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The hate factor in political speech: Where do responsibilities lie ?

REPORT OF THE COUNCIL OF EUROPE CONFERENCE ON

"THE HATE FACTOR IN POLITICAL SPEECH – WHERE DO RESPONSIBILITIES LIE?"

WARSAW, 18-19 SEPTEMBER

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Introduction

1. The Warsaw Conference (19-23 September 2013), very well prepared and intellectually constructed, triggered interesting debate and produced challenging conclusions. In this report I shall start with some general considerations in order to set the context and identify the main issue at stake concerning hate speech and the fight against it (1). I shall then highlight the contributions made by the three sessions of the Conference, dealing respectively with the "acquis" of the European legal standards on hate speech (2), hate speech within the framework of pluralist democracy, populism and political calculus (3) and the obligation to intervene in an appropriate manner: minimising compulsion – maximising persuasion (4). Some observations are cross-cutting, such as for instance those relating to the question of a possible definition of hate speech and the need for more scientific research in this field. To conclude, a number of recommendations will be proposed (5). Indeed, it was clear from the beginning that the Conference should be "result-oriented".

1. The background / La mise en contexte

2. As a starting point, the importance and contemporary nature (*l'actualité*) of the topic have been highlighted. On the one hand, hate speech is becoming a crucial social and political problem in many member States which can no longer be ignored. Ignorance and indifference foster hate speech. It reflects a fundamental intolerance to being different (ethnically, religiously, racially, sexually, politically, etc.). As a matter of fact, those who use hate speech want to strengthen their identity against other identities. Here the danger is that hate speech turns into hate deeds and violence. On the other hand, Internet is a "turbo accelerator" of hate speech, not only because of its obvious wide access but also because of its anonymity which permits freedom without responsibility[1].

3. As we will see, tackling hate speech is a complex and multidimensional task in which we are all involved (parliamentarians, journalists and the media, law-makers, political leaders, civil society, lawyers, teachers, academics, etc.). So where do responsibilities lie? The answer is short and simple: everywhere.

4. Furthermore, in line with the General Recommendation No. 35 on *Combating hate speech* recently adopted by the UN Committee on the Elimination of Racial Discrimination, since there is differentiation within hate speech, there is a need for differentiation of responses which moves away from the traditional criminalization of hate speech. This idea of differentiation is also at the very heart of the Council of Europe's various responses.

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1. See, for instance, ECtHR, *Delfi AS v. Estonia* judgment of 10 October 2013.

5. In this respect, before passing laws and imposing sanctions, or in addition to them, education and culture are of course of first and paramount importance, thus creating a strong obligation. *We are here to generate a long-term action*. This is even more needed because hate speech works like c *"Chinese water torture"*, a falling of innocent drops with the cumulative impact of hate in a drop-by-drop sequence.

2. European legal standards on hate speech. Is there an acquis?

6. The European Convention on Human Rights and the European Court of Human Rights constitute the essential part.

7. "How to reach greater consistency and clarity in the case-law of the European Court of Human Rights?" was one of the questions submitted to the panel. The Court, as it did all the time, has to come back to the basics. The general rule should be respect for freedom of expression and the utmost care is to be commended when it comes to the legal framework of this fundamental freedom. The jurisprudence of the European Court of Human Rights enshrines the right to "ideas that offend, shock or disturb the State or others". So we have to distinguish between hate speech and harsh criticism. Moreover, it appears preferable to combat hate speech through political debate and discussion rather than through criminal sanctions. It is better to disagree than to prohibit, better to argue than to ban.

8. However, there are some limits. The Court condemns hate speech either by way of exclusion of abuse of rights (Art. 17 of the Convention) – which must be used with moderation – or by way of restrictions to freedom of expression (Art. 10 § 2 of the Convention). Concerning precisely political debate, the *Erbakan v. Turkey* judgment of 6 July 2006 reflects the essence of the European Court of Human Rights' position today: "[T]olerance and respect for the 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 which spread, incite, promote or justify hatred based on intolerance [and] it is of crucial importance for politicians, in their public speeches, to avoid disseminating statements likely to feed intolerance"[2].

