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Legal Concept of Hate Speech and Jurisprudence of the European Court of Human Rights

VESNA ALABURIĆ
Lawyer and Political Scientist

Summary

This article problematizes the legal concept of so-called hate speech in order to contribute to current debates on this complex and omnipresent social phenomenon. Firstly, it refers to the provisions of various international human rights instruments relevant in the context of combating hate speech, providing general legal framework for the proper assessment of this issue. Then it discusses the legal concept of hate speech and certain controversies and difficulties involved. In particular, it points to the specific distinction that must be established and preserved between hate speech and other forms of hateful speech. Finally, the jurisprudence of the European Court of Human Rights concerning hate speech is analyzed by providing relevant examples from its case-law. In this connection, certain serious deficiencies in the ECtHR hate speech jurisprudence are indicated and briefly explained.

Keywords: Hate Speech, Hateful Speech, Discrimination, Vulnerable Groups, International Human Rights Instruments, European Convention on Human Rights, ECtHR

1. Introduction

Hate speech is a highly complex social phenomenon. It is by no means a new phenomenon. However, although known and existent in various forms of social organization throughout history, only during the 20th century (especially in the wake of WWII) it was recognized by the international community as a universal evil that should be restricted and suppressed by appropriate legal, political and educational means and measures. Various human rights agreements have been adopted at the international level in order to ensure certain fundamental rights and freedoms to all human beings without discrimination on the grounds such as race, colour, nationality, sex, language, religion or other status. Principles/fundamental values of

inviolable human dignity, equality and non-discrimination are recognized as the cornerstones of modern democratic society constitution. Hate speech directly endangers these fundamental principles/values. Owing to the rapid development of new means of communications in recent decades (the Internet, in the first place), hate speech has become a global phenomenon requiring comprehensive, coherent and harmonized response on the international and national levels. In recent years it has been the subject of fierce debates, among jurists in the European countries in particular.[1] There are no final conclusions yet, and the debate over hate speech continues. Any meaningful discussion on the subject of hate speech and the relevant jurisprudence of the European Court of Human Rights (ECtHR) in this respect, however brief it may be, should, at least, take into consideration the following:

i) relevant international legal framework (i.e. specific provisions of the relevant international human rights instruments relating to (a) free speech guaranties, (b) provisions prohibiting discrimination on various grounds such as race, colour, religion, ethnicity, sex, age, language or other status, as well as (c) the prohibition of abuse clauses contained in those instruments;
ii) European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) and in particular its Article 10 which guarantees the right to freedom of expression and provides conditions for possible limitation of this right;
iii) interpretation and application of Article 10 of the Convention (concerning hate speech) as developed in the case-law of the ECtHR;
iv) ECtHR interpretation and application of Article 17 (abuse of rights clause) of the Convention in this context (i.e. in the context of hate speech jurisprudence);
v) vital role of the media and journalists in a democratic society and special duties and responsibilities of media and journalists when disseminating hate speech statements of politicians and other participants in the public discourse;
vi) certain controversies and shortcomings of the ECtHR jurisprudence relating to hate speech.

[1] Surprisingly, hate speech has not been the subject of serious debates among jurists in Croatia, although our public discourse is contaminated to a significant degree with various hate speech instances.

2. International Legal Framework

At the outset, it should be noted that various international human rights instruments (universal and/or regional) do not contain, *expressis verbis*, the term hate speech. On the other hand, the term hate speech has been widely used in the documents (resolutions, recommendations, directives, reports etc.) of various international organizations, as well as in the decisions/judgments of international courts/commissions/committees empowered to interpret and apply respective human rights instruments.

Universal Declaration of Human Rights[2] provides in Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 29 states: "[...] (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Article 7 of the Declaration stipulates: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Article 2 of the Declaration establishes: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]" Finally, Article 30 prohibits abuse of the rights contained in the Declaration stating: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

International Convention on the Elimination of All Forms of Racial Discrimination[3] in its Article 1(1) defines the term "racial discrimination", rather widely, as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". In Article 2(1) State Parties commit themselves to "[...] pursue by all appropriate means and without delay a policy of eliminating racial discrimina-

[2] Adopted by the General Assembly of the United Nations on 10 December 1948 (General Assembly resolution 217 A).

[3] Adopted by the General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969.

tion in all its forms and promoting understanding among all races [...]". In Article 4 State Parties "[...] condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination [...]", and specifically undertake to "[...] declare an offence punishable 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 [...]".

International Covenant on Civil and Political Rights[4] guarantees freedom of expression by Article 19: "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals." In Article 20 the Covenant prescribes: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Provision of Article 2 of the Covenant provides, *inter alia*: "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Finally, Article 5 of the Covenant states: "1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

Similarly, *American Convention on Human Rights* (ACHR)[5] provides in Article 13 (freedom of thought and expression): "1. Everyone has the right to freedom

[4] Adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

[5] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, entry into force on 18 July 1978.

of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals. [...] 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

By ratifying these documents, state parties accepted certain negative and positive commitments, depending on the rights and/or freedoms concerned. On the one hand, the states committed themselves not to interfere with the rights and freedoms guaranteed therein to a larger extent than necessary and proportionate in a democratic society for the protection of some other legitimate aims. On the other hand, to ensure (by various positive actions/measures, including legislative) undisturbed enjoyment/exercise of the rights and freedoms guaranteed. These international agreements and their respective relevant provisions, referenced and quoted above, are essential and indispensable for the proper understanding and consideration of the malign phenomenon of hate speech. They provide a kind of general horizon or background for the proper reflection on and meaningful approach to this phenomenon, both in legal theory and legal (legislative and court) practice. If this horizon is disregarded, this will inevitably lead to conceptual confusion in theory and unacceptable, even absurd, results in (legislative and court) practice.

