

Hate speech against Roma and Travellers

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Introduction

The Committee of Ministers of the Council of Europe, in its Recommendation 97(20) on hate speech, provides the following definition of hate speech: *“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”*. The European Commission against Racism and Intolerance (ECRI) defines hate speech as *“advocacy, promotion or incitement, in any form, of the denigration hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression on the ground of race, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status.”*¹ Both open ended definitions can be interpreted as including anti-Gypsyism².

As the European Roma and Travellers Forum’s position paper notes, hate speech needs to be distinguished from hate crimes, the latter being criminal acts involving damage to life, bodily integrity or property.³ Anti-Romani hate speech, on the other hand, is speech - even if it appears in print - that offends Roma and Travellers as a group. Nonetheless, in case it threatens the life or physical integrity of Roma and Travellers, depending on the imminence of the threat, hate speech may reach the level of incitement to hatred, which is a criminal act.

Mechanisms for fighting against hate speech at national and international level

Mounting legal challenges against hate speech is contained by the fact that, in general, hate speakers harass groups of Roma and Travellers, as opposed to targeting individuals. Unless domestic procedural provisions permit, individuals cannot legally challenge such general statements. The optimal solution would be if Roma and Traveller organisations were given legal standing to mount such challenges, but at present in many countries this is only possible if criminal sanctions are available against hate speech. Another hurdle at the domestic level arises in relation to the special status of public figures - including politicians - who engage in Anti-Romani hate speech. Political immunity can, however, be overcome in civil proceedings. There are, therefore, two reasons why litigating in civil courts for moral damages against hate speakers is preferable. It must also be noted that under domestic anti-discrimination laws, hate speech would in general amount to harassment, which is a harm against which civil law remedies must be available - at least in EU member states.

The Internet is a prime vehicle for hate speech. In 2000, ECRI issued General Policy Recommendation No. 6 on Combating the Dissemination of Racist, Xenophobic and Anti-Semitic Material via the Internet.

¹ ECRI General Policy Recommendation No. 15 on combating hate speech, of 8 December 2015

² ECRI Definition: anti-Gypsyism is a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination

³ European Roma and Travellers Forum (ERTF) page 2, Hate Speech: The language of rejection, April 2016.

In 2001, the Committee of Ministers of the Council of Europe adopted the Convention on Cybercrime. In 2003, the CoE launched an additional protocol to the Convention on Cybercrime which addresses online expression of racism and xenophobia and imposes an obligation on Member States to criminalise racist and xenophobic insults online.

The Charter of Fundamental Rights of the European Union safeguards the right to freedom of expression in Article 11, but it prohibits the abuse of rights. A particularly important document is the European Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. The Audio-visual Media Services Directive⁴ requires Member States to ensure that audio-visual media services provided under their jurisdiction do not contain any incitement to hatred based on race, etc. (Article 6). The Electronic Commerce Directive, Directive 2000/31/EC⁵ aims at ensuring free movement of information society services but includes a derogation for 'the prevention, investigation, detection and prosecution of criminal offences, including the fight against any incitement to hatred on grounds of race, etc.' (Article 3(4)(a)(i)). The Victims' Support Directive⁶ provides obligations to promote victims' rights to information and support as well as basic procedural rights in criminal proceedings.

The European Convention on Human Rights and Fundamental Freedoms (ECHR) does not explicitly prohibit hate speech. However, the right to freedom of expression is guaranteed in the ECHR in a manner that is subject to various limitations. This structure reflects the way national constitutions guarantee the freedom of expression. The extent to which Roma and Traveller communities are in fact protected from hate speech depends on how their interests are balanced against the hate speakers' freedom of expression. While one may argue that hate speech should be categorically banned, others believe that first, such a ban could not be implemented in practice and second, that pluralist democracies cannot exist without the open discussion of ideas, no matter how biased or hurtful they are. Undoubtedly, however, certain social groups - including Roma and Travellers - are in fact more often targeted by hurtful, biased opinions than others.

The European Court of Human Rights (ECtHR) has provided protection against anti-Romani hate speech in an uneven manner. There is room for improvement in at least three domains. First, it is important to recognize that hate speech harms Roma and Traveller communities even if it is not intentional. Second, it is important to make a firm stand against hate speech - by Roma and Traveller individuals and/or NGOs - before domestic courts as well as the ECtHR, even if such speech does not single out an individual or NGO. Third, hate speech must be interpreted as anti-Romani harassment, which is a particular type of discrimination in that it does not require intention, or a comparator.

It is regrettable that the Factsheet on Roma and Travellers published by the ECtHR failed to properly qualify anti-Romani hate speech where it was clearly manifested, such as in *Aksu v Turkey*, *R.B. v Hungary* and *Vona v Hungary*.⁷ It seems that unless anti-Romani hate speech occurs in the context of physical threats, it does not constitute a legitimate limitation to the freedom of expression. It would in turn require repressive measures on the part of member states, be that criminal investigation, the banning of hate speaking organisations or the censoring of educational or academic publications - particularly those subsidized by a member State.

The comparison of the cases *Aksu v Turkey* and *Vejdeland and Others v Sweden* shows that it may in fact be the intentionality of hate speech and not its offensive nature that triggers a stricter approach from the ECtHR as to the freedom of expression.⁸ It is also plausible that once (criminal) sanctions are

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>

⁵ <http://www.columbia.edu/~mr2651/e-commerce3/2nd/statutes/ElectronicCommerceDirective.pdf>

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=EN>

⁷ *Aksu v Turkey*, Grand Chamber judgment of 15 March 2012. *R.B. v Hungary*, judgment of 12 April 2016. *Vona v Hungary*, judgment of 9 July 2013.

⁸ The hate speakers prevailed in *Aksu v. Turkey*, in which a prominent Turkish Roma public figure failed to secure a domestic ruling seeking to seize an academic book and two dictionaries that contained anti-Romani stereotypes, while they were

imposed on hate speakers, the ECtHR upholds the balance thus struck by member states. In the context of racism, the judgments handed down in *Feret v Belgium* and *Le Pen v France* support this line of interpretation.⁹ In other words, much still depends on how eager a member state is in providing a wider range of protection from hate speech.

defeated in *Vejdeland and Others v Sweden*, a case in which criminal sanctions were taken against individuals distributing homophobic materials in an educational facility. *Vejdeland and Others v Sweden*, judgment of 5 September 2012.

⁹ *Feret v Belgium*, judgment of 16 July 2009, *Le Pen v France*, judgment of 20 April 2010.