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Analysing the Hate Speech Within the Framework of Political Discourse

Aleksandar Stevanović*

Research Associate, Institute of Criminological and Sociological Research, Belgrade, Serbia

The author considers hate speech within the broader context of the right to freedom of expression with specific reference to political speech. The European Court of Human Rights in its jurisprudence takes the stance that the protections for freedom of expression extend to content that might be offensive, shocking, and disturbing to someone. It is also well accepted in comparative case law and doctrine that political speech has a privileged position in terms of legal protection when it comes to the greater degree of criticism. On the other hand, it is extremely important to protect individuals and collectives from exposure to hate speech since it does not achieve the objectives of the right to freedom of expression in any way. However, it is clear at first glance that in a large number of cases, there is an intertwining of hate speech with speech to which the law provides legal protection. Content related to racial, negationism, revisionism, religious, ethnic, etc. issues is a legitimate and integral part of political discourse, while a very small space separates them from slipping into the field of hate speech. Although the historical, cultural, sociological, and psychological context is important for the qualification of certain content as hate speech, the author seeks to analyze the basics of the definition of hate speech through a comparative legal approach (UN and other international and regional organizations) to offer a framework for distinguishing hate speech from other permitted content which would be applicable in general, appreciating all the possible variables that affect the qualification of hate speech.

Key words: Hate speech / Political speech / Freedom of expression

* Korespodencija: aleksandar.stevanovic993@gmail.com, https://orcid.org/0000-0002-3637-5846

Introduction

The processes of gaining freedom were necessarily faced with the need to establish certain boundaries, as even in the earliest philosophical contemplations it was noticed that freedom should only reach the limits of not violating the freedom of others. Different limitations on freedom and the different understandings of an absence of coercion or control in achieving it have defined an age or society as (un)free (Stevanović, 2021, p. 642). Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights in a democratic framework.

The prohibition of hate speech is a product of the civilizational legacy formed in a democratic society and derives from the sole nature of the right to freedom of expression, which does not have an absolute character as is the case when it comes to the right to life.[1] Although in the scientific literature, there are different views on the need to ban any type of speech, at the same time it cannot be denied that norms of prohibitive content exist in all national legal systems, taking into account their different reach and scope of limitation (Herceg Pakšić, 2017, p. 230). Even in Great Britain which is considered the cradle of freedom of speech, there are some incriminations that limit freedom of speech to a great extent (Ćirić, 206, p. 201). In line with this is the position of the Council of Europe which in one document has stated that racism is not an opinion, and therefore the provisions on freedom of speech cannot be applied to it. Such speech must be treated as a crime (Ćirić, 2015, p. 57).

In modern society, it is not disputable that speech suggesting a certain hatred or that incites violence should be sanctioned and that as such is not desirable for the proper functioning of the society. Moreover, in Europe and Commonwealth counties, including Canada, Australia, South Africa, and the UK, except the USA, the position is taken that bans on hate speech are not only permissible under human rights standards, but actively required by them (Philipson, 2015, p. 1). However, apart from that fact, it seems that everything else is disputable, particularly when it comes to the substantive basis of what we consider 'hate speech', the scope and mechanisms of suppression, as well as the legal reaction to such speech.

The reason for the lack of agreement on the nature and content of hate speech lies in the fact that socially acceptable public discourse depends on a multitude of factors, particularly on the social factors that make up the 'cultural identity' of a certain society. Expressing thoughts, ideas, attitudes, and claims, by its very nature, is a dynamic activity that cannot be 'molded' and controlled to establish dominant social acceptability (Stevanović, 2021, p. 642). For this reason, it is noted in the

[1] Earlier interpretations of the First Amendment treated the right to freedom of expression as an absolutely guaranteed right, but judicial practice introduced certain restrictions over time.

literature that the constitutional treatment of these problems, moreover, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next, depending on the given context (Rosenfeld, 2002, p. 1523).

In addition, the content that usually falls under the term 'hate speech' has political connotations which further complicates things in terms of the special protection provided for political discourse and its participants.

