



**AMERICAN UNIVERSITY OF
ARMENIA**

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LL.M. Program

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TITLE

**Finding Balance between Freedom of Expression and Hate Speech restriction
in the Republic of Armenia**

STUDENT'S NAME

RAFAYEL ISHKHANYAN

SUPERVISOR'S NAME

PROF. ARMAN TATOYAN

NUMBER OF WORDS

10168

ABSTRACT

Regulating hate speech represents a problem of balancing the right to freedom of expression with other human rights, namely right to be free from discrimination and right to dignity. In 2019, several new state-sponsored initiatives were launched to amend restrictions on freedom of expression to tackle the issue of hate speech within the legal framework of the Republic of Armenia. The international framework is incoherent due to lack of uniform approach towards the definition of “hate speech”. While several states have reached to the establishment of balanced, sustainable and stringent framework and good practice in this area, this process still represents a challenge for those states, which are starting to undertake efforts towards regulating hate speech. The aim of this paper is to reveal the lacunae in the current legislation of the RA and to outline the scope of possible reforms and amendments in the context of regulating hate speech while maintaining balance with the freedom of expression. The research was conducted through review of scholarly works, legal analysis of domestic legal framework, international commitments, guidelines of experienced organizations and best practice of select Council of Europe member states.

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LIST OF ABBREVIATIONS

CoE	Council of Europe
CERD	Committee on the Elimination of Racial Discrimination
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

INTRODUCTION

It is difficult to exaggerate the importance of the freedom of expression. The famous statement “*I disapprove of what you say, but I will defend to the death your right to say it*”¹ aesthetically emphasizes the significance of free speech. Freedom of speech is demanded by pluralism, tolerance and broadmindedness, which are indispensable for the democratic society². But when speech becomes the very opposite to those virtues it can itself undermine the same pluralism, tolerance or broadmindedness.

We often encounter the phrase “hate speech” in interviews, newspaper articles, social media, reports and the public speeches among other realms. The term is used by state officials, politicians, journalists, civil activists and public speakers alike in their everyday social life. Searching **ստեղծարարական խոսք** [hate speech] on Google search engine displays approximately 267.000 results at the time of writing this paper. The problem is, there is no universally accepted, authoritative definition of hate speech³. The term used in different contexts to refers to a broad range of “*extremely negative discourse stretching from hatred and incitement to hatred; to abusive expression and vilification; and arguably also to extreme forms of prejudice and bias*”⁴.

Simultaneously to the increase of the access to the internet throughout the world, hate speech has become even more widespread, demanding effective counter actions. In 2013, the

¹ S. G. Tallentyre (Actual author: Evelyn Beatrice Hall), *The Friends of Voltaire*, 199, available at <https://bit.ly/39sVEJF>

² *Handyside v. The United Kingdom*, 5493/72, ECtHR, para 49 (1976)

³ Anne Weber, *Manual on hate speech*, 3 (2009),

⁴ Tarlach McGonagle, *The Council of Europe against online hate speech: Conundrums and challenges*, 2013, 3

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Youth Department of the Council of Europe launched the No Hate Speech campaign, covering 45 countries, including Armenia⁵. It was initiated “*by the need to counter on-line hate speech in all its forms, including those that most affect young people, such as cyber-bullying and cyber-hate, racism and other forms of discrimination*”⁶. The campaign was designed to counter hate speech through human rights education and awareness-raising, youth participation and media literacy⁷.

Freedom of expression constitutes one of the essential foundations of a democratic society. Sometimes, speech can offend, shock or disturb, nevertheless, it is still protected under the freedom of expression⁸. On the other hand, freedom of expression is not absolute, tolerance and respect for the equal dignity of all human beings constitute another core concept of a democratic, pluralistic society⁹. The balance has to be kept between the protection against discrimination and the freedom of political debate¹⁰. Hate speech regulations are one of the areas where the thin line is being drawn between the freedom of expression and the legitimate aim to protect others against discrimination. The question is, how to balance prohibition of hate speech with the protection of other rights, namely the freedom of expression (in the Republic of Armenia).

Methodology

In order to outline an acceptable approach to balance prohibition of hate speech with the protection of freedom of expression a two stage research has been conducted. Research of the first stage covered the literature of some of the frequently cited authors on the subject of hate speech: Mari Matsuda *Public Response to Racist Speech: Considering the Victim's Story* (Michigan Law Review, 1989), Alexander Brown *What is hate speech? Part 1: The Myth of*

⁵ Council of Europe, *What is the No Hate Speech Movement?*, available at <https://www.coe.int/en/web/no-hate-campaign/home> (last visited Feb. 28, 2020).

⁶ Council of Europe Committee of ministers, *The fight against violent extremism and radicalisation leading to terrorism - Action Plan*, (2015), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3576 (last visited Feb. 28, 2020).

⁷ *Ibid.*

⁸ *See footnote 2*

⁹ *Erbakan v. Turkey*, 59405/00, ECtHR, para. 56 (2006)

¹⁰ *Lingens v. Austria*, 9815/82, ECtHR, para. 42 (1986)

Hate, and *What is Hate Speech? Part 2: Family Resemblances* (Law and Philosophy volume 36, 2017), Nadine Strossen *Hate: Why We Should Resist it with Free Speech, Not Censorship* (Inalienable rights, 2018), Katharine Gelber, *Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)* (Michael Herz & Peter Molnar eds., 2012). The aim of the research of the first stage was to overview the differences of the legal and non-legal interpretation of the term “*hate speech*”, the history of the evolvement of the term since its inception to current usage and implications and to identify key challenges of regulating hate speech.

During the second stage, the established legal approach and mechanisms of responses to hate speech were researched. During this stage, applicable treaties and other international instruments, including ECtHR case law, recommendations of CoE bodies were reviewed. A comparative analysis has been conducted between the legal framework of several CoE member states and the current legislation and practice of the Republic of Armenia to outline the scope of practices concerning the 1) protected characteristics, 2) different variations of the *actus reus* element of the offences, 3) the differences of the liability of the hate speech regulations. Finally, the assessments of non-governmental organizations operating in the field were studied. In the conclusion, findings of both stages of the study were combined to evaluate the current situation, prospects and challenges in the Republic of Armenia in the context of regulating hate speech, based on which recommendations were made.

Justification and significance

In recent years, the increase of the hate speech in the Republic of Armenia has been noted¹¹, and several research studies show a correlation between the rise of the hate speech and

¹¹ Para TV, Արման Թաթոյանը՝ նոր Հնարական օրենսգրքի, համաներման և համացանցային անհանդուրժողականության մասին, (2018), available at https://www.youtube.com/watch?v=Wp87t1eUMRs&feature=emb_title (last visited Mar. 15, 2020)

Civilnet, Ատելության խոսքը վտանգավոր աստիճանի է հասել. Արման Թաթոյան, (2019) available at <https://www.ombuds.am/am/site/VideoGalleryView/326> (last visited Mar. 15, 2020)

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occurrences of certain political events having strong resonance in the opinion of the society¹². State officials, public figures, human rights defenders debate over their approaches to what is hate speech, how it should be regulated or should it be regulated at all in order to not jeopardize the freedom of expression¹³.

