

A EUROPEAN MODEL LAW
FOR THE PROMOTION OF TOLERANCE
AND THE SUPPRESSION OF INTOLERANCE

SUBMITTED WITH A VIEW TO BEING
ENACTED BY THE NATIONAL LEGISLATURES
OF EUROPEAN STATES

Preamble

The purpose of this Law is to provide effective mechanisms for the promotion of tolerance and the suppression of intolerance in European societies.

The assumptions underlying this Law are:

- (a) Respect for human dignity is the basis of observance of human rights.

Explanatory Note.*

As the European Committee on Social Rights pronounced, human dignity is the fundamental value and indeed the core of human rights law (*International Federation for Human Rights v. France*, 2004).

- (b) Without pluralism and tolerance there is no democratic society.

Explanatory Notes:

- (i) The words in (b) are those of the European Court of Human Rights (*Handyside Judgment*, 1976).
- (ii) Tolerance must be seen as the glue that enables a pluralistic democratic society to function successfully.

- (c) The concept of tolerance is incompatible with any form of unlawful discrimination.

* Explanatory notes must be viewed as an authentic interpretation of the text of the Model Law.

- (d) Tolerance is derived from recognition of the inherent right of every person to be different within a pluralistic society.
- (e) Tolerance postulates an open mind to unfamiliar ideas and ways of life.
- (f) The fabric of democratic society is enriched and strengthened by cooperation of diverse groups and peaceful coexistence.
- (g) Cooperation and coexistence within a democratic society require that individuals and groups make mutual concessions to each other.
- (h) Integration within society does not mean assimilation.
- (i) Diversity should not affect the fundamental identity - or the shared values, history and aspirations - of society.
- (j) Respect for the distinctive characteristics of diverse groups should not weaken the common bonds of responsible citizenship within a democratic and open society.

Explanatory Note:

Every European society has its own shared values, history, and aspirations, yet all European societies share certain democratic values and goals.

Section 1. Definitions

For the purposes of this Law:

- (a) "Group" means: a number of people characterized by national, racial or ethnic origin or descent, cultural roots, religious affiliation, linguistic links, gender identity or sexual orientation.

Explanatory Notes:

- (i) There are many groups within a diverse society. The question is which ones must be protected for the purposes of the promotion of tolerance. The irreducible traditional minimum relates to national, racial, ethnic, cultural, religious and linguistic groups. But modern developments militate in favour of the inclusion of groups based on sexual or gender identity,

- (ii) Determination of criteria of belonging to a particular traditional group is primarily made by the group itself ("self-determination").
- (iii) When statutory restrictions – relevant to criteria of belonging to a group - are enacted, they have to be reasonable and objective (see the Human Rights Committee's view in the matter of *Lovelace v. Canada*, 1981).
- (iv) An individual cannot force himself/herself on a traditional group, but every individual is entitled to withdraw from any group.
- (v) It is not proposed to go here into the complex question whether group rights are collective rights of the group as such or individual rights of the members of the group.

(b) "Group libel" means: defamatory comments made in public and aimed against a group as defined in Paragraph (a) – or members thereof – and intended to incite to violence, maliciously vilify the group, express contempt for it or subject it to false charges.

Explanatory Notes:

- (i) This definition covers "blood libels" and anti-Semitic slurs, as well as allegations that, e.g., "all gypsies are thieves" or "all Moslems are terrorists".
- (ii) Obviously, group libel does not consist of mere pejorative or even abusive language about a group. A malicious intent to defame the group is of critical importance.
- (iii) The European Court of Human Rights held that freedom of expression covered the publication of an academic research book - not driven by a racist intent - according to which most gypsies in Ankara were earning their living from stealing, begging, door-to-door selling and fortune-telling (*Aksu v. Turkey* Judgment, 2012).
- (iv) It must be understood that the group libel may appear to be aimed at members of the victim group in a different time (another historical era) or place (beyond the borders of the State).

(c) "Hate crimes" means: any criminal act however defined, whether committed against persons or property, where the victims or targets are intentionally selected because of their real or perceived connection with - or support or membership of - a group as defined in Paragraph (a).

Explanatory Note:

The need to suppress hate crimes is generally recognized in Europe today. Yet, there is no common definition of hate crimes. It is submitted that the definition must be comprehensive as stated here.

(d) "Tolerance" means: respect for the human rights of others, as well as acceptance of the peculiarities of the distinct identity of a group as defined in Paragraph (a).

Explanatory Notes:

- (i) Tolerance means both respect (as an active term) and acceptance (as a passive term)
- (ii) Coexistence of diverse groups within a pluralistic society requires, *inter alia*, some knowledge of local language as a means of communication with authorities and the social environment.
- (iii) Tolerance is designed to include. But it also excludes intolerance as set out in Section 2(d)-(e).