It is evident from the above-mentioned human rights documents that they:

i) declare *inviolable dignity* inherent to all human beings, as well as their *equality*;

ii) explicitly guarantee the right to freedom of expression to everyone;

iii) establish preconditions for possible limitations to this right by providing an exhaustive list of so-called "legitimate aims" (i.e. certain individual and social values deserving protection in a democratic society, such as *rights or reputations of others, national security, public order, or public health or morals*);

iv) explicitly exclude certain types/forms/contents of expression from the scope of the free speech guaranties (as exemplified above in the ACHR, Article 13);

v) explicitly prohibit discrimination in the enjoyment of the rights and freedoms guaranteed on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

vi) explicitly prohibit the abuse of the rights and freedoms recognized in those instruments for the purpose of destruction or suppression of any of the rights and freedoms guaranteed.

It should be noted that the principle of *equality* and the principle of *non-discrimination* are, undoubtedly, the most important principles (fundamental values) enshrined in the mentioned international human rights instruments. All other principles/rights contained therein (including the right to freedom of expression) should be interpreted and applied in the light of these principles/rights. In fact, the principle of non-discrimination is derived from the principle of equality and both are rooted in and derived from the axiomatic determination/premise on the inherent and inviolable dignity of every human being. At the very least, it must be accepted that the right to equality, the right to non-discrimination and the right to freedom of expression/speech are the rights of the same legal status, deserving the same level of protection. Consequently, this allows the states a wider discretion in restricting various instances of so-called hate speech since this kind of public discourse, unlike various other forms of expression, is in direct conflict with the right to equality and the right to non-discrimination (as will be explained below).

If the protection afforded to freedom of expression is the main indicator of the democratic character of the particular society, then the respect of the principle of equality and protection against discrimination are the main indicators of its humanity. In this context (i.e. in the context of discussion on hate speech) it should be emphasized and remembered that according to the mentioned international human rights instruments only certain forms/contents of public speech could/should be subject to strict legal limitations/prohibitions. Namely, only propaganda for war and advocacy of national, racial, or religious hatred that constitute incitements to violence, hostility or discrimination against any person or group of persons on any ground (as it is stated in Article 13 of the ACHR) could and should as such be *banned* (i.e. prohibited by law) in a democratic society. All other forms of expression enjoy the protection in accordance with the free speech guaranties, i.e. fall within the scope of those guaranties.

3. Relevant Provisions of the European Convention on Human Rights

In a manner similar to the above-reviewed international human rights agreements, the *European Convention on Human Rights*,[6] as the most important regional hu-

[6] Adopted by the Council of Europe on 4 November 1950, entry into force on 3 September 1953.

man rights instrument for the European countries, guarantees freedom of expression to everyone. Article 10 of the Convention states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...]
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Additionally, Article 14 ensures the enjoyment of the rights and freedoms recognized in the Convention "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".[7] Finally, Article 17 prohibits the abuse of conventional rights and freedoms, stating: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

This Convention constitutes a sort of "Magna Carta" of human rights and fundamental liberties for the European countries, i.e. 47 member-states of the Council of Europe.[8] In this connection it should be pointed out that, quite similar to the

[7] Similarly, Protocol 12 to the European Convention provides general prohibition of discrimination in the enjoyment of *any right set fort by* (national) *law* (and not exclusively the rights recognized in the Convention) (see: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, open to signature on 4 November 2000, entry into force on 1 April 2005).

[8] In this European context, the *Charter of Fundamental Rights of the European Union* (200/C 364/01) should also be mentioned. The Charter was proclaimed in December 2000 and became binding in December 2009. By its Article 1 the Charter declares that the human dignity is inviolable and must be respected and protected. By Article 11 it guarantees freedom of expression to everyone, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 20 guarantees to everyone equality before the law. Article 21 prohibits any discrimination based on any ground. And Article 51, relating to the scope of guaranteed rights, stipulates that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms" and, further, that "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objec-

above-mentioned international human rights instruments, the Convention (i) guarantees freedom of expression, providing conditions for possible limitations of this freedom, (ii) prohibits discrimination on any ground "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" and (iii) contains an "abuse of rights" clause. But, in contrast to those instruments, the Convention does not contain specific provision explicitly prohibiting certain kinds of expression which could be labeled as hate speech and, consequently, legally banned/restricted as such, i.e. "propaganda for war and advocacy of national, racial, or religious hatred that constitute incitements to violence, hostility or discrimination against any person or group of persons".