Currently, several NGOs conduct hate speech monitoring programs and provide recommendations, while state bodies initiate legal reforms to counter hate speech. In August 2019, the Ministry of Justice of RA introduced a draft criminalizing public calls for violence, which has justified by the need to combat hate speech¹⁴. In December 2019 the Committee on Protection of Human Rights and Public Affairs of the National Assembly of RA has established a working group for preparation of reforms of the RA legislation to address hate speech¹⁵. The 2020-2022 Action Plan deriving from the National Strategy for Human Rights Protection plans to define responsibility for hate speech in compliance with international norms until the first half of 2021 (Action 42)¹⁶. The background clearly implies that efforts to regulate hate speech are on the priority list of the current political agenda. Yet no consensus has been established on the definition and the scope hate speech which is the subject to potential regulation. **The aim of this paper is to outline an acceptable approach to balance prohibition of hate speech with the**

¹² Pink Armenia, *Hate Speech Displayed by State Officials Towards LGBT People in Armenia* (2004-2018), available at https://www.pinkarmenia.org/wp-content/uploads/2019/05/hatespeech_en.pdf, (last visited Mar. 15, 2020)

Helsinki Committee of Armenia, *Monitoring of Hate Speech (Pilot Project) Report* (July 2018 - June 2019), available at http://armhels.com/wp-content/uploads/2019/07/Hate_speech_monitoring_2018-2019.pdf (last visited Mar. 15, 2020),

Helsinki Committee of Armenia, *Monitoring of Hate Speech Report* (August-October 2019), available at <https://bit.ly/2uqvzwo> (last visited Mar. 15, 2020),

¹³ Emilio Luciano Cricchio, *Hate Speech in Armenia: To Criminalize or Not?* (2019), available at <https://www.civilnet.am/news/2019/11/20/Hate-Speech-in-Armenia-To-Criminalize-or-Not/370823> (last visited Mar. 15, 2020)

¹⁴ «Հայաստանի Հանրապետության Քրեական Օրենսգրքում լրացում կատարելու մասին» ՀՀ օրենքի նախագիծ, available at <https://www.e-draft.am/projects/1862/justification> (last visited Mar. 30, 2020),

¹⁵ ԱԺ հանձնաժողովում քննարկվում է ստեղծարարական խոսքի դեմ աշխատանքային խումբ ստեղծելու հարցը, available at http://www.parliament.am/news.php?cat_id=2&NewsID=12494&year=2019&month=12&day=16 (last visited Feb. 6, 2020)

¹⁶ Government of the Republic of Armenia Decree on Approval of The National Strategy For Human Rights Protection and Deriving Action Plan For 2020-2022, Appendix 1, available at <http://moj.am/en/page/575> (last visited Feb. 6, 2020)

protection of freedom of expression in the Republic of Armenia in compliance with the international commitments and taking into account the current situation.

CHAPTER 1: Defining hate speech

It is believed, that the term “*hate speech*” was introduced by a group of legal scholars after examination of responses from various legal systems against certain forms of racist speech during late 1980s¹⁷. Since then, the term was used extensively in both legal and non-legal contexts. In order to orientate in the flow of information, the common concept of hate speech, which is used without reference to legal concepts, should be differentiated from the legal term of hate speech.

Non-legal concept of hate speech

Dictionary definition of hate speech reads as follows: “*public speech that expresses hate or encourages violence towards a person or group based on something such as race, religion, sex, or sexual orientation*”¹⁸. It is, first of all, an *expression of hate* or *encouragement of violence*. Hate is a variety of an emotional attitude¹⁹. If a person expresses emotional resentment towards his or her colleagues in the workplace, would it be considered hate speech? Perhaps, if the statement was fueled by the fact that the colleagues share some character such as race, religion etc. But how did the author of the statement actually feel hatred?

The emotional element of hate speech has been described to contribute to the ambiguity of the concept of hate speech. To define hate speech, one should also define the emotion “hatred” and its level strength to amount in a “hate speech”²⁰. At the same time, an author of a statement that may otherwise be considered hate speech, may not possess any hateful emotion towards any

¹⁷ Alexander Brown, *What is Hate Speech? Part 1: The Myth of Hate*, 2017 *Law and Phil.*, 424

¹⁸ Definition of hate speech from the Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press (last visited Mar. 20, 2020)

¹⁹ Paul Ekman, *An Argument for Basic Emotions*. *Cognition & Emotion*, (1992) 6(3–4), 169–200.

²⁰ Susan Benesch et al, *Dangerous speech: a practical guide*, (2020), available at <https://dangerousspeech.org/guide/> (last visited Mar. 20, 2020)

defined or definable group of people with shared characteristics, such as race, but a simple desire for attention or sense of fear²¹.

If it is not the “hateful” motivation of the speaker, then, which factor is decisive for an expression to amount to an instance of hate speech? Perhaps it is the reaction or perception of the audience, the substance of the message or the effect and impact the expression had on the public that should be taken into consideration. As Alexander Brown argues, relying on those criteria would not cover each and every instance, which would otherwise be qualified hate speech, because of the possibility of absence of hate as an emotional construct²².

It is evident that the term “hate speech” as a common concept is not precise, it is backed with an emotional rationale and is often used without an actual reference to the legal nature of the same term. Whether or not the common concept of hate speech is to a large extent perceived as an expression, fueled or fueling hatred, is a subject to further debate. It appears to be more of a research subject for other academic disciplines, such as sociology and psychology. However, it is not the purpose of this paper to analyze the emotional component of hate speech, rather its legal implications. For this purpose, in the remainder of this paper the discussion will be based on the rationale that all human beings are equal before the law and are entitled to equal protection against any discrimination²³ and that hate speech regulations are among the tools designed to support that protection.

Hate speech as a legal term

If the common concept of hate speech is far from being defined universally because of inconsistent usage, the legal concept has to be defined at least for the purpose to satisfy the legal certainty requirement. Hate speech finds its place in the domain of several competing human rights. Obviously, hate speech regulations limit freedom of expression to some extent. What does

²¹ Brown, *supra* at 441

²² Brown, *supra* at 462

²³ International Convention on the Elimination of All Forms of Racial Discrimination preamble, *available at*

<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

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it protect are other human rights, namely the prohibition of discrimination and right to dignity, which would be discussed below. The key is to find balance between those rights.

First and foremost, the difference of hate speech as a legal concept from other forms of limited forms of expression (e.g. defamation, libeling, insulting speech), is its target. Hate speech targets individuals or groups, *because of who they are*²⁴. If a person addresses another one using swear words, because the other person accidentally stepped on his or her toes, this may amount to an insult. In a similar situation, with the only difference that the insulting person refers to the skin color of a person or emphasizes the racial, ethnic, religious or other *character* of the target, it is likely for that expression to be qualified as hate speech. Even if the expression was targeted to a single individual, if we swap the target with another person of the same character (race, ethnicity, religion etc.), the insult is equally applicable.

The example above illustrates, that the rights on the other half of the scale are the **prohibition of discrimination** and **right to dignity**. Despite the disharmony between international and domestic approach to the right to dignity²⁵, it is inevitably harmed in any of both situations described above to some extent under the protection provided. Discrimination occurs everytime “*when a person is treated less favourably on the basis of ‘protected grounds’ in a similar situation*”²⁶.

Protection of those rights requires some limitations of others, namely freedom of expression and freedom of thought. The right to freedom of thought has two dimensions - *forum internum* and *forum externum*, on which international human rights bodies have relied upon²⁷.

²⁴ Article 19, ‘Hate Speech’ Explained a Toolkit, 13 (2015), available at <https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>

²⁵ Conor O’Mahony, *There is no such thing as a right to dignity* 551–574 (International Journal of Constitutional Law, Volume 10, Issue 2, 2012)

²⁶ *Handbook on European non-discrimination law* 43 (2018), available at https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf

²⁷ Alison Mawhinney, *Coercion, oaths and conscience: conceptual confusion in the right to freedom of religion or belief* in *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* 205 (2016)
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Forum internum, or “a person’s inner realm of thinking and believing”²⁸, is an absolute one²⁹. In the context of the freedom of expression, the *forum internum* dimension is the right to hold opinions. In no circumstances can a person be subjected to limitations on which opinions to hold. This is true, unless a person decides to manifest his or her opinions. The expression of an opinion in the outside world, or the *forum externum* dimension, is subject to limitations under limitation clauses of a given legal document. In other words, restricting hate speech does limit the forum externum of the right to hold opinions, which overlaps with the freedom of expression.

As it is formulated above, hate speech regulations are designed to also protect the right to be free from discrimination, in other words, it protects people who share common traits, called *protected characteristics*³⁰, from certain discriminating statements. Some states provide exclusive lists of protected characteristics against hate speech in their legislation, while others leave the list open ended (those approaches will be discussed in the Chapter 3 in more detail). Inclusion of a list of protected characteristics in the hate speech regulations bears danger of neglecting some, while affirming others. At the same time, legal certainty principle requires that whoever gets familiar with the regulation, should have ability to foresee the consequences of his or her actions, which in the context of hate speech regulations, a possibility to differentiate protected characteristics from other common traits. It is also rarely clarified what is the standard necessary for a common trait to be counted as a protected characteristic³¹.

