on the other. It troubles me that multiculturalists turn a blind eye to this tragedy."[312] Arguably, the best antidote to what Friedrichs refers to as a "tragedy" would be an atmosphere that is open for robust, controversial and even difficult conversations, and in which concerns held by a large part of the population[313] would not be made illegitimate in law nor culture. As explained by Friedrichs, in India, the secularists' unwillingness to address the concerns of the Hindu majority, ended up paving the way for the nationalist party and its illiberal leader, Modi, who has been in power since 2014.[314] Modi's nationalist government has adopted British colonial-era laws against hate speech, which were meant to protect minorities, but are routinely used by those in power to silence speech they don't like by claiming to be offended.[315] As of this moment, it is clear that Europe is only repeating the mistakes of India by granting special immunity against criticism for religious minorities, thus driving more people to rely on the only parties that are addressing their concerns: the right-wing populists.

The assumption that censoring right-wing opinions and anti-immigration sentiments will decrease hate crime and increase societal harmony may not be completely accurate, either. While studies suggest that hate speech can sometimes result in real life harm, the restrictions on speech may not necessarily be an effective solution.[316] Moreover, research has shown that restrictions on speech can increase the risk of the extremist violence they are supposed to protect. A 2020 study found that "nonviolent hate crimes" such as verbal insults, threats and bullying increased in the Netherlands when the far-right Dutch politician Geert Wilders was prosecuted for hate speech in 2010-2011.[317] This study found that criminal proceedings against hate speech may create a "backlash" effect and intensify a propensity to engage in hate crime as some people feel that some values (e.g. freedom of speech) are under threat.[318] Additionally, a recent study shows that a combination of high immigration, low electoral support for anti-immigration (radical right) parties and extensive public repression of radical right actors and

[312] Friedrichs, p.13.
[313] According to the latest Eurobarometer survey Europeans thought that the most important issues facing the EU at the moment of the survey were the environment and climate change (26%), rising prices, inflation, cost of living (24%) and immigration (22%). See Standard Eurobarometer 96 - Winter 2021-2022.
[314] Friedrichs. p. 62-63 and Mchangama (2022), p. 329.
[315] Mchangama (2022), p. 329-330.
[316] See e.g. Erik Bleich, 'Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany, and France', *American Behavioral Scientist*, Vol. 51, Nr. 2, October 2007 and Mchagama and Alkividaou p. 1018.
[317] Laura Jacobs, Joost van Spanje, A Time-Series Analysis of Contextual-Level Effects on Hate Crime in The Netherlands, *Social Forces*, Volume 100, Issue 1, September 2021, Pages 169–193.
[318] *Ibid.*

opinions fuel hostility, polarization and violence, as well as contributes to the rise of far-right extremism in Western Europe.[319] Additionally, when far-right extremists and white supremacists are removed from mainstream platforms such as Facebook or Twitter for violating hate speech rules, they often change to alternative platforms such as Telegram, which is encrypted.[320] This, in turn, enables the creation of small networks with minimal publicity, meaning that it is harder for law enforcement to predict possible extremist attacks and necessary counterspeech cannot be used to fight such ideas.[321] These studies and observations indicate that even if attempts to curb right wing-extremism by using hate speech laws are well intended, they often turn out to not only be ineffective in reaching their desired goals, but to cause the opposite effect.

The measures taken by European governmental and judicial institutions to tackle hate speech may also be problematic for democracy. Malik argues that banning hate speech undermines democracy in two ways: 1) By implying that not every citizen's voice counts, no matter how outrageous or obnoxious one's belief is. The branding of certain ideas as "hate speech" can also in itself be problematic for democracy, since it has become a means to rebrand obnoxious political arguments as immoral and beyond debate. 2) By making the expression of some ideas illegal, while abandoning the responsibility to challenge those ideas politically.[322] As such, the increasing willingness to censor uncomfortable speech, especially right-wing voices, in Europe becomes difficult to justify.

