

INDIA'S SOCIAL MEDIA PARADOX FREEDOM OF SPEECH VS. HATE SPEECH AND EXTREMISM

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CHAPTER 2 – HATE SPEECH: CONTEXT AND CRITICAL ISSUES

Information technology has undergone a significant transformation in recent years, characterized by the widespread adoption of online social networks and social media platforms. This advancement has revolutionized the way people communicate, providing a rapid, convenient, and cost-effective means of digital interaction. Despite the numerous benefits, the anonymous nature of these interactions often leads to adopting more aggressive and hateful communication styles.

These aggressive and hateful behaviors emerge rapidly and uncontrollably, significantly harming their targets. It is crucial for governments and social network platforms to effectively detect and regulate such behaviors, which occur regularly across multiple online platforms. However, detecting this type of speech is challenging due to its abstract nature. Therefore, In the present work propose to enhance existing solutions for detecting hate speech online, focusing on multiple social media platforms such as Twitter, Facebook, YouTube, Gab, and Reddit.

The definition of hate speech is complex, even for human understanding. Hate speech refers to using verbal, nonverbal, or written behaviour to target individuals or groups based on attributes like race, religion, ethnic origin, and gender. It encompasses any form of speech that is discriminatory, threatening, intimidating, harassing, or hostile in nature. According to HateBase, an online platform that collects hate speech messages from around the world, hate speech is most directed at individuals based on ethnicity, nationality, and religion.

While certain countries, such as Canada, France, and Denmark, have legal provisions prohibiting discrimination and hate speech, other countries, including the United States, offer constitutional protection for hate speech. Consequently, hate speech and incitement to violence have become widespread, particularly on the internet and social media platforms. Hate speech primarily targeted individuals on the social media platform Twitter. This analysis identified dominant hate speech targets and quantified their frequency on these platforms. The most frequent categories are outlined below:

- **Gender:** Often associated with sexism, bias against women, and discrimination against transgender individuals, among other issues.
- **Sexual Orientation:** Individuals with non-heteronormative orientations, including gays, lesbians, bisexuals, etc.
- **Ethnicity:** Dehumanization and the use of ethnic slurs.
- **Religion:** Targeting ethnic and religious communities.
- **Nationality:** Focusing on national origin and citizenship.

- Race: Specifically addressing African American/Black individuals.

Varying backgrounds and beliefs contribute to diverse definitions and perspectives, making it an abstract and unpredictable concept. In the thesis have gathered illustrations from multiple sources to capture a comprehensive global perspective on hate speech and its current scope. This approach ensures a holistic understanding of what constitutes hate speech in today's context.

As the volume of such content increases, the need to identify and address hate speech and racist language on social media sites becomes increasingly crucial in the present work to explore the definition and various forms of hate speech, alongside providing examples of violence that can be attributed to online hate speech. Subsequently, the Thesis addresses the contributions outline and proposed solution.

2.1. Concept Of Hate Speech

Definitional Dilemma

Etymologically, 'hate speech' is a speech designed to promote hatred centred on race, religion, ethnicity, or national origin.¹²⁹⁸ They may be distinguished from parallel crimes – crimes that are similar in every manner but for the absence of bias motivation – in terms of the mental state of the actor as well as the nature of the harm caused. A parallel crime may be motivated by a specific, personal and group-based reason: the victim's real or perceived membership in a particular group.¹²⁹⁹ Hate speech as a cause of discrimination towards a group has existed throughout the ages and is still most pertinent in this modern world, where social media and broadcasting reach millions with the click of a button without fear of reprisal or the need for intensive research. Social media and the cyberspace as forms of disseminating malicious intent and hatred between groups are rife. Hate speech may be a symptom of

hatred amongst a few, but it has the power to stir and plant the seeds of the same hatred in many.¹³⁰⁰ Hate Speech is not simply reserved for dissidents, nor rebels nor extremist characters. It is regularly those in power who have the means and intent to disseminate hatred, in pursuit of a political goal.¹³⁰¹ How true was Samuel P. Huntington, the American theorist, who suggested that, often, hate speech is a means of implementing a political agenda: it may be cited by people with interests in creating, enflaming, and maintaining such divides in society to further their own individual or party ends?¹³⁰² Although there is no uniform definition of hate speech across the globe, hate speech creates a widening divide among the public. In succinct, hateful expressions bring divisive forces into play, victimizing the identity of the vulnerable.