4. General Remarks on the Legal Concept of Hate Speech

The fact that the Convention does not contain specific provision explicitly prohibiting hate speech complicates, to a significant degree, the ECtHR dealings with application relating to such matters and, consequently, makes its jurisprudence concerning the phenomenon of hate speech controversial, unforeseeable and liable to justified criticism. In this connection, it should be borne in mind that the issue of hate speech is undoubtedly one of the most complex issues in the field of freedom of expression in general, theoretically as well as practically. In recent years the issue of hate speech has been the subject of heated public debates in the European countries (Croatia included). Regrettably, these debates show that there is a lot of misunderstandings on the concept even among legal scholars, let alone among legal practitioners. There is no universal, commonly accepted definition of hate speech in legal theory. Various authors define hate speech differently. There is no need to provide and review the various definitions here. But despite all differences in the definitions, there are certain common aspects in all of them. It could be argued that as far as legal theory is concerned the term hate speech has a relatively precise meaning. It embraces specific kinds of attacking speech which spread, promote and/or justify hatred, hostility, contempt, intolerance, exclusion, separation and prejudices and call for or incite violence and/or discrimination against certain identifiable and "vulnerable" groups and/or their members on account of their race, colour, national or ethnic origin, religion, age, sex, sexual orientation, gender iden-

tives of general interest recognised by the Union or the need to protect the rights and freedoms of others". Finally, Article 54 (abuse of rights clause) states: "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."

tity, health, disability, immigrant status or some other common characteristic or status.[9]

In sum, from the legal point of view two preconditions must be *cumulatively* met in order to attribute the label of hate speech to certain forms of expression: firstly, the content of the expression must be hateful, hostile, threatening, offensive, prejudicial, belittling, derogating, humiliating, dehumanizing...; secondly, such speech must be aimed at certain "vulnerable" groups and their members by promoting, inciting or justifying hatred, hostility, violence and/or discrimination "against certain identifiable groups and/or individuals on account of their particular common characteristics" (such as race, sex, age, religion, health, disability, nationality, immigrant status, sexual orientation, gender identity or other status). Although the list of these "protected groups" is not exhaustive (as the term "other status" clearly confirms), it should not be extended *ad limitum*, so as to include all sorts of different social groups and their members (such as political parties, sport clubs, military, police forces, politicians, government, business enterprises, lawyers, judges, journalists, members of particular professions etc.). "Protected identifiable groups" in this context should include only social groups which objectively are (or could be) subject to possible discrimination in society. In other words, only "vulnerable", or historically "victimized", "deprived", "oppressed" or "disadvantaged" groups should be legitimately protected from hate speech. These "vulnerable" groups represent, in principle, minority in society (such as various ethnic or religious minorities, gay persons etc.), but in exceptional cases it could even be a majority group (such as women or black people in certain apartheid societies). In both cases we are talking about "vulnerable", or historically "victimized"/"disadvantaged" social groups and their members. This should always be borne in mind, so as to avoid and prevent utilization/misuse of hate speech legislation for illegitimate purposes, i.e. for the protection of social groups that represent the overwhelming majority in the society against the alleged hate speech of individuals and/or minority groups.

Sub specie iuris, hate speech must be clearly distinguished from various other forms/contents of hateful/offensive speech. The decisive feature/aspect of hate speech is not as much its "hateful/hostile/prejudicial" content (i.e. hateful emotions emanated) as its intrinsic "discriminatory" character in relation to the vulnerable "group targeted", i.e. its "discriminatory intention" directed against certain "vulnerable" groups and their members on account of their particular identity. It should be noted here that hatred is not always so easily recognizable and detectable in the various instances of hate speech. Hate speech can be articulated and

[9] See Alaburić, 2003. In this article, I suggested a similar definition of hate speech as provided herein.

expressed in the form of scientific or pseudo-scientific writings without a trace of hatred on the surface. However, it still remains hate speech if it contains discriminatory premises or shows discriminatory intentions towards certain vulnerable groups.

In contrast, hatred, animosity and/or hostility towards someone or something are the primary (if not exclusive) feature of hateful speech, recognizable at first sight. The principal target of hate speech is always a group, even if only an individual member of the group is attacked. Moreover, it is (explicitly or implicitly) aimed at discrimination of the targeted group as such and, therefore, directly concerns all members of the group. On the other hand, hateful speech is, as a rule, aimed at and prejudicial to individuals (detrimental for their honor or reputation or some other personal rights). For example, if someone says that XY must or should not be allowed to become a Minister in the Government, he possibly calls for discrimination of this particular person, but if someone says that XY, being a Serb, or Muslim, or gay, should not be allowed to become a Minister, then he calls for discrimination not only against particular persons, but against whole groups they belong to (and all of their members) as well. Additional reference to a person's group identity substantially and, in my opinion, dramatically changes the context and the meaning of the speech, i.e. transforms otherwise hateful/hostile/discriminatory speech into hate speech in the legal sense of the term.