In addition to increased populism and right-wing extremism, other related problems appear, too. When cases such as *E.S.* demonstrate the low threshold for banning certain forms of blasphemy and criticism of Islam, one important factor seems to have been forgotten: the possibility and right of the "minorities within the minority" and the most vulnerable people within the Muslim community (i.e. women, ex-Muslims, LGBT+ people, and Muslims with heterodox views) to criticise and blaspheme their own culture, community and religion. These people should enjoy the same rights to criticise and mock their own religion that they themselves subscribe to or were born into, as those who come from any other religious or cult

[319] Jacob Aasland Ravndal, 'Explaining right-wing terrorism and violence in Western Europe: Grievances, opportunities, and polarization', *European Journal of Political Research* 57: 845–866, 2018, p. 861.
[320] See e.g. Aleksandra Urman and Stefan Katz. "What they do in the shadows: examining the far-right networks on Telegram." *Information, communication & society* (2020): 1-20.
[321] Urman and Katz, p.1-20 and Mchangama (2022), p. 371-372.
[322] Malik, p. 90.

background. The precedence set by the ECtHR and other national courts jeopardises this right and puts the most vulnerable members of the Muslim community at risk.

5.5. The Weimar Fallacy as the Foundational Reason for Hate Speech Laws

One of the underlying assumptions is that hate speech legislation is necessary due to historical experiences, while their national approval, on the other hand, is based on that assumption.[323] Varying types of hate speech laws have been a response to atrocities at least in Germany, South Africa, Rwanda and more recently in Kenya.[324] The assumption that hate speech laws are necessary because of historical atrocities, is also illustrated in *Vejdeland*, where two judges expressed in a concurring opinion that the American approach to free speech was unattainable in Europe since "for many well-known political and historical reasons today's Europe cannot afford the luxury of such a vision of the paramount value of free speech."[325] As discussed earlier in this thesis, even the drafting history behind many human rights instruments shows how historical atrocities were referred to when reasoning the importance and need of extended restrictions on hateful speech. Undoubtedly, historical evidence suggests that constant dehumanising messaging about a group has the potential to eventually incline people to violence against that group.[326] As such, it can be argued that the prevention of atrocities such as genocides is one of the most fundamental reasons for hate speech laws. The idea is that hate speech laws work as a type of pre-emptive measure to avoid a return to Europe's horrific totalitarian past. However, is it possible that Europe's desperate struggle for atonement for past wrongs is, although well intended, taking us closer to some form of (soft) authoritarianism and not further away from it? Although Germany and other countries have seen numerous atrocities (eg., the Holocaust, the Rwandan genocide, the Apartheid) their subsequent reactions to incorporate hate speech legislation is really based on one and the same argument, which is summarised in what Eric Heinze calls the "Weimar Fallacy",[327] to combat the tolerance of intolerance.[328] This rather appealing argument is based on the assumption that if the Weimar Republic had done more to combat propaganda and anti-Semitism, Nazi Germany and the

[323] See e.g. Scheffler, p. 41-42.
[324] *Ibid.*
[325] *Vejdeland*, Concurring opinion of Judge Yudivska joined by Judge Villiger, para 6.
[326] See e.g. Leader Maynard, Jonathan and Benesch, Susan 'Dangerous Speech and Dangerous Ideology: An Integrated Model for Monitoring and Prevention', *Genocide Studies and Prevention: An International Journal*: 2016, Vol. 9: Iss. 3: 70-95.
[327] Quoting Eric Heinze in Mchangama (2022), p. 3.
[328] Paraphrasing Karl Popper in Mchangama (2022), p. 3.

Holocaust might have been avoided.[329] The same argument can be applied to other genocides and atrocities. The aim in Europe and many other countries with hate speech laws is to avoid making that same mistake again. Mchangama argues that this is a questionable conclusion for a number of reasons, perhaps the most important one of them being that contrary to popular belief, Europe's history proves the very dangers of restricting unpopular speech. He explains that there were constant attempts to silence leading Nazis, like Hitler himself, and the National Socialist Party. Yet, the attempts to silence the Nazis made them gain attention, popularity and sympathy by "turning monsters into martyrs".[330]

