CONSIDERATIONS ON HATE SPEECH IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Izabela Bratiloveanu
PhD, University of Craiova

Abstract:There is currently no unanimously accepted definition of defining hate speech. Based on these considerations, this article analyzes the jurisprudence developed by the European Court of Human Rights, which proceeds in two different ways: either excludes from the protection of Article 10 of the Convention under Article 17 (Prohibition of abuse of the rights) the hate speech that denies the democratic values either apply restrictions of protection under Article 10 § 2 of the Convention if the discourse is a language of incitement to hatred but is not capable of destroying the fundamental values of the Convention.

Keywords: hate speech; freedom of expression; prohibition of abuse of rights; case law; European Court of Human Rights.

1. Hate Speech

In the case of hate speech, there is no unanimously accepted definition. An expression that has appeared in the 1980s in the United States, the hate speech "marks a problematic category of expressions and related freedoms, such as freedom of association and assembly, and involving hatred and discrimination against groups based on race, color, ethnicity, religious beliefs, sexual orientation or other status"[1]. In the doctrine, it is also noted that hate speech differs from other forms of offensive expression through three specific features, namely: targets an individual or group of individuals based on certain characteristics, stigmatizes the victim by attributing a set of traits constitutive that are generally seen as deeply undesirable and is a form of expression in which the target group is projected beyond the normal boundaries of social relationships[2].

Among the international documents on the protection of human rights at the universal level, it is of relevance art. 20 par. (2) of the International Covenant on Civil and Political Rights[3], which, while not using the expression "hate speech", stipulates that it is prohibited by law any incitement to national, racial or religious hatred that constitutes an incitement to discrimination, hostility and violence. The text refers only to three categories of groups (national, racial and religious), some authors proposing to consider these criteria to be illustrative[4]. At

[1] K. Boyle, *Hate Speech: The United States versus the Rest of the World?*, Maine Law Review no.53/2001, p. 489.
[2] B. Parekh, *Hate Speech. Is there a case for banning?*, Public Policy Research, no. 12/2006, p.214.
[3] The Pact was adopted and opened for signature by the General Assembly of the United Nations on 16 December 1966. It entered into force on 23 March 1976, 49 for all provisions, except those of art. 41; on 28 March for the provisions of Art. 41. Romania ratified the Pact on 31 October 1974 by Decree no. 212, published in the Official Bulletin of Romania, Part I, no. 146 of November 20, 1974.
[4] In this regard, see E. Heinze, *Cumulative jurisprudence and human rights: the example of sexual minorities and hate speech*,The International Journal of Human Rights no. 13/2009, p.195.

regional level, we refer to the text of art. 13§5 of the American Convention on Human Rights[5]according to which "Any propaganda for war and any advocacy of national, racial, or religious hatred constitute incitements to lawless violence or to any other action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered offences punishable by law".

In 1997, the Committee of Ministers of the Council of Europe adopted Recommendation no. 97 (20) on the "hate speech" where it is stated that the term "shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin". Through it, the Committee of Ministers condemned all forms of expression that incited racial hatred, xenophobia, anti-Semitism and intolerance, and recommended to the governments of the Member States to take appropriate measures to combat hate speech based on the principles set out in the Recommendation and to ensure that these steps are part of a comprehensive approach to the phenomenon. In addition, the Committee of Ministers has recommended the governments of the Member States to adopt the International Convention on the Elimination of All Forms of Racial Discrimination[6] and to ensure that their domestic law and case law are in line with the principles set out in the Appendix to the Recommendation.The European Court of Human Rights refers to Recommendation no. 97 (20) in one case[7].

In this matter, the Court prefers a particular case-by-case approach. It is an "autonomous notion" because the Strasbourg court does not consider itself bound by the qualifications retained at national level by the domestic judge or, on the contrary, qualifies certain words as a hate speech, even if the qualification was rejected by the domestic judge[8]. As a consequence, the European Court states that "there is no doubt that the concrete expressions which constitute a hate speech, which may be insulting to individuals or groups, do not benefit from the protection of art. 10 of the Convention"[9]. More specifically, this concept allows to distinguish between expressions which are not protected by Article 10 of the conventional text and those which are not considered "hate speech" and are protected by freedom of expression. The European Court's vision is characterized as a syncretic and extensive one in the field of hate speech, this expression being unlimited in the field of racial or religious discrimination[10].