The term hate speech also covers speech that promotes, advocates or glorifies various social theories/ideologies/policies of race/ethnic supremacy, such as fascist and Nazi ideologies, as well as speech that approves, glorifies, justifies, minimizes or denies crimes committed by the fascists and Nazis during WWII (Holocaust and other crimes against humanity). This is logical and justified, since these ideologies are intrinsically racist and discriminatory. To summarize, hate speech is always, directly or indirectly, aimed at inciting discrimination against targeted social groups and their members on account of their particular common characteristics/identity. Its principal aim is to exclude, segregate, alienate, humiliate, dehumanize, intimidate and in the final analysis discriminate "vulnerable" social groups and their members and, consequently, deprive them of the human rights and freedoms guaranteed or, at least, make the exercise of those rights substantially more difficult for them. By spreading hatred and hostility against such groups, haters create a social atmosphere/environment suitable/favorable to their discrimination.[10]

This discriminatory aspect of hate speech is clearly recognized by the EU Directive implementing the principle of equal treatment between persons irrespective

[10] This could result, in most drastic cases, in their elimination from society, or even physical extermination (Holocaust, Ruanda genocide, Srebrenica genocide...).

of racial or ethnic origin.[11] It contains the following definition of "harassment", as a special type of discrimination: "Harassment shall be deemed to be discrimination within the meaning of paragraph (Article) 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States" (Article 2(3)).[12]

Accordingly, speech can truly discriminate, even if it does not contain explicit instructions or incitement to discrimination. It is sufficient that it "violates dignity of a person" and "creates an intimidating, hostile, degrading, humiliating or offensive environment" for certain vulnerable groups and their members. As argued before, hate speech must not be confounded with all kinds of hateful speech. Restrictions/limitations imposed on hate speech require different/distinct legal foundation and justification from those concerning other forms/contents of speech (including hateful speech). Considering fundamental values/principles/rights enshrined in various international human rights agreements and involved here ("human dignity, equality and non-discrimination", as explained), the states enjoy a significantly wider margin of appreciation/discretion in restricting hate speech than is the case with other kinds of speech that are subject only to general limitation clauses contained in the provisions guaranteeing freedom of expression.[13]

Therefore, the legitimate principal aim/purpose/justification of hate speech laws could not be to make public discourse more decent, courteous, polite, civilized, cultivated or even tolerant but to combat, suppress and restrict speech aimed at discrimination of individuals or groups based on their race, religion, nationality, origin, sex, sexual orientation, disability, age or other status, i.e. based on their particular distinct, historically, biologically, genetically or culturally conditioned identity, or "who they are". That does not mean that the states are not entitled to

[11] Directive 2000/43/EC of 29 June 2000.

[12] The Croatian Law on Suppression of Discrimination (Zakon o suzbijanju diskriminacije, NN 85/08, 112/12) defines harassment in an almost identical manner (Article 3(1)). But unlike the EU Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which relates, in the first place, to racial and ethnic discrimination, the Croatian Law significantly extends the list of protected groups by ensuring protection against discrimination (including harassment) based on "race, ethnicity or colour, sex, language, religion, political and other conviction, national or social origin, wealth, membership in syndicate, education, social status, marital or family status, age, health, disability, heredity, gender identity, expression or sexual orientation" (Article 1).

[13] Important note: this article does not discuss whether hate speech should be legally prohibited or not, and what legal means or modalities should or could be used and what legal standards applied in a democratic society to restrict such public speech.

limit various kinds of hateful expression through their respective legislations relating to freedom of expression in general, but this must not be done under the pretext of combating hate speech and applying the same legal standards/restrictions.[14] This would be a clear case of (mis)use of hate speech laws for illegitimate purposes.

In particular, governments must not use hate speech laws to shut the mouths of their opponents or critics, or to restrict public debate on various issues of public interest, or to repress unpopular ideas and opinions. States are allowed to impose certain limitations to free speech in general, but this must be done strictly within the limits of free speech guaranties, namely, only if it is with sufficient precision prescribed by law, necessary in a democratic society and proportionate to the legitimate aim(s) pursued. Democratic society should be able to cope with and tolerate a certain amount of hateful content in the public discourse without having to resort to criminal or disproportionate civil law sanctions. After all, in a truly democratic society citizens should have the right to freely express their negative feelings, dissatisfaction, animosity, hostility and, in certain cases, even hatred towards various social occurrences, policies, measures, individuals or institutions (even if the words/expressions used could be assessed as inappropriate, intolerant or unjustified).[15]

Considering all stated above, it is of the utmost importance, and one of the principal tasks of legal theory in this field, to provide a comprehensive and operational legal definition of hate speech which could be commonly accepted and applied through appropriate legislation and court practice. In this connection, the definition of hate speech contained in the *Recommendation of the Committee of Ministers to Member States on "Hate Speech"* could be relevant for the member states of the Council of Europe.[16] Despite of its serious deficiencies it could serve as a relevant starting point for legislators and courts in dealing with the instances of hate speech. According to this definition, the term hate speech covers "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" (Appendix to Recommendation [Scope]). Consequently, hate speech relates to and encompasses specific forms of expression that: (i) spread, (ii) incite, (iii) promote and/or (iv) justify "hatred based on intolerance" against certain social groups and their members (specifically mentioning racial hatred, xenophobia, anti-Semitism, aggressive nationalism,

[14] Hate speech laws usually involve serious criminal sanctions.

[15] Such speech could be combated by various measures (educational in the first place), including appropriate and balanced legal provisions, but it should not be repressed by resorting to sweeping provisions of hate speech laws.

[16] Recommendation No. R (97) 20, adopted on 30 October 1997.

ethnocentrism, discrimination and hostility against minorities and immigrants, but the list is not exhausted).