Taking into account the complex sociological basis of the term 'hate speech', Rosenfeld's stance should be accepted in terms that any assessment of whether, how, or how much, hate speech ought to be prohibited must, therefore, account for certain key variables: namely *who* and *what* is involved and *where* and under what circumstances these cases arise (Rosenfeld, 2002, p. 1523). We would just add to this that the same variables must be applied when determining the essence of the concept of 'hate speech' and in the following lines, we will try to determine the core concept of 'hate speech' which would be acceptable regardless of the political and cultural context.

The Content of the Term Hate Speech

The concept of hate speech has appeared in academic literature and legal texts as well as in public speech at the end of the twentieth and the beginning of the 21st century as a consequence of the need to regulate the spread of aggressive propaganda against various minorities. In general, the introduction of this term was motivated by the memory of the Nazi expansion of anti-Semitic and racist propaganda, i.e. to react legally to the spread of xenophobia and intolerance towards less powerful groups that over time strongly began to emancipate themselves more and more (Nikolić, 2018, p. 27). The modern concept of 'hate speech' was coined by a group of legal scholars in the late 1980s in the US in response to harmful racist speech (Brown, 2017, p. 424). It should be emphasized that the hate speech concept is relatively new and did not have a long historical development, mostly because in the socio-economic context in which the idea of white supremacy, legitimized practice of slavery or indentured labor were existing, attention was not paid to the protection of the weaker social group, in terms of their political power.

From a sociological point of view, hate speech is actually a broader linguistic system that is used to hurt and disparage the interlocutor or a third party. In addition to certain words and sentences, which *per se* are offensive or directly call for hatred and contempt (even violence), hate speech contains a complete system of values and attitudes that one person or group can have toward another group, a system that is usually based on deeply rooted *prejudices* and *stereotypes* (Nikolić, 2018, p. 30). As Foucault pointed out, using hate speech can be significant in the process of creating

hierarchical relations, as a means of obtaining or taking away social power through the mechanisms of symbolic manipulation as Castells further observes (Nikolić, 2018, p. 31). Therefore, the concept of hate speech should be understood as a form of socially active expression that produces socially harmful consequences. The aforementioned symbolic manipulation must have its *basis*, while its transformation into action must cause a certain *consequence*. For this reason, hate speech amount to 'performative-utterances' (Austin, 2013), and in line with this, the Supreme Court of Canada stated that hate speech to be regarded as such needs to blur the distinction between speech and conduct.[2] We can see that the *basis* is the key objective element of the term hate speech, and the quality of the norm, i.e. its applicability in practice, will depend on the range of grounds that the legislator includes under hate speech 'umbrella'.

The most common grounds that can be found in the normative definitions of hate speech in both international and national documents refer to race, sex, citizenship, ethnicity, language, religion, sexual orientation, political affiliation, social background, health condition, etc. (Nikolić, 2018, p. 42). In addition, different times and social circumstances create different bases of social division. For instance, in the midst of the COVID-19 virus, the editor of a well-known media portal in Serbia wrote on her private Twitter account that she wished death to all unvaccinated people.

Some authors see the root of hate speech in the treatment of targeted groups as *non-human, or less than human*. Thus, they proposed that the hate speech laws should cover speech that, explicitly or implicitly denies the equal humanity of the target group (Philipson, 2015, p. 16).

From a structural point of view, we agree with Brown who clearly defines the structure of the hate speech concept in terms of three necessary conditions. According to his stance, *something is hate speech only if it is speech or expressive conduct, concerns any members of groups or classes of persons identified by protected characteristics, and involves or is intimately connected with emotions, feelings, or attitudes of hate or hatred* (Brown, 2017, p. 446). However, the third condition calls for special attention for the reason that many authors agree that *hatred* is one of the basic human emotions and as such is extremely difficult to be legally regulated. As Luc-Nancy stated, just as it seems impossible to ordain love or friendship, it perhaps seemed impossible to forbid hatred as long as it was seen as an emotion that was difficult to relate to anything other than such a private and intimate feeling as love or friendship (Nancy, 2014).