It should be noted that the phrase is mentioned for the first time in the case-law of the Strasbourg court in four judgments of 8 July 1999 against Turkey without being defined[11]. Thus,

[5] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. For developments, see E. Bertoni, *Hate speech under the American Convention on Human Rights*, ILSA Journal of International § Comparative Law no.12/2006, pp. 569-574.

[6] Adopted and opened for signature and ratification by General Assembly of the United Nations Resolution 2106 (XX) of December 1965, entry into force 4 January 1969, in accordance with article 19.

[7] See ECHR, case of Gündüz v. Turkey, application no. 3507/97, judgment of 4 December 2003.

[8] A. Weber, *Manuel sur le discours de haine*, Editions de Conseil de l'Europe, Martinus Nijhoff Publishers, Leiden, Boston, 2009, p.3.

[9] ECHR, case of Gündüz v. Turkey, application no. 35071/97, judgment of 4 December 2003.

[10] See J.-F. Flauss, *La Cour Européenne des Droits de l'Homme et la liberté d'expression*, Indiana Law Journal no. 84/2009, p.899.

[11] These are the cases of Sürek v. Turkey (No.1), §62, Sürek and Ozdemir v. Turkey, §63, Sürek v. Turkey case (No.4), §60, and Erdogdu and Ince v. Turkey, §54. In this respect, see B. Karovska-Andonovska, *Creating*

in the case of Sürek v. Turkey (No.1), the Grand Chamber found that Article 10 of the Convention had not been violated. In the present case, the applicant was the owner of a weekly magazine in which the letters of two readers were published. The letters called "Silahlar Őzgürlüğii Engelleyemez" ("Weapons can't do anything against freedom") and "Suç Bizim" ("It's our fault") have vehemently condemned the military actions of the authorities in Southeast Turkey and accused them of the brutal suppression of the Kurdish people in their struggle for independence and freedom. The domestic courts condemned the applicant for "separatist propaganda" and considered that there was no reason to condemn him for "inciting the people to hostility and hatred". The Grand Chamber considered that this is a hate speech and the apology of violence. The Strasbourg court appreciated that although the complainant did not personally associate himself with the views expressed by the readers, he nevertheless gave the authors a blowout to incite hatred and violence. According to the Grand Chamber, as the owner of the magazine, the applicant was indirectly subordinate to the duties and responsibilities that journalists and editorial staff assumed in the collection and dissemination of information to the public and which were even more important in conflict and tension situations.

Considering that the case is characterized in particular by the fact that the applicant was sanctioned for allegations qualified by the national courts as "hate speech", the Court emphasized in Erbakan against Turkey that "Tolerance and respect for 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 that spread, incite, promote or justify hatred based on intolerance (…), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim persued"[12].

Next, we will refer to the two approaches of the Strasbourg court when dealing with cases of inciting hatred and discrimination, namely:

-the approach of excluding the expressions concerned from the protection afforded by the Convention by applying Article 17 of the Convention text (when expressions constitute a hate speech and denies the fundamental values of the Convention); and

-the approach consisting in the application of the restrictions of protection provided by art. 10§2 of the conventional text (when the discourse, though it is a language of incitement to hatred, is not capable of destroying the fundamental values of the Convention)[13].

2.The first approach: the speech which fall within the scope of Article 17 of the ECHR

Article 17 stipulates that articles of the Convention can't be interpreted as protecting actions that seek to destroy other rights of the Convention or to restrict them to a greater extent than is permitted by the Convention. Article 17 of the Convention does not have an autonomous existence, as the Court's jurisprudence has always been applied in principle by reference to the provisions of Articles 10 and 11 of the Convention[14].