2.2. Types of Hate Speech

Judges have attempted to find a balance between the harm caused by hate speech and the danger to liberty of expression and speech. The Canadian Supreme Court, for example, in *Saskatchewan v. Whatcott*, confined the definition of the term "hate" to extreme forms of "detestation" and "vilification".¹³⁰³ The Court identified two types of hate speech in this case: (i) marginalizing individuals based on their membership in a targeted group, thereby affecting inclusiveness and dignity; and (ii) impairing their ability to respond to substantive ideas under debate, thereby posing a serious barrier to their full participation in democracy. These two types are broad ones.

The Law Commission of India in its 267th report¹³⁰⁴ on hate speech highlighted various means through which hate speech is manifested. Though hate discourse can be demonstrated commonly based on religion,

¹²⁹⁸ Rosenfeld, Michael, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" 24 *Cardozo Law Review* 1523 (2003)

¹²⁹⁹ Heidi Hurd and Michael S. Moore, "Punishing Hatred and Prejudice", 56 *Stanford Law Review* 1128- 29 (2004).

¹³⁰⁰ Galpin, Caitlin, *International Law and Human Rights. Hate Speech as a Symptom and Cause of Hatred* 5 (Grin Publishing, 2014).

¹³⁰¹ *Ibid*

¹³⁰² Huntington, Samuel P., "Who Are We? America's Great Debate" 28 (Free Press, New York, 2004).

¹³⁰³ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 (CanLII)

¹³⁰⁴ Law Commission of India, 267th Report on Hate Speech (March 2017).

sexual identity, and race in India, there are a lot of other forms to it.

a) Religious Hate

In 2018, hate crime rates in India had rocketed to a decade-high level of 93 with the minorities, at the receiving end at 75% of the attacks. Ever since 2009, Muslims have been subjected to 66% of such attacks, Christians around 17%, even after accounting for 2% of the population, and Hindus, who constitute 80% percent of the population, were the victims in 16% of the

The Constitution of India, through Article 25, ensures its citizens fundamental right to profess any religion. According to Article 25 (1), "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."

Regardless, Hindu nationalist parties have been trying to create a Hindu dominated state, consciously being oblivious to the principle of secularism that has been enshrined by our Constitution. This menacing effort has resulted in violence, communal riots, lynching, and other brutal hate crimes being committed against the minority Muslims which to an extent, is an outcome of dissemination and indulgence in hate speech.

b) Racial and Regional Hate

India being a diverse and democratic country, is supposed to demonstrate one of its essential features of peaceful co-existence of all the communities. The rise in inflammatory statements against communities has led to tension and barbarity amongst these communities.

People from Northeast communities have been making the headlines being subjected to racial violence and statements, especially when they move to metropolitan cities. North-eastern communities put up with an extreme amount of violence, discrimination, and negative stereotyping "they experience – mostly as migrants in metropolitan Indian cities like Delhi,

Bangalore, and Hyderabad is the result of their belonging to tribal and indigenous communities rather than simply a symptom of high crime rates and inter-community tensions in a culturally diverse polity."¹³⁰⁵

This racial hatred they face also comes with an undertone of regional hatred. A study found that 78% of the people from the Northeast who were interviewed believed that bodily look was the most crucial reason behind the discrimination and prejudice they face.¹³⁰⁶ Remarks like "chinki", "hakka noodles", "chinese" have become a common way to identify and address them. In the light of Covid-19, people from the Northeast have also been subjected to rigorous discrimination with hateful statements and remarks hurled at them that accused them of spreading the virus.¹³⁰⁷