The use of the term 'hate speech', i.e. a broad and free interpretation[3] of what is considered under this term, can often cause misunderstanding in communication and social interaction. Also, just not understanding the exact content of the speech that

[2] R. V. Keegstra 3 SCR 697, 748 (1990).
[3] The property of language is neither in seeing nor in proving but in interpretation" (Foucault, 1971).

should potentially be sanctioned opens numerous opportunities for manipulation and abuse of the essentially noble goal of regulating the speech with harmful consequences for society. In this regard, the legal norming of hate speech must strive to deal with precisely defined terms with a clearly expressed *racio legis.*

Legal Aprroach

When conceptualizing the issue of hate speech, the issue arises whether the speech is *causing* harm or whether certain speech itself *constitutes* harm (Barendt, 2019). Opting for one or the other solution is the starting point for the legal prohibitions for certain speech. The next step is to create a legal response to socially undesirable speech, which can be implemented through *criminal*, *civil*, or *administrative* norms and corresponding sanctions. Following the *ultima ratio* doctrine, the penal response should be aimed at those expressions that are undesirable in society to such an extent that they undermine social coexistence. However, there is no place for social fashion and pandering to criminal populism since incriminations must be provided in such a way as to satisfy the principle *nullum crimen sine lege stricta/certa*. Today is common for many criminal legislations to value the hatred expressed during the commission of any criminal offense as an aggravating circumstance when determining the sanction.

While 'hate speech' has no definition under international human rights law, the expression of hatred towards an individual or group based on a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:

1) Severe forms of 'hate speech' that international law requires States to prohibit, including through criminal, civil, and administrative measures; 2) Other forms of 'hate speech' that States may prohibit to protect the rights of others, such as discriminatory or bias-motivated threats or harassment, and 3) 'Hate speech' that is lawful and should therefore be protected from restriction, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.[4]

International Covenant on Civil and Political Rights[5] (hereinafter: the ICCPR) in Article 19(3), provides that the exercise of the rights provided for in paragraph 2 (freedom of expression) 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

[4] Responding to 'hate speech': Comparative overview of six EU countries, https://www.article 19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf, July 9, 2022.
[5] International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar.1976.

(ordre public), or of public health or morals. It comes out from the cited norm that *respect for the rights or reputations of others, protection of national security or of public order, and public health or morals* are the fields that the international community unanimously strives to protect, even if other guaranteed human rights need to be limited. For instance, the European Convention for the Protection of Human Rights and Fundamental Freedoms[6] (hereinafter: ECPHR) provides for the protection of *territorial integrity or public safety and the prevention of disorder or crime.*

In addition, at this level, the influence of the political and social identity of the community is clearly visible. Thus, those countries that based their "national DNA" largely on religion, primarily seek to protect the dominant religion and its fundamental principles by banning hate speech towards it. Let's take for example the Afghan Law on mass media in which, among others, expressions which *are contrary to the principles and provisions of the holy religion of Islam; offensive to other religions and sects; promoting of religions other than the holy religion of Islam* are not permissible.[7] Similarly, in Iran, the law stipulates that the print media are permitted to publish news items except in cases when they violate Islamic principles and codes and public rights.[8]

After determining the primary field of protection that concerns the functioning of the social community legal norms specify the spheres within those fields that are endangered. In this regard, ICCPR in Article 20(1), provides that any *propaganda for war* shall be prohibited by law while (paragraph 2) any advocacy of *national, racial, or religious hatred* that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law. For instance, International Covenant on Economic, Social and Cultural Rights[9] (hereinafter: ICESCR) in Article 2(2) provides that the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or another status.* At this level, it is possible to notice different actions of states legislator depending on cultural, political, and economic structure. Thus, states that were previously colonized with a slave system primarily define race as a sphere in which the basic interests of the state for its functioning could be violated.

[6]European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 04 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; entered into force 03 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998).
[7]Global Handbook on Hate Speech Laws, https://futurefreespeech.com/global-handbook-on-hate-speech-laws/ July 12, 2022.
[8]*Ibid*.
[9]International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

Certain consequences are determined in the norms concerning hate speech. Thus, according to the most important international documents, certain expressions colored by the emotion of hatred should constitute *an incitement to discrimination, hostility, or violence*.

Finally, the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law[10] is of great importance for gaining insight into legal responses to hate speech. According to mentioned Decision, public incitement to violence or hatred directed against a group of persons or a member of such a group defined based on race, color, descent, religion or belief, or national or ethnic origin; the above-mentioned offense when carried out by the public dissemination or distribution of tracts, pictures or other material; publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group, are punishable as criminal offenses.