Member states of the Council of Europe are recommended to establish a legal framework consisting of civil, criminal and administrative law provisions on hate speech. With regard to criminal sanctions, the Recommendation warns that these sanctions generally constitute serious interference with the freedom of expression and therefore the principle of proportionality has to be respected strictly (Appendix/Principle 2). The Recommendation further states that national law and practice should take due account of the role of the media in communicating information and ideas which expose, analyze and explain specific instances of hate speech and the underlying phenomenon in general, as well as the right of the public to receive such information and ideas. National law and practice should, therefore, clearly distinguish between the responsibility of the authors of expression 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, on the other hand (Appendix/Principle 6).

5. ECtHR Jurisprudence Concerning Hate Speech (Case-law Examples)

It must be reminded, in this connection, that unlike some other international human rights instruments (as explained above), the *European Convention on Human Rights* does not contain specific provision(s) explicitly prohibiting certain forms of expression which could be deemed as hate speech and legally restricted as such. Expectedly and admittedly, that makes the work of the ECtHR more difficult and to a certain degree open to arbitrariness. In consideration of applications based on the alleged violation of the right to freedom of expression (including those relating to hate speech) the ECtHR applies Article 10 (guaranteeing freedom of expression) and Article 17 of the Convention (prohibiting abuse of conventional rights and freedoms).

Guillotine Effect of Article 17 in the Practice of the ECtHR

Article 17 of the Convention represents the so-called "abuse of rights" clause, prohibiting misuse of the Conventional rights and freedoms for the purposes of destroying those rights and freedoms.[17] Pursuant to Article 35 of the Convention "the Court shall declare inadmissible any individual application if it considers that the application is incompatible with the provisions of the Convention or the Protocols thereto or manifestly ill-founded". A significant number of applications concern-

[17] The other international human rights instruments referenced above contain a similar provision.

ing hate speech instances submitted pursuant to Article 10 of the Convention has been declared inadmissible by the ECtHR by invoking precisely Article 17 of the Convention which prohibits abuse of conventional rights, i.e. activities and acts "aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention". In other words, the majority of applications relating to various instances of so-called hate speech has been disposed of, as a rule, at the admissibility phase of the proceedings, and declared inadmissible *ratione materiae* by applying Article 17 of the Convention. The ECtHR refused to consider such applications (i.e. to issue judgments on the merits) and they have been, *de facto* and *de iure*, excluded from the scope of Article 10 protection. Holocaust denial, revisionism of the historical facts of WWII, anti-Semitism, denying the crimes against humanity committed by the Nazis, activities of various paramilitary groups, attempts to revive the Fascist party, as well as some other forms of *prima facie* racial or religious hatred (especially islamofobia) have been consistently excluded from the protection of Article 10.

The following cases are examples of such practice:

Pavel Ivanov v. Russia:[18] The applicant "authored and published a series of articles portraying Jews as the source of evil in Russia, calling for their exclusion from social life", accusing this ethnic group of plotting a conspiracy against Russian people and ascribing "Fascist ideology to the Jewish leadership". He was convicted for public incitement to ethnic, racial and religious hatred. "The application was declared inadmissible by the ECtHR, for such general, vehement attack on one ethnic group is directed against the Convention's underlying values such as tolerance, social peace and non-discrimination."

Garaudy v. France:[19] The Court considered that the content of the book *The Founding Myths of Modern Israel* "had amounted to Holocaust denial and pointed out that denying crimes against humanity was one of the most serious forms of racial defamation of Jews and of incitement to hatred of them". The Court concluded that "the real purpose was to rehabilitate the National Socialist regime and accuse victims of falsifying history". These acts are manifestly incompatible with the core values of the Convention and therefore Article 17 was applied and application declared inadmissible.

Norwood v. UK:[20] "The applicant had displayed in his window a poster supplied by the British National Party, of which he was a member, representing the Twin

[18] ECtHR, application no. 35222/04, decision of 20 February 2007.

[19] ECtHR, application no. 65831/01, decision of 24 June 2003.

[20] ECtHR, application no. 23131/03, decision of 16 November 2004.

Towers in flame. The picture was accompanied by the words 'Islam out of Britain – Protect the British People'. He was convicted of aggravated hostility towards a religious group." The Court declared the application inadmissible (incompatible *ratione materiae* with the Convention) invoking Article 17 and found that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.

Abedin Smajic v. Bosnia and Herzegovina:[21] The applicant, a Bosnian lawyer, wrote a number of posts on a publicly accessible Internet forum in which he described military action to be undertaken against Serb villages and neighborhoods in the Brcko District in the event of war caused by the Republika Srpska. The Court notes that the subject of the applicant's posts, even if written in a hypothetical form, had touched "upon very sensitive matter of the ethnic relations in post-conflict Bosnian society". Expressions used were highly insulting towards Serbs and the complaint was declared inadmissible, manifestly ill-founded, and it was rejected.