In Assam, for the reason that NRC was pressingly demanded, a lot of turmoil was stirred between the Assamese and the non-Assamese speaking communities resulting in violence and hate crimes founded on the demarcation of their regions. Racial hatred and regional hatred, thus, to some degree show an interrelation and form common factors that lay the paradigm of the establishment of hate speech against people from certain communities and regions.

c) Hate Based on Sexual Identity

Before the landmark judgment, in the case, *Navtej Singh Johar v. The Union of India*¹³⁰⁸ was passed, homosexuality was regarded as something aberrant. There was a standard order of nature that defined sexual relationships and gender identities, that had legally criminalized anything going against the said nature.¹³⁰⁹ People who identified as anything outside the standardized norm were subjected to hateful discourse and gestures that mentally

¹³⁰⁵ Duncan McDuie-Ra, *Debating Race in Contemporary India*, 2 (Palgrave Pivot, London, 2015).

¹³⁰⁶ Vijaita Singh, "Northeast citizens faced racial discrimination amid COVID-19 outbreak, says govt. study", *The Hindu*, Apr. 12, 2021. available at (last visited on 25th June, 2021).

¹³⁰⁷ *Ibid.*

¹³⁰⁸ AIR 2018 SC 4321.

¹³⁰⁹ The Indian Penal Code, 1860 (Act 45 of 1860), ss. 377 (repealed).

deranged them. Even after Section 377 of IPC was decriminalized due to the judgment passed in the aforementioned case, masses refuse to socially accept the same. The community that identifies as the umbrella term, LGBT+ has been finding it hard to break past the prejudices that still exist against them in society. This predisposition of most of the majority has caused the hurling of hateful statements against them, which sometimes also lead to subjecting them to violence, discrimination, and isolation.

For instance, even after the decriminalization of Section 377, people from the community have been excluded to partake in the institution of marriage and the rights that come with it. The existence of prejudice against them has led to an emergence of hate towards them that finds it difficult to accept the concept of same-sex marriage in India. Spiteful speeches have been made against the supporters of same-sex marriage who fail to understand the disadvantages same-sex couples face when denied matrimonial and other rights solely based on their sexual orientation.

People go to extreme lengths, such as 'conversion therapy'¹³¹⁰ when driven by their misbeliefs and when political leaders venomously talk about it as a disease that needs a cure.¹³¹¹ Such is the extent that hate speech is in our country.

d) Caste Hatred

On the 28th of May, 2018 eight Dalits from the village of Kachnatham, in the Sivagangai district were stabbed with knives and sickles by members of an upper-caste Hindu family who belonged to the same village.¹³¹² This is but one of the thousand occurrences of hateful viciousness that have been inflicted on the Dalits, even after 74 years of Independence.

¹³¹⁰ Taran Deol, "Shock and outrage won't stop Indian parents forcing queer children into 'conversion therapy'", The Print, May 20, 2020. available at (last visited on 25th June 2021).

¹³¹¹ Staff, "Being gay is against Hindutva, it needs a cure: MP Subramanian Swamy", Times of India, Jul. 10, 2018. available at (last visited on 25th June 2021).

¹³¹² Jeya Rani, "How Caste Hatred Turned Tamil Nadu's Kachanatham Bloody", The Wire, Jun. 22, 2018. available at (last visited on 25th June 2021).

Dalit families due to casteism which persists, continue to be subjected to violence and discrimination and losing their loved ones as aftermath.

e) Disability Hatred

Although not a well-known type, disability hatred exists at the core of the functioning of a society. Even though unnoticed, disability speech is an everyday experience for many people thereby leaving them emotionally scarred. Disability hate speech takes place in the form of teasing, bullying, and physical abuse against people with disabilities. Disabled people are viewed in a negative way that stereotypes people with disabilities as uneducable, unemployable, and unproductive and believes that they are therefore in need of institutionalized care, sheltered employment, and welfare.

