

Legal Overview

European standards related to
hate speech,
defamation and insulting speech

presented by

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SKOPJE

INTRODUCTION

1. Freedom

Article 10 § 1 (of the European Convention on Human Rights)

«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.(...)»

- **Who does it concern?**

Everyone has the right to freedom of expression

- **What does it include?**

- The freedom of opinion + the freedom to receive and impart information and ideas.

- **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 (*Handyside v. United Kingdom*, n° 5493/72, § 49, 7 December 1976).

2. Restriction

Article 10 § 2 provides that:

«The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.»

3. What is hate speech in this context ?

- *No accepted universally definition*
- *Recommendation 97 (20) of Committee of Ministers (Council of Europe) to Member states on hate speech*

«... the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism 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.»

➤ **How does the Court qualify hate speech?**

In Müslüm Gündüz v. Turkey judgment of 4 decembre 2003, the European Court of Human Rights («the Court») referred to :

“(...) all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)”



I. AN OVERVIEW OF HATE SPEECH

A. ELEMENTS TAKEN INTO CONSIDERATION BY THE COURT

1) Context

- Racial hatred

Ex: In *Jersild v. Denmark* case (n° 15890/89, 23 September 1994), the Court has dealt with a broadcast describing the racist attitudes of members of a group of young people against black people.

- **Xenophobia + discrimination**
(including religious intolerance)

Ex: In *Le Pen v. France* (inadmissibility) decision (n° 18788/09, 20 Avril 2010), the president of Front National party had been fined for incitement to discrimination, hatred and violence towards a group of people because of their ethnic origin, on account of statements he made about muslims in France in an interview with a newspaper. The wordings were as follows: *“the day there are no longer five million but 25 million muslims in France, they will be in charge.”*

Ex: In *Norwood v. United Kingdom* (n° 23131/13, 16 November 2004) - inadmissibility- decision, the applicant’s conviction for having displayed in his window a large poster of British National Party showing a photograph of the Twin towers in flame, with the words *«Islam out of Britain- Protect the British People»* and the symbol of crescent and star in a prohibition sign.


- Sexual orientation


Ex. *Vejdeland v. Sweden* (n° 1813/07, 9 February 2012) :
the applicants went to an upper secondary school and distributed leaflets containing homophobic statements alleging that “*homosexuality is a deviant proclivity and had a morally destructive effect on the substance*”. (No violation)

This is **the first time** the Court has applied the principles relating to speech offensive to certain social groups to speech against homosexuals.

inciting to violence/ glorification of violence and hate speech

Ex: Sürek v. Turkey [n° 1] (n° 26682/95, 8 July 1999)

The impugned letters amount to an appeal to bloody revenge by **stirring up base emotions and hardening** them: the use of labels such as “the fascist Turkish army”, “the TC murder gang” and “the hired killers of imperialism” alongside references to “massacres”, “brutalities” and “slaughter”.  Incitation to violence + glorification of violence

In *Leroy v. France* case (2 October 2008), the case concerns the drawings of the applicant, a cartoonist, representing the attack on the World Trade Center which was published in a Basque newspaper on 13 September 2011 with a caption which read “ *we have all dreamt of it, Hamas did it*”.  glorification of violence

B) Other elements

- *In Jersild v. Denmark*
 - ✓ clear distinction between comments made by greenjackets and the **role of the journalist** of the documentary in question.
 - ✓ **the punishment of a journalist** for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest.

- *In Gündüz judgement (4 decembre 2003)*
 - ✓ Expressed **orally during a live** television broadcast,
 - ✓ statements **counterbalanced** with the other participants in the program,
 - ✓ expressed as a part of **pluralist debate**,
 - ✓ **no possibility of reformulating**, refining or retracting them before they were made public.

2. CONSEQUENCES OF A HATE SPEECH

- **Direct application of Art 17 (Prohibition of abuse of rights)**

- ***When?***

In following cases:

- ☐ National Socialism
- ☐ Negationism (Holocaust)

- ***What consequence?***

- ☐ Exclusion from the protection of Art 10 (*inadmissible ratione materiae*)
- ☐ No need for a balancing process under Art 10

- **Proportionality test under Art 10**

1. Interference? (Restriction on the freedom of expression)
2. Is the restriction prescribed by law?
3. Does it have a legitimate aim? (mentioned in Art 10 § 2)
4. Is it necessary in a democratic society?
5. Is it within margin of appreciation of the State?

Let's see this balancing exercise in concret cases:

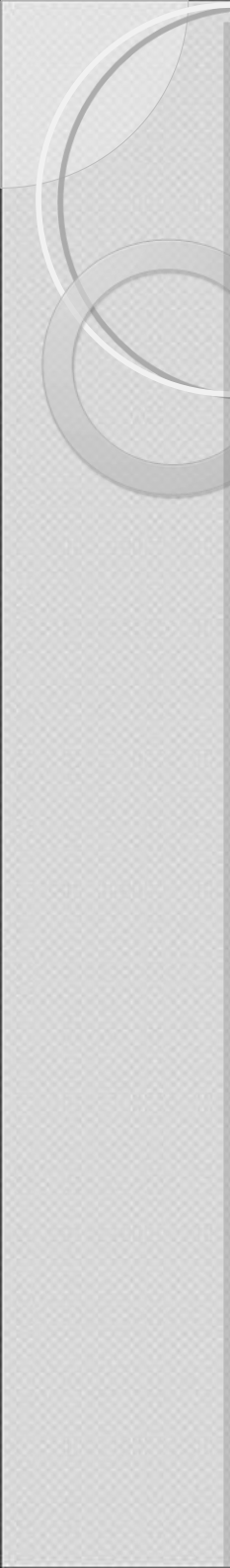


- In Soulas v. France case (n° 15948/03, 10 July 2008) -

- ✓ assesement of “social need” in order to determine the necessity of the restriction imposed in this regard: french problem regarding the social integration of immigrants
- ✓ the public need for a wide margin of appreciation in relation to such a delicate issue
- ✓ the wording of the book and the harmful effects of it in the historical, demographic and cultural context of the country.