Section 2. Purpose

The purpose of this Law is to:

- (a) Promote tolerance within a pluralistic society without weakening its common bonds.
- (b) Foster tolerance between different groups.
- (c) Condemn all manifestations of intolerance based on bias, bigotry and prejudice.
- (d) Suppress intolerance, in particular with a view to eliminating racism, colour bias, ethnic discrimination, religious intolerance, totalitarian ideologies, xenophobia, anti-Semitism, Negrophobia, anti-feminism and homophobia.

Explanatory Notes:

- (i) This formulation does not go into detail within the subsets listed. Thus, religious intolerance is understood to cover Islamophobia, anti-Catholicism, etc. Ethnic discrimination is understood to cover, e.g., anti-Roma activities.
- (ii) Anti-Semitism is listed as a separate subset since it crosses the lines of various subsets. It is certainly not confined to religious intolerance (conversion did not save Jews from extermination under the Nazis).

- (e) Suppress group libel and hate crimes as defined in Section 1(b)-(c).

Explanatory Notes:

- (i) It is due to the need to preserve tolerance that a pluralistic society must show zero tolerance for hate crimes.
- (ii) Hate speech is an illustration of hate crimes. In the words of the European Court of Human Rights, it is sometimes necessary to prevent "forms of expression which spread, incite, promote or justify hatred based on intolerance" (*Erbakan v. Turkey* Judgment, 2006).
- (iii) As for group libel, the European Court of Human Rights explicitly allowed interference with freedom of expression to prevent defamatory statements intended to incite racial hatred (*Garaudy v. France* Judgment, 2003).
- (iv) The European approach to this issue is admittedly different from the American approach.

Section 3. Exercise of Rights

The Government must take concrete action to:

- (a) Respect the preservation and development of the distinct identity of all groups as defined in Section 1(a);
- (b) Suppress intolerance in line with Section 2(d)-(e).
- (c) Foster tolerance in the relations between members of all groups

Explanatory Notes:

- (i) The exercise of tolerance must be understood not only as a vertical relationship (Government-to-individuals) but also as a horizontal relationship (group-to-group and person-to-person).
- (ii) What this means, first of all, is that the Government must do its utmost to ensure respect for all groups and suppress intolerance by State organs. Thus, the Supreme Court of Canada upheld the termination of employment of a teacher in a public school who preached anti-Semitism (*Ross v. New Brunswick* Judgment, 1996). Of course, the special nature of teaching, as compared to other vocations (including research), must be fully perceived. Preaching anti-Semitism by teachers cannot be condoned even in private schools.

- (iii) The obligations of the Government in this field are basically obligations of conduct (relating to best efforts) rather than obligations of result.
- (iv) Tolerance must be practiced not only by governmental bodies but equally by individuals, including members of one group *vis-à-vis* another. This is in keeping with the general human rights law obligation not to infringe upon the rights and freedoms of others.
- (v) That is to say, tolerance must be reciprocal. Members of a group who wish to benefit from tolerance must show it to (aa) society at large; (bb) members of other groups; and also (cc) dissidents within their own group.

Section 4. Limitations

- (a) There is no need to be tolerant to the intolerant.

Explanatory Note:

As pronounced by the European Court of Human Rights, individuals or groups with totalitarian aims can be prevented from exploiting in their own interests the principles of human rights (*Norwood v. UK* Judgment, 2004).

- (b) Tolerance must not be used as a means for condoning terrorism or as a cover for those seeking to subvert domestic or international peace and security.
- (c) Tolerance does not mean that a whole group can completely segregate itself from society as a whole, repudiating the need to interface with other groups.

Explanatory Note

The limitation regarding segregation relates to a whole group. It does not relate to specific communities such as monasteries.

- (d) Tolerance is subject to other reasonable limitations in conformity with human rights law.

Explanatory Notes:

Examples:

- (i) Freedom of expression may be restricted - for the protection of tolerance - in accordance with the provisions of Article 10(2) of

the European Convention for the Protection of Human Rights and Fundamental Freedoms.

- (ii) Tolerance does not denote acceptance of such practices as female circumcision, forced marriage, polygamy or any form of exploitation or domination of women.
- (iii) The European Court of Human Rights dismissed a challenge against a legal ban of wearing clothing designed to conceal the face, in public places, is permissible even as regards women who wish to wear a full-face veil for reasons related to their religion (*S.A.S. v. France* Judgment, 2014).
- (iv) City planning and zoning rules may override an attempt to build a place of worship on a particular site.