In Germany, beginning from 1922, censorship of newspapers became more and more common, and increasingly draconian laws and emergency decrees were gradually implemented to limit press freedom. Between 1930 and 1932, 284 newspapers, ninety of which were Nazi, were temporarily banned in Prussia alone.[331] While it is true that Hitler and the Nazis gained popularity in large part because of Hitler's public speeches and skills as an orator, the newspaper censorship and the ban which prohibited Hitler from speaking between 1925 and 1927 fuelled propaganda and the ability of the Nazis to portray themselves as martyrs. Hitler also concluded that the ban was a net benefit for his fame and popularity.[332] The imprisonment of Hitler and other prominent Nazis, such as Julius Streicher, the fanatically anti-Semitic editor of the Nazi newspaper Der Stürmer in 1929, was also used to boost propaganda and martyrdom.[333] In fact, the Nazi party multiplied its votes dramatically in local elections shortly after Streicher's verdict, something that Mchangama says "may be history's most pernicious example of the Streisand effect".[334]

The martyr image that the Nazis gained due to censorship efforts by the state is echoed in many of the more recent hate speech cases discussed above. Based on the observations made thus far, it is reasonable to argue that in practice, hate speech prosecutions and convictions often generate sympathy towards the convicted, thus creating martyrs rather than criminals.[335] It also

[329] Mchangama (2022), p.3.
[330] *Ibid.*
[331] *Ibid.* p. 273-274.
[332] *Ibid.* pps. 244-276.
[333] *Ibid.* pps. 272-277.
[334] *Ibid*. p. 277.
[335] This is also observed by Mchangama (2022), p. 3 and by Toby Mendel in 'Study on International Standards Relating to Incitement to Genocide or Racial hatred. For the UN Special Advisor on the Prevention of Genocide', April 2006, p. 39.

brings to question the efficacy of hate speech laws to reach desired results. As stated by Mendel, "Restrictions on free speech which are not effective cannot be justified; they cannot be necessary to protect a legitimate aim since, by definition, they are not protecting it."[336] This is not to say that censorship has never worked or will never work in preventing the dissemination of bad, or good, ideas, but that the assumption that it does, is highly exaggerated. Since the restrictions on "hate speech" are slowly getting more extensive, and increasing, the onus is on the state to prove their efficacy and why their benefits outweigh the costs.

6. Alternatives to Current Hate Speech Laws and their Interpretation

6.1. The Rabat Plan of Action

Taking into account the prevalence and apparent lack of widespread disapproval for hate speech laws in Europe,[337] it seems reasonable to argue that the free speech absolutism that is characteristic in U.S. jurisprudence would not bode well in a European context. The line between unacceptable and acceptable speech must also be drawn somewhere, and the criminalisation of the gravest form of speech in the category of hate speech is necessary. Yet, as displayed throughout this thesis, the European approach would benefit from a higher threshold for unlawful hate speech, not to mention consistency, predictability and reasonableness. A helpful framework, at least in part, may be found in the Rabat Plan of Action (RPA) by the United Nations.[338] Compared to the interpretations of the limits to hate speech made by the ECtHR, the RPA offers a higher threshold as well as a clarification of the standards of Article 20 of the ICCPR.[339] The RPA was adopted by experts in Rabat, Morocco in 2012, and the conclusions and recommendations made therein are a result of a series of expert workshops organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the topic of incitement to national, racial or religious hatred as reflected in international human rights law.[340] The RPA emphasises that Article 20 of the ICCPR requires a high threshold in its application, and that limitations must remain an exception as a

[336] Mendel, (2006), pps. 39-40.
[337] Similar attitudes are also illustrated in the Pew survey, see Poushter, '40% of Millennials OK with limiting speech offensive to minorities', *Pew research Center*, 20 November 2015.
[338] 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', Appendix in the Annual Report of the United Nations High Commissioner for Human Rights A/HRC/22/17/Add.4, 5 October 2012, (Hereinafter RPA).
[339] Mchangama and Alkiviadou, p. 1037.
[340] RPA, p. 6.

matter of fundamental principle.[341] It notes that restrictions shall be clearly and narrowly defined and respond to a pressing social need, that they must be the least intrusive measure available, proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, and that they are not to be overly broad.[342] The plan underlines that civil sanctions and remedies should be considered and that criminal sanctions related to unlawful forms of expressions should be seen as last resort measures.[343] To achieve a high enough threshold, the RPA has proposed a six-part test for defining restrictions on hate speech in paragraph 29:

(a) Social and political context
(b) The speaker's position or societal status
(c) Intent to incite
(d) Content and form of the speech
(e) The extent of the speech, such as the reach of the speech, its public nature, magnitude and size of the audience
(f) Likelihood of harm, including imminence

The 2020 UN Strategy and Plan of Action on Hate speech has underlined that *all* six criteria in the RPA must be met to criminalize hate speech, while the less severe forms should be tackled by other measures.[344] Although the RPA has received criticism due to a number of short-falls,[345] the extent of which will not be discussed in this research due to space constraints, it does offer a framework that impedes the misuse of hate speech restrictions.[346]

The RPA also takes a stand on blasphemy laws, by stating that they are counterproductive, since they may result in de facto censure regarding religious dialogue, they frequently afford different levels of protection to different religions and have often been applied in a

[341] *Ibid*., para. 18.
[342] *Ibid.*, para. 18.
[343] *Ibid.*, para. 34.
[344] United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences, September 2020, p. 5. (Hereinafter UN Hate Speech Strategy)
[345] For example, the RPA has received criticism for a lack of concentration on internet-based forms of hate speech and the lack of sex or sexual orientation as a protected characteristic. See Sejal Parmar, 'The Rabat Plan of Action: A Critical Turning Point in International Law on "Hate speech"' in *Free Speech and Censorship around the Globe,* p. 214.
[346] Mchangama and Alkiviadou p.1038.

discriminatory manner.[347] Especially religious minorities or dissenters, non-theists and atheists often suffer from these types of laws. The plan also takes into account that criticism and debate regarding religions is mostly constructive, healthy and needed.[348] This view on blasphemy differs quite significantly from the ECtHR jurisprudence, which has, as argued earlier in this thesis, given leeway for restrictions on blasphemous utterances and blurred the line of acceptable criticism of religion. Notably, the RPA was not specifically tailored for European democracies, but its global scope was taken into consideration by the drafters. However, the points laid out in the RPA relating to blasphemy may not be completely irrelevant for Europe. As observed by Heiner Bielefeldt, the UN Special Rapporteur on freedom of religion and belief, overly broad anti-incitement laws, that exist in many national Penal codes, can be just as damaging for freedom of speech as traditional blasphemy laws.[349]

Although the RPA acknowledges the importance of a legal response to hate speech, it also acknowledges that it is only a "part of a larger toolbox" when responding to problems related to hate speech. The Plan suggests that societies need a plurality of measures in order to create and strengthen "a culture of peace, tolerance and mutual respect among individuals, public officials and members of the judiciary, as well as rendering media organizations and religious/community leaders more ethically aware and socially responsible."[350] As complimentary efforts, the RPA recommends that states should, among other things, "combat negative stereotypes of and discrimination against individuals and communities"; "promote intercultural understanding"; "introduce or strengthen intercultural understanding" in schools; "promote and provide teacher training on human rights values"; "build the capacity to train and sensitize security forces, law-enforcement agents and those involved in the administration"; "consider creating equality bodies, or enhance this function within national human rights institutions with enlarged competencies in fostering social dialogue"; "ensure the necessary mechanisms and institutions in order to guarantee the systematic collection of data in relation to incitement to hatred offences"; and "have in place a public policy and a regulatory framework which promote pluralism and diversity of the media, including new media."[351] Although the RPA may not be the sole solution to problems that emerge from hate speech laws, it does offer a more promising route that would be less likely to be subject to the misuse of hate

[347] RPA, para, 19.
[348] *Ibid.*
[349] Quoted in Temperman (2016), Foreword.
[350] RPA, para 35.
[351] RPA, paras. 42-49.

speech restrictions. The RPA's recognition of the necessity of "a larger toolbox" to combat hate speech indicates of a healthy scepticism towards a direct legal response to hate speech and the necessity to consider other, non-legal, measures.