---

standards against hate speech through the case law of the European Court of Human Rights, Balkan Social Science Review no. 8/2016, p.11.

[12] ECHR, case of Erbakan v. Turkey, application no.59405/00, judgment of 6 July 2006, §56.

[13] European Court of Human Rights, Factsheet – Hate speech, March 2019.

[14] C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole. Vol. I. Drepturi şi libertăţi*, C.H.Beck Publishing House, Bucharest, 2005, p.947.

Article 17 was initially conceived as an additional safeguard against the threats of groups or individuals pursuing totalitarian purposes[15], at this stage, its jurisprudential use being rare. We can't but quote here the Communist Party (KPD) v. Germany, judgment of July 20, 1957 in which the former Commission stated that art. 17 "aims to safeguard its rights by defending the free functioning of democratic institutions" and that it is "to prevent totalitarian flows from exploiting in their favor the principles contained in the Convention, that is to invoke the rights of liberty to suppress Human rights"[16].

The Commission declared the application inadmissible, the organization and functioning of the German Communist Party being an activity within the meaning of Article 17 of the Convention which could not be justified by reference to any provision of the Convention, especially those of art. 9, art. 10 and art. 11. In the present case, the former Commission established that the German Communist Party had the purpose of establishing the communist social order through proletarian revolution and the dictatorship of the proletariat. The Strasbourg court has shown that it is irrelevant that the party had the purpose of conquering power only by constitutional means because it did not result in abandoning its traditional aims involving the dictatorship of the proletariat or the use of dictatorship for the establishment of a regime was incompatible with the Convention, because it destroyed a number of rights and freedoms enshrined in the conventional text.

The relationship between Article 17 and the rest of the articles is highlighted for the first time in Lawless c. Ireland (No.3) in the following paragraph: "Whereas in the opinion of the Court the purpose of art.17, insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; whereas, therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms"[17]. The Strasbourg court will first check whether the expression of opinions falls under Article 17, an affirmative answer will lead to their exclusion from the protective umbrella of Article 10 because, in the words of the Court, "there is no doubt that any statement against the values underlying the Convention will be eliminated through art. 17 from the protection of art.10"[18].

The link between Article 17 of the Convention and the hate speech can be identified in Glimmerven and Hagenbeek v. The Netherlands[19], in which the applicants had been convicted by the domestic courts for the possession of leaflets addressed to the Dutch White people claiming that any person who is not white have to leave the Netherlands. The former Commission has declared the application inadmissible by finding that Article 17 of the Convention can not allow the use of Article 10 to disseminate racial hatred.

The same case of condemnation of the racial hate speech also includes the case of Jersild v. The Netherlands in which the applicant was convicted of an interview with members of the Greenjackets group, in which the three young people expressed racist opinions: "(…) the

[15] L.-E. Pettitti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des droits de l'homme*, Economica Publishing House, Paris, 1999, p.509.
[16] EDO Commission, case of Communist Party (KPD) v. Germany, application no. 250/1957, judgment of 20 July 1957, Convention Series, p. 222.
[17] CEDO, case of Lawless v. Ireland (No.3), application n. 332/57, judgement of 1 July 1961.
[18] ECHR, case of Seurot v. France, application no. 57389/00, judgment of 18 May 2004.
[19] EDO Commission, case of Glimmerveen and Hagenbeek v. The Netherlands, application no. 8348/78 and 8406/78, judgment of 11 October 1979.

Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals"; "Just take a picture of o gorilla, man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and kill of things"; "A nigger is not a human being, is an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they were called"; "It is the fact that they are "Perkere", that's what we don't like, right, and we don't like their mentality (...) what we don't like is when they walk around in those Zimbabwe – clothes and then speak this hula-hula language in the street (...)"; "It's drugs they are selling, man, half of the prison poulation in "Vestre" are in there because of drugs (…) they are people who are serving time for dealing drugs (…)"; "They are in there, all the "Perkere", because of drugs" [20]. The Court highlighted the importance of combating racial discrimination and referred to the object and purpose of the International Convention on the Elimination of All Forms of Racial Discrimination to determine whether the measure of the applicant's conviction by the domestic courts was "necessary" within the meaning of Article 10 §2 of the Convention. An important factor in the Court's assessment was the intention to spread racist ideas, or, in the case of the applicant, the purpose was not a racist but to expose, analyze and explain the peculiarities of this group, which was a matter of public interest.Instead, the Strasbourg court held that „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 group and not enjoy the protection of art.10"[21].The Court held that the principle of proportionality had not been respected, the means used being disproportionate in relation to the purpose of protecting the "rights and reputation of others" and concluded that Article 10 had been violated.

In the case of Ivanov v. Russia[22], the Court eliminated an ethnic hate speech from the protection of art. 10 on the basis of Article 17 of the Convention. The complainant, owner and publisher of a newspaper, published a series of articles portraying the Jews as the source of evil in Russia, accusing the entire ethnic group of plotting a conspiracy against the Russian people and attributing fascist ideology to the Jews' leadership. The applicant constantly denied Jews' right to national dignity, claiming they did not form a nation. The Strasbourg court had no doubt about the apparent anti-Semitic connotation of the complainant's views and adhered to the assessment made by the national courts that the applicant sought through his publications to incite hatred towards the Jewish people and felt that such a a general and vehement attack on an ethnic group is in contradiction with the fundamental values of the Convention, especially tolerance, peace and non-discrimination.

The Court applied directly Article 17 of the Convention and denied the protection of art. 10 in Norwood v. R.U[23]. The complainant, the regional organizer of the British National Party (BNP), an extreme right-wing political party, has been condemned by the domestic courts for displaying a poster with twin towers at the window of his apartment, along with the message „Islam out of the UK - protect the British people" and a symbol of the crescent and a star in a banner. The Court held that „Such a general, vehement attack agains a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranted by the Convention, notably tolerance, social peace and non-discrimination". The application was declared inadmissible (incompatible ratione materiae).

[20] ECHR, application no. 15890/888999, judgment of 23 September 1994, §12.
[21] Idem, §35.
[22] ECHR, case of Ivanov v. Russia, application no. 35222/04, admissibility Decision of 20 February 2007.
[23] ECHR, case of Norwood v. R.U., application No 23131/03, admissibility Decision of 16 November 2004.

Holocaust denial was initially included in the scope of Article 17 of the Convention because of its affiliation to the repression of Nazi-related activities for which the article was initially conceived[24]. Three stages of the Holocaust denial have been identified according to the role assigned to Article 17: in the first instance, the Court does not place the discussion on the field of art.17, but on Article 10 of the Convention, at a second stage , Article 17 serves as a principle of interpretation, and in the third stage the Court refers to the "guillotine effect"[25] of the text analyzed to categorically exclude this type of expression from the protection of Article 10 of the Convention[26], this stage originates in Lehideux and Isorni v. France[27], to which we will now refer. In the case, the plaintiffs published in the Le Monde newspaper an advertising page in which the works of Marshal Pétain were glorified between 1940 and 1945, the authors claiming the "double game theory", supposed to be beneficial to the French, although they knew it was rejected by all historians.In §47, the Grand Chamber „considers that 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 art. 10 by art. 17". The Grand Chamber concluded that Article 10 of the Convention had been violated, since the sanction imposed on the applicants was disproportionate to the purpose pursued by its application and was therefore not necessary in a democratic society, which allowed it "considers that is not appropriate to apply art.17"[28].