United States v. European Model

There is a divide[11] between the US and other Western democracies (Philipson, Howard, Rosenfeld) since in the US, hate speech is given wide constitutional protection while under international human rights covenants and particularly ECHR jurisprudence which even held that direct expression of racial hatred is not 'expression' for the purposes of Article 10(1). Such approaching contrast was illustratively described by Philipson who noticed that:

Living in a European democracy, you grow up taking for granted hate speech bans. Then you come across the US literature, which provides a series of very persuasive and passionate arguments as to why hate speech bans are both wrong as a matter of principle and ineffective – even counter-productive – in practice. (Philipson, 2015, p. 2).

In the literature, there are two models of approaches to the norming of hate speech and its prohibition, although it seems to us that it is more about the *threshold of tolerance* for hate speech in the US on the one hand and in European countries on the other. Although freedom of expression is a highly valued right in democratic political systems, the US approach is exceptional (Lee, 2010) since according to US doctrine freedom of expression strives to accomplish a societal purpose, which, in

[10] Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA.

[11] According to Howard, the world's democracies fiercely disagree on the hate speech issue [Howard, 2019, p. 94].

the case of political discourse, is the *purification of the democratic process* (Emerson, 1962). The US doctrine rests on a strict *laissez-faire* model and places freedom of expression in *the marketplace of ideas* (Lee, 2010), which has been an inspirational source of a general framework for US free speech tradition. Legal practice and doctrine in the US are unanimous in emphasizing the fact that it is necessary to allow ideas and attitudes to compete equally for their place in the public space. Such an approach is rooted in the classical settings of liberalism, while it was given an academic form by John Stuart Mill.

Some authors believe that American exceptionalism in terms of absolutely guaranteeing the right to freedom of speech arose from British imperialism. To maintain sociopolitical order across its transatlantic empire, Britain suppressed dangerous utterances in many ways, and that is why the founding fathers have given freedom of speech such a special place in the system of proclaimed rights (Rosenthal, 2020).

Due to its greater heterogeneity in terms of national, cultural, and religious identity than in the US, in the legal space of Europe, historically, there is a tendency to establish wider restrictions on freedom of speech. Contrary to the light-touch regulation model that is characteristic of the US, the European model focuses on the protection of the individual, constantly balancing between proclaimed and threatened rights while the ECHR, depending on the specific situation, allows states a *margin of appreciation*.

Hate Speech Within the Framework of Political Discourse

Taking into account the content of the term hate speech analyzed above, it is clear at first glance that it largely overlaps with what we instinctively consider political discourse. There is a big contradiction between the two concepts since, although with similar content, hate speech is one extreme, and political discourse is a completely different extreme. In that sense, hate speech is often subject to criminal liability, while expression within the framework of political discourse has a privileged position. Thus, for example, the Serbian legislator provided that the perpetrator of the criminal act of insult will not be punished if it was committed within the framework of political activity.[12]

Starting from the viewpoint that politics is related to the public sphere and the functioning of society, the question of how to more precisely define the content of political discourse to which special protection is granted in relevant international and domestic statutes arises. In general, political discourse may be about virtually any topic (Van Dijk, 1997, p. 25). The following principles can be used to deal with the

[12] Criminal Code (Official Gazette of the RS, no. 85/2005, 88/2005 – amd., 107/2005 – amd., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).

aforementioned issue: *the personal, realistic, and mixed principles*[13] can help determine the scope and reach of political discourse (Stevanović, 2021, p. 645). In the first mentioned principle, the basic question is who the subjects in a political discussion are. In essence, when determining political discourse based on the personal principle, primary importance is given to the professional status, role, and function of the actors. If the subjects perform state or political functions, it becomes political discourse. This approach is the simplest way to delineate privileged political speech from other forms of expression. However, it should be noted that this approach is susceptible to various misuses and manipulations as it relativizes the importance of the content that is being expressed, which is of key importance for assessing its potential to harm the rights of other persons and ultimately for sanctioning it.

The issue of relativizing the content expressed can be overcome by using the realistic principle as the basis for determining the scope of political discourse. This approach focuses all attention on the content while disregarding the person that publicly expresses and promulgates it, which is the opposite end of the scale compared to the problem inherent to the personal principle and opens the door to a new, no less important, problem in interpreting relative norms. Finally, it would appear that a mixed approach that gives equal value to the subjects and the content of discourse is the most suited for determining political discourse.

