

CREATING STANDARDS AGAINST HATE SPEECH THROUGH THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

Hate speech imposes a complex and sensitive problem. Hate speech indicates intolerance and lack of culture of respect for diversity, particularly in modern multicultural societies when has manifested extreme forms of open incitement to violence, terrorism or war.

The European Court of Human Rights created standards by which a line between hate speech as a negative phenomenon and the right to free expression guaranteed in national and international level, were noted. By straight of his authority, the Court with its judgments and decisions sends strong messages condemns expression containing hatred of a certain category of citizens.

The basic goal of this paper is to identify the standards which the European Court of Human Rights creates through the court's practice handling cases related to hate speech.

For that purpose, firstly we made an overview of basic definitions and elements of hate speech. Furthermore, we analyzed some of the most impressive cases related to hate speech processed in the case law of the European Court of Human Rights.

Keywords: *European Court of Human Rights, hate speech, freedom of expression, standards against hate speech*

Introduction

An expression that is motivated by hatred of a certain category of citizens is actually abusing one of the human rights – the right to freedom of expression. The freedom of expression implies free and unhindered expression through speech or by other appropriate means, and also freedom to receive and impart information. This right is protected on national and international level, as one of the basic human rights. It is however worrying that freedom of expression is often used as a screen for expression that is discriminatory. Hate speech targets certain categories of citizens, especially vulnerable minorities. Hate speech violates not only the dignity of the persons to whom it is addressed, but also has potential to cause discord, widespread intolerance and public disorder. Hate speech causes psychological pain and emotional trauma to victims. Hate speech can deeply affect their confidence and could be the cause of antisocial and even criminal behavior. The consequences of hate speech can be far-reaching and tragic not only for victims but also for society as a whole. Hate speech can affect the quality of life and mutual respect of communities, which can lead to serious intolerance, conflicts and open clashes with far-reaching consequences.

In the era of digital and aggressive media, the world is confronted with new manifestations and dimensions of hate speech. Such expressions can quickly spread through the Internet and social networks. There is an evident surge in crime caused by intolerance against groups of citizens who are from different religious or different national affiliation. Moreover, due to the characteristics of the Internet as a boundless global information and communication platform, the determination of responsibility for the dissemination of hate speech is extremely difficult. For this reason, the issue of hate speech occupies a very important place in discussions at intergovernmental level in terms of what is and what is not acceptable speech (Kiska, 2012). On the international plane, combating intolerance and discrimination towards others on the grounds of their different religions or beliefs (which includes protection of non-theistic beliefs), has been a central theme of the international human rights movement since the establishment of the United Nations (Boyle, 1992, p. 62). Distinction can be made between national and international measures to ensure the freedom of religion or belief, "including the elimination of discrimination and the more difficult subject of combating the manifestation of intolerance expressed in acts which are intended or which have the effect of arousing hatred and persecution of others of a different religion or belief" (Boyle, 1992, p. 62).

In 1997 the Committee of Ministers of the Council of Europe adopted a Recommendation to Member States concerning "hate speech" (Rec. (97) 20). The Recommendation was an expression of serious concern about the resurgence of racism, xenophobia and anti-Semitism and the development of a climate of intolerance which encourages racial hatred, violence or discrimination against groups from different racial, ethnic, national origin, social status or religious belief. With this document, the Council of Ministers recommended to governments of the member states to take appropriate steps to combat hate speech on the basis of the principles set out in the recommendation and to ensure that such steps are part of a comprehensive approach to this phenomenon. The Council of Ministers also recommended to governments of the member states to adopt the United Nations Convention on the elimination of all forms of racial discrimination, and to ensure that their national law and practice is in accordance with the principles set out in the appendix to the recommendation.

1. "Hate speech" and element of the hate speech

The term "hate speech" does not have a universal and generally accepted definition. While the term "hate speech" is widely used in the law, by policy makers and academia, there is often disagreement over its scope and how best to resist it (McGonagle, 2012). Among other things, this is consequence of the fact that hate speech depends on the context of the circumstances. However, there are some relevant definitions that do contribute to the better and appropriate understanding of the notion of hate speech. Basically, hate speech could be defined as speech containing racist, fascist, sexist comments, promoting, encouraging, spreading or justifying racial hatred, xenophobia and other forms of hatred based intolerance. The Recommendation (Rec. (97) 20) emphasized that "the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed in the form of aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".