Section 5. Migrants

- (a) Tolerance (as defined in Section 1(d)) must be guaranteed to any group (as defined in Section 1(a)), whether it has long-standing societal roots or it is recently formed.
- (b) Foreign migrants, for their part, have to adhere to the principle of coexistence of diverse groups within a pluralistic society.
- (c) If a foreign migrant - who has been admitted into the territory of the State but has not acquired citizenship – is clearly unwilling to comply with the principle of coexistence of diverse groups within a single national society, he or she may be obliged to leave the State (subject to applicable international legal standards).
- (d) This Section is without prejudice to the obligation of non-refoulement of refugees in conformity with the 1951 Convention Relating to the Status of Refugees.

Explanatory Notes:

- (i) Under Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, "No one shall be expelled ... from the territory of the State of which he is a national". Obviously, once a new migrant has acquired nationality, Paragraph (c) is no longer applicable.
- (ii) Even with non-nationals, it is necessary to bear in mind that, under Article 4 of the same Protocol, "collective expulsion of aliens is prohibited". The decision whether a new migrant has forfeited the right to remain within the State must therefore be

made on an individual basis through an appropriate judicial or quasi-judicial procedure.

- (iii) The right to expel migrant workers who "offend against public interest or morality" is explicitly expressed in Article 19(8) of the European Social Charter.
- (iv) The question whether a foreign migrant is clearly unwilling to comply with the principle of coexistence of diverse groups within a pluralistic society is an issue of fact, which has to be determined by a judicial or quasi-judicial authority.
- (v) Upon admission to the State, foreign migrants may be required to sign a statement in which they confirm that they are aware of the provision included in Paragraph (c).
- (vi) The issues have to be explained to a foreign migrant in a language that he or she understands.

Section 6. Implementation

To ensure implementation of this Law, the Government shall:

Explanatory Note:

It goes without saying that enactment of a Law does not suffice by itself. There must be a mechanism in place ensuring that the Law does not remain on paper and is actually implemented in the world of reality.

- (a) Be responsible for the special protection of vulnerable and disadvantaged groups.

Explanatory Notes:

- (i) Members of vulnerable and disadvantaged groups are entitled to a special protection, additional to the general protection that has to be provided by the Government to every person within the State.
- (ii) The special protection afforded to members of vulnerable and disadvantaged groups may imply a preferential treatment. Strictly speaking, this preferential treatment goes beyond mere respect and acceptance lying at the root of tolerance (see the definition of tolerance in Section 1(d)). Still, the present provision is justified by the linkage between historical intolerance and vulnerability.
- (iii) The answer to the question which group is vulnerable or disadvantaged in a particular society varies from one country to another.

- (b) If necessary, set up a special administrative unit in order to supervise the implementation of this Law.

Explanatory Notes:

- (i) The implementation of this provision depends on the existing structure in any given State. In any country which has already set up an administrative body vested with general competence to supervise laws such as the present Law, no further action has to be taken. However, where no such body exists, it has to be set up.
- (ii) The special administrative unit should preferably operate within the Ministry of Justice (although the Ministry of the Interior is another reasonable possibility).

- (c) Establish a National Tolerance Monitoring Commission as an independent body – composed of eminent persons from outside the civil service – vested with the authority to promote tolerance. The Commission will be empowered to:

- (i) Issue general guidelines and specific recommendations for action.
- (ii) Express views regarding the degree to which this law is implemented in practice.
- (iii) Disseminate such guidelines, recommendations and views through the mass media and otherwise.
- (iv) Foster international cooperation with similar bodies in other States.

Explanatory Notes:

- (i) The thrust of Paragraphs (b) and (c) is the existence of two national bodies entrusted with the implementation of the present Law. The first body (referred to in Paragraph (b)) is a governmental department. The second body (established under Paragraph (c)) is external to the Government, acting independently (not unlike a special Ombudsman).
- (ii) The independent Commission will be empowered to express its views regarding implementation of the Law by all concerned. Implementation in this context includes (but is not limited to) the imposition of penal sanctions, education and mass media coverage.
- (iii) The independent Commission will also be empowered to organize national or international conferences, workshops, seminars, etc.

- (iv) The powers and responsibilities of the National Tolerance Monitoring Commission may be assigned to an independent human rights commission which already exists.
- (v) The National Tolerance Monitoring Commission may be subjected to the jurisdiction of an administrative court or tribunal.

Section 7. Penal Sanctions

- (a) The following acts will be regarded as criminal offences punishable as aggravated crimes:

Explanatory Notes:

- (i) This Sub-Section is without prejudice to any existing legislation on the same subject-matters.
- (ii) The degree of punishment of these aggravated crimes is left to the discretion of the court in accordance with the circumstances of the case.