From the above, it can be concluded that political discourse could optimally be defined as any public pronouncement and expression of value judgments and factual claims by holders of political and public offices in the execution of their duties, as well as by any other persons that do not perform political and public functions when they do it in the course of performing their official duties or scientific activities, or when it concerns persons that participate in civil initiatives directed at state bodies regarding proposed legal solutions, other regulations and other general acts, or when their public expression is a consequence of protecting a justified public interest, or when it represents a review of issues of public significance (Stevanović, 2021, p. 647).

It follows that it is important to establish criteria for the distinction between *forbidden* and *privileged* discourse. When examining a violation of the right to freedom of expression, the European Court of Human Rights (hereinafter: the ECHR) applies the 'tripartite test' without exception. Following the test, for limitations on freedom of expression to be justified, they need to be *prescribed by law, pursue a legitimate aim, and are necessary for a democratic society*

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[13] For instance, Van Dijk suggests the application of the following principles: roles and goals of speakers, main topics, special conditions and circumstances and especially the functionality of such discourse.

The Rabat Plan of Action,[14] adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights, clarifies in a more concrete way than the "tripartite test" that prohibitions imposed on hate speech should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group. To properly determine the sphere of expression that deserves to be included under the term hate speech, Rabat Plan of Action proposes a six-part threshold test according to which it is necessary to look at the expression through a prism of *context, speaker, intent, content and form, the extent of the speech act, likelihood, including imminence*. All of the above criteria are intended to ensure that hate speech bans are applied only to the most serious forms of expression, which meet the elements discussed above.

Mirroring the structure of hate speech proposed by Brown, for the first element 'expressive conduct' it is necessary to note that this term encompasses not only freedom of speech but also other forms of expressing the state of the spirit and the consciousness, which can be verbal, real, symbolic, etc. Another important circumstance related to 'expressive conduct' is that it should be publicly exposed because only in that way the conditions regarding *incitement to discrimination, hostility, or violence* could be met. Today, this is achieved by publishing content on the Internet, which has largely become the main forum for social communication. Theoretically speaking, incitement to discrimination, hostility, or violence can also be carried out when only one person is influenced, but in that case, the severity of the consequences is weakened, and such cases are generally difficult to prove and prosecute.

The issue of context appears to be an important point for evaluating certain content as hate speech and when assessing whether particular statements are likely to incite discrimination, hostility, or violence against the target group. It is possible to observe the context in different ways, and in the judicial practice so far, *historical, cultural, regional, political*, etc. have proven to be the most significant. For instance, given their different historical experiences with anti-Semitism, it seems reasonable that Germany should go further than the others in prohibiting anti-Semitic speech (Rosenfeld, 2002, p. 1566). On the other hand, in the case of *Lehideeux and Isorni v. France*, it was pointed out that the State cannot treat the events of the Second World War with the same severity, even though they remained in the painful collective memory, for the reason that they took place more than 40 years ago.[15]

Sometimes hate speech can be analyzed through the context of a specific social event such as Russia's military operation against Ukraine. This example is

[14]https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf, July 10, 2022.
[15] Lehideeux and Isorni v. France, 24662/94.

illustrative because it shows a new approach to hate speech in the context of a military operation, which refers to the encouragement of such speech towards a certain ethnicity, which we consider a degrading procedure toward civilizational achievements. It is about the decision of the Meta Platforms which allowed Facebook and Instagram users in some countries to call for violence against Russians and Russian soldiers, which casts a shadow over all the efforts of the international community to eliminate hate speech.[16]

Concerning who is the speaker, at least one contradiction appears again. Namely, in almost all national legislations, the *indemnity principle* applies to certain holders of political offices. This contradiction is precisely reflected in the fact that they may say anything they like (*incitement to discrimination, hostility, or violence*) in parliament debates free from legal challenge, regardless of public influence. The US Supreme Court itself had held in one decision that a federal official is absolutely immune from liability in respect of speech made in his official duties.[17]

