



Freedom of expression vs hate speech

Freedom of expression is one of the most basic human rights with fundamental importance for both the individual and the society. At the individual level, it is a means for the development of the personality, as with the expression and exchange of ideas man progresses and ends up as a human being. On the other hand, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress¹. Such a society is based on citizens' choices. And the right of speech and expression is essential for communicating these choices and for shaping them through information. Given the importance of this right, we have to be very cautious with its restrictions. For this reason, subject to paragraph 2 of Article 10 of the European Convention on Human Rights, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued².

Particular examples of the restriction on freedom of expression are the libel and the defamation which do not fall within the scope of protection of freedom of expression but are punishable by criminal law. However, these are not cases where particular issues arise as to the legitimacy of the restriction. Such issues and questions arise, on the contrary, with hate speech. So whether or not the hate speech has to be protected by freedom of speech and what is the suitable legislative treatment of this phenomenon.

But what exactly is hate speech? There is no commonly accepted definition for "hate speech". Even at the level of the European case law the European Court of Human Rights has not given a precise definition of hate speech, but the Court just refers in some judgments to "all forms of

¹Handyside v. the United Kingdom judgment of 7 December 1976, § 49.

²Handyside v. the United Kingdom judgment of 7 December 1976, § 49.

expression which spread, incite, promote or justify hatred based on intolerance”³. However, Council of Europe (Committee of Ministers) has given an almost thorough definition, which is the only internationally adopted definition of hate speech and according to this definition the term "hate speech" shall be understood as covering all forms of expression which spread, incite⁴, 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 origin⁵. We have to note that hate speech includes every form of expression, such as written or oral speech, art, games and posts on the internet. As far as the internet is concerned, it certainly seems to be a place that boosts the development and spread of hate speech mainly through the social media and it should be noted that online hate is growing more and more. Hate speech has detrimental effects on the person or the group of persons that targets. In particular, the effects of hate speech include discrimination, marginalization and alienation, while the phenomenon targets individuals or groups of persons at personal and social level. In addition, it raises community tensions and, as a result, causes damage to society as a whole. European Commission against Racism and Intolerance (ECRI) considers hate speech as a particularly dangerous phenomenon, which is often the first step towards violence.

A long theoretical debate on the criminalization of hate speech has sparked which also includes the issue of the balance between the legitimate goods that are being protected from such a legislation and the freedom of speech. As mentioned earlier, the right of freedom of speech is subject to restrictions. The dilemma that occurs is whether hate speech should be protected as a form of freedom of expression or it should be an exception from the protective field of this right. The party in favor of the permissiveness of hate speech argues that in a democratic society, freedom of expression must be preferred and that it is not legitimate to restrict this right (with the exception of course of some forms of speech, as the defamation that was mentioned before). This would be an unreasonable limitation of freedom of speech and cannot be accepted because it detracts from democracy itself. And democracy means that everyone can freely express his opinions even if they are extreme and his speech is repulsive. In this sense racist speech should be not necessarily acceptable but certainly tolerable in a democratic society. Otherwise, we would basically talk about criminalizing the opinion, the idea that is expressed and democracy would lose its meaning.

Proponents of the criminalization of hate speech pay more attention to the effects that this form of speech can have on the legitimate goods of the vulnerable social groups against whom it is directed. In particular, the principle of equality and dignity of these people is being violated with their social depreciation. At the same time, however, hate speech can also incite hate crimes against these groups. It is precisely in order to protect these groups from marginalization and unequal treatment, but also to prevent hate crimes against them, that side favors the criminalization of hate speech. How can we talk about democracy when the principle of equality

³Gündüz v. Turkey, § 40, Erbakan v. Turkey, § 56.

⁴ ECRI gives the following definition of incitement: "incitement" shall mean statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them (ECRI GENERAL POLICY RECOMMENDATION NO. 15)

⁵Council of Europe, Committee of Ministers, Recommendation No. R (97) 20 on "hate speech".

is not respected? Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance..., provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued⁶.

All these different positions are reflected on each government's legislative policy. If, however, we wanted to personalize the two sides, we would say that United States advocate the protection of hate speech from freedom of expression, while Europe is in favor of criminalizing it. That means that US and Europe are addressing the issue of freedom of expression in a different way and this differentiation could be considered as a result of different cultures and their historical experiences.