- (i) Hate crimes as defined in Section 1(c).
- (ii) Incitement to violence against a group as defined in Section 1(a).
- (iii) Group libel as defined in Section 1(b).
- (iv) Overt approval of a totalitarian ideology, xenophobia or anti-Semitism.
- (v) Public approval or denial of the Holocaust.

Explanatory Note:

The European Court of Human Rights expressly held that the Holocaust is a clearly established historical fact the denial of which is removed from the protection of freedom of expression (*Lehideux and Isorni v. France* Judgment, 1998).

- (vi) Public approval or denial of any other act of genocide the existence of which has been determined by an international criminal court or tribunal.

Explanatory Note:

- (i) The European Court of Human Rights (in the *Perinçek* case of 2013) drew a distinction between the historical facts of the Holocaust (e.g. the existence of the gas chambers) - confirmed by the International Military Tribunal at Nuremberg - and historical facts that are in controversy (such as the Armenian genocide of 1915).

- (ii) Accordingly, sub-paragraph (vi) does not affect public (or private) discussions and differences of opinion as to whether acts not covered by decisions of international courts or tribunals amount to genocide.
- (b) Juveniles convicted of committing crimes listed in paragraph (a) will be required to undergo a rehabilitation programme conducive to a culture of tolerance.
- (c) Crimes listed in paragraph (a) will not be considered political offences for purposes of extradition.
- (d) Victims of crimes listed in paragraph (a) will have a legal standing to bring a case against the perpetrators, as well as a right to redress.
- (e) Free legal aid will be offered to victims of crimes listed in paragraph (a), irrespective of qualification in terms of impecuniosity.

Section 8. Education

The Government shall ensure that:

- (a) Schools, from the primary level upwards, shall introduce courses encouraging students to accept diversity and promoting a climate of tolerance as regards the qualities and cultures of others.

Explanatory Notes:

- (i) The principle has been accepted for many years (*cf.* the Declaration Regarding Intolerance – A Threat to Democracy, adopted by the Committee of Ministers of the Council of Europe on 14 May 1981).
 - (ii) It is very important to start such courses as early as possible in the educational programme, *i.e.* in elementary school. Yet, these courses must be offered also at higher levels of education, up to and including universities.
- (b) Similar courses shall be incorporated in the training of those serving in the military and law enforcement agencies.

- (c) Training and tolerance awareness courses shall be made available to different strata of society, with an emphasis on professional groups.

Explanatory Notes:

- (i) Training must be made available as part of continuing adult education.
 - (ii) It is especially important to ensure advanced professional training of lawyers (including judges and criminal justice personnel), administrators, police officers, doctors, etc.
- (d) Teaching materials for tolerance awareness courses (including syllabi) will be developed by Departments of Education to meet the needs.
 - (e) Instructors will be trained in a manner qualifying them to train others in tolerance awareness courses.
 - (f) Departments of Education shall ensure that teaching materials in ordinary courses will be free of any innuendos and slights directed against any group as defined in Section 1(a).
 - (g) The production of books, plays, newspapers reports, magazine articles, films and television programmes – promoting a climate of tolerance – shall be encouraged and, where necessary, subsidized by the Government.

Section 9. Mass Media

- (a) The Government shall encourage public broadcasting (television and radio) stations will devote a prescribed percentage of their programmes to promoting a climate of tolerance, as per Section 8(f).
- (b) The Government shall encourage all privately owned mass media (including the printed press) to promote a climate of tolerance, as per Section 8(f).
- (c) The Government shall encourage all the mass media (public as well as private) to adopt an ethical code of conduct, which will prevent the spreading of intolerance and will be supervised by a mass media complaints commission.

Explanatory Notes:

- (i) This is a delicate matter, inasmuch as there is no intention to censor news coverage by the mass media. All the same, it must be borne in mind that expression of opinions in the mass media must not consist of group libel or hate speech (see Section 1(b)-(c)).
- (ii) The mass media complaints commission is supposed to consist of independent persons, but it has to be set up by – and report to - the media themselves, rather than the Government.

Section 10. The Internet

The Government shall take action against the propagation of group libel or hate crimes (as defined in Section 1(b)-(c)) in the Internet.

Explanatory Notes:

- (i) The Internet is a commonly used tool for spreading hate speech.
- (ii) The obligation to delete certain data from the Internet was approved by the European Court of Justice in the *Google* Judgment of 2014. It is believed that this case paves the way for the suppression of Internet publications that propagate hate crimes or group libel.

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