Since *incitement* cannot exist without intention, negligence, and recklessness are not sufficient for it. However, at the level of *content and form*, it is possible to determine more precisely the nature of hate speech. Many factors such as tradition, historical context, as well as the symbolic meaning of the expression should be taken into account. Thus, when Croats publicly shout *For home ready*, at first glance, it has no relation to hate speech. However, when it is taken into account that this cry refers to the ethnic cleansing of the Serbs who once made up the majority of the population in today's Croatia, i.e. that it was an official greeting of the Ustasha movement in the Independent State of Croatia – ISC, a country based on fascism, similar to *Sieg Heil* in the Third Reich, that cry takes on a completely new meaning and represents hate speech towards another ethnicity. This was confirmed in the decision of the ECHR in the case of well-known Croatian soccer/football player Josip Šimunić[18] when he shouted into a microphone at the end of a football match a cry that was used by and associated with the racist regime in Croatia during Second World War – *For home ready*. In the mentioned case, the court attaches particular importance to the context, namely, that the applicant chanted a phrase used as a greeting by a totalitarian regime at a football match in front *of a large audience* to which the audience replied that he did so four times. The Court considers that the applicant, being a *famous football player and a role model* for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators' behavior. This case is illustrative since in its decision, the ECHR practically analyzed all the criteria established by the Rabat Plan and based its decision on them.

[16]https://www.reuters.com/world/europe/exclusive-facebook-instagram-temporarily-allow-calls-violence-against-russians-2022-03-10/, July 10, 2022.
[17] Barr v. Matteo 360 US 564 (1959).
[18] Josip Šimunić v. Croatia Application no. 20373/17

Extent includes such elements as the reach of the speech act, its public nature, its magnitude, and the size of its audience.[19] This means that it is more likely for a speech to be characterized as hate speech due to incitement (if it meets all the other characteristics) if it was made in a way that is easily accessible to a large number of people.

One of the first principles which US The Supreme Court was applying when balancing in the area of political speech was so-called *clear and present danger*.[20] The whole idea is to analyze whether the words are used in such circumstances and are of such nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.[21]

A few years later, the US Supreme Court further elaborates the idea of *clear and present danger* by distinguishing between the *expression of philosophical abstraction* and the *language of direct incitement*.[22] The same rule was applied when in the *Yates v. US*[23] decision the Court found that it is unlawful to advocate or teach the duty of violent overthrow of the government or political assassination, distinguished between advocacy of abstract political doctrine and the speech designed to promote unlawful specific action.

It seems that such an approach in the jurisprudence of the US Supreme Court was further developed to protect the freedom of expression as much as possible following *American exceptionalism* in this matter. Thus, in a landmark case from US judicial practice, *Brandenburg v. Ohio*,[24] the difference was pointed out for the first time between *advocacy and incitement to imminent lawless action*. In this case, the plaintiff, a Ku Klux Klan leader, gave a speech advocating violence and was charged under an Ohio statute prohibiting individuals from advocating for crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform, and voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism. The Supreme Court of the United States held that the Ohio law failed to distinguish advocacy and incitement to imminent lawless action and for that reason, the First Amendment was violated. The most important thing about this decision is that it established a test for evaluation laws affecting speech acts. The Court implemented the principle that the advocacy of the use of force or law violation does not permit a State to forbid it, except if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. This approach was named *the Brandenburg formula*. Additionally, the Court

[19] Responding to 'hate speech': Comparative overview of six EU countries, https://www.article19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf, July, 9, 2022.
[20] It was first formulated by Holmes J. in judgment Schenk v. US 249 US 47, 52 (1919).
[21] Schenk v. US 249 US 47, 52 (1919).
[22] Gitlow v. New York 268 US 652, 644-5 (1925).
[23] Yates v. US 354 US 298 (1957).
[24] *Brandenburg v. Ohi*o 395 U.S. 444

found that abstract discussions are not the same as actually preparing or inciting individuals to engage in illegal acts.

Negative Determination of Hate Speech

Due to the expressed complexity of the term, it is far easier to define hate speech negatively by eliminating what does not fall under the hate speech concept. We could classify those categories into four groups: 1) *speech for academic purposes*, 2) *political speech*, and 3) *religious speech.* However, artistic expression should be free of limitations, but in certain occasions, it can be characterized as hate speech,[25] but the threshold of tolerance must be placed at a very high level.