In the European area the freedom of expression is established in article 10 of the European Convention for the Protection of Human Rights, which 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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 judiciary⁷.

Freedom of speech is therefore subject to restrictions under paragraph 2, but it is accepted that these limitations must be interpreted narrowly and exhaustively. This is because freedom of speech is of fundamental importance, as already mentioned, for a democratic society. Respectively we should interpret in the same way Article 20 paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR), which also refers to restriction of freedom of expression (any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law).

In recent decades Europe has debated on whether hate speech is protected by Article 10 par.1 of the ECHR or should be subject to the exceptions of paragraph 2 and thus can be forbidden. The fact that there is no absolutely commonly accepted definition of hate speech makes the case more complex. A further obstacle is the fact that the identification of statements that could be classified as "hate speech" seems all the more difficult because this kind of speech does not necessarily manifest itself through expressions of "hatred" or emotions. "Hate speech" can be concealed in statements which at a first glance may seem to be rational or normal⁸.

The European Court of Human Rights in many decisions highlights the importance of freedom of

⁶Erbakan v. Turkey judgment of 6 July 2006, § 56.

⁷Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November, 1950.

⁸Council of Europe, Manual on Hate Speech, Anne Weber, 2009.

expression in all its forms, which it considers to be fundamental to both democracy and personal progress. But when dealing with cases concerning incitement to hatred and freedom of expression, ECHR uses two approaches which are provided for by the European Convention on Human Rights:

-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; and

- the approach of setting restrictions 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)⁹.

In the first approach, the court does not accept the abuse of the right of the Article 10 of the ECHR and therefore exempts it from the protection of the article. In particular, the Court rules that there is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 (freedom of expression) by Article 17 (prohibition of abuse of rights)¹⁰. Here we would say that there are cases of intense hate speech that their protection would be incompatible with the spirit of the ECHR, as the rights that the other provisions of the Convention provide will be called into question.

As far as the second approach is concerned, under Article 10 par.2 of the Convention the Court, when assessing the interference in the freedom of expression, examines if this interference is prescribed by law, if it pursues one or more legitimate aims and finally if it is necessary in a democratic society to achieve these aims¹¹.

To consider that the interference is prescribed by law, the law must be adequately accessible to the public and furthermore "the law must be formulated with sufficient precision to enable the citizen to regulate his conduct," by being able to foresee what is reasonable and what type of consequences an action may cause. A law that puts restrictions on freedom of expression and is formulated in a broad way, and hence it is vague, it could be used by the authority completely arbitrarily by actually encroaching on the rights of the ruled. This would mean unlimited power for the executive, something that is incompatible with democracy. The ECHR, therefore, to consider that there is a provision in the law, which is a prerequisite for the implementation of the Article 10 par.2 of the ECHR, requires it to define clearly and precisely when and to what extent limits are placed on freedom of expression. It is worth noting that the endeavor to introduce such a law (which in our case will prohibit hate speech) with the above specifications is usually difficult, and so it is observed that many European countries are adopting laws that are capable of many different interpretations. This naturally hinders the consolidation of a climate of legal certainty around these issues.

As far as the term "law" is concerned, the ECHR has always understood the term law in its substantive sense and observed that the word "law" covers not only statute but also unwritten

⁹European Court of Human Rights Factsheet-Hate Speech, Council of Europe.
https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

¹⁰Seurot v. France, decision on the admissibility of 18 May 2004.

¹¹European Court of Human Rights Factsheet-Hate Speech, Council of Europe.
https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

law. The Court also clarifies that a norm cannot be regarded as “law”¹².

The second step for the Court is to examine if the interference pursues at least one legitimate aim. There must be a sufficient reason, a particular social need for the state intervention. For this reason, the Court examines whether this objective can be included in one of the restrictively mentioned cases in Article 10 par.2 of the ECHR, because only they can justify a restriction on freedom of expression. In particular: 1) interests of national security, territorial integrity or public safety, 2) prevention of disorder or crime, 3) protection of health or morals, 4) protection of the reputation or rights of others, 5) prevention of the disclosure of information received in confidence and 6) maintenance of the authority and impartiality of the judiciary. That means that the state cannot identify the legitimate aim freely, but it has to “choose” one from the above exhaustive list.