Which characteristics should be subject to protection against hate speech? Perhaps historically oppressed groups are the ones who are the most vulnerable as targets. Depending on the local context, those groups vary from state to state, which also contributes to the variations of the state practice and approaches. Most members of international community would prohibit hate speech in relation to characteristics such as race, religion, ethnicity, others include disability,

²⁸ UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief* para 7 (2015), available at https://www.ohchr.org/Documents/Issues/Religion/A-HRC-31-18_en.pdf

²⁹ Jeroen Temperman et al, *The European Court of Human Rights and the Freedom of Religion or Belief: the 25 years since Kokkinakis* 37 (2019)

³⁰ See footnote 26

³¹ Brown, *supra* at 445

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sexual orientation, political opinion³². Human rights organizations would suggest that all characteristics under non-discrimination provisions of international human rights law should be considered as ‘protected’³³. Social networks tend to provide more comprehensive lists of protected characteristics and examples of banned conduct within their domain in their policy description. Facebook includes “*caste*” in the list of protected characteristics³⁴. Youtube also includes the fact of being “*victims of a major violent event and their kin*” as another ground for protection against hate speech³⁵. Even if the latter two entities are basically for profit organizations, their approaches may serve as illustrative examples of combating hate speech within a realm probably the most abundant with colliding opinions from a large number of societies – the internet.

As to the methods of combating hate speech, some international organizations are more inclined to provide a broader outline for promotion of tolerance and non-discrimination³⁶, while others, most notably Council of Europe, have developed a framework and policy, which is enforced through judicial authority³⁷. Measures of fighting hate speech will be discussed in Chapter 5.

To sum up, the extract of approaches described above illustrate **two basic elements of hate speech**: first, a certain **expression of hate**, and second, its direction **towards an individual or group defined by a legally protected characteristic**.

CHAPTER 2: International instruments on hate speech

None of the international human rights treaties, that the Republic of Armenia has ratified, explicitly mention the term “hate speech”. It should be noted that most of those treaties came

³² See Chapter 3

³³ See footnote 24 at 13

³⁴ Facebook community standards, hate speech, available at https://www.facebook.com/communitystandards/hate_speech (last visited Mar. 30, 2020)

³⁵ <https://support.google.com/youtube/answer/2801939?hl=en>

³⁶ CSCE & OSCE, *Commitments Freedom of the Media Freedom of Expression Free Flow of Information*, (4th ed. 2017), available at <https://www.osce.org/representative-on-freedom-of-media/354081?download=true>.

United Nations Strategy and plan of action on hate speech (2019), available at <https://bit.ly/2yl3Sqi>

³⁷ More on CoE and ECtHR on hate speech in Chapter 2.

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into existence before the phrase *hate speech* has emerged as a legal term. UN conventions, such as ICCPR and ICERD do place some obligations on member States in the context of hate speech regulations. In the case of Council of Europe, while ECHR does not explicitly refer to hate speech as such, several other instruments and the case law of the ECtHR provide the most comprehensive approaches and regulations on hate speech compared to any other international entity.

UN institutions and conventions

Article 20 of the ICCPR requires states to prohibit by law “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. While states have a margin of appreciation regarding the limitations of the freedom of expression within the context of Article 19, the acts described above are all subject to restriction pursuant to article 19, paragraph 3³⁸.

ICERD is the most elaborative international convention addressing hate speech in the context of racism and nationalism. Article 4 of ICERD requires states to not only prohibit, but to punish by law “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”. In its General recommendation No. 35, the CERD stressed, that *lack of explicit reference [to hate speech] has not impeded the Committee from identifying and naming hate speech phenomena*³⁹. CERD is of the opinion, that legislative measures, including civil and administrative and criminal law, are required to effectively combat racist hate speech⁴⁰. Furthermore, CERD recommends that the following actions are sanctioned as punishable offences⁴¹:

³⁸ Human Rights Committee 102nd session Geneva, 11-29 July 2011 General comment No. 34 Article 19: Freedoms of opinion and expression, para 50 (2011)

³⁹ UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 35 : Combating racist hate speech*, para 5 (2013)

⁴⁰ *Ibid*, para 9

⁴¹ *Ibid*, para 13

- (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;*
- (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;*
- (c) Threats or incitement to violence against persons or groups on the grounds in (b) above;*
- (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;*
- (e) Participation in organizations and activities which promote and incite racial discrimination.*

ICERD has 177 state parties, which makes the convention the most widely acknowledged and adopted tool which does address hate speech worldwide. While the characteristics protected by ICERD **are limited to race, color, descent, or national or ethnic origin**⁴², it nevertheless provides useful guidance for general regulation of hate speech.

Council of Europe

In the context of hate speech, the Council of Europe provides multiple instruments, ranging from treaties, such as the Framework Convention for the Protection of National Minorities, ECtHR case law, to various recommendations adopted by the Parliamentary Assembly, the Committee of Ministers, the European Commission against Racism and Intolerance.

Recommendation R (97) 20 of the Council of Europe Committee of Ministers

One of the most remarkable effort towards combating hate speech was the adoption of the Recommendation R (97) 20 of the Council of Europe Committee of Ministers in 1997. The recommendation provides an explicit definition of hate speech, which reads as follows:

⁴² See footnote 23, art 1
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*"[H]ate 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*⁴³.

The Recommendation is remarkable for several aspects. First, it not only covers actions, such as *incitement to hatred*, but also those that *spread, promote and justify* forms of hatred based on intolerance. Second, it suggests a higher threshold to be set for state officials to refrain from not only statements, which fall within the definition of hate speech, but also from those, which “*may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred*”⁴⁴. Third, it outlines several important measures to thoroughly address hate speech with help of both civil, criminal and administrative law, such as “*allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction*”⁴⁵. Allowing such actions would be especially relevant for societies, where some groups have been continuously stigmatized or are reluctant to apply for legal remedies because of mistrust in remedial bodies, lack of resources or public pressure. Forth, the Recommendation suggests to “*distinguish [...] between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest*” in their respective legislation and practice⁴⁶.

⁴³ Recommendation No. R (97) 20 of the Committee Of Ministers to Member States on "Hate Speech", Appendix (1997), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505d5b>

⁴⁴ *Ibid*, principle 1

⁴⁵ *Ibid*, principle 2

⁴⁶ *Ibid*, principle 6

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ECRI General Policy Recommendation No. 15

General Policy Recommendation No 15 is another, a more recent recommendation prepared by ECRI in 2015 which provides a definition of hate speech. The recommendation sums up former international efforts and can serve as a comprehensive guide for states to craft their legal framework, policy and mechanisms. ECRI suggests states to comprise efforts involving⁴⁷:

1. *raising public awareness;*
2. *countering any use of hate speech;*
3. *providing support to those targeted by such use;*
4. *promoting self-regulation;*
5. *taking regulatory action;*
6. *imposing administrative and civil liability;*
7. *withdrawing support from particular organisations and prohibiting others;*
8. *and imposing criminal sanctions in some very specific and limited circumstances.*

In the recommendation, the definition of hate speech is the “*advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of race, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status*”⁴⁸.

⁴⁷ ECRI General Policy Recommendation No. 15 on Combating Hate Speech, para 4 (2016), available at <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>

⁴⁸ *Ibid*, recitals
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Case law of the European Court of Human Rights

Throughout many decades, ECtHR exhibited remarkable efforts in helping to draw a line between the freedom of expression and restrictions justified by the need of prohibition of discrimination. In a landmark case *Handyside v. the United Kingdom*, the Court stressed the importance of the freedom of expression “*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*”⁴⁹. Nevertheless, the need to respect for the equal dignity may sometimes necessitate to *sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance*⁵⁰.

In cases addressing hate speech, ECtHR adopted two interconnected approaches excluding protection of expressions inciting hatred either referring to Article 17 or the second paragraph of Article 10. Article 17 was initially exploited in a limited manner and mostly invoked in the context of totalitarian doctrines in question. Eventually, Article 17 was applied to such instances, as Holocaust denial⁵¹, racism⁵² etc., then gradually unlocking its potential when the Court confronted with hate speech⁵³.