- In Féret v. Belgium case (n° 15615/07, 16 July 2009)

- ✓ the racist and xenophobic speech of the applicant
- ✓ the existence of a pressing social need to prevent disorder and protect the rights of others, in this case the immigrant community
- ✓ inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners



II. COURT'S VIEW ON
THE DEFAMATORY AND
INSULTING
EXPRESSIONS

1. General principles and limits to freedom of expression regarding defamatory and insulting speech

A different aspect under Article 8 (*the right to respect for private and family life*)

Ex: Aksu v. Turkey ([GC], n° 4149/04, 15 March 2012)

The publications allegedly insulting Roma community. The applicant claimed that the book and the dictionary contained remarks humiliating and debasing Gypsies.

✓ **What is a defamatory statement?**

- A statement as an intention to harm the reputation of an individual + irrational and unprovoked criticism

Ex: *Dalban v. Roumania* ([GC], n° 28114/95, 28 September 1999): « publication by a journalist of articles accusing public figures of involvement in fraud.»

- with regard to the defamatory or insulting speech
 - ≠ inciting to hatred or to violence
- In the sphere of defamatory and insulting speech, the legitimate aim for restricting freedom of expression is, mainly, the protection of the reputation and rights of others.

2. Balance of the concurring interests in case of defamation

The Court looks at the expressions as a whole and the particular context in which they were written and/or spoken.

- ✓ The Court must determine:
 - ❖ whether the interference at issue was "proportionate to the legitimate aim pursued"
and
 - ❖ whether the reasons adduced by the national courts to justify it are "relevant and sufficient".



Various factors, taken into consideration:

- ✓ contribution made by the article to a debate of general interest,
- ✓ how well known the person is and the subject of the report,
- ✓ the previous conduct of the person concerned,
- ✓ the content,
- ✓ form of the publication (TV broadcast? Article? Spoken? Written...) and
- ✓ Impact of the publication (live?...)
- ✓ the severity of the sanction imposed.

➤ **The criteria derived from the case law of the Court in this regard:**

✓ **Concerning the persons targeted:**

- The limits of acceptable criticism are wider as regards a

- *politician*

- *civil servant acting* in an official capacity as such than as regards a private individual.

- the limits of permissible criticism are wider with regard to the *Government* than in relation to a private citizen, or even a politician

✓ - **Concerning the press**

- its duty is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest,

- it must not overstep certain bounds, particularly in respect of the reputation and rights of others,

- Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation,

- audiovisual media being known to have a more immediate and powerful impact than printed press

✓ **Concerning the margin of appreciation of the State**

The Contracting States have a certain margin of appreciation in assessing whether such a pressing social need exists but it goes hand in hand with a European supervision.

- it is equally clear that States' margin of appreciation for restricting the right to freedom of expression on matters of **public interest, including political issues**, is very **limited**.

- However, that the use of certain terms in relation to an individual's private life was not "justified by considerations of public concern" and that those terms did not "bear on a matter of general importance" → celebrities (*ex: Von Hannover, n° 59320/00, § 60, 24 June 2004*) (or purely "commercial" interests)

✓ **The considerations of national courts**

In Oberschlick case [n° 2] (n° 20834/92, 1 July 1997), the applicant was convicted for having insulted a politician by describing him as a «Trottel» (idiot) in his article.

- calling a politician as an idiot in public may offend him.
- does it constitute a **gratuitous personal attack**?
- conduct of the person targeted : reaction against provocative behaviour

In Tuşalp v. Turkey case (n° 32131/08, 21 February 2012), the case concerns the applicant's comments and views on current events and had a bearing on issues such as the allegedly illegal conduct and corruption of high-ranking politicians and public figures and the Prime Minister's alleged aggressive response to various incidents or events.

- very important matters in a democratic society which the public has a legitimate interest in being informed about,
- It falls within the scope of political debate
- Impact

➤ **the nature and severity of the penalties imposed**

✓ **Decriminalization of defamation cases**

≠criminalization of hate speech

✓ **Amount of the compensation in civil proceedings**

In the case of *Pakdemirli v. Turkey* (n° 35839/97, 22 February 2005), the applicant used a wording “*the fat of Cankaya and the liar*» towards the prime minister.

-Insulting character of wording

but

- Disproportionality of the high compensation in civil proceedings

CONCLUSION

- Common standards for hate speech and defamation cases: Balancing exercise
 - The rise of hate speech in social media and the degree of tolerance/intolerance
 - *As an example: Macedonia*
- (Osmani v. Macedonia, n^o 50841/99, 11 October 2001)*
- Political mechanisms in order to ensure the criminalization of hate speech and decriminalization of defamation