At the last stage the court examines whether the intervention can be considered necessary in a democratic society. The word “necessary” is not synonymous with “indispensable”, “useful”, or “reasonable”, but it implies the existence of a pressing social need. In addition to servicing this need, the principle of proportionality must be respected (“proportionality between the restriction and the legitimate aim”¹³). The principle of proportionality means that 1) the measure must be suitable to achieve the aim, 2) the measure must be necessary to achieve the aim, and that means that there is no less onerous measure that is equally effective and 3) the measure must be reasonable, considering the competing interests of different groups at hand.

Only when the above three conditions (law, legitimate aim, necessary in a democratic society) are met cumulatively, can be justified the restriction of the freedom of expression and thus the prohibition or criminalization of the hate speech based on article 10 par.2 of the ECHR. If one of them is missing, then it is an unlawful state interference in one of the fundamental rights enshrined in the ECHR. However, in cases of extreme hate speech, the ECHR resorts to the application of the article 17 ECHR by exempting this form of expression from the scope of protection of article 10 of ECHR.

This jurisprudence of the ECHR reflects the way in which European States treat hate speech and which is far from the policy pursued on the other side of the Atlantic Ocean.

In the United States, the protection of freedom of expression we would say that it is more extensive, as it extends to certain manifestations of freedom of expression which are not tolerated in the European area. The First Amendment to the U.S. Constitution provides citizens with special protection as far as the speech is concerned¹⁴. This is because it perceives freedom of speech as the main element of democracy, as it is the means of informing, exchanging ideas and opinions and of the general progress of the society.

Despite the fact that the right to free speech is substantial, “it is not absolute at all times and under all circumstances”¹⁵. The US Supreme Court has ruled in a series of judgments that there are forms of expression that are excluded from the First Amendment’s protection, because they

¹²The Sunday Times v. United Kingdom judgment of 26 April 1979, § 47.

¹³ The Sunday Times v. United Kingdom judgment of 26 April 1979.

¹⁴Text of the First Amendment (adopted on December 15, 1791): Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

¹⁵Chaplinsky v. New Hampshire, 1942, (at 571).

do not have to offer something positive to society as they do not promote public debate, but instead create a risk to the rights of others."There are certain well-defined and limited classes of speech, the prevention and punishment of which have never been thought to raise a Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words – those which by their very utterances inflict injury or tend to incite an immediate breach of the peace"¹⁶.On the basis of this rule formulated by the Court, when a form of speech does not fall into the above cases, it is protected by First Amendment. This was in force until the year of 1969, when the Supreme Court adapted this rule to another basis. In particular, the Court ruled that "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force, or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action"¹⁷.In analyzing this rule, we distinguish three key elements / conditions. There must be 1st intension/purpose of the speaker ("directed"), 2nd the element of the imminence and 3rd the element of the likelihood (of carrying out the threatened action).

In a later decision¹⁸the Court clarified that the First Amendment leaves no space for a prohibition of hate speech. In particular, the Court was called upon to rule on a law restricting freedom of expression on the basis of its content, which forbade a form of hate speech, and the Court ruled that it was an unconstitutional law.However, to explain the apparent contradiction with the case-law hitherto,the Court clarified the distinction betweenhate speech (which is a protected form of speech) and fighting words (which is not protected). To characterize a form of expression as fighting words, the criterion is the manner of expression that is the result of the content of speech¹⁹. On the other hand, to be characterized a form of expression as a hate speech, so as to be banned, its content and the idea being expressed should be evaluated.Therefore, hate speech and fighting words are not identical as concepts and their different treatment by the Court is not a contradiction. In one case, the manner of expression is criminalized, while in the other the content of the expression would be criminalized.It goes without saying that in order to exclude fighting words from the scope of protection of freedom of expression, the three conditions: intention, imminence and likelihood, as they have been set out in the case *Brandenburg v. Ohio*, must be met.

