THE PROBLEM OF HATE SPEECH IN THE DIGITAL AGE

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This article is dedicated to the problems connected with the regulation of online content in the age of modern technologies. Freedom of speech and complete permissiveness on the Internet lead to the dissemination of hateful and ill-founded content on all kinds of social media and communication platforms. States and international law bodies put their efforts to combat the problem by trying to create a precise definition of «hate speech» and defining factors for its determination. On the other hand, the problem of censorship and criminalisation of legitimate online statements appear.

Key words: hate speech; freedom of expression; online content; six-part threshold test; censorship.

John Perry Barlow once declared that the Internet would usher in «a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity» [1]. Although the Internet remains history's greatest tool for global access to information, the public faces hate, abuse and intolerance in the content users generate [2, para 1]. As a result, it has prompted attempts to regulate online content, even on the international level. Of course, the first step in such regulation is to provide the definition of «hate speech».

Today there is no unified definition. One of the most precise and comprehensive one was developed within the framework of the Committee of Ministers of the European Union. According to its Recommendation No R (97) 20, the term «hate speech» 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 [3, page 107]. Similar definition was used by the European Court of Human Rights in case *Stern Taulats and Roura Capellera v Spain*, where the Court referred to «hate speech» 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 [4, para 41].

In cases concerning hate speech a great number of problems and challenges arise. Firstly, when victims come from disadvantaged or vulnerable groups as minorities, there is frequently inadequacy or even absence of legislation or lack of judicial assistance for such groups on the national level. In this regard, a six-part threshold test was proposed within the UN framework

for defining incitement to hatred in each particular case, which includes the following criteria [5, para 28]:

- context: It is necessary to place the speech act within the social and political context prevalent at the time the speech was made and disseminated;
- speaker: The speaker's position or status in the society should be considered, especially in the context of the audience to whom the speech is directed;
- intent: Negligence and recklessness are not sufficient for an act to be recognised as an offence;
- content and form: This includes the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech;
- extent of the speech act: Such elements as the reach of the speech act, its public nature, size of its audience should be considered;
- likelihood, including imminence: The courts have to determine whether there was a reasonable probability that the speech would incite actual actions against the target group, while such causation should be rather direct [5, para 29].

These criteria are not cumulative, but it is not stated how many of them must be met to satisfy the test, or which of them are more valuable. In practice, not all of them are used. For example, the European Court of Human Rights usually applies only three, namely, context, content and likelihood of violence. In addition, since modern cases often concern dissemination of speech online through different platforms and applications, extent can be also considered. In this regard, it would be useful to elaborate on real-life hate speech cases to explain better the meaning of these criteria.

For example, in case *Perinçek v Switzerland* the European Court of Human Rights addressed hate speech in a very detailed manner. In this case, a Turkish politician publicly expressed the view during a conference in Switzerland, that the mass deportations and murders suffered by the Armenians in the Ottoman Empire had not amounted to genocide. The Swiss courts held that his statements appeared to be racist and nationalistic. The applicant complained that his criminal conviction and punishment were in breach of his right to freedom of expression. In assessing whether the interference with the exercise of the right to freedom of expression was necessary, the European Court of Human Rights regarded several factors in connection with its rich case law [6, para 204].

One of the factors is whether the statement was made against a tense political or social background. Examples of such tense background include armed clashes or problems relating to the integration of non-European and especially Muslim immigrants in France [6, para 205]. Another factor is

whether the statement could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance. In assessing that point, the Court has been particularly sensitive towards statements attacking in a negative light entire ethnic, religious or other groups [6, para 206]. Finally, the Court has also paid attention to the capacity of statements, direct or indirect, to lead to harmful consequences [6, para 207]. The Court has acknowledged that it is sufficient that statements are objectively capable of producing actual effects [7, para 9].

In the case at issue, first of all, the Court stated that the question whether those mass deportations and murders could be regarded as genocide refered to the dignity of the victims and the dignity of modern-day Armenians. This is protected by the right to respect for private life (Article 8 of the European Convention on Human Rights). Hence, it was necessary to strike a fair balance between two Convention rights – the right to freedom of expression and the right to respect for private life [6, para 189].

Then the Court applied the developed criteria to the facts of the present case. As a result, the Court held that the applicant's statements concerned a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions in Switzerland, and that the statements could not be linked to any violence suffered by the Armenians. Moreover, the Court highlighted that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal punishment, that the Swiss courts had censured the applicant for voicing an opinion that diverged from the established one in Switzerland, and that the interference took the serious form of a criminal conviction [6, para 280].

It was concluded that it had not been necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the case. Consequently, the Court held that there had been a violation of the freedom of expression (Article 10 of the European Convention on Human Rights) [6, para 281].

The second problem is that legitimate online expressions tend to be criminalized in contravention of States' international human rights obligations. It is usually done either through the application of existing criminal laws, or through the creation of new laws specifically designed to criminalize expressions on the Internet. Such laws are often justified on the basis of protecting others' rights and reputations, national security, public order or countering terrorism, but in practice they are used to censor content that the government does not like or agree with. Moreover, such measures as arbitrary arrests and detention, enforced disappearance, harassment and intimidation are also applied to the Internet users. One clear example of criminalizing legitimate ex-

pression is the imprisonment of bloggers around the world [8, paras 33-35]. According to Reporters Without Borders, 228 journalists and media assistants are imprisoned to date [9]. Instead, civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply, as well as some forms of administrative sanctions [5, para 34].

Thus, in conclusion, it is necessary to point out that hate speech is a new problem of international law in the age of digital developments, which contributes to expansion and development of its subject area [10, page 225]. It is now of great importance to strike a fair balance between protecting targeted groups and proportionate sanction of unlawful online behaviour. In this regard, both States and international organisations need to cooperate in order to combat the problem properly and effectively.

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