6.2. Civil Society Resolutions and the State's Roll as the Arbiter of Hate Speech

More tightly defined hate speech laws, such as the proposition made above, inevitably mean that more manifestations of hatred can be uttered without legal consequences. Although it may be tempting and intuitive to use the law to fight outrageous and uncomfortable speech that goes against everyday norms of kindness and decency, hate speech laws, especially if they are vague and broad, often turn out to be counterproductive and problematic for democracy. However, as argued by Jacobsen and Schlink, the lack of legal hate speech bans does not stop civil society from banning it just as effectively.[352] Creating such a civil society is by no means easy, and it does not provide solutions to every problem. However, in comparison with the current European hate speech laws and the recent trends that seek to increase legal measures to tackle manifestations of hatred, civil society resolutions are unequivocally the lesser of two evils.

The critics of unnecessarily broad hate speech laws often refer to civil society resolutions as an alternative method to combat unwanted hate speech, not least because of citizens' civic responsibilities. Ash argues that the overregulation of speech by law manifests a "tendency for the state to treat us as overgrown children, not mature enough to make such judgements for ourselves, incapable of coping with contrary or offensive views, forever needing to be ticked off by the teacher."[353] This view is reiterated by Winfield and Tien who see that governmental overreach in matters of speech restriction "produces infantilism in the citizenry."[354] Malik also states that "Ironically, for all the talk of using free speech responsibly, the real consequence of the demand for censorship is to moderate the responsibility of individuals for their actions."[355] This idea is, at least to an extent, echoed in Immanuel Kant's piece from 1784, where he answers the question of "What is Enlightenment?":

> Enlightenment is man's emergence from his self-imposed immaturity. Immaturity is the inability to use one's understanding without guidance from another. This immaturity is self-imposed when its cause lies not in lack of understanding, but in lack of resolve and courage to use it without guidance from another.

[352] Arthur Jacobson and Bernhard Schlink. "Hate Speech and Self-Restraint" in Michael Herz, and Peter Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, p. 227.
[353] Ash, p. 83.
[354] Winfield and Tien, p. 492.
[355] Malik, p.85.

> Sapere Aude! [dare to know] "Have courage to use your own understanding!"—that is the motto of enlightenment.[356]

As governments are taking more steps to combat hate speech, while simultaneously coming closer to creating a new form of paternalism and facilitating the citizenry's abdication of personal civic responsibility,[357] the idea behind "self-imposed immaturity" by Kant seems to have faded away to a large extent in Europe. Most offensive or bigoted ideas are recognised as such by the majority population, and it would be beneficial to treat the citizenry as capable of evaluating and rejecting such ideas themselves. When the law prohibits hate speech, it easily obscures the complexities causing social offences and creates a false sense of security that the government can protect from hate speech and the underlying hatred.[358] As such, it becomes easier for citizens, politicians, community leaders and human rights organisations to refrain from politically challenging the *arguments* behind bigoted or morally suspect views, which is necessary to reduce the actual bigotry behind the hateful words and the spread of morally offensive views.

Winfield and Tien are sceptical about the state's ability to modify human thought and behaviour in an efficient manner by punishing expressions that offend the sensibilities of a few.[359] The authors refer to the potential dangers that the state uses hate speech laws to commandeer the criminal justice system in order to deal with matters of mere political correctness. The dangers of a lack of limits to the seemingly boundless power of the state to punish, or not to punish, expressions that the state has the sole authority to deem offensive is recognised by states such as the United States and Japan, who have refrained from criminalising nonviolent hate speech.[360] As hate speech laws have widened to cover expressions that are considered offensive or insulting in many European countries and in the ECtHR, it raises the question of whether courts and governments are well suited to determine questions of subjective offensiveness and insensitivity. According to Winfield and Tien, Governmental involvement in controversies that are fundamentally religious, racial or cultural may turn out to be particularly hazardous.[361]

[356] Kant, Immanuel, "What is Enlightenment?", 1784.
[357] Also observed by Winfield and Tien, p. 492.
[358] *Ibid.,* p. 492.
[359] *Ibid*., p. 490.
[360] *Ibid.,* p. 490.
[361] *Ibid.,* p. 492.