Application of Article 17 in the ECtHR jurisprudence concerning Article 10 was, to say the least, arguable, for various reasons. Firstly, Article 17 explicitly refers to "acts and activities", which could be reasonably interpreted as and applied to "deeds", not words. Secondly, such broad interpretation (and application) of Article 17 allowed the judges a too wide margin of discretion, bordering on arbitrariness. Thirdly, in cases concerning Article 10 it should be used (if at all) only in exceptional/extreme cases which are *prima facie* manifestly ill-founded, i.e. incompatible with the provisions of the Convention (such as direct incitement to war, violence or discrimination against specific groups); all other forms/contents of expression should be covered by the protection provided for in Article 10 of the Convention and duly considered in the judgments, strictly applying the well known three-part test of legality, legitimacy and necessity/proportionality of the disputed interference in democratic society. Admittedly, the ECtHR has obviously been aware of the controversies inevitably implied and involved in such application of Article 17 since, in recent years, it invoked relatively sparingly Article 17 as the basis for dismissal of applications concerning Article 10 of the Convention.

Application of Article 10 in Cases Involving Hate Speech

All applications concerning hate speech have been submitted pursuant Article 10 of the Convention alleging violation of the rights to freedom of expression guaranteed therein. A number of those applications have been declared admissible and duly considered by the ECtHR in the respective judgments. The ECtHR assessed

[21] ECtHR, application no. 48657/16, decision of 8 February 2018.

specific circumstances of each particular case in the light of guarantees contained in paragraph 1 of Article 10. Since the right to freedom of expression is not an absolute right but is subject to certain limitations in a democratic society ("in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary", as provided in paragraph 2 of Article 10), the ECtHR applies, to the specific circumstances of each case, so-called three-part test. It establishes (a) whether the impugned restriction has been prescribed by law, (b) whether it has pursued a legitimate aim and, finally, (c) whether the impugned restriction has been necessary in a democratic society and proportionate for the protection of the legitimate aim pursued.

Two cases are significant and indicative with regard to the scope of general protection afforded by Article 10. In the *Handyside v. UK* case[22] the Court pointed out, more than 40 years ago: "Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man". Subject to paragraph 2 of Article 10, "it is applicable not only to 'information' or 'ideas' that are favorably 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society." On the other hand, in *Erbakan v. Turkey*[23] the Court pointed out "that combating all forms of intolerance was an integral part of human-rights protection" and "that it was crucially important that in their speeches politicians should avoid making comments likely to foster such intolerance". The Court considers not only the content of the speech, but the case as a whole. Namely, it considers content of the statement, context, intention or the aim of the applicant, status of the author, public concerned, form, impact of the speech and all other relevant circumstances of the case. All relevant elements are combined and assessed on a case-by-case basis. Depending on the particular circumstances of each case, the ECtHR may find violation or non-violation of Article 10.

The following cases could serve as indicative examples of this practice:

Lehideux and Isorni v. France:[24] Lehideux was Minister for Industrial Production in the Government of Marshal Pétain from September 1940 to April 1942. He was the president of the Association for the Defence of the Memory of Marshal

[22] ECtHR, application no. 5493/72, judgement of 7 December 1976, para. 49.

[23] ECtHR, application no. 59405/00, judgement of 6 July 2006.

[24] ECtHR, application no. 24662/94, judgement of 23 September 1998.

Pétain. Isorni, attorney at law, was officially appointed to assist the President of the Bar Association in defending Marshal Pétain at his trial before the High Court of Justice. In August 1945, the High Court of Justice sentenced Philippe Pétain to death for collusion with Germany with a view to furthering the designs of the enemy. Isorni was the author of the advertisement published in the daily *Le Monde* bearing the title "People of France, you have short memories". The text recapitulated, in a series of assertions, the main stages of Philippe Pétain's life as a public figure from 1916 to 1945, presenting his actions, first as a soldier and later as French Head of State, in a positive light. Lehideux and Isorni were sentenced for public defence of the crime of collaboration with the enemy. In contrast to French courts, the ECtHR found that France violated Article 10. It stated, *inter alia*: 47. "[...] The Court considers that it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17. In the present case, it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as 'Nazi atrocities and persecutions' or 'German omnipotence and barbarism'. In describing Philippe Pétain's policy as 'supremely skillful', the authors of the text were rather supporting one of the conflicting theories in the debate about the role of the head of the Vichy government, the so-called 'double game' theory." And further: "55. [...] The Court (further) notes that the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately."

Sürek (no. 1) v. Turkey:[25] The applicant was the owner of a political weekly which published two readers' letters condemning military actions of the Turkish authorities against Kurdish population "in south-east Turkey and accusing them of brutal suppression of the Kurdish people in their struggle for independence and freedom". Domestic courts convicted him, in accordance with the Turkish Criminal Code, for the criminal offence of "disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people". The ECtHR found "that there had been no violation of Article 10 (freedom of expression). It noted that the impugned letters amounted to an appeal to bloody revenge and that one of them had identified persons involved in military operations by name, exposing

[25] ECtHR, application no. 26682/95, judgement of 8 July 1999 (Grand Chamber).

them to the possible risk of physical violence". In the assessment of the Court the applicant's conviction has been justified and proportional in a democratic society.