"Generally speaking, the term "hate speech" means an oral or written communication or other form of public expression of attitude in any form of communication with others (by implication actions, gestures, uses symbols, etc.), containing purpose based prejudicial to discriminate, disturb, provoke reactions or exacerbate negative attitude, intolerance, hostility or violence against individuals or groups of people based on their race or gender, age,

ethnicity, nationality, religious belief, sexual orientation, gender identity, disability, linguistic background, cultural background, moral or political views, social status, occupation, mental and physical characteristics, or any other trait" (Камбовски и Лазарова-Трајковска, 2012, p. 37). "Hate speech consists in giving particularly negative qualities and/or incitement to discrimination against particular social category, especially when the affiliation is seen as a natural (due to classification), not selected" (Hordeski, 2014). "Such speech generally tends to express impatience, humiliate or condemn individuals or members of a group. Hate speech is a form of expression that is designed to promote hatred based on race, religion, ethnicity, national origin, gender, sexual orientation, class/social origin, physical or mental disability"¹ (Михајлова, Бачовска и Шекерџиев, 2013, p. 25). "Specifically, hate speech as a concept applies to a whole range of negative speech, ranging from speech that expresses, encourages, invites or promotes hate with insulting words and epithets, and even (albeit questionable) extreme examples of prejudice, stereotypes and bias" (Михајлова, Бачовска и Шекерџиев, 2013, p. 25).² Further differentiation between forms of hate speech can be attained by determining whether the expression is: "direct (sometimes called 'specific') or indirect; veiled or overt; single or repeated; backed by power, authority, or threat, or not" (Delgado and Stefancic, 2009).

Given these definitions hate speech can be recognized by certain elements. That element are related to intention of expression that is essentially hatred, also with the content of the phrase when spoken words or written text, drawing, caricature, poster, flyer, etc. make explicit reference to hate, and also with the effects caused by hate speech to person's dignity or to causing intolerance or public disorder.

There is a wide range of negative speech that stretches from insults through expression which incite hatred and intolerance, to the manifestation of extreme prejudice against a certain category of citizens. The hatred or intolerance can be expressed not only through speech that is xenophobic, but also through other numerous and various forms and ways. Some of these expressions of hatred which are the reason for causing discord and hostility, are for instance: the cartoons that hurt religious feelings of members of a particular religion, or burning flags and other symbols that identifies people or nation, also public using of offensive symbols, leaflets and placards inscribed with text hateful or expressing hatred through social networks, etc.

¹Translation made by the author of this paper.

²Translation made by the author of this paper.

2. Hate speech in light of the jurisprudence of the European Court of Human Rights

The European Court of Human Rights (ECtHR) used the term "hate speech" without explanation or definition first in four judgments delivered on the same day - July 8, 1999, all processed against Republic of Turkey (Sürek v. Turkey (No. 1); Sürek & Özdemir v. Turkey; Sürek v. Turkey (No. 4), and Erdogdu & Ince v. Turkey. In these and other cases the ECtHR has understood "hate speech" as all forms of expression which spread, incite, promote or justify hatred based on intolerance. About notion of hate speech, according with Lazarova Trajkovska judge in ECtHR, the Court is determination not binding precise definition or classifications established by the national courts, but acknowledging the particular circumstances of the case, the context of the particular statement and the consequences (Лазарова Трајковска, 2015, p. 51). The approach to the issue of hate speech in the practice of the ECtHR "reflects the devotion of this Court to building standards and principles that are based on protecting the equality and dignity of all citizens through the application of the test of balancing private and public interests" (Камбовски и Лазарова Трајковска, 2012, p. 5). The Court's judgments and decisions are intended to decide the specific case, but also to establish standards and principles which will become an integral part of the legislation of the states.

When handled cases concerning incitement to hatred and freedom of expression, the Court used two approaches set forth by the European Convention (Factsheet on hate speech, 2016, p. 1):

- "the approach of exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention";

- "the approach of setting restriction on protection, provided for by Article 10, paragraph 2, of the Convention (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention)".

As applicants in the proceeding cases were usually people who are held accountable in their national state for inciting hatred through speech, written text or in any other appropriate manner, they were referred to the Court according with Article 10 of the European Convention of Human Rights. Applicants seek protection of freedom of expression that, according to them, is limited or revoked by the authorities in their country. A significant number of processed cases were those related to expressing

hatred on ethnic or racial grounds. Dominant among these cases are situations expressing anti-Semitism. Promotion and advocacy of religious fundamentalism, especially extreme Islamist views, is also remarkably present in the processed cases. It may be noted that a significant number of cases are related to expressing hatred against migrants from foreign countries. Also, in many cases the applicants appear to be journalists or newspaper editors, as well as politicians, complaining of alleged violation to their freedom of expression.