Hate speech against them escalates into physical attacks that target them and subject them to cruelty, humiliation, and degrading treatment that relates to the nature of the victim's disability. Sometimes multiple perpetrators are involved in these incidents that encourage the main offender.¹³¹³

In India, access to justice when it comes to disability hate is a laborious process which makes it imperative for the Government to intervene and play an important role in regulating this aspect of hate speech.

f) Negotinism and Hate Speech

An interesting aspect brought forward by the Law Commission was how hate speech leads to negationism.¹³¹⁴ The report states, "historical consciousness is essential for recognizing instances of denial of basic rights to certain groups, in the past. Negationism is one of the grounds on which European Convention of Human Rights (ECHR hereinafter) has in recent

¹³¹³ Hate Crime against People with Disabilities, ODIHR, Hate Crime Reporting.\

¹³¹⁴ Law Commission of India, 267th Report on Hate Speech (March 2017) at p.23.

years limited Article 10.¹³¹⁵ Hate speech in the form of negationism is “excluded from the protection of the Convention not only when it is sudden and direct but also when it was presented as an artistic production.”

Additionally, Babak Bahador highlights three ways to determine the categories of hate speech.¹³¹⁶

i) Dehumanization and demonization “Dehumanization involves belittling groups and equating them to culturally despised subhuman entities, such as pigs, rats, monkeys, or even germs or dirt/ filth.”

ii) Violence and incitement “While dehumanization and demonization characterize groups of people in extremely negative ways, they do not outright call for violence against them. However, another notable typology of hate speech involves incitement to violence.”

iii) Early warning “The third category of speech that often borders what constitutes hate speech can be called “early warning” for this analysis. The commencing point of groupbased hate speech is rarely dehumanization or incitement but rather usually more subtle and measured. Recognizing these early signs, however, can help prevent escalation toward more intense language.”

Hence, it is cardinal to understand the types of hate speech that advocate totalitarian doctrine that poses a threat to society and is necessary to protect the democratic order of a nation

2.3. Hate Speech and effect over society

Hate speech significantly undermines the rights of targeted individuals, compromising their equality and freedom. The severe consequences of hate speech have been historically proven to be potentially catastrophic if left unchecked. It fuels prejudice

¹³¹⁵ Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

¹³¹⁶ Babak Bahador, “Classifying and Identifying the Intensity of Hate Speech.” *Items: Insights from the Social Sciences*, Nov. 17, 2020. available at (last visited on 25th June, 2021).

and hatred and has the potential to destabilize societies, creating deep divisions among social groups that can fracture social cohesion.

The proliferation of online communities have further exacerbated the prevalence of hateful behaviours. The ease of posting and interacting, often anonymously or without disclosing personal information, incentivizes expressing unpopular and hostile opinions without facing the consequences.

2.4. Social Media

Social media is fast emerging as a powerful and unparalleled tool to share information, shape opinions, connect people across domains and cultures, bring participation, and above all to communicate as never before. Social media can become a very effective policy tool for governments if they learn to utilize it in the best possible manner. Governments across the World need to communicate more effectively, engage citizens, garner feedback on policies and programmes in real time, and demonstrate a commitment to a more participative governance model. In all these areas social media platforms can offer the right interfaces and tools. Further, as internet penetration increased manifold it became more localized, social media thus enabled more and more people to get connected.

Apart from above, many other initiatives in the Government of India are committed to harnessing social media. An ever increasing number of Ministries/ organizations are on social media platforms including the Ministry of External Affairs, the Planning Commission and the Prime Minister’s Office etc. This is just the beginning. Social media is still at a very nascent stage and communities across the World are just beginning to understand the potential of this medium to impact discourse and communication. For instance, current methods of communication in Government could change to leverage facebook, twitter, youtube, along with traditional methods such as press releases etc. Further, as traditional media becomes increasingly dictated by monetary decisions

and establishment structures, social media is going to emerge as the more untainted voice of the citizens and will truly be the people's platform, with the power to transform their transactions and interfaces with governments.

2.4.1 Social Media – A Double-edged Sword/Challenges

Business houses have understood this potential of the social media and are using it effectively for various purposes that include marketing, customer relations, supply chain management, engaging their customers and providing useful information about the business and details about their products or services through websites and blogs. Interacting directly with the customers not only generates loyalty but also gets the kind of feedback that they need to improve their products or services based on today commercial activity based in commerce.