The Court directly applies Article 17 of the Convention to another Holocaust denial case, Garaudy v. France[29], in which the applicant, Roger Garaudy, philosopher, writer and politician, was convicted by domestic courts for committing crimes of contesting crimes against humanity, racial defamation in the public, and inciting racial hatred for the publication of the paper entitled "Founding myths of modern Israel" in which he expressed negative opinions about the Holocaust. Before the European Court of Human Rights, the applicant alleged, inter alia, the violation of his right to freedom of expression. The court found that, after examining the content of the book, as the domestic courts held, the applicant adopted revisionist theories and systematically challenged the existence of crimes against humanity committed by the Nazis against the Jewish community. The European Court has held that there is no doubt that challenging the reality of clearly established historical events, such as the Holocaust, does not mean in any way conducting research to find a truth. The real purpose of the work was to rehabilitate the nationalist socialist regime and, as a consequence, to accuse Holocaust victims of falsifying history. Thus, in the Court's view, challenging crimes against humanity was one of the most serious forms of racial defamation against the Jews and inciting hatred against them. Further, the Court has shown that denial or review of such historical facts undermines the values on which the fight against racism and anti-Semitism is based and is a cause of serious public order disorder. The Court has held that such acts are incompatible with democracy and human rights, and those who indistinctly commit them pursue objectives prohibited by Article 17 of the

[24] P. Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regi*me, European Journal of International Law no. 26/2015, p.248.
[25] G. Cohen-Jonathan, Le droit de l'homme à la non-discrimination rasiale, RTDH no.46/2001, p. 665.
[26] P. Lobba, *citted work*, pp. 240-243.
[27] ECHR, case of Lehideux and Isorni v. France (MC), application no. 55/1997/839/1045, judgment of 23 September 1998.
[28] Idem, §48.
[29] ECHR, case of Garaudy v. France, application no. 65831/01, admissibility Decision of 24 June 2003.

Convention. The Court also considered that the applicant's work had a marcant negationist character, contrary to the fundamental values of the Convention, namely justice and peace, and declared the application inadmissible (incompatible ratione materiae).

By invoking its previous case-law, the Court ruled in Witzsch v. Germany[30] that the freedom of expression guaranteed under Article 10 of the Convention can't be invoked in conflict with Article 17, in particular in Holocaust denial and related matters. The case is interesting because the applicant did not deny either the Holocaust as such or the existence of the gas chambers, but „a circumstance of the Holocaust as equally significant and established, considering it to be a fake and unsustainable historical fact that Hitler and the NSDP planned, initiated and organized the killing mass of Jews"[31] which it includes within the scope of art.17 of the Convention. In the Court's view, the statement demonstrated the applicant's contempt for the victims of the Holocaust, it being irrelevant that it was made in a private letter rather than in a larger audience. In view of all these considerations, the court concluded that, under Article 17, the applicant can't rely on the provisions of Article 10 in respect of that statement. As such, the Court has declared this claim incompatible ratione materiae.

The European Court is vigilant when it comes to direct recourse to this article, underlining that „Article 17 applies only exceptionally and in extreme circumstances"[32].

In the doctrine, it was argued that in the matter of hate speech, the application of art. 17 is undesirable because it tends, even in its indirect form, to remove the principles and guarantees that are characteristic of the European framework for the protection of freedom of expression[33]. It has been noted that the application of Article 17 is also unnecessary as it does not generate added value for democracy and the protection of human rights and strongly encourages the Strasbourg court to consider all forms of hate speech from the perspective of Article 10 without giving decisive impact, directly or indirectly, to Article 17 of the Convention[34].

3. The second approach: restrictions on freedom of expression (Article 10§2 ECHR)

Article 10§1 of the European Convention on Human Rights enshrines freedom of expression: „Everyone has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and without taking into account the borders. This Article does not prevent States from subjecting broadcasting, cinematographic or television broadcasting companies to an authorization regime".