3. Review of processed cases before the European Court of Human Rights relating to hate speech

From the review of the case-law of the European Court of Human Rights concerning the hate speech, we can be ascertaining a wide range of different grounds for expressing hatred under the guise of freedom of expression. The remainder of this paper will present selected judgments and decisions of the rich jurisprudence of the ECtHR related to hate speech.

3.1. Hate speech on the basis of ethnic and religious intolerance

In the ECtHR case law, there are numerous cases relating to hate speech based on ethnic and religious grounds, especially hate speech against Muslim communities from North and Central Africa. France, for example, instituted criminal proceedings against authors of a published book entitled "Colonization of Europe" subtitled "Truthful remarks about immigration and Islam." The authors were convicted of inciting hatred and violence against Muslim communities. Because of that, they requested protection of freedom of expression from the ECtHR in Case of Soulas and Others v. France. The Court found no violation of freedom of expression of those authors. The Court sided in this stance, among other things, because the terms used in the published book aimed at creating a sense of resentment and antagonism among readers, encouraged the use of military language in terms of the communities concerns. The Court held that the interference with the right to freedom of expression in the present case was necessary (Factsheet on hate speech, 2016, p. 9). In the case Norwood v. United Kingdom the Court rejected applicant's appeal as inadmissible. The applicant was a member of a political party who put a poster in his window that displayed in flames of the Twin Towers in the United States, with an accompanying text: "Islam out of Britain - protecting the British people". The applicant was found guilty of hate speech on religious grounds. He requested protection of freedom of expression from the ECtHR. The ECtHR found that such a general, "vehement attack against a religious group, linking the group as a whole with

a grave of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination" (Factsheet on hate speech, 2016, p. 4).

The ECtHR also found the appeal of the former president of the French "National Front" party regarding an alleged violation of freedom of expression inadmissible. He was convicted of incitement to discrimination, hatred and violence against a group of people based on their origin or membership of a particular ethnic group, nation, race or religion. He laid out his stand against the number of members of the Islamic faith in France in an interview for the daily newspaper *Le Monde*. The Court declared the application was inadmissible. Applicant's statements were made in the context of the general debate on issues related to the integration of immigrants in host countries. Moreover, the Court held that for this kind of problem countries need to be allowed freedom in assessing the need for interference with the freedom of expression of a person. The Court concluded that "the reasons given by the domestic courts for convicting the applicant had thus been relevant and sufficient" (Factsheet on hate speech, 2016, p. 10).

In *Aksu v. Turkey*, ECtHR observes that discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction (*Aksu v. Turkey*, 2012, para 44). The Court observes that in the present case the applicant, who is of Roma origin, argued that a book and two dictionaries that had received government funding included remarks and expressions that reflected anti Roma sentiment (*Aksu v. Turkey*, 2012, para 45). In this connection, according to Court, it is important to note, that while the author pointed to certain illegal activities on the part of some members of the Roma community living in particular areas, nowhere in the book he did not make negative remarks about the Roma population in general or claim that all members of the Roma community were engaged in illegal activities. Furthermore, in different parts of the book, namely in the preface, introduction and conclusion, the author emphasised in clear terms that his intention was to shed light on the unknown world of the Roma community in Turkey, who had been ostracised and targeted by vilifying remarks based mainly on prejudice (*Aksu v. Turkey*, 2012, para 70). In view of the foregoing, the Court considers that the domestic authorities did not overstep their margin of appreciation and did not disregard their positive obligation to secure to the applicant effective respect for his private life (*Aksu v. Turkey*, 2012, para 88).

In *Vejdeland and Others v. Sweden*, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts (*Vejdeland and Others v. Sweden*, 2012, para 55). Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour" (*Vejdeland and Others v. Sweden*, 2012, para 55). In this case the applicants were convicted because they went to an upper secondary school and distributed approximately a hundred leaflets by leaving them in or on the pupils' lockers. The originator of the leaflets was an organization called National Youth and the leaflets contained the statements about homosexuality and other sexual deviances "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The Court notes that the applicants said that they distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools. However, the Court agrees with the Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient (*Vejdeland and Others v. Sweden*, 2012, para 59).

3.2. Expressions of anti-Semitism and revisionism

A significant number of applications submitted to the ECtHR are in connection with hate speech against Jews, including anti-Semitism and revisionist expressions that deny the Holocaust and crimes against humanity committed during the Second World War are historical proven truths. Because of such content, ECtHR for example rejected as unfounded the appeal of the author of a book titled "The Founding Myths of Modern Israel" (*Garaudy v. France*, 2003) which denies atrocities against Jews and mankind in general. The author was accused in national state of spreading hatred and inciting racial discrimination. In another case processed against France, the Court recognized abuse of freedom of expression in a situation that appeared at first glance to be only provocative satirical expression but was actually a demonstration of hatred, anti-Semitism and support for Holocaust denial (*M'Bala M'Bala v. France*, 2015). In this case the Court identified that "it was in fact as dangerous as a head on and sudden attack,

and provided a platform for an ideology which ran counter to the values of the European Convention" (Factsheet on Hate speech, 2016, p. 3).