Individuals too are using the social media in their own different ways to interact and connect with people, get in touch with old friends, share media files/content/ documents, personal views, opinions, comments and even personal photos on social networking sites with likeminded people, communities and groups.

Making the accessibility to social media even easier, today's smart phones are integrated with the most popular networking sites and also offer popular free apps that can be downloaded easily to chat, message, upload photos and videos that can be shared instantly online with friends or contacts, making it much more easier to stay connected and updated on the latest happenings. However, this has also resulted in circulation of incorrect information, false videos and misleading information which has resulted in unfair trade practices, where by the consumers fall prey and gets cheated.

2.4.2 Negative aspects of Social Media

Social media to like every coin has two sides, the positive (good) and the negative (bad effect). Social media has proved to be a two-edged sword. Apart from the positive aspects discussed above there are certain negative

aspects which also require due consideration. Perhaps the most worrying aspect to the social media is the fact that it cannot be controlled. Therefore, it goes without saying that its consequences can also be dangerous and uncontrollable for all those who use it recklessly and in an irresponsible manner. It is rightly said that, "one takes control of social media, one who takes risk of indulging in it put himself in getting controlled by social media itself."

The very nature of social media, provides the prospects of enhanced social interaction, presents an opportunity for the user to speak up and be heard without being interrupted, thereby making social media seem interesting and addictive at the same time. This is what lures people into embracing the social networking with a vigour. However, the continued activity on social media has its own pitfalls, which may not be evident, and we as a society need to be vigilant of the impact these can have on individuals in particular and society in general.

Despite all its qualities, social media has some shortcomings also like identity theft, fake personality, creating false accounts sometimes even false websites, cloning government sites, spreading false news or rumours without verifiable data, etc. Some people also suffer from over usage of social media and are always on the edge about being 'notified', 'tweeted', 'commented', tagged/hash tagged' or 'mentioned. A person's identity gets eclipsed from that what he is in real life to how many friends and followers he has in cyber World. It might not be wrong to say that though social media may have connected us to each and everyone, known or unknown in the virtual World but we are physically disconnected from each other. The term 'Social Distancing' in vogue during the present pandemic has actually enhanced the use of social media but have resulted in actual physical distancing. This has led to social media overtaking and overpowering the mental attitude, capability, information domain which is often deceptive and has resulted in enhancing the depressive behaviour of the social media users.

Some sort of regulatory mechanism on the freedom of speech and expression on social and electronic media is the need of the hour. Printed material like books and pamphlets also have some content which is inappropriate for all the age groups for which regulatory measures does exist since it is often noticed that children and women get exposed to vulgar and indecent content on television channel and on websites. It is felt that laws are required for keeping control on the unchecked use of freedom of speech and expression on social media platform also. It thus emerges from the above discussion that the development and popularity of social networking sites have resulted in an immense increase in the cyber crimes. The task of the law makers is now required to focus and prioritize the issues relating to the menace and evolve mechanism and enact strict laws in our country with the developing technology. It goes beyond saying the contact list and friend list of the children and women constituting the vulnerable class are the major sufferers. This list includes most of the unknown friends with whom through, opinions and views are openly shared on the social media. Though some privacy measures are already there, yet it is more apt to focus as to how safe it is to share personal information's online. Since the crimes are taking place hence some legal media privacy regulatory measures are required.

Social media vis-à-vis Right to Privacy has to be looked into by the legislative policy makers. In Indian context, it cannot be denied till the decision of Maneka Gandhi case¹³¹⁷ and R.C. Cooper case¹³¹⁸, the legal position has been that Right to privacy was not covered under Article 21 as a fundamental Right. However, the judicial activism through Maneka Gandhi judgement has changed the approach which too has come to be applied with respect to right to privacy and social media. Needless to explain, that right to privacy is considered as a *"condition of state of being free from public*