In a constant case-law that goes back to Handyside v. UK, the European Court has pointed out that „the freedom of expression enshrined in Article 10 §1 is one of the essential foundations of a democratic society, one of the primary conditions of its progress"[35]. As stated

[30] ECHR, case of Witzsch v. Germany, application no. 7485/03. admissibility Decision of 4 February 2003.
[31] Idem.
[32] ECHR [GC], case of Paskas v. Lithuania, judgment of 6 January 2011.
[33] H. Cannie and D. Voorhoof, *The abuse clause and freedom of expression in the European Human Rights Convention: an added value for democracy and human rights protection?*, Netherlands Quaterly of Human Rights no. 29/2011, p.54.
[34] Ibidem.
[35] ECHR, case of Handyside v. UK, judgment of 7 December 1976, case of Lingens v. Austria, judgment of 24 May 1988, §41, case of Müller and Others v. Sweden, judgment of 20 September 1994, §33.

by the same judgment, freedom of expression protects not only „informations" or „ideas" that are considered favorably or considered harmless or indifferent, but also „those that contradict, shock or restless; this is the demand for pluralism, tolerance or openness in a democratic society"[36], but this does not mean that it is intangible, the limitations being provided by art. 10§2 of the Convention. Limits to freedom of expression can be divided into two categories: those imposed by the defense of general interests such as national security, territorial integrity, public security, defense and prevention of crime, health and public morality, the impartiality of the judiciary and those imposed by the protection of personal interests, such as the reputation and rights of others, preventing disclosure of confidential information.

Any limitation on freedom of expression must comply with three conditions provided for in Article 10 § 2 of the Convention, which the European Court of Human Rights examines progressively: **1)** the interference must be prescribed by law; **2)** to be done for a legitimate purpose and **3)** to be „a necessary measure in a democratic society", meaning that the interference of the state must correspond to „a pressing social need" and be proportionate to the legitimate aim pursued by the adoption saddle.

As regards the first condition that a state interference is compatible with the Convention, it is worth mentioning that the Court refers to the term "law", latto sensu, which defines all the legal rules in force, irrespective of their type, including case-law. In the European Court's view, it would be wrong to force the distinction between countries that are common law and those of continental law. In its case-law, the Court has established that the law must have two qualities: accessibility and predictability. The law must be accessible to the person concerned, „who must be able to foresee its consequences for him, and compatible with the rule of law"[37]. The predictability of the law requires that the law be stated with sufficient precision so as to allow the citizen to adapt his conduct so as to comply with the requirements of the rule. The addressee of the rule must be able to foresee, under reasonable conditions and at a reasonable level in the circumstances of the case, the consequences that may result from a concrete act. However, the European Court has stated that legal rules can't be of absolute predictability.

Another condition to be compatible with the provisions of the Convention is that state interference should pursue one of the legitimate purposes of protecting general or personal interests provided for in Article 10 § 2 of the Convention.

The necessity test is the core of international control in Strasbourg[38]. In a constant case-law, the Court held that the term „necessary" is not synonymous with „indispensable", but it does not have the suppleness of the terms „admissible", „normal", „useful" but implies the existence of a pressing social need to resort to a restriction on the exercise of freedom of expression. The Court leaves the state authorities „a certain margin of discretion", but it is not unlimited, with the European Court being competent to decide by a final decision on the compatibility of state interference with conventional provisions[39]. The extent of the national

[36] Idem. On this type of information, see F. Krenc, *La liberté d'expression vaut pour les propos qui "heurtent, choquent ou inquiètent. Mais encore?"*, RTDH no. 106/2006, pp. 311-350.
[37] ECHR, case of Kruslin c. Franței, application no. 11801/85, judgement of 24 April 1990, §27.
[38] C. Moldovan, *Libertatea de exprimare. Principii. Restricții, Jurisprudență*, C.H.Beck Publishing House, Bucharest, 2012, p. 155.
[39] Relevant is the content of the judgment in Handyside v. UK where it is stated that "(…) art.10§2 leaves to Contracting States a margin of appreciation" (§48). But, he adds "Nevertheless, art. 10§2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commision, is responsible for ensuring the observance of those State's engagements (art.19), is empowered to give the final ruling on whether a

margin of appreciation is not identical with respect to all the legitimate purposes set out in Article 10§2 of the Convention, being wider when it comes to the protection of public morality in respect of which there is no objective definition. Instead, it was noted that in the field of hate speech, the control exercised by the Court is one of the strictest.