Freedom of expression does cover expressions done practically in any form: oral speech, printed or electronic form, use of symbols, artistic expression etc⁵⁴. Similarly, hate speech can take different shapes. Analysis of select ECtHR cases suggests, that forms of expressions, which may constitute hate speech, range from detailed pseudohistorical works representing grave

⁴⁹ See footnote 2

⁵⁰ *Erbakan v. Turkey*, 59405/00, ECtHR, para. 56 (2006),

⁵¹ *Garaudy v. France*, 65831/01, ECtHR, (2003)

⁵² *Glimmerveen and Hagenbeek v. the Netherlands*, 8348/78 and 8406/78, ECtHR, (1979)

⁵³ Weber, *supra* at 23

⁵⁴ Toby Mendel et al, Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights, 6, available at <https://rm.coe.int/16806f5bb3>

instances of revisionism, such as Holocaust denial⁵⁵ to distribution of leaflets⁵⁶, use of posters⁵⁷, or comments⁵⁸ which included statements inciting or promoting hatred towards certain groups.

It was in 1999 that ECtHR started to use the term hate speech in its judgements⁵⁹ and eventually adopted the definition of the Recommendation No. R (97) 20 in case *Gündüz v. Turkey*⁶⁰. From that point on, the formulation of hate speech given in the aforementioned Recommendation has gained more weight and was invoked in a number of following cases⁶¹. At the same time, through its case law ECtHR elaborated on hate speech even more, particularly in the context of protected characteristics not explicitly mentioned in Article 14.

In a number of landmark cases, ECtHR, identified vulnerable groups, which may enjoy protection under Article 14. Adding characteristics, such as a person's sexual orientation⁶², mental faculties⁶³, disability⁶⁴, health status⁶⁵ as grounds further broadened the scope of application of the right to be free from discrimination. In *Vejdeland and Others v. Sweden*, the Court formulated, that “*discrimination based on sexual orientation is as serious as discrimination based on ‘race, origin or colour’ or sex*”⁶⁶.

Obviously, those characteristics, together with ones explicitly listed in the Article 14 are protected against discrimination. However, one of those grounds, particularly the *political opinion*, appears to be more problematic compared to others as a protected characteristic in the context of hate speech. In a landmark case *Lingens v. Austria*, ECtHR draw an higher threshold of acceptable criticism for politicians compared to other citizens⁶⁷. A politician is knowingly

⁵⁵ See footnote 51

⁵⁶ *Vejdeland and Others v. Sweden*, 1813/07, ECtHR, (2012)

⁵⁷ *Norwood v United Kingdom*, 23131/03, ECtHR, (2004)

⁵⁸ *Delfi AS v. Estonia*, 64569/09, ECtHR, (2015)

⁵⁹ *Erdoğan and Ince v. Turkey*, 25067/94 and 25068/94, ECtHR, (1999), *Süreç v. Turkey*, 26682/95, ECtHR, (1999)

⁶⁰ *Gündüz v. Turkey*, 35071/97, ECtHR, (2003)

⁶¹ *inter alia*, *Balsytė-Lideikienė v. Lithuania*, 72596/01, ECtHR, (2009), *Vejdeland and Others v. Sweden*, 1813/07, ECtHR, (2012)

⁶² *Schalk and Kopf v. Austria*, 30141/04, para 97 (2010)

⁶³ *Alajos Kiss v. Hungary*, no. 38832/06, para 42 (2010)

⁶⁴ *Glor v. Switzerland*, 13444/04, para 84 (2009)

⁶⁵ *Kiyutin v. Russia*, 2700/10, para 74 (2011)

⁶⁶ See footnote 56

⁶⁷ See footnote 10

exposing himself or herself to “*close scrutiny of his every word and deed [...] must [...] display a greater degree of tolerance*” towards criticism. The requirement of protection of a politician's reputation “*have to be weighed in relation to the interests of open discussion of political issues*”⁶⁸. If the criticism includes hateful statements on the ground of a politician's political ideas, it is hard to qualify the instance as a manifestation of hate speech without undermining the standard set in *Lingens*. The same idea is expressed in the Declaration on Freedom of Political Debate in the Media of 2004 of the Committee of Ministers of CoE. To ensure transparency and accountability, “*public officials must accept that they will be subject to public scrutiny and criticism, particularly through the media*”⁶⁹ and even be exposed to higher degree of satirical exaggeration and provocation⁷⁰. The tolerance towards criticism should be extended on all three branches of the government and they should not enjoy protection by criminal punishment against defamation or insults⁷¹.

Another characteristic, which imposes certain difficulties within the context of hate speech is a person's *religious beliefs*. Finding balance between the freedom of religion and restrictions of hate speech on the grounds of a person's religious beliefs is a particularly fragile topic, since extreme interpretations of several religions may lead to mutual intolerance. The use of the term *blasphemy* in several jurisdictions raised issues before the Court several times. In older judgements, the Court considered that the states are in better position to evaluate on questions, such as *blasphemy laws*⁷². This margin of appreciation, however, does not appear to be a particularly wide one. Other CoE bodies also contributed to narrowing down the interpretation of this approach. Parliamentary Assembly of the Council of Europe recommends, that “*blasphemy, as an insult to a religion, should not be deemed a criminal offence*”⁷³ and that

⁶⁸ *Ibid*

⁶⁹ CoE Committee of Ministers, *Declaration on freedom of political debate in the media* art 4, (2004) available at <https://bit.ly/2QWabHo>

⁷⁰ *Ibid*, art 5

⁷¹ *Ibid*, art 2

⁷² *Otto-Preminger-Institut v. Austria*, 3470/87, ECtHR, para 56 (1994), *Wingrove v. the United Kingdom*, 17419/90, ECtHR, para 58 (1996)

⁷³ Parliamentary Assembly of the CoE, *Recommendation 1805(2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion*, para 4 (2007), available at

<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en>

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freedom of expression should not be restricted “*out of deference to certain dogmas or the beliefs of a particular religious community*”⁷⁴. Similarly, the Venice Commission considers, in the context of freedom of expression and freedom of religion, that “*in a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme*”⁷⁵. In the pursuit of finding balance between the freedom of expression and freedom of religion, “*only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite hatred that should be prohibited*”⁷⁶. It also appears to be true to suggest, that the right to freedom of religion or belief, does not guarantee its adherents to be free from any criticism or ridicule⁷⁷.

The analysis above illustrates that international regulations related to hate speech do cover an important portion of the area. States are explicitly required to restrict or punish several forms of hate speech due to binding international obligations. Member states of the CoE have further undertaken more responsibilities to conform their legal practice with the extensive case law of the ECtHR, which does address important aspects of hate speech such as means of dissemination, content and protected characteristics. Those states, which are committed to further elaborate their legislation to combat hate speech are granted with valuable resources and recommendations. In the next Chapter, legal approaches of several CoE member states will be discussed in order to identify the current best practice and diversity in the context of regulating hate speech.

⁷⁴ Parliamentary Assembly of the CoE, *Recommendation 1804 (2007) State, religion, secularity and human rights, para 19 (2007)*, available at

<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17568&lang=en>

⁷⁵ Venice Commission, *Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, para 46 (2008), available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)026-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)026-e)

⁷⁶ *Ibid*

⁷⁷ *Annual report of the United Nations High Commissioner for Human Rights, Appendix: Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, para 19 (2013)

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CHAPTER 3: Hate speech regulations in select CoE countries

Most CoE member states incorporate hate speech laws in their corresponding legal framework. The scope of those laws varies a lot, from relatively vague ones to those, which provide a very precise description of the offence. Examples from several CoE countries will be discussed below to illustrate the diversity of approaches in terms of 1) protected characteristics, 2) different variations of the *actus reus* element of the offences, 3) the differences of the liability.

Germany

German Criminal Code prohibits incitement to hatred, calls for violent or arbitrary measures, assaults on human dignity through insults and malicious maligning “*in a manner capable of disturbing public peace*”⁷⁸. Those actions can be made either orally or through any means of dissemination of written materials, including audiovisual media, data storage media, illustrations. ECRI criticized the law, arguing that the causal link between the acts and the outcome *capable of disturbing public peace* is difficult to prove, thus this may result in a impunity gap⁷⁹.

Further, under the same section certain acts of denying or glorifying crimes committed during National Socialist rule are explicitly prohibited⁸⁰. Dissemination, use of symbols or propaganda of unconstitutional organizations, such as the National Socialist German Workers' Party is prohibited under several other sections of the Code⁸¹. Interestingly, the presence of intent to commit such acts is not required. Sanctions under section 130 are among the highest of other hate speech laws, with imprisonment ranging from 3 month to 5 years.