When it comes to *speech for academic purposes*, it is clear that the principle of non-interference must be applied for science to be able to fulfill its social goals. Extreme examples like the tragic cases of Galileo or Copernicus are fortunately not common nowadays. Nevertheless, there are a large number of examples that can be interpreted in different ways, and it is very important to establish functional criteria for determining the academic debate.[26]

Analyzing *political speech*, we pointed out that there is a certain scope of individuals who cannot be held responsible for their speech, whatever it may be, due to *indemnity*. When it comes to the content of the political discourse in a material sense, it is difficult to set precise boundaries for the reason that every form of expression has a political connotation in a certain sense. In principle, it can be said that the debate concerning the public interest undoubtedly has the character of political discourse. The German Constitutional Court took the same stance in *Lüth*[27] case by concluding that speech designed to contribute to a public debate on a matter of legitimate concern is entitled to a greater degree of protection than in case of private economic interests.[28]

In determining political discourse, it is possible to adopt a narrower interpretation according to which the preferred position of political speech refers only to speech

[25] See: M'Bala M'bala v. France Application no. 25239/13

[26] It is indisputable that active and clear incitement to the dehumanization of individuals and groups based on "protected characteristics" should definitely be treated as hate speech, i.e. that the principle of non-interference in academic debate must not be an "umbrella" for the promotion and practice of hate speech.

[27] BverfGE 198 (1958).

[28] In the decision Macovei v. Romania (App. no. 53028/14), ECHR provided criteria for helping assess the public interest and the protection of the individual rights of the person to whom the information expressed refers. The criteria are a) contribution to a debate of general interest; b) how well-known the person concerned is and what the subject of the content – information was; c) prior conduct of the person whom the information concerns; (d) method of obtaining the potentially harmful information; e) content, form and consequences of the report and f) severity of the sanction imposed. As supplemental criteria, the ECHR listed: a) the collective nature of the statements and not a particular focus on an individual and b) the existence of at least a certain factual background for the statements.

concerning political or governmental matters to enable the people to make a free and informed voter choice.[29] We cannot agree with such determination of political discourse, for the reason that such an approach makes it possible to suppress speech that *de facto* has a political nature because political is not only topics that are exhausted in terms of election to political positions but also when debating political strategies, etc. That is why we strongly believe that the High Court of Australia took the right stance when in the *Theophanous* case stated that political speech refers to all speech relevant to the development of public opinion on the whole range of issues that an intelligent citizen should consider.[30]

Jurisprudence narrowed the field of political discourse to some extent and excluded from it speech that calls for the violent overthrow of the government.[31] Moreover, there is also a noticeable tendency to suppress extreme political speech with the explanation that it may sometimes be too late to intervene at the eleventh hour (Barendt, 2009).

Although it may have a political connotation, convention protection is not provided for speech containing false factual claims at least if it is known or has been proven that they are untrue. That principle was most strictly applied in the jurisprudence of the German Constitutional Court[32] when it comes to the *negationism* issue, say, when someone denies Holocaust for example. In French jurisprudence has also been established that the court was entitled not to allow anyone to contradict *historical truth* (Barendt, 2009, p. 180). The same approach was taken by ECHR in many cases.

The religious speech needs to be well protected. However, since religious issues can cause various animosities and hurt feelings, *blasphemy* rules have been established. Nevertheless, in the 21st century, blasphemy is reflected in the context of secularization and the encouragement of the right to religion in the context of freedom of expression. On the contrary, since the French Revolution, the protection of religion no longer has the importance it had before (Vuković, 2018, p. 247).

Rational debate on religious matters should be free while slipping into insults and threats leaves the domain of religious speech and legal protection. However, in judicial practice, some cases deeply violate the right to free religious speech. For instance, the English High Court has found that a Christian speaker publicly calling on people to desist from gay relationships was using "insulting" words for public order law, although the Bible, which in Leviticus condemns gay sex as 'an abomination' (18: 22), punishable by death (20: 13) are untouched by law (Philipson, 2015, p. 5).

[29] Lange v. Australia Broadcasting Corporation (1997) 189 CLR 520, 558.
[30] Theophanous v. Herald Weekly Times Ltd (1994) 182 CLR 104, 124, HC of A.
[31] Boucher v. R, 2 DLR 369 (1951).
[32] BVerfGE 241, 266 (1994).