The Strasbourg court examines the purpose pursued by the applicant, the content of the speech and the context in which it was broadcast[40]. By analyzing the context, elements such as the author of the discourse, its form, the impact on recipients and the proportionality of the sanction applied by the national authorities are taken into account[41].

Regarding the aim pursued by the author of the discourse, if his intention was to inform the public about a matter of a general nature rather than to propagate a racist discourse, the Court generally concludes that the interference in the exercise of his freedom of expression was not necessary[42].

As to the content of the discourse, „there are few chances under Article 10§2 of the Convention for restrictions on political discourse or debates on matters of public interest"[43]. It is clear from the case-law of the Court that there is a distinction between two types of discourse[44]: the one on issues that are part of „an ongoing debate among historians" and the „cathegory of clearly established facts - such a Holocaust", the latter being excluded from the protection art. 10 under Article 17 of the Convention.

From the point of view of the discourse context, the Court's control over interference with the freedom of expression of a political person is one of the most stringent because it represents the electorate, signals its concerns and defends its interests[45]. Where the right to freedom of expression of civil servants is at stake, the "duties and responsibilities" set out in Article 10 §2 of the Convention have a special meaning which justifies giving the national authorities a certain margin of appreciation in order to determine whether the interference in question is or is not proportionate to the intended purpose[46]. The status of the author of the hate speech as a history teacher is taken into account by the Court in Seurot v. France[47], in which the Court insists on the role of teachers as a „symbol of authority over pupils in education" and the particular duties and responsibilities incumbent on them inside and outside the school setting. As regards the quality and function of the person subject to criticism, the European Court of Human Rights reiterated the principle that, in the field of political debate and discourse, art. Article 10§2 of the Convention leaves a very limited space for restrictions on freedom of expression, so that the

---

"restriction" or "penalty" is reconciliable with freedom of expression as protected by art.10. The domestic margin of appreciation goes hand in hand with the European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court " (§49). Consequently, it is in no way the Court's task to take the place of the competent national courts but rather to review under art.10 the decision they delivered in the exercise of their power of appreciation (…)". (§50). See, ECHR, case of Handyside v. UK, application no. 5493/72, judgement of 7 December1976.

[40] A. Weber, *cited work*, p.33.

[41] M. Oetheimer, *La Cour Européenne des Droits de l'Homme face aux discours de haine*, RTDH no 69/2007, p.74.

[42] A. Weber, *cited work*, p.34.

[43] ECHR, case of Wingrove v. R.U., application no. 17419/90, judgement of 25 November 1996, §8.

[44] ECHR, case of Lehideux and Isorni v. France [MC], application no. 55/1997/839/1045, judgement of 23 September1998, §47.

[45] ECHR, case of Incal v. Turkey, application no. 41/1997/825/1031, judgement of 9 June 1998, §46.

[46] ECHR, case of Ahmet and others v.. UK, judgement of 2 September 1998, Recueil 1998-VI, p.2380, §61.

[47] ECHR, application no. 57383/00, Admissibility Decision of 18 May 2004.

limits of admissible criticism are wider when it comes to political persons, the latter being deliberately and inevitably exposed to careful control both by the press and from the public in general, which requires politicians to show a high degree of tolerance on this issue[48]. It was noted that, in order to assess the impact of a speech on the addressees, the Court takes into account, in particular, the support used for its dissemination: written press, audiovisual media or works of art. The Court gives a small margin of discretion to the contracting parties in the field of press freedom[49]. The Strasbourg court has often stressed the essential role that the press plays in a democratic society, admitting that freedom of journalistic expression includes the possible use of a certain amount of exaggeration or provocation[50]. On the other hand, the Court considers that the poems are forms of expression that address a minority of readers, which notably limits their potential impact on national security, public order or territorial integrity[51]. Finally, from the perspective of the sanctioning regime, the European Court of Human Rights has held that the nature and severity of the punishment applied are elements to be taken into account when considering the proportionality of the interference in the exercise of freedom of expression[52]. By itself, this was often enough to justify the finding of a violation of Article 10 when it was an offensive, insulting or inciting expression[53].