As for the protected characteristics, race, nationality, religion and ethnicity are explicitly mentioned, with the list left open ended for other *segments of the population*. This formulation in

⁷⁸ Criminal Code of Germany, section 130

⁷⁹ ECRI, *ECRI Report on Germany (fifth monitoring cycle)*, para 6 (2013), available at <https://rm.coe.int/fifth-report-on-germany/16808b5683>

⁸⁰ *Ibid*

⁸¹ Criminal Code of Germany, sections 86 and 86a
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practice does cover characteristics such as disability, gender identity or sexual orientation. The wording “a segment of the population” is considered broad and, in practice, covers grounds that are not explicitly mentioned, such as disability or gender and sexual orientation⁸².

Republic of Ireland

The Prohibition of Incitement To Hatred Act of 1989 is a comprehensive document addressing hate speech in the Republic of Ireland. It is one of the early hate speech laws to initially include a person's sexual orientation as a protected characteristic⁸³.

The Act provides detailed description of means of expressing hate. It is prohibited to make public expressions orally or through behavior, actions of publicly distributing written materials, showing, playing a recording of visual images or sounds and broadcasting of materials which “*are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred*”⁸⁴. If the actions were conducted without the intention and it is proven that the person “*was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting*”, or was not aware that such actions might be *threatening, abusive or insulting* is exempt from liability⁸⁵. Exception also applies to situations, where such actions were committed inside a private residence, where the person reasonably believed, that such words, materials or behaviour could not be seen or heard outside⁸⁶. Lastly, preparations or holding possession of such materials, except for personal use, is itself punishable. Again, the same defence of lack of intention and unawareness of the nature of the materials is applicable *mutatis mutandis*. The offence is punishable with fine or imprisonment up to 2 years.

⁸² Article 19, *Germany: Responding to 'hate speech'*, 22 (2018), available at <https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-%E2%80%98hate-speech%E2%80%99-v3-WEB.pdf>

⁸³ The Prohibition of Incitement To Hatred Act of 1989, available at <https://www.oireachtas.ie/en/debates/debate/dail/1989-11-15/29/>

⁸⁴ *Ibid*, section 2

⁸⁵ *Ibid*, section 2

⁸⁶ *Ibid*

The list of protected characteristics is exhaustive and includes persons' *race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation*⁸⁷. According to the Department of Justice and Equality in the Government of Ireland, the act "*reflects [their] society's rejection of displays of prejudice, bias or hostility, especially those based on fundamental aspects of a person's identity which cannot or should not be changed or concealed*⁸⁸".

Despite the long history of existence, the act is rarely invoked. Only five instances of convictions, two of which resulted in imprisonment, have been recorded since 2000⁸⁹. ECRI also criticized the act for being ineffective in combating online hate speech⁹⁰. In 2019, the Department of Justice and Equality of the Government of Ireland called for submissions to review several aspects of the act, particularly the use of term "*hatred*", the requirement for the prosecution to prove intent or likelihood to stir up hatred, matters of application of the act to online hate speech as well as necessity to amend the list of protected characteristics taking into account "*current social issues, but also their social or historical context*", for example, disability or gender identity⁹¹.

Nordic countries

Nordic countries⁹² have a world-famous image of a high level of protection of human rights. In case of Denmark⁹³, Finland⁹⁴ and Sweden⁹⁵, criminal legislation mostly reflects the recommendations concerning the use of criminal law of the General Policy Recommendation

⁸⁷ *Ibid*, section 1

⁸⁸ The Department of Justice and Equality of the Government of Ireland, *Review of the Prohibition of Incitement to Hatred Act 1989 Public Consultation* (2019), available at <https://bit.ly/2QXZi7J>

⁸⁹ ECRI, *ECRI Report on Ireland (fifth monitoring cycle)*, para 21 (2019), available at <https://rm.coe.int/fifth-report-on-ireland/168094c575>

⁹⁰ *Ibid* para 34

⁹¹ *See footnote 88*

⁹² Refers to the member states of the Nordic Council - *Denmark, Finland, Iceland, Norway, and Sweden*

⁹³ Criminal Code of Denmark, section 266 B.

⁹⁴ Criminal Code of Finland, Chapter 11, section 10

⁹⁵ Criminal Code of Sweden, Chapter 16, section 8

(GPR) No. 7⁹⁶. Analysis of the criminal legislation in a more narrow context of hate speech reveals that the laws of those countries are very similar to each other in terms of types of acts prohibited, with several differences on the protected grounds.

In different wordings, the laws prohibit promotion of hate towards certain groups. Such promotion may be done through actions of threatening (*all*), insulting (*Norway*⁹⁷, *Denmark, Finland*), defaming (*Finland, Iceland*⁹⁸), expressing contempt (*Norway, Sweden*), mocking (*Iceland*) degrading (*Denmark*) representatives of certain groups. The actions should be made in *public*, or, in case of Sweden, *be disseminated*. None of the countries require the existence of *intent* for the actions to be punishable, with the exception of Norway, which deems necessary the presence of either *intent* or *gross negligence*. All codes include certain aggravating circumstances either within the same articles or in separate ones. In all countries the offence is punishable with fines or imprisonment up to two years (three years in case of Norway) or more in case of aggravating circumstances.

Nationality, skin color, race, religion and sexual orientation are recognized as protected characteristics in the corresponding laws of all those countries. Disability is a protected characteristic in Finland and Norway. Gender identity is explicitly recognized in Iceland, Sweden and, presumably, in Denmark according to the *travaux préparatoires* through a broader interpretation of the words *sexual inclination*⁹⁹. Finally, Finnish law goes beyond including a person's birth status as a protected characteristic and leaving the list non-exhaustive for *comparable basis* to those grounds explicitly listed. This approach was criticized by ECRI for lack of legal certainty. It was recommended that the characteristics should be listed explicitly in

⁹⁶ ECRI, *ECRI Report on Denmark (fifth monitoring cycle)*, para 3 (2017), available at <http://rm.coe.int/fifth-report-on-denmark/16808b56a4>, *ECRI Report on Finland (fifth monitoring cycle)*, para 1 (2019), available at <https://rm.coe.int/fifth-report-on-finland/1680972fa7>, *ECRI Report on Sweden (fifth monitoring cycle)*, para 3 (2018), available at <https://rm.coe.int/fifth-report-on-sweden/16808b5c58>

⁹⁷ Criminal Code of Norway, section 135

⁹⁸ Criminal Code of Iceland, article 233 a

⁹⁹ ECRI, *ECRI Report on Denmark (fifth monitoring cycle)*, para 98 (2017), available at <http://rm.coe.int/fifth-report-on-denmark/16808b56a4>

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the law to “convey the clear message to the public that members of the corresponding groups are protected by the law”¹⁰⁰.

CHAPTER 4: Legal framework related to hate speech in the Republic of Armenia and current situation

Constitutional Framework

Right to freedom of expression and opinion, inviolability of human dignity and prohibition of discrimination are enshrined in the second chapter of the Constitution of RA (Basic rights and freedoms of the human being and the citizen). Formulations are tailored in a manner consistent with major international human rights instruments, such as ICCPR and ECHR¹⁰¹. The Article 42 on Freedom of expression, for example, provides even lesser grounds for restrictions than ECHR. Inviolability of human dignity is recognized as a separate, self-sustaining right¹⁰². On the other end of the spectrum, restrictions can not be more excessive than those provided in the international treaties ratified by RA¹⁰³. Lawful restrictions of freedom of expression can pursue aims, *inter alia*, to **protect the honour, good reputation of others and other basic rights and freedoms**.

Amendments to the Constitution of the RA of 2015 did not touch upon the prohibition of discrimination clause already included after the referendum of 2005:

“Discrimination based on sex, race, skin colour, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances shall be prohibited”¹⁰⁴.

¹⁰⁰ ECRI, *ECRI Report on Finland (fifth monitoring cycle)*, para 2 (2019), available at <https://rm.coe.int/fifth-report-on-finland/1680972fa7>

¹⁰¹ Venice Commission, *First opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia*, para 16 (2015), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)037-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)037-e)

¹⁰² RA Const. art 23

¹⁰³ *Ibid*, art 81, para 2

¹⁰⁴ *Ibid*, art 29

The Constitutional Court has interpreted discrimination in a broad manner as a *differentiated treatment that lacks objective grounds and legitimate purpose*¹⁰⁵.