*attention to intrusion into or interference with once acts or decision"*¹³¹⁹ Whereas social media is an internet-based form of communication. So, when one has to use a social networking site or to interact with others through this platform, he has to create a personal profile. Since 1990 when the cyber crime concept emerged, it has climbed to its zenith in the present times to a new level leading the users to compromise with their privacy without knowing the evil involved in it by IP address, keywords and shared information, online transactions have attenuated the problem since it involves sharing personal records and details as happened in the Amazon. in¹³²⁰ case. Thus cases of Identify thefts, sexual predators, unintentional fame, cyber stacking and defamation have gained focus. Similar is the case with the facebook users, whatsapp Users, twitter and youtube etc. which have led to the users even to commit suicide¹³²¹ after humiliating video was uploaded on youtube. Hence the Privacy issue on the social media sites has become prime concern for requiring Indian legislations on social media privacy and data protection.

It may be submitted that the legislature has made an effort to address and embrace the social media policy issues under the provision of Information Technology Act 2000 (under section 43, 66, 66-F, 67) and also under the Rules framed under the Act. Recently India's new Intermediary Guidelines and Digital Media Ethics Code¹³²² which has become subject matter of discussion and dispute by Facebook on Twitter is a step towards having a balanced restriction on the Social Media.

¹³¹⁹ Blacks Law Dictionary 1315 (9th Edition 2009).

¹³²⁰ <http://www.livelaw.in/amp/cap.stories/supreme-seeks-whatsapp-facebok-google-pay-amazon-payresponse-on-plea-seeking-data-protection-on-upi-platforms-169228> & ved.

¹³²¹ Social Media & Suicide; <http://en.wikipedia.org/w/index.php?title=social-media-and-suicide&oldid=105056585>

¹³²² The new; The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, framed & enforced in India are subject matter of discussion in the chapter six of this work infra at pg. 271

¹³¹⁷ Maneka Gandhi v. Union of India, AIR 1978 SC 597.

¹³¹⁸ R.C. Cooper v. Union of India, AIR 1970 SC 564.

Hate Speech: Definitional and Conceptual Framework

There is no universally accepted definition of hate speech whilst the phenomenon is seldom defined by States or international institutions in legal documents. The closest we usually get is finding a definition in a non-binding policy document of a specialised committee or body. As well as not having a universally accepted definition, States and institutions around the globe adopt differing conceptualisations of (i) hate speech (McGonagle, 2013: 3) and (ii) free speech and its limitations. As noted in the 2017 Motion for European Parliament resolution on establishing a common legal definition of hate speech in the EU, the end product is that, even within a supranational organisation such as the EU, States adopt their own understanding and approaches to hate speech and how to tackle it.¹³²³ On the European level, the Council of Europe's Committee of Ministers developed one of the only documents, albeit non-binding, which seeks to shed light on the meaning of hate speech, namely, the 1997 Recommendation of the Council of Europe Committee of Ministers on Hate Speech. It holds that hate speech "is to 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 intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".¹³²⁴ This definition is both interesting and problematic.

Firstly, by including the justification of hatred in the sphere of prohibited speech, the Recommendation is broad in its conceptualisation of hate speech, encapsulating a low threshold.

Secondly, the Recommendation blatantly disregards hate speech which is not linked to racial or religious groups and, as such, homophobic and transphobic speech is left outside the spectrum. On a judicial level, the ECtHR has not, per se, provided a definition of hate speech. Instead, as in *Gündüz v. Turkey* (2003), it correlated hate speech with "all forms of expression which spread, incite, promote or justify hatred based on intolerance including religious intolerance"¹³²⁵

Interestingly, in *Vejdeland and Others v. Sweden* (2012), the ECtHR mobilised on the opportunity to rectify loopholes left by institutions such as the Council of Ministers, referred to above, in relation to homophobic speech, and argued that homophobic speech should be prohibited in the same manner as racist speech, stressing that "discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour".¹³²⁶ In the same case, the Court offered an important insight into threshold issues. More particularly, it held that it is not necessary for speech "to directly recommend individuals to commit hateful acts"¹³²⁷ given that harm may arise from "insulting, holding up to ridicule or slandering specific groups of the population".¹³²⁸ This is undoubtedly a broad conceptualisation on what is to be considered prohibited speech as the requirement for incitement to hatred and conducting hateful acts does not need to arise from speech. Instead, the insult, ridicule or slander found in speech is, in itself, harmful. Notwithstanding the delineations and elucidations made by the ECtHR, the fact that it has not, as yet, offered a hate speech definition has been characterised as "unsatisfactory from the point of judicial interpretation, doctrinal development and general predictability and foreseeability" (McGonagle, 2013: 10).