Feret v. Belgium:[26] "The applicant was a Belgian member of the Parliament and chairman of the political party Front National. During the election campaign, several types of leaflets were distributed carrying slogans including 'Stand up against the Islamification of Belgium', 'Stop the sham integration policy' and 'Send non-European job-seekers home'. The applicant was convicted of incitement to racial discrimination. He was sentenced to community service and was disqualified from holding parliamentary office for 10 years. He alleged a violation of his right to freedom of expression. The Court held that there had been no violation of Article 10 for the applicant's comments had clearly been liable to arouse feelings of distrust, rejection or even hatred towards foreigners and thus clearly amounted to incitement to racial hatred. The applicant's conviction had been justified in a democratic society in the interests of preventing disorder and protecting the rights of others, namely members of the immigrant community."

Vejdeland and others v. Sweden:[27] "This case concerned the applicants' conviction for distributing in an upper secondary school approximately 100 leaflets" (by leaving them in the school lockers) offensive to homosexuals. The leaflets contained "allegations that homosexuality was a 'deviant sexual proclivity', had 'a morally destructive effect on the substance of society' and was responsible for the development of HIV and AIDS... The Court found that these statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful acts. The Court stressed that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour. It concluded that there had been no violation of Article 10."

Leroy v. France:[28] The applicant, a cartoonist, published a drawing in a Basque weekly newspaper "representing the attack on the twin towers of the World Trade Center of 11 September 2001 with a caption imitating the advertising slogan of a famous brand: 'We all dreamt of it... Hamas did it'". He has been fined by the domestic courts. The ECtHR found no violation of Article 10. It considered, *inter alia*, that the applicant supported and glorified violent destruction of the twin towers and diminished the dignity of the victims.

Soulas and others v. France:[29] The applicants have been convicted for inciting violence against Muslim communities from northern and central Africa following

[26] ECtHR, application no. 15615/07, judgement of 16 July 2009.

[27] ECtHR, application no. 1813/07, judgement of 9 February 2012.

[28] ECtHR, application no. 36109/03, judgement of 2 October 2008.

[29] ECtHR, application no. 15948/03, judgement of 10 July 2008.

the publication of the book with the title *The Colonisation of Europe*, and the subtitle "Truthful remarks about immigration and Islam". The ECtHR found no violation of Article 10. It accepted, as relevant and sufficient, the arguments of the French courts that the content of the book and the terms used were intended to give rise in readers to a feeling of rejection and hostility against the Muslim communities as the main enemy in a future war of ethnic re-conquest.

Perincek v. Switzerland:[30] The applicant was a Turkish politician who publicly expressed the view, in Switzerland, "that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide. The Swiss courts held in particular that his motives appeared to be racist and nationalistic and that his statements did not contribute to the historical debate. The applicant complained that his criminal conviction and punishment had been in breach of his right to freedom of expression. The Court held that there had been a violation of Article 10." It concluded that it had not been necessary "to subject the applicant to a criminal sanction in order to protect the rights of the Armenian community". The Court emphasized: "expression on matters of public interest is in principle entitled to strong protection, whereas expression that promotes or justifies violence, hatred, xenophobia or another form of intolerance cannot normally claim protection" (para. 230).[31]

In addition to the above-mentioned cases and examples, we can outline at least a couple of other important cases particularly relevant when discussing the relationship between hate speech and media relative to the application of Article 10 of the Convention. These are:

Jersild v. Denmark:[32] The case is significant and exemplary in this context. The applicant was a Danish journalist convicted for aiding and abetting members of the racist group called *Greenjackets* in making abusive and derogatory remarks and racist comments by broadcasting their views. Some of these racist comments were: "niggers... are not human beings, they are animals", "just take a picture of a gorilla,

[30] ECtHR, application no. 27510/08, judgement of 15 October 2015.

[31] Denial of the crime of genocide committed in Srebrenica is the topic of the current heated public debate in Bosnia and Herzegovina and Serbia. Some Serb politicians deny the existence of genocidal intention, and accordingly the commitment of the crime of genocide in Srebrenica, although they do not deny that crimes of murder of thousands Muslim men had been committed. In this context, the following conclusion of the Court in the *Perincek* case should be mentioned: "[...] [G]enocide justification does not consist in assertions that a particular event did not constitute a genocide, but in statements which express a value judgment about it, relativizing its gravity or presenting it as right. The Court does not consider that the applicant's statements could be regarded as bearing this meaning; nor could they be regarded as justifying any other crimes against humanity" (para. 240).

[32] ECtHR, application no. 15890/89, judgement of 23 September 1994.

man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and all kinds of things...". The program was broadcasted in the context of a serious public debate on anti-immigration movements in Denmark. Based on this and other circumstances of the case, the Court concluded that the penalty/restriction imposed on the journalist by Dutch courts violated Article 10 of the Convention, stating:

> 35. News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" [...]. The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted. There can be no doubt that the remarks in respect of which the Greenjackets were convicted [...] were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 [...]. However, even having regard to the manner in which the applicant prepared the Greenjackets item [...], it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code.
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> 36. It is moreover undisputed that the purpose of the applicant in compiling the broadcast in question was not racist. [...]