By failing to challenge hateful or offensive expressions and making them illegal instead also fails to address the root causes of hate speech and hate crimes. Hate speech often entails that there are some unresolved societal issues that need to be discussed and addressed openly and honestly. Fighting hate speech by law is only fighting a symptom, and as argued by Scheffler "the most effective way to prevent violence emanating from speech is to tackle the underlying causes".[362] This was also noted by the expert workshop held by The Office of the High Commissioner for Human Rights (OHCHR):

> We should never lose sight that our ultimate goal is to find the most effective ways through which we can protect individuals against advocacy of hatred and violence by others. Hate speech is but a symptom, the external manifestation of something much more profound which is intolerance and bigotry. Therefore, legal responses, such as restrictions on freedom of expression alone, are far from sufficient to bring about real changes in mindsets, perceptions and discourse. To tackle the root causes of intolerance, a much broader set of policy measures are necessary, for example in the areas of intercultural dialogue or education for tolerance and diversity. In addition, this set of policy measures should include strengthening freedom of expression.[363]

Thus, there is reason to listen carefully to hate speech, in order to understand why such views are held and expressed. This is especially important in situations when the hate speech in question may strike a chord with the audience.[364] As argued by Malik, when a statement confirms an audience in their opinion, branding it as hate speech will not disenfranchise those who hold such a view.[365] Additionally, Strossen argues that hate speech is a potential tool for addressing the underlying problem, since it flags where discriminatory conduct is occurring or being fuelled, and it can be used by law enforcement officials to uncover and track illegal activity.[366] The UN 2020 Strategy and Plan of Action on Hate Speech, also underlines, among other things, the importance of identifying and addressing root causes, drivers and actors of hate speech.[367] Although the recommendations made therein include a variety of measures, some of the most important ones that relate to addressing root causes might be the support for projects, programmes and activities that aim to "provide a forum for the discussion on controversial opinions" and those that aim to "promote the communication of counter and alternative narratives (i.e. speech that discredits and deconstructs the narratives on which hate speech is based, by proposing narratives based on human rights and democratic values), and in

[362] Scheffler, p. 85.
[363] OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred. Expert workshop on Europe (9-10 February 2011, Vienna), p.12.
[364] See Malik, p. 85-91 and Scheffler, p.83.
[365] Malik, p. 90.
[366] Strossen, p. 386.
[367] UN Hate Speech Strategy, p. 28.

doing so, assess and mitigate the risks for individuals addressing and countering hate speech."[368] The importance of promoting a constructive conflict culture is also observed by Scheffler, who argues that sensitive topics, regardless of how deep-seated they are, require open debate and not legally enforced prohibitions.[369]

An important part of preventing and combating hate speech is education and the role of the media. Ash argues that the political debate about education in democracies may emphasise the economic function of education, such as job skills, at the expense of the civic one.[370] The UN Strategy and Plan of Action on Hate Speech has also addressed the importance of education as a tool, and suggests, for example, to "Support the national Government in providing teacher training and student briefings on human rights values and principles, to promote tolerance, and in strengthening intergroup dialogue and understanding as part of the school curriculum for pupils of all ages" and to "Promote critical thinking, social and emotional skills."[371] Undoubtedly, as Western societies become increasingly diverse, a reasonable, and a rather self-evident solution may simply be to discuss diversity, opposing views and related challenges. Similarly, as argued by Mendel, the media has an important role in combating bigotry and it represents a social duty for these actors. For instance, by giving a voice to minorities and by presenting diverse viewpoints, the media can be used to combat ignorance and prejudices that parts of the population might have towards any given group.[372]

Another part of the solution, which may be the lesser of two evils when compared to excessive hate speech laws, is public condemnation and disapproval directed towards hateful expressions.[373] Although these types of reactions occur arbitrarily, and the outcomes may be as unpredictable as governmental intervention to hate speech, it eliminates the easily dangerous authority that lets the state be the arbiter of hate, offensiveness and morality. Public condemnation can be very effective, which is why public reactions to hateful speech has led to serious consequences for many who have made such statements publicly. For example, in 2004, Muslim groups protested to a series of explicitly anti-Muslim newspapers written by an

[368] *Ibid.*
[369] Interestingly, the arguments made in the research are, according to Scheffler, applicable to Rwanda, which experienced a genocide as recently as 1994. Despite the exceptionally sensitive situation in the country, the author still sees that open discussion about controversial issues is crucial, while their suppression is detrimental. See, Scheffler, p. 86.
[370] Ash, p. 231.
[371] UN Hate Speech Strategy, p. 40.
[372] Mendel (2006), p.74-75.
[373] Winfield and Tien. p. 492-493.