9. Admittedly, in a democracy a person may not be incriminated on the basis of an opinion but only on the basis of behaviour or of an act. Does it mean that words cannot be subject to any restriction? Not necessarily. As can be observed, "the category of fighting words reverses the dialectics between speech and conduct: speech which can provoke retaliatory conduct is in itself a form of conduct"[3]. In his paper for the seminar, the philosopher J.-L. Nancy takes the same direction. He says that hatred can go as far as seeking to destroy the other by engaging in acts of elimination. . Hatred is, intrinsically,

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2. Eur Court H.R., *Erbakan v. Turkey*, judgment of 6 July 2006, §§ 56 and 64.

3. F. RIGAUX, "Abridged or forbidden speech: how can speech be regulated through speech?", in M. Van Hoecke (ed.), *Epistemology and methodology of comparative law*, Oxford-Portland (Oregon), Hart Publishing, 2004, p. 292.

turned more towards action. It is more committed to, or bent on, achieving a result. So, according to Nancy, , hatred has an active and 'executive' nature. A hate utterance is itself an act; the thought it expresses is in itself an act of negation"[4].

10. Therefore, a distinction should be made between offence as an act and speech offence: verbal abuse cannot be criminalized in a democracy. Since it is a question of criminalizing acts and not speech, it is necessary to underline the determinative nature of the concept of *direct incitement to violence*.

11. Is a European legally-binding definition of hate speech possible or desirable? From the very beginning and during the Conference, this question has often been raised. Some argue that hate speech has vague boundaries and does not have a clear-cut definition. So, what constitutes hate speech varies from country to country. Others have a different view. Hate speech has a common denominator: it is a speech that intentionally attacks a person or a group based on race, ethnicity, gender, disability, sexual orientation, religion, or any other prohibited discrimination criterion. Moreover, there is already a definition of hate speech in the 1997 Recommendation of the Committee of Ministers of the Council of Europe and some very clear guidelines in the EU Framework-Decision on Combating racism and xenophobia. Finally, the different forms, contents or targets of hate speech are evolving and changing for instance recently moving from a focus only on race and ethnicity to LGBT and disabled persons. So it is better to keep a flexible framework which is likely to be adapted to new developments.

12. The dual approach against political hate speech taken by the European Commission against Racism and Intolerance (ECRI) deserves great attention. On the one hand, it calls for restrictions on some types of political expression whilst, calling for politicians to promote best (or promising) practices for combating hate speech and to refrain from using language or expressions which could incite intolerance. But, above all, education is required in order to follow "the natural order of things".

13. The EU Fundamental Rights Agency (FRA) has collected a large pool of data that shows how pervasive biased and discriminatory remarks against the most vulnerable groups in our societies are and has documented what damage this does not only to individuals but to entire groups. One example is FRA's survey of some 93,000 LGBT people throughout the EU in which 44% of respondents said that offensive language by politicians about LGBT people is widespread.

3. Pluralist democracy, populism and political calculus

14. Hate speech targeting ethnic, religious, sexual minorities, immigrants and other groups is a widespread phenomenon within Europe, including in political discourse. It is increasingly found not only in the political discourse of far-right parties, but spreads also into the rhetoric of mainstream parties. Populism does not relate only to countries under situations of austerity: today there is a new phenomenon of populism in Europe.

4. J.-L. NANCY, "Hatred, a solidification of meaning" (unpublished), 2013, pp. 5-7.

A serious concern is the growing success of populist parties that widely use hate speech, as well as trivialising its use. Moreover, hate speech can be instrumental in increasing the voter base – cynical but effective. The mobilizing effect of populism and scapegoating is often accompanied by conspiracy theories.

15. Nevertheless, political effort to limit hate speech has its dangers not only because it may encroach on freedom of expression but also because it could be misused as a tool for intimidating and containing opposition. So we have to think seriously about what is actually prohibited, particularly in political discourse? Which ideas are too dangerous or too offensive to be included in the public discourse?