However, there are some limited areas where, according to the Court, freedom of speech can be restricted exceptionally because of the content of speech, but only for reasons of public order and morality²⁰. The court mainly means the true threats, which defines as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”²¹.And with a slightly different wording, the court accepted that there is true threat “where a speaker directs a threat to a

¹⁶*Chaplinsky v. New Hampshire*, 1942, (at 572).

¹⁷*Brandenburg v. Ohio*, 1969, (at 447).

¹⁸*R.A.V. v. City of St. Paul*, (1992).

¹⁹ *R.A.V. v. City of St. Paul*, (1992): "The reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey."

²⁰ *Virginia v. Black*, 2003, (at 358).

²¹ *Virginia v. Black*, 2003, (at 359).

person or group of persons with the intent of placing the victim in fear of bodily harm or death”²². We observe that the court does not regard the true threat as a form of speech worthy of protection and that, unlike the other types of speech (for example in fighting words), for the prohibition of it there is no demand for the three conditions of intention, imminence and likelihood. That means that the true threat can be prohibited even if it is proved that the speaker did not intend to carry out his threat.

Summing up the above we end up saying that three types of speech may be excluded from the protection of the First Amendment: obscenity, defamation and speech that creates clear and present danger. The last category includes among others the fighting words and the true threats. The Supreme Court with its jurisprudence confirms repeatedly that there is no “hate speech” exception to the First Amendment. It also followed this approach in the very recent decision *Matal v. Tam* (2017) when it ruled the following: Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate”. Hence hate speech in the US is, in principle, protected. Only forms of hate speech that are at the same time obscenity, defamation or speech that creates clear and present danger can be punishable by law. The most common of the three is to fall into the third case (speech that creates clear and present danger). However, it should be stressed that in these cases hate speech is forbidden only by coincidence. Hate is not the qualitative element that allows us to restrict this form of speech. What allows us to do so is the fact that this form of speech is at the same time, for example, fighting words. This is important because the Supreme Court generally does not accept the punishment of opinion, namely the content of speech, but only the type of the specific expression.

It is understood that Europe is following a stricter approach to the issue. This can be easily explained by the fact that in the European region in recent years the phenomenon of racism seems to be getting more and more pronounced. An important role has also been played by the historical experiences of Europe related to the Hitler era and the Holocaust, which was one of the strongest manifestations of racism in the history of humanity. It is therefore not absurd that Europe is more cautious about issues relevant to racism than the US.

On the other hand, freedom of expression is a fundamental human right for which has been shed a lot of blood and can only be limited under certain circumstances. The reasons for restricting expression should fulfill the element of necessity and the restriction must be adapted and proportionate to one of the aims listed in Article 10 par.2 of the ECHR. In my opinion, however, the criteria laid down in US case law are of crucial importance and should be adopted by the European Court of Human Rights as additional conditions for limiting freedom of expression, at least in the case of hate speech. And I am referring mainly to the elements of the intention, imminence and likelihood. I do not think that all forms of hate speech should be excluded from the protective scope of article 10, but only those which, in an objective judgment, are likely to cause a relatively immediate time-unlawful action. This is often a function of the place, time and manner of speech. Criminalization of forms of expression that simply feed or spread hatred for specific groups of individuals, but without “directing to inciting or producing

²²Virginia v. Black, 2003, (at 360).

an imminent lawless action” against them, is in fact a precautionary measure. In other words, it seeks to prevent the occurrence of a danger to which the gradual promotion of hate may indirectly lead. However, such a restriction on freedom of expression seems to me to be excessive and should not be accepted. I would say that I am more inclined to the approach followed by the US Supreme Court, which accepts a restriction on freedom of expression when a clear and present danger is diagnosed and therefore not all forms of hate speech can be prohibited. The Supreme Court may declare that there is no hate speech exception to the First Amendment and indeed the Court means it, but with the legal construction of fighting words and true threats practically leaves the field open so that significant forms of hate speech can be punished, even if the Court does not expressly acknowledge it.

In any case we should keep in mind that freedom of speech contributes to progress in all areas of life and strict and unjustified restrictions on it are not compatible with the democracy. On the contrary, history has shown that such limitations can gradually lead to ever greater arbitrariness of the state. In this situation jurisprudence plays an important role and so the court should therefore weigh carefully each time its choices.

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