employee of the British Council. As a consequence, the employee lost his job, but he did not face criminal charges for his statements.[374] Similarly, popular outrage towards public figures who use racial slurs have often resulted in serious financial damage to their careers and a stained reputation.[375] Strossen also argues that allowing hate speech has a net "amplifying" effect because it can prompt responses from community members who might not have felt angered, or even realized that there was a problem, until they heard the hateful speech.[376] This, in turn, is often followed by a ripple effect which leads to more and more community leaders speaking out. On the contrary, if there is no one to hear the hateful speech, there can be no response. She also argues that no silencing effect that hate speech might cause is as powerful as the statements that can be heard from community leaders, such as university presidents who have spoken out against hateful speech on their campuses.[377] This view is reiterated in the UN Strategy and Plan of Action on Hate Speech, which addresses the importance of encouraging individuals who have credibility and influence over an audience (e.g. community and religious leaders, State authorities and thought leaders) to speak out against hate speech.[378]

Creative solutions to hate speech, propaganda and disinformation online have also been provided by the Swedish online community #jagärhär (#Iamhere), whose purpose it is to offer counterspeech to harmful narratives on the internet.[379] Since 2016, the approach has spread throughout Europe, and it has gained thousands of members across the continent in its sister groups.[380] The rise of the internet also suggests that it becomes increasingly difficult not to counter hateful, offensive or opposing views. Subsequently, it might be reasonable to suggest that people would benefit from learning to live with higher degrees of offence. Growing a thicker skin and encouraging resilience in culture and education, would offer a more promising approach that would not incentivise the weaponisation of outrage, violence or taking offence in order to get special protection by law. Arguably, a combination of a higher threshold for unlawful speech provided by the RPA and civil society resolutions which tackle manifestations of hatred by non-legal measures, is a more liberal way of tackling hate speech without

[374] *Ibid.*
[375] *Ibid.*
[376] Strossen, p. 387.
[377] *Ibid.*
[378] UN Hate Speech Strategy, p. 29.
[379] See the internet comunity website #jagärhär and their goals with the initiative at: https://www.jagarhar.se/om-oss/ (Accessed 9 May 2022)
[380] Makana Eyre and Martin Goillandeau, 'Here, here: the Swedish online love army who take on the trolls', *The Guardian,* 15 January 2019.

jeopardising fundamental freedoms. These suggestions complement each other and one of these responses can be used in all situations.

7. Conclusions

Although manifestations of hatred must be tackled by liberal democracies committed to equality regardless of characteristics such as race, religion, sexual orientation and gender identity, doing so by sacrificing the cornerstone of democracy includes considerable risks and unintended consequences. In Europe, freedom of speech is increasingly seen as a threat to, instead of a prerequisite for equality and democracy. Consequently, the Overton window of acceptable speech is gradually and slowly shrinking in the attempt to save democracy, as censorship of speech that is considered hateful is increasing both on the national and on the international level.

The European Court of Human Rights has an overly restrictive approach to hate speech, considering that it ruled against the speaker in 62 per cent of the hate speech cases brought before it. In the light of the recent case law on hate speech, it is difficult to claim that restrictions on speech are the exception while upholding the right to freedom of expression is the rule. The *Handyside* judgement and the importance of the right to offend, shock and disturb may be referred to in theory, but it has been forgotten in practice. The scope creep of hate speech standards can be witnessed when observing how principles, such as incitement, have changed meaning. Now mere offensive, insulting or ridiculing statements may suffice to restrict the fundamental right of freedom of speech, without requiring proof of intent to spread hatred or the probability of harm. The approach adopted by the Court illustrates that it lacks a clear set of legal tests that characterise its jurisprudence, which has led to arbitrary and unforeseeable judgements. Instead, the case law illustrates that the Court contradicts itself routinely and guarantees different levels of protection for different groups. For instance, it appears that non-believers enjoy less protection than believers, and Jews enjoy more protection from genocide denial than the Armenians. Similarly, the lines between acceptable and unacceptable criticism of religion are increasingly unclear, and the Court has forbidden blasphemy in all but name. Subsequently, the Court's ability to determine matters of offensive speech is questionable at best and detrimental to the principle of equality and legal certainty at worst.