Finally, recalling and totally agreeing with the position of the European Court of Human Rights stating that Article 17 of the Convention should be applied „only by way of exception and in extreme conditions”[54], we draw attention to the danger of defining its scope by reference to the vague notion of "an affirmation against the fundamental values of the Convention", which may include a growing range the of statements.

BIBLIOGRAPHY

Bîrsan, C, Convenţia Europeană a Drepturilor Omului. Comentariu pe articole. Vol. I. Drepturi şi libertăţi, C.H.Beck Publishing House, Bucureşti, 2005.

Boyle, K, Hate Speech: The United States versus the Rest of the World?, Maine Law Review no. 53/2001.

Bozeşan, V, Călin, D, Mihăiţă, F, Militaru, I, Pană, D, Limitele libertăţii de exprimare. Politicieni, jurnalişti, magistraţi. Comentarii şi jurisprudenţă, Hamangiu Publishing House, Bucharest, 2014.

Cannie, H and Voorhoof, D, The abuse clause and freedom of expression in the European Human Rights Convention: an added value for democracy and human rights protection?, Netherland Quaterly of Human Rights no. 29/2011.

[48] V. Bozeşan, D. Călin, F. Mihăiţă, I. Militaru, D. Pană, *Limitele libertăţii de exprimare. Politicieni, jurnalişti, magistraţi. Comentarii şi jurisprudenţă*, Hamangiu Publishing House, Bucharest, 2014, p.62.

[49] J.-F. Renucci, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009, p.180.

[50] ECHR, case of Prager and Oberschlick v. Austria, application no. 15974/90, decision of 26 April 1995, §38.

[51] ECHR, case of Karataş v. Turkey [GC], application no. 23168/94, judgement of 8 July 1999.

[52] Case Ceylan v. Turkey, application no. 13556/94, judgement of 8 July 1999, §37, case of Tammer v. Estonia, application no. 41205/98, judgement of 6 February 2001, §69, case Cumpănă and Mazăre v. Romania, application no. 33348/96, judgement of 17 December 2004, §111, case Skalka v. Poland, application no. 43425/98, judgement of 27 May 2003, §32.

[53] D. Voorhoof şi J. Englebert, *La liberté d'expression syndicale mise à mal par la Cour Européenne des Droits de l'Homme*, RTDH no. 83/2010, p.740.

[54] ECHR [MC], case of Paskas v. Lituania, application no. 34932/04, judgement of 6 January 2011.

Cohen-Jonathan, G, Le droit de l'homme à la non-discrimination rasiale, RTDH no. 46/2011.

Heinze, E, Cumulative jurisprudence and human rights: the exemple of sexual minorities and hate speech, The International Journal of Human Rights no.13/2009.

Flauss, J.-F., La Cour Européenne des Droits de l'Homme et la liberté d'expression, Indiana Law Journal no. 84/2009.

Karovska-Andonovska, B, Creating standards against hate speech through the case law of the European Court of Human Rights, Balkan Social Science Review no. 8/2016.

Krenc, F, La liberté d'expression vaut pour les propos qui "heurtent, choquent ou inquiètent". Mais encore?, RTDH no. 106/2006.

Moldovan, C, Libertatea de exprimare. Principii. Restricţii, Jurisprudenţă, C.H.Beck Publishing House, Bucharest, 2012, p. 155.

Parekh, B, Hate Speech: Is there a case for banning?, Public Policy Research no.12/2006.

Oetheimer, M, La Cour Européenne des Droits de l'Homme face aux discours de haine, RTDH no. 69/2007.

Pettitti, L.-E., Decaux, E and Imbert, P-H, La Convention européenne des droits de l'homme, Economica Publishing House, Paris, 1999.

Renucci, J.-F., Tratat de drept european al drepturilor omului, Hamangiu Publishing House, Bucharest, 2009.

Voorhoof, D and Englebert, J, La liberté d'expression syndicale mise à mal par la Cour Européenne des Droits de l'Homme no. 83/2010.