¹³²³ European Parliament: Motion for a European Parliament resolution on establishing a common legal definition of hate speech in the EU (accessed 22 December 2017).

¹³²⁴ Council of Europe's Committee of Ministers Recommendation 97 (20) on Hate Speech.

¹³²⁵ *Gündüz v. Turkey*, App. no. 35071/97 (ECtHR, 4 December 2003), para. 40, *Erbakan v. Turkey*, App. no. 59405/00 (6 July 2006), para. 56.

¹³²⁶ *Vejdeland and Others v. Sweden*, App. no. 1813/07 (ECtHR, 9 February 2012), para. 55.

¹³²⁷ *Ibid.*, para. 54.

¹³²⁸ *Ibid.*

The historian who was prosecuted under an anti-revisionist law (the Gayssot Act) brought his case to the Committee, claiming that his freedom of expression had been violated. The Committee found that anti-Semitic speech could be restricted in order to protect the rights and freedoms of others, namely Jews, from religious hatred. More particularly, it held that: The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect – the right to be free from incitement to racism or anti-semitism; protecting that value could not have been achieved in the circumstances by less drastic means.¹³²⁹ The above overview demonstrates several significant issues. Firstly, it appears that at the heart of the problem in defining hate speech is the perceived tension between free speech and hate speech. Apart from one faulty example set by the Council of Europe's Committee of Ministers, no other body or committee of an institution whose outputs are binding or semi-binding or, at least, of some force at all, has formulated a definition of hate speech. For example, General Recommendation 15 of the CERD on Article 4 of the Convention, which deals with racist speech, amongst others, offers no definition of what this speech is. The CERD's General Recommendation 35 of Combatting Racist Hate Speech looks at several related issues such as what factors are considered for criminalisation and that whilst incitement is defined, racist hate speech is not. In fact, this recommendation recognises that the lack of a definition of hate speech in the Convention has "not impeded the Committee from identifying and naming hate speech phenomena and exploring the relationship between speech practices and the standards of the Convention".¹³³⁰ The closest the Recommendation gets to extrapolation is its remark that: Racist hate speech can take many forms and is not confined to explicitly racial

remarks. As is the case with discrimination under Article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives.¹³³¹ Although not a definition, this remark is reflective of the low threshold and broad spectrum of speech granted by the committee. Unlike, for example, the EU, which, in its Framework Decision on Racism and Xenophobia (2008), conceptually prohibits speech as speech which publicly calls for violence or hatred,¹³³² the UN considers that even speech which, in a disguise, seeks to perpetuate hatred is to be prohibited. In terms of a definition, neither the ICERD nor its monitoring committee offer a definition of racist speech in order to facilitate the Committee itself or the States Parties. Either way, even if a definition were provided for by this committee, it would be limited to racist speech. Furthermore, the regional court itself, which is directly relevant to the current discussion, namely the ECtHR, has dealt with several hate speech cases but has tiptoed around the definitional framework of the phenomenon. The result is that, in essence, "hate speech seems to be whatever people choose it to mean" (Kiska, 2012: 110) and, although States receive guidelines from institutions, such as the CERD, to prohibit the dissemination of racist ideas and racist expression, there is no technical analysis of themes such as thresholds and delineations between potentially conflicting freedoms such as expression and nondiscrimination.

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¹³³¹ Ibid., para. 7.

¹³³² Article 1(a) of the Framework Decision on Racism and Xenophobia: (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin

¹³²⁹ Ibid.

¹³³⁰ CERD General Recommendation 35: Combatting Racist Hate Speech (2013) CERD/C/GC/35, para. 5

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