With these and other cases, the Court sent a clear message that the denial of the Holocaust and crimes against humanity is not only the most severe form of racial defamation of Jews and incitement of hatred, but that the purpose is denying the existence of clearly established historical events, and rehabilitation to fascist regime. Such attempts to deny history, according to the ECtHR, is not a scientific or historical research and they are contrary to the basic values of the European Convention.

3.3. Hatred in political speech

According to the Declaration on freedom of political debate in the media adopted by the Committee of Ministers of the Council of Europe (Declaration on freedom of political debate in the media, 2004) "the political debate does not include freedom to express racist opinions or attitudes that incite hatred, xenophobia, anti-Semitism and any other form of intolerance. Governments of Member States, public authorities and public institutions at national, regional and local level, as well as officials, have a special responsibility to refrain from statements, in particular the media, which may reasonably be understood as hate speech, or as speech likely to have the effect of legitimizing, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance".

However, in the case *Erbakan v. Turkey* the ECtHR found that there had been a violation of Article 10 of the European Convention by the then president of the Welfare Party. The applicant felt that his freedom of expression was violated by being convicted of making comments in a public speech that were contrary to the principle of secularism, and which were judged to incite hatred and religious intolerance. The Court held that "such comments from a well-known politician at a public gathering were more indicative of a vision of society structured exclusively around religious values." (Factsheet on Hate speech, 2016, p. 12). The Court stressed that "it was crucially important that in their speeches politicians should avoid making comments liable to foster intolerance" (Factsheet on Hate speech, 2016, p. 12). But, taking into account the importance of free political debate in a democratic society, the Court concluded that the reasons given to justify the interference in the exercise of the right to freedom of expression were not sufficient. In a similar judgment, the ECtHR found one applicant, Faruk Temel, who was then president of the youth wing of the Kurdistan Workers'

Party, had violated Article 10 of the ECHR. The applicant was charged and convicted of spreading propaganda because he publicly defended the use of violence and other terrorist methods. In the meeting of the party, he read a press statement that criticized the detention of the leader Abdullah Ocalan, and the disappearance of persons taken into police custody. The Court found that freedom of expression of the applicant had been harmed, especially because he spoke as a political actor and as a member of an opposition political party who presented party's stance on current issues of general interest (Faruk Temel v. Turkey, 2011, para 60). Also, the Court considered that the speech of the applicant, taken as a whole, had no potential to inspire others to use violence or armed resistance and thus did not constitute hate speech (Faruk Temel v. Turkey, 2011, para 62).

4. Assessment of the context in which hatred is expressed

When deciding on a specific case, ECtHR primarily analyzes speech or other content (written text, drawing, cartoon, etc.) through which a person has expressed his views. Despite the content of expression, the Court analyzes and evaluates the context of the circumstances of every particular expression. The context is assessed in terms of whether the expression was made in public debate as an exchange of conflicting views and opinions. The intention to humiliate or to belittle a specific group of people or to cause discord, animosity or conflict is one of the indicators for which a particular expression could be considered as a hate speech. In addition, the Court looks at who in the present case was spreading hate speech. Is it a politician, journalist or other person that was using his position or profession as a cover for hate speech? In the case of *Erbakan v. Turkey*, ECtHR stressed that it crucial is to avoid comments that could incite intolerance in the speeches of politicians. However, for democratic societies it is very important that there is a climate of free political debate. The existence of the free political debate must not be choked off under pressure from the threat of spreading hate speech. For these reasons and in mention case of *Faruk Temel*, the Court finds a violation of freedom of expression because the speech of the applicant, taken as a whole, had not the potential to incite others to violence and does not constitute hate speech. Overall, regardless of expressed extreme religious and anti-democratic attitudes, the Court assessed that there is a violation of freedom of expression if expressing are given in a democratic debate with conflicting views and exchange opinions. For these reasons, for some apparently uncontested cases of hate speech, the Court takes the view that freedom of expression should prevail. The best illustration of the influence of the context in which hate speech is expressed, we can find in the