The last part of the formulation of the prohibition of discrimination clause presumes that the list of protected grounds is not exhaustive. At the time of writing this paper, there is no Constitutional Court decision which would elaborate on the list about other protected characteristics. However, the Constitution itself provides sufficient means of interpretation.

One of the important novelties of the 2015 amendments is the Article 81. The first paragraph reads as follows.

“The practice of bodies operating on the basis of international treaties on human rights, ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution”

This provision creates a flexible instrument to ensure the development of human rights law in compliance with international standards. Those bodies logically include the Office of the High Commissioner for Human Rights and Human Rights Committee of the United Nations, European Court of Human Rights. Practice of those bodies, particularly of the ECtHR, can shed light upon the question of other protected characteristics not mentioned in Article 29 (Prohibition of discrimination), but nevertheless appear to be protected by virtue of Article 81. Such grounds, recognized by ECtHR, have been discussed in the Chapter 3.

The Constitution of RA does not provide any obstacles for regulation and restricting hate speech in the legislation. It is needless to say, that any such attempt should pass the proportionality test by virtue of article 78 of the Constitution, which in essence is comparable to similar test of the ECHR.

¹⁰⁵ Constitutional Court of the RA, ՄՌՈ-881, para 5 (2010)
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Legislation

The Criminal Code does not contain a specific offence of hate speech. It should be noted that states rarely label the corresponding offences as “hate speech”, rather their actual nature as a hate speech regulation can be implied from an analysis of the elements of crime. Article 226 of the Criminal Code of RA is the closest regulation to the legal concept of hate speech. The offence is the *incitement of national, racial or religious hatred*:

“Actions aimed at the incitement of national, racial or religious hatred, at racial superiority or humiliation of national dignity, are punished with a fine in the amount of 200 to 500 minimal salaries, or with imprisonment for the term of 2-4 years.”

The aggravating circumstances include, inter alia, same actions done publicly or by mass media and by abuse of official position (term of imprisonment is 3 to 6 years).

Main shortcomings of Article 226 are the very limited number of protected characteristics and vague description of the *actus reus*. The latter is even more uncertain because of inconsistent practice of extremely limited actual cases. In one of such relatively recent cases S. Akojyan was sentenced for 4 years of imprisonment for acquiring anti-armenian photo album titled “*Армянский терроризм*” [“Armenian terrorism”] and subsequent efforts to promote sales of the albums¹⁰⁶. The album appeared to present several episodes of NKR conflict as terrorist actions of armenian forces against azerbaijanis. He was later acquitted by the Court of Appeal. According to S. Akojyan, the purpose of the sales of the said albums was purely pecuniary¹⁰⁷. The Court, however, considered that the title of the photo album and its content “*could have influenced readers’ consciousness by creating distorted perceptions of the Armenian nation and national animosity*”. The fact that the Court of Appeal later **reversed** the judgement leaves us to suppose

¹⁰⁶ Երևանի քաղաքի Կենտրոնի և Նորի-Մարտի վարչական շրջանների ընդհանուր իրավասության առաջին ստյամի դատարան, ԵԿԴ/0253/01/11, (2012)

¹⁰⁷ Hetq, «Հայոց»։ վանառած գրքի բովանդակության համար 4 տարով դատապարտված գրավաճառն աննեղ հանաչվեց, (Jul 21, 2012), available at <https://hetq.am/hy/article/16818> (last visited at Mar. 30, 2020)

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that either the actions of S. Akojyan did not amount to hate speech or the Article 226 covers only limited instances of hate speech.

Article 226 finds its roots in the Model Criminal Code of the CIS¹⁰⁸. It has similar formulation to the Article 187 of the code (incitement of national, racial or religious hostility), the roots of which can be traced back to the formulation of Article 74 of the Criminal Code of RSFSR of 1960¹⁰⁹. With its limited scope of application, few protected characteristics and rare usage it clearly can not serve as an adequate legal instrument to combat hate speech.

Legal instruments against hate speech are absent from other branches of law. Civil remedies for defamation and libel cannot be invoked to respond to hate speech, if it was not addressed to an identified individual. The Code of Administrative offences does not contain any provision even distantly resembling hate speech prohibition. It can be concluded that the legal framework of RA regulates hate speech in a limited, one level approach.

The extremely limited number of applications of the Article 226 may suggest that instances of hate speech, to the degree the article restricts, are uncommon. However, throughout the years, hate speech monitoring programs conducted by various CSOs reveal a different picture.

Prevalence of hate speech in the Republic of Armenia

In 2014 the Committee to Protect Freedom of Expression NGO (CPFE) published a summary report on hate speech in the Armenian media¹¹⁰. The nine-month monitoring revealed 1795 instances of hate speech in the publications of three online media outlets, three television companies and three print media newspapers¹¹¹. Another report published in 2018 by the

¹⁰⁸ Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States, *Модельный Уголовный Кодекс*, (1996), available at <https://www.cisatc.org/1289/135/154/241>

¹⁰⁹ Criminal Code of the RSFSR, (1961) available at <https://www.cia.gov/library/readingroom/docs/CIA-RDP65-00756R000400010001-6.pdf> (last visited at Mar. 20, 2020)

¹¹⁰ Committee to Protect Freedom of Expression, *Hate Speech in the Armenian Mass Media*, (2014), available at <https://khosq.am/en/monitorings/hate-speech-in-the-armenian-mass-media/>

¹¹¹ *Ibid*, p 2-3

Helsinki Committee of Armenia NGO (HCA) identified 122 instances of hate speech in 6 print and online media outlets and 5 television companies¹¹². Both monitoring programs relied on the standard of hate speech given in the Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers¹¹³.

Most instances of hate speech monitored by the CPFE were of political nature, followed by expressions targeting a person's sexual orientation and religious views¹¹⁴. According to HCA, which exempted political hate speech from its methodology, hate speech primarily was targeted towards persons' religious views, sexual orientation and gender identity¹¹⁵. A large part of hate speech were authored by politicians and public officials¹¹⁶. A 14-year long research conducted by the Pink HRD NGO showed that hate speech by politicians and State officials on the ground of a person's sexual orientation became even more widespread¹¹⁷. Hate speech has been also noted as the most common form of discrimination on the ground of sexual orientation and gender identity in educational institutions¹¹⁸.

In another report on the freedom of religion, HCA monitored 485 negative publications in the 26 online and printed media outlets about religious organizations other than the Apostolic church of Armenia during the time period of 9 years, with Jehovah's witnesses being targeted the

¹¹² Helsinki Committee of Armenia, *Monitoring of Hate Speech (Pilot Project) Report (July 2018 - June 2019)* 12, (2019) available at <http://armhels.com/wp-content/uploads/2019/07/Monitoring-of-hate-speech-2018-2019.pdf>

¹¹³ Recommendation No. R (97) 20 Of The Committee Of Ministers To Member States On "Hate Speech" (1997), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505d5b>

¹¹⁴ See footnote 110 at 10

¹¹⁵ See footnote 112 at 11

¹¹⁶ See footnote 110 at 3

¹¹⁷ Pink Armenia, *Hate Speech Displayed by State Officials Towards LGBT People in Armenia* (2004-2018), para 139 (2019), available at https://www.pinkarmenia.org/wp-content/uploads/2019/05/hatespeech_en.pdf

¹¹⁸ Pink Armenia, *Monitoring of Human Rights Violations of LGBT People in Armenia*, 9 (2013), available at <https://issuu.com/pinkarmenia/docs/lgbtmonitoring/3> p 9

most¹¹⁹. While probably not all these publications would have been qualified as hate speech, some of the examples provided in the report clearly do¹²⁰.

Analysis of the current situation indeed provides a far different picture on the prevalence of hate speech from the one which may have been concluded based on the application of the Article 226. Addition of other protected characteristics, such as person's sexual orientation and gender identity has been suggested by ECRI¹²¹. At the same time, absence of criminal cases on the ground of Article 226 in relation to incitement of religious hatred, which is one of the already protected grounds, suggests that the regulation is itself ineffective.