Delfi AS v. Estonia:[33] This was the first case relating to the Internet, i.e. to the responsibility of the commercial news portals for the content of their websites. The applicant company which runs a new portal has been held liable (and sanctioned with a moderate fine of 320 E) by domestic courts for the offensive comments posted by the readers of the news portal below its article about disputable business practices of one ferry company. It is important to mention that the news portal removed disputable comments after six weeks "at the request of the lawyers of the owner of the ferry company". The ECtHR found no violation of Article 10. It held that the majority of the impugned comments published under the news portal article amounted to an incitement to hatred and/or violence against the owner of the ferry company. The Court established responsibility (pursuant to paragraph 2 of Article 10) of the Internet news portal for the clearly unlawful content published, especially if generated comments amounted to hate speech and incitement to violence or "direct threats to the physical integrity of individuals". Considering all aspects and circumstances of the case, the Court held that the restrictions imposed on the applicant company have been justified and proportionate to the legitimate aims pursued.

[33] ECtHR, application no. 64569/09, judgement of 16 June 2015.

6. Concluding Remarks Concerning the ECtHR Hate Speech Jurisprudence

The ECtHR jurisprudence concerning hate speech is still unsettled. It is by no means uncontroversial. Certain decisions and/or judgments/decisions concerning particular instances of hateful expressions, including those that reasonably fall under the notion of hate speech (within the meaning explained above), have been disputed by legal scholars and legal practitioners. On the other hand, there are judgments that have been commonly accepted and praised as well-reasoned and justified. It clearly follows from the relevant ECtHR case-law that certain forms/contents of "hate" or "hateful" speech enjoy a rather narrow scope of protection, if any, under Article 10 of the Convention. In particular those relating to Holocaust denials, promotion of fascist/Nazi ideologies or various terrorist activities, as well as those amounting to incitement to hatred, discrimination and/or violence against certain groups and their members. Some other forms/contents of hate speech enjoy a wider scope of protection in accordance with Article 10 guarantee and legal standards developed in the relevant ECtHR jurisprudence. It is also evident from its case-law that the ECtHR recognizes the vital role of the media and journalists in a democratic society in disseminating all information of public interest, including those relating to hate speech instances, bearing in mind the right of the public to receive this information. Therefore, such role of the media and media professionals must be respected and protected by national authorities. But the media and journalists are expected to exercise special caution when they disseminate information and ideas that could be deemed as hate speech, including those inciting hatred, violence or discrimination against certain groups or individuals, to ensure they do not become instruments of various groups or individuals in spreading and promoting those ideas.

However, it should be noted that the ECtHR jurisprudence regarding hate speech instances suffers from serious deficiencies:

i) invoking Article 17 of the Convention as the legal basis for dismissal of applications concerning Article 10 is a highly problematic practice open to justified criticism; the principal purpose of Article 17 (prohibition of abuse of rights) is to protect the democratic organization of the state/society against groups and individuals invoking conventional rights and freedoms with the aim of undermining them; the ECtHR jurisprudence concerning interpretation and application of Article 17 does not provide clear criteria for determining which activities/acts/conducts reasonably fall within the ambit of Article 17 and that makes this jurisprudence inconsistent and to a significant extent arbitrary; when "speech" (not conduct) is concerned, Article 17 should be used, *if at all*, only in the most exceptional cases (directly calling for or inciting violence against certain vulnerable groups); in all other hate

speech cases Article 10 should be applied, including limitations provided therein, in conjunction (where appropriate in the circumstances of the case) with Article 14 of the Convention and Protocol 12;

ii) the lack of a coherent, comprehensive and operational definition[34] of hate speech is the most serious deficiency of the relevant ECtHR jurisprudence; the ECTHR case-law blurs the crucially important distinction between hate speech and some other forms of hateful expressions (as explained above); in consequence, the ECtHR assessment of hate speech is primarily based on the (offensive/attacking/hostile/vulgar) words used, not on the (discriminatory) ideas conveyed; absent of a comprehensive definition, the ECtHR case-by-case approach in dealing with particular instances of hate speech is inconsistent, unpredictable and practically doomed to confusion and arbitrariness;

iii) the lack of a hate speech definition allowed the ECtHR an unacceptably wide interpretation and application of the term "other status", contained in the non-discrimination provisions (of the Convention and other relevant international human rights instruments); this term has been widened *ad absurdum* in the relevant ECtHR jurisprudence, so as to include not only certain "vulnerable" groups and their members explicitly mentioned in those provisions, but virtually all different social groups based on grounds such as membership in the police or military force, business enterprise, organization, marital status, parenthood, place of residence etc.; such interpretation of the term "other status" in the context of hate speech jurisprudence additionally contributes to confusion;

iv) the lack of a coherent and comprehensive definition of hate speech is even more relevant bearing in mind that one of the essential roles of the ECtHR and its case-law is to contribute to the harmonization of legislative and judicial practices in the field of human rights and freedoms among the CoE member-states, i.e. to provide clear (as possible) guidelines through its case-law to national legislators and domestic courts in implementing the Convention, especially with regard to such a precious and for a democratic society so important freedom – freedom of expression; in this respect the ECtHR case-law does not help much in establishing common legal principles and applicable legal standards.

Hopefully this will change, and these insufficiencies will be corrected in due time. The sooner, the better.

[34] Every definition is a limitation.

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Mailing Address: **Vesna Alaburić**, Hebrangova 21, 10000 Zagreb. *E-mail*: v.alaburic@gmail.com