Conclusion

Norming certain speech as *hate speech* is following the need to provide all citizens of society with an equal position that would respect the right to their dignity and even protect their physical and mental existence. The creation of rules on hate speech is a consequence of major social crises and wars, especially two world wars.

Hate speech should not be equated with defamatory speech, which does not have the same negative effect as hate speech, although it damages reputation and honor. This is because hate speech targets, not individuals but collectivities due to their inherent characteristics, making it unbearable for dominant and marginal social groups to live together in one community.

For the rules on the prohibition of hate speech to be clear and applicable, the term needs to be defined precisely enough. This endeavor is almost impossible due to a multitude of socio-political causes, but legal authorities should strive to find a common understanding to define the concept of hate speech on a universal level. However, the issue of inconsistency in judicial practice, which can be found in many countries, be it on a regional or historical (temporal) level, is affected by the indeterminate nature based on the social, economic, political, and cultural circumstances, a wide array of different content can be placed. Populist determination of the term hate speech, which can be politically expedient at a certain moment, certainly has a negative effect on the functionality of the concept itself, although they are in widespread use today.

From a legal point of view, if the concept of hate speech does not have its own qualitative specificity that would distinguish it from, say, discrimination, insults, and the like, then the question of the existence of hate speech as a legal concept arises. Analyzing the structure of hate speech that we presented above, that qualitative difference refers to the fact that hate speech contains *incitement to hostility or violence* which places hate speech in a special legal category and the expression that falls under that term should be prevented to proceed to live in the community in an ordinary way. This is why the doctrine developed under the influence of the ECHR starts from the fact that hate speech is not speech within the meaning of Article 10, and for this reason, it is not guaranteed protection. For a long time, the US doctrine resisted such a point of view, but the tendency to lean towards the European doctrine is noticeable in recent times.

Speech that is usually considered political discourse includes topics closely related to hate speech, such as race, color, sex, language, religion, political or another opinion, national or social origin, property, birth, or other status. For this reason, sometimes is extremely difficult to make a distinction between political discourse that is considered privileged in society and hate speech that is completely undesirable. In this effort, one should rely on the criteria presented above.

For the rules on hate speech to achieve their effect, without producing a *chilling effect* at the same time, it is necessary to avoid politicization. Finally, the rules on hate speech should be used with respecting the rule of *ultima ratio* with the least possible limitation of freedom of speech.

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Analiza pojma govor mržnje u okviru političkog diskursa*

Aleksandar Stevanović

Istraživač saradnik, Institut za kriminološka i sociološka istraživanja, Beograd, Srbija

Autor razmatra govor mržnje u širem kontekstu prava na slobodu izražavanja sa posebnim osvrtom na politički govor. Evropski sud za ljudska prava u svojoj jurisprudenciji zauzima stav da se zaštita slobode izražavanja proširuje na sadržaje koji mogu biti uvredljivi, šokantni i uznemirujući za nekoga. Komparativna sudska praksa široko prihvata ideju da politički govor ima privilegovan položaj u pogledu pravne zaštite kada je u pitanju veći stepen kritike. S druge strane, izuzetno je važno zaštititi pojedince i kolektive od izloženosti govoru mržnje, jer se njime ni na koji način ne ostvaruju ciljevi prava na slobodu izražavanja. Međutim, već na prvi pogled je jasno da u velikom broju slučajeva dolazi do preplitanja govora mržnje sa govorom kome zakon pruža pravnu zaštitu. Sadržaji koji se odnose na rasna, revizionistička, verska, etnička i druga pitanja su legitiman i sastavni deo političkog diskursa, ali može da ih deli mali korak od „iskliznuće" u govor mržnje. Iako je istorijski, kulturni, sociološki i psihološki kontekst važan za kvalifikaciju određenog sadržaja kao govora mržnje, autor nastoji da analizira osnove definicije govora mržnje kroz uporedno pravni pristup (UN, i druge međunarodne i regionalne organizacije) kako bi se ponudio okvir za razlikovanje govora mržnje od ostalih dozvoljenih sadržaja koji bi bio primenjiv uopšteno, istovremeno uvažavajući i ostale moguće varijable koje utiču na kvalifikaciju govora mržnje.

Ključne reči: govor mržnje / politički diskurs / sloboda izražavnja

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