On the other end of the spectrum, there was a legislative initiative to criminalize “*preaching non-traditional sexual orientation among persons under the age of sixteen*”¹²². The authors of the draft justified the need to adopt the amendment with the need to protect “*historical-cultural values and national character*”¹²³. The draft was mildly criticized by the Government, mostly for editorial aspects but not the essence of the document¹²⁴. When it was introduced to the National Assembly, the parliamentary majority voted against, with the reasoning that the term “*non-traditional sexual orientation*” is not precise¹²⁵. When dealing with the case *Irina Fedotova v. Russian Federation* involving a conviction based on a similar law, UN Human Rights Committee found that “conviction of [...] an offence for “*propaganda of*

¹¹⁹Helsinki Committee of Armenia, *Freedom of Religion in Armenia A Study*, 30 (2010), available at http://armhels.com/wp-content/uploads/2012/06/344eng-Freedom_of_Religion_in_Armenia.pdf

¹²⁰ *Ibid*, 30-34

¹²¹ ECRI, *ECRI Report on Armenia (fifth monitoring cycle)*, para 35 (2016), available at <https://rm.coe.int/fourth-report-on-armenia/16808b5539>

¹²² Հայաստանի Հանրապետության Օրենքի Հայաստանի Հանրապետության Քրեական Օրենսգրքում լրացում կատարելու մասին (N-136-16.05.2019-ՊԻ-011/0), available at <http://www.parliament.am/drafts.php?sel=showdraft&DraftID=10461&Reading=0>

¹²³ *Ibid*

¹²⁴ Government of RA, «Հայաստանի Հանրապետության Քրեական Օրենսգրքում լրացում կատարելու մասին» Հայաստանի Հանրապետության օրենքի նախագծի վերաբերյալ Հայաստանի Հանրապետության Կառավարության առաջարկությունների մասին (N 754-Լ, 2019), available at <http://www.irtek.am/views/act.aspx?aid=100202>

¹²⁵ Shant News, Մագաչափի նահանջի տեղ չունենք. Պետրոսյանը պնդում է համասեանությունից հարող բրեւիանցները, (Sep. 09. 2019), available at <https://www.shantnews.am/news/view/474707.html> (last visited at Mar. 30, 2020)

homosexuality among minors” [...] amounted to a violation of her rights under article 19, paragraph 2, read in conjunction with article 26 of the Covenant”¹²⁶.

Current legal initiatives to respond hate speech

On August 2019 the Ministry of Justice of the RA introduced a draft law amending the Criminal code of the RA. The draft law would criminalize actions of *public calls and public justification of violence threatening life or health of a person or incitement of such violence*¹²⁷.

The Ministry justified the need for amendment within the context of combating hate speech and refers to both Recommendation R (97) 20 of the Council of Europe Committee of Ministers and ECRI General Policy Recommendation No. 15¹²⁸. The justification did not refer to the scope of the recommendations and definitions of hate speech, instead cited several paragraphs completely out of context. Interestingly, the draft of the offence **did not contain any protected characteristic at all**. It can be affirmed that the draft was not a hate speech law in any sense.

Later in 2019, the Minister of Justice introduced a new and elaborated iteration of the draft, which now contained protected characteristics. At the time of writing this paper, the draft has been adopted by the National Assembly and later signed by the President of the Republic of Armenia on April 30¹²⁹. Consequently, the Criminal Code has been amended with the Article 226.2, which prohibits public calls for violence, public justification or promotion for violence in connection with persons’ *sex, race, skin color, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances*. The offence is punishable with fine, detention or imprisonment for up to one year.

¹²⁶ The Human Rights Committee, *Communication no. 1932/2010* 2012, para 10.8 (2012)

¹²⁷ «Հայաստանի Հանրապետության Քրեական Օրենսգրքում լրացում կատարելու մասին» ՀՀ օրենքի նախագիծ, *available at* <https://www.e-draft.am/projects/1862/justification> (last visited Mar. 30, 2020)

¹²⁸ *Ibid.*, justification

¹²⁹ See the history of adoption of the amendment at http://www.parliament.am/draft_history.php?id=11229 (last visited May 06, 2020)

The list of the protected characteristics is open-ended for *other personal or social circumstances* not explicitly mentioned, which is the same as the list given in the Article 29 (Prohibition of discrimination) of the Constitution. As it was discussed in Chapter 3, this approach has been criticized by ECRI for lack of legal certainty. Furthermore, a person's sexual orientation and gender identity are not included in the list. Even if it is still possible to construe those grounds as types of *other personal or social circumstances* and to apply the Article on the instances of calls for violence against people for their sexual orientation or gender identity, it is still recommended by ECRI to list those characteristics explicitly. Furthermore, given the current situation of the prevalence of the hate speech against LGBT people without any precedent of liability and the lack of appropriate practice of the law enforcement agencies, it is not very likely that the Article would be invoked in such cases.

The inclusion of the *political views* as a protected ground also raises some concern. While discrimination based on political opinion should be prohibited, it should not be construed in a way to hinder criticism on politicians, even if criticism may *figuratively* include such statements which resemble *calls for violence*. In his presentation of the draft of the current Article during the Government session, the Minister of Justice the Minister himself brought the example of person's political allegiance (to a certain political power) while reasoning for the need to include protected characteristics in the draft¹³⁰. However, in order to not to disproportionately limit the freedom of expression, the Article should not be invoked in a way to contradict the *Lingens* standard.

Another initiative has been started by the Committee on Protection of Human Rights and Public Affairs of the National Assembly of RA. The 2020-2022 Action Plan deriving from the National Strategy for Human Rights Protection includes commitment to define responsibility for hate speech in compliance with international norms until the first half of 2021¹³¹. The Committee has established a working group for preparation of reforms of the RA legislation to address hate

¹³⁰ Azatutun.am, Կառավարությունն առաջարկում է բռնություն գործադրելու հրապարակային կոչերը քրեականացնել, (Dec. 12, 2019), available at <https://www.azatutyun.am/a/30322377.html> (last visited May 06, 2020)

¹³¹ See footnote 16

speech in December 2019, where nearly 20 NGOs and individual experts were included¹³² in the working group. The group has not published any report on the ongoing efforts. However, the initiative may be an important one if the drafting process makes use of available resources and guidelines, described in the next chapter.

CHAPTER 5: Measures against hate speech

Non-legal measures

Finding balance between the freedom of expression and the right to dignity and right to be free from discrimination is a difficult task. Efforts to regulate and restrict hate speech will always encounter a strong opposition. Arguments against hate speech regulations come from both the perspectives of the need for protecting free speech¹³³ and from the assumption that censorship can play against equality¹³⁴. An extralegal measure that is suggested to combat hate speech is often called **countering speech or counterspeech**. It has been described as “*any direct response to hateful or harmful speech which seeks to undermine it*”¹³⁵. It can be also supported by a number of preventive activities, such as organized community actions to specific events, awareness rising, publications in media to reply disseminated hateful messages etc¹³⁶.

Counterspeech by media promoting solidarity and understanding between different groups of society, be it ethnic, religious or cultural can be indeed useful and fruitful¹³⁷. Activist groups and the Civil Society Organizations can play the central role organizing campaigns and

¹³² Aravot, Ասեկուրյան խումբի դեմ պայքարին 20 ՀԿ է ցանկանում միանալ. 5 ամիս է մնացել, (Mar. 06, 2020), available at <https://www.aravot.am/2020/03/06/1098266/> (last visited Mar. 30, 2020)

¹³³ John Samples, “Hate Speech” Laws Undermine Free Speech and Equality, (2018) available at <https://www.cato.org/blog/hate-speech-laws-undermine-free-speech-equality> (last visited Mar. 15, 2020)

¹³⁴ Nadine Strossen, *Hate: Why We Should Resist it with Free Speech, Not Censorship*, 81 (2018)

¹³⁵ Dangerous Speech Project, *Counterspeech* (2020), available at <https://dangerousspeech.org/counterspeech/> (last visited Mar. 30, 2020)

¹³⁶ Katharine Gelber, *Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)*, in *The Content and Context of Hate Speech: Rethinking Regulation and Responses* 198–216 (Michael Herz & Peter Molnar eds., 2012). p 214

¹³⁷ Recommendation No. R (97) 21 of the Committee Of Ministers To Member States on the Media and the Promotion of a Culture of Tolerance, Appendix (1997) , available at

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168050513b>

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activities. However, another group of authors argue that reliance on counterspeech is not effective¹³⁸. While counter speech may indeed serve as a useful policy tool, most severe forms of hate speech may be better dealt with regulatory measures, including criminalization¹³⁹.