case *Gündüz v. Turkey*. Applicant was a self-proclaimed member of the Islamist sect. He complained that his freedom of expression is violated because he was found guilty and sentenced to two years in prison for inciting hatred and enmity because of differences based on religious grounds. But, his views was expressed in a televised debate that aired live late at night. In that debate, applicant criticized democracy, modern secular institutions, secular and democratic principles. He openly called for the introduction of Sharia law. Despite the undeniable fact of the extreme views of the applicant, however, the Court found that there was a violation of freedom of expression of the applicant, taking into account the context and circumstances in which those views were expressed. The applicant expressed their views through active participation in the animated pluralistic public debate. The Court stopped the stance that this issue is the subject of widespread debate in the Turkish media and refers to a problem of general interest. Hence, according to the Court, the views of the applicant and his remarks to the existing secular system, cannot be regarded as a call to violence or as hate speech based on religious intolerance (*Gündüz v. Turkey*, 2003, para 51). According the Court, mere fact of defending Sharia and call for its introduction, but without a call for violence, cannot considered hate speech (para 51).

The impact of the context and circumstances of the present case, perhaps is the best illustrated in *Jersild v. Denmark*. Namely, the applicant is a journalist convicted of aiding incitement and dissemination of racist expressions in connection with a documentary prepared and containing extracts of a television interview with three members of the group of young people called "Greenjackets". Those young people were making derogatory comments about immigrants and ethnic groups in Denmark. But, in this case, the Court made a distinguish between members of that group who openly express racist attitudes on the one hand, and the applicant, who tried to expose, analyze and explain this group, on the other side. The Court found a violation of Article 10 of the ECHR on the grounds that the documentary as a whole had no intended to propagate racist attitudes and ideas, but only to inform the public about a social problem (*Jersild v. Denmark*, 1994, para 33).

Case of *Delfi AS v. Estonia* raised the question whether the portal which sets out the information on the Internet has a responsibility in terms of offensive and violent comments bordering on hate speech. In this case, portal complained about the responsibility for the comments of readers questioned his freedom of expression. The Court finds that the determination of liability portal by Estonian courts was justified and proportionate, particularly particularly because: comments were deeply offensive; Portal failed not to

prevent their publication, profited from their posting and allow authors to remain anonymous and the fine of 320 euros determined by Estonian courts was excessive (Лазарова Трајковска, 2015, p. 50)

5. Concluding remarks

From the above mentioned cases processed in the case-law of the European Court of Human Rights we can see that the Court has identified various forms of expression that do not comply with the European Convention on human rights and fundamental freedoms. These cases are connected with freedom of expression that is protected by Article 10 of the European Convention, but also with numerous other rights and freedoms protected under this Convention, as freedom of religion, protection of discrimination, etc.

It is undisputed that the Court strongly condemns the speech that is aimed at fostering racial, religious, and national or any other intolerance and bigotry and discrimination on any grounds. Primary responsibility to respect the rights guaranteed by the Convention lies with national authorities. The ECtHR should intervene only where national authorities have not fulfilled this obligation. ECtHR will undoubtedly face further challenges in determining the spoken words in their extremity and in their potential to encourage intolerance, discord and violence. Borderline cases and dissenting opinions will always exist and that is certainly part of the democratic process of decision-making process by the Court.

However, in current practice ECtHR established guidelines by which States should identify and differentiate between cases of expression with elements of hate speech from the expression that should be protected under the provisions of the European Convention. Sometimes such identification is quite subtle issue because there are cases in which the expression seemingly is justified, but in its essence contains all the elements of hate speech. Conversely, situations in which, though seemingly it comes to hate speech, however, the circumstances of the case, are to inform the public on issues of broad public interest or it comes to expression in a free and democratic debate protected by Article 10 of the European Convention. Besides the content of expression, the Court analyzes and evaluates the context of circumstances in terms of whether the expression was made in public debate, which should be free, but should not be an arena for expressing views that could incite hatred.

Following these guidelines, States have a positive obligation to adopt legislation, to set standards and to create an environment for respecting diversity. In fulfillment of positive obligations, those guidelines could be basis for creation of public policies for dealing with clearly expressed hate speech, but also with subtle forms of hate speech.

With its case-law, the Court sends a clear and powerful message - hate speech must not be tolerated. All forms of expression that are contrary to the spirit of the European Convention must be disabled and prevent their spread. This message is especially important today, when the world has faces with profound contradictions, divisions, terrorism and the threat of collisions with larger sizes. But, in the same time, through its judgments and decisions ECtHR send a message that in endeavor to prevent hate speech, we must not go to the other extreme and at no point should not be lost the fact that freedom of expression is basic human right and one of the most important human rights and that nothing should move the standards and bring into question this freedom and its democratic value.

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