At the same time, the increase of vulnerable groups in need of protection from hate can be witnessed on the national level, which is inevitably reflected on the international level. This can be witnessed especially in the laws and court cases that have included "homophobic" speech as a punishable offence. Even though it is important to recognise the vulnerability of specific groups in society, the expansion of characteristics that are categorised as hate speech victims has created an incentive for groups to race to the bottom in order to be considered oppressed, marginalised or discriminated enough to gain special protection. This phenomenon has created new taboos, or new heresies, which are based on contemporary conceptions of morality. The assumption that a difference in opinion equates hatred or incitement to hatred is made too readily. As such, those who dissent from the popular opinions of society are easily targeted for having "blasphemed" the current orthodoxy. Yet, it would be arrogant to claim that at this time in history, Western societies have found ultimate truths, which justify making the expression of certain ideas illegal. As John Stuart Mill proclaimed in the famous 1859 treatise *On Liberty*: "We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and even if we were sure, stifling it would be an evil still." Vaguely drafted hate speech laws and their increasingly broad interpretation makes them highly susceptible for misuse, and it is often minorities and dissenters who pay the heaviest price.

The "free speech recession", as Mchangama calls it, can be witnessed in many different dimensions: in EU efforts, in national legislation and in international law and practice. Especially the growth and prominence of the internet has exacerbated the willingness to limit hateful speech. Yet, there is a lack of proof that would illustrate why hate speech bans are the most efficient instrument to combat uncomfortable or obnoxious speech. Similarly, despite regular referrals to the importance of censoring hate in order to secure a stronger democracy, tolerance and social cohesion, no evidence has been laid out as to why or how these aims will be met by doing so. As such, there has been little to no exploration or discussion of measures to tackle hate speech that would be less intrusive, even when there is reason to suspect that the cure to fight hatred has become worse than the disease. For a democracy, it is important to assure that everyone thinks that their voice counts. However, when certain voices are being suppressed, especially right-wing actors feel alienated, and start seeing populism and extremism as viable options. Yet, it should be no surprise that labelling someone's opinions as "hate speech" by applying increasingly low standards is likely to create resentment, not a change of heart. As such, when hate speech is tried in courts, the image of martyrdom can be easily adopted, and it often works even for those with the most hateful messages.

As spaces for dissent are shrinking globally, European countries have the opportunity to provide a counterweight to hostile attitudes towards freedom of expression, instead of adopting an increasing number of restrictions themselves. Despite being imperfect, a combination of civil society resolution and the framework provided by the Rabat Plan of Action offer helpful solutions to tackle hate speech. Perhaps the most important aspects that these two approaches can offer is the principle according to which intervening with freedom of speech must be an exception as a matter of fundamental principle. Instead, other civil sanctions and remedies should be applied as a general rule, and the underlying reason for hate speech must be addressed. This approach would provide a much higher threshold for restricting speech by law, and it would put greater emphasis on tackling the underlying hatred behind the words through education, media and institutions. Open discussion about sensitive issues ought to be encouraged, and civil society should take back the moral responsibility to challenge views that are considered immoral or hateful.

Freedom of expression and opinion may remain core values in liberal European democracies, but the current trends bring forth the question of how these countries will look like a few decades into the future, providing that these trends keep replicating? Eleanor Roosevelt's warnings about the dangers of implementing vague prohibitions on "incitement to hatred" have actualised, but this time in European liberal democracies and not in the Soviet Union. Europe might need to remember that the freedoms we enjoy were hard to win, but they are all too easy to lose. A freedom that one has not personally had to fight for, is easy to take for granted. The enlightened message by judge Stephen Sedley was once the predominant view across liberal democracies, and if we remember its importance, it still can be:

> *Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of state control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power. We in this country continue to owe a debt to the*

jury which in 1670 refused to convict the Quakers William Penn and William Mead for preaching ideas which offended against state orthodoxy.[381]

[381] Redmond-Bate v Director of Public Prosecutions.

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