Guides to legal response

Obligation to prohibit certain types of hate speech falls within international commitments of the Republic of Armenia, particularly by the virtue of paragraph 2 of the Article 20 of ICCPR and Article 4 of the ICERD. Though the scope of those articles is limited in terms of the described actions (incitement to discrimination, hostility or violence through advocacy of hatred), as well as the protected characteristics explicitly mentioned (race, color, ethnic origin and, in case of ICCPR, religion), it is a reliable starting point for states seeking to establish legislative framework and policy to combat hate speech.

In the outcome of series of expert workshops organized by the OHCHR in 2011 and 2012, a **Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence** has been developed. Rabat plan differentiates three tiers of expressions in the context of article 20 of the ICCPR: (1) expression that constitutes a criminal offence; (2) expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; (3) expression that does not give rise to criminal, civil or administrative sanctions¹⁴⁰,

To qualify hate speech as a criminal offence, a six part threshold severity test is proposed. To assess the severity of the hatred, possible elements may include the cruelty or intent of the statement or harm advocated, the frequency, quantity and extent of the communication. The test proposes examination of six variables, which are the (a) **context**, (b) **speaker**, (c) **intent**, (d) **content and form**, (e) **extent of the speech act** and (f) **likelihood, including imminence**¹⁴¹.

¹³⁸ Gelber, *supra* 208

¹³⁹ McGonagle, *supra* 5

¹⁴⁰ See footnote 77, para 20

¹⁴¹ *Ibid*, para 29

Those variables are further elaborated. If the current sociopolitical context is favorable for the hate to incite discrimination, hostility or violence against a particular group, it would contribute to the high level of severity of the speech in question. Similarly, the social or political status of the speaker and the influence he or she has on the audience clearly makes hateful statements more harming than the same statement made by a less authoritative speaker. The authors of the plan suggest that within the context of Article 20 of ICCPR intent is required to amount to an offence. Further, the content and form of the speech, its nature, style and nature should be taken into account to find the right balance. Lastly, the extent, magnitude of the speech, the level of dissemination and the *probability that the speech would succeed in inciting actual action against the target group* should be assessed.

In par with the guidelines for crafting legal responses to hate speech, the Rabat plan also makes suggestions concerning the policy questions. To establish an atmosphere of tolerance, together with the application of the legislation states should make efforts “*rendering media organizations and religious/community leaders more ethically aware and socially responsible*”¹⁴², trigger intercultural dialogue¹⁴³, challenge the negative stereotypes certain groups have inside the society¹⁴⁴ and develop effective mechanisms to collect data on hatred offences in order to successfully address them¹⁴⁵. To this ends, it is important that “*political and religious leaders should refrain from using messages of intolerance or expressions which **may** incite violence, hostility or discrimination*”¹⁴⁶. This formulation is quite similar to the principle 1 of the appendix to the Recommendation R (97) 20.

Similarly, Article 19 NGO, which also participated in the preparations of the Rabat Plan, suggests another, nevertheless similar, three tier approach to differentiate types of hate speech and corresponding legal responses¹⁴⁷: (1) hate speech the must be restricted (such as incitement to genocide, advocacy of discriminatory hatred which incites hostility, discrimination or

¹⁴² *Ibid*, para 35

¹⁴³ *Ibid*, para 37

¹⁴⁴ *Ibid*, para 42

¹⁴⁵ *Ibid*, para 45 and 47

¹⁴⁶ *Ibid*, para 36

¹⁴⁷ *See footnote 23 at 19*

violence), (2) hate speech that may be restricted (for the purpose to protect the rights or reputations of others, to protect national security, public order, public health or morals) and (3) one that must be protected, even though it rises some concerns in terms of intolerance. The latter concerns expressions that may be inflammatory or offensive, but do not reach the threshold to amount threats of violence, harassment and assault¹⁴⁸.

CONCLUSION

The ongoing situation of prevalence of hate speech in the Republic of Armenia is quite disturbing. Despite the broad international commitments of the RA and enabling Constitutional framework, available legal instruments to address hate speech are inadequate. Several groups, particularly religious and sexual minorities are often stigmatized and discriminated against, sometimes by state officials themselves. There is an urging need to address hate speech in order to protect the right to be free from discrimination without prejudicing the freedom of expression.

There is an abundance of resources and good practice examples available to the authorities in this difficult task¹⁴⁹. International best practice suggests a multiple level response to hate speech through a series of activities and reforms. Awareness rising, advocacy for tolerance are among the easiest steps once the state may take to tackle the issue. Furthermore, the practice of international bodies does outline the scope concerning the actions subject to restriction, which would also be consistent with the freedom of expression. Several instruments, particularly the Recommendation R (97) 20 of the Council of Europe Committee of Ministers and ECRI General Policy Recommendation No. 15 and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence are capable of guiding states to maintain their international commitments and protection of the freedom of expression. The practice of several CoE member states does illustrate the effectiveness of this approach.

¹⁴⁸ *Ibid*, 22

¹⁴⁹ ECRI, *ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination* (2017) and sources in footnotes 24 and 77

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In the context of legal response, a multi-level approach (civil, administrative and criminal) appears to be most useful to tackle hate speech in all its forms without taking the risk of disproportionately restricting the freedom of expression. In this context, addition of possibility of **civil action for non-pecuniary damage for hate speech** victims may be the first level of legal remedy. To further encourage active legal response, civil society organizations may be allowed to bring civil or administrative law actions against authors of more severe instances of hate speech in defense of their beneficiaries. This will also have a chilling effect on potential perpetrators, both public officials and other individuals.

The **last instance of criminal liability** has to be tailored in a very responsible manner. Clearly, the current edition of the Criminal Code of RA does not adequately address severe forms of hate speech due to limited scope of application and protected characteristics. The actions constituting hate speech should be revised and amended to clarify the means of incitement of hatred in order to retain legal certainty. The list of protected characteristics should be amended to include those which are more often targeted, such as a person's sexual orientation and gender identity, as well as others advocated by the competent international bodies. Having a definite and inclusive list of protected characteristics is also paramount to ensure legal certainty.

In the course of drafting the list of protected characteristics, a particular care has to be made towards the scope of inclusion of the ground of **political opinion**. Indeed political affiliation can be regarded as an important part of a person's mindset and while many would adhere to a certain political ideology for lifetime, examples of total conversion to a fundamentally different political opinion are not rarely observed. They are not inherent to a person to the same extent as, for instance, religious views or belief. In this respect, it is argued that they differ from other beliefs, such as political or philosophical beliefs, and it is argued that they deserve a higher degree of protection¹⁵⁰. This effort is crucial to maintain the freedom of political debate and political criticism.

¹⁵⁰ Venice Commission, *Blasphemy, insult and hatred: finding answers in a democratic society Science and technique of democracy*, No. 47, para 48, contribution by N. Alivizatos, “Art and religion: the limits of liberalism”, on p. 73, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e)

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In the course of drafting amendments to establish the criminal offence of hate speech, consultations with the civil society, legal scholars, individual experts and international specialized agencies is needed. The sanctions should be flexible to enable the judiciary to proportionately address every instance of hate speech through an evaluation of the facts such as the context, the influence of the perpetrator, his or her intent, content and extent of the hate speech, as well as the impact.

In a broader sense, the fight against hate speech (including hate speech online) should be included in the national policy for protection of human rights. Public officials should refrain from such statements, which may be perceived as hate speech. Explicit prohibition of hate speech, consistent with the Recommendation R (97) 20 of the Council of Europe Committee of Ministers and ECRI General Policy Recommendation No. 15 should be amended to the Code of Ethics for members of the National Assembly of RA and high-ranking public officials. Public officials bear an important responsibility to reconcile different segments of the population and should definitely abstain from contributing to the further gaping among them.

Balancing freedom of expression and restricting hate speech is a difficult task, especially for countries such as the Republic of Armenia. However, the road towards building and maintain a democratic society requires consistency, persistence and political will from the ones who were delegated with the power of the people.

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