16. Politicians and other public figures have a greater responsibility because they have broader possibilities for spreading prejudice against certain groups. Moreover, the impact of political speech is also greater because politicians are in a position of authority: so hate speech has an impact on potential offenders who feel encouraged in their intolerance and bias. In some countries, it has been said that criminal legislation has an added responsibility if the author of hate speech holds public office.

17. So it is all the more important, at political level, to speak out: unless politicians speak out against hate speech by fellow politicians, silence can be interpreted as an approval. It is also essential to promote a climate where diversity is a value. We need to have a political culture in Europe where these issues and statements are addressed more firmly. As the European Court of Human Rights repeatedly said, diversity is not to be "perceived as a threat but as a source of enrichment"[5]. More precisely, in the functioning of political parties, diversity should be promoted in their leadership. It has also been suggested that politicians join public marches and demonstrations.

18. Even if for victims, hate speech automatically leads to hate crime, research by the OSCE cannot always establish the relationship between hate speech and hate crime. Nevertheless, law enforcement authorities deem that there is an *environment* around hate crime. Hate crime starts with the use of degrading words which could escalate into hate crime..

19. As to the danger of hate speech in the European Parliament, the findings of a recent report on "Conflicted politicians" are interesting. "With the 2014 European Parliament elections approaching and populist radical right parties continuing to influence the political debate, this report takes a timely look at the activities of populist radical right MEPs. Using data from *VoteWatch Europe*, it aims to develop an in-depth understanding of how the populist radical right operates within an institution to which it is often hostile. .The picture that emerges is one of a conflicted politician, pulled in multiple directions by ideology, by internal party constraints, and by formal and informal institutional pressures"[6].

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5. ECtHR (GC), *Nachova and Others v. Bulgaria*, judgment of 6 July 2005, § 145.

6. The report is available at : http://counterpoint.uk.com/reports-pamphlets/conflicted-politicians/

20. Finally, hate speech needs to be monitored, but by whom? Member States, which would therefore be under an obligation to collect information and make this information public? Civil society? Moreover, in order to monitor hate speech, some argue that a definition is indispensable, which is contradicted by others. In any event, empirical evidence and research are absolutely necessary in this respect.

21. The general conclusion of the session is highly significant. Hate speech is not only inspired by some social circumstances. It is also part of a general democratic process. Taking this observation seriously, it would be a fatal error to treat hate speech in *isolation* from a wider critique of racism, xenophobia, misogyny or homophobia in society. Hate speech is not a pathological exception to otherwise properly functioning public spheres.

4. Minimising compulsion – maximising persuasion

22. If all States have an obligation to prohibit hate speech, not all forms of regulation need to be criminal in nature. In order to prohibit hate speech, all States should prioritise the issue of prevention, which includes persuasion. In this sense, prevention should be inherent to prohibition. Moreover, since hate speech could be a direct incitement to violence, the obligation to prevent is also about preventing harm. The challenge is how to increase the knowledge, from childhood, about diversity. If we accept diversity, we can build a culture of solidarity.

23. For effective prevention, it is necessary to understand the patterns of hatred and have a better knowledge, grounded on empirical data, about the phenomenon: scientific research versus ideological bias of the foundations of hate speech. For instance, is there a connection between the ascending wave of hate speech and the economic crisis? It seems not because poverty does not necessarily lead to extremism. Populism and hate speech were doing well before austerity. The economic crisis is not the root cause of this. So it is an illusion to think that the problem will disappear when we are out of the crisis.

24. Against this background, the emphasis should be on three aspects. Firstly, media has of course an important role to play, creating an environment where persuasion could be developed. So there is a need to mobilise media as a responsible actor, i.e. not as an actor that reports stories of hate but addresses them and raises awareness. Against this background, for advocating diversity and pluralism, it is important to keep media independent from Government.

25. A proper understanding of hate speech in media and public debate involves moving away from thinking about "old" and "new" media, or the internet as separate from social life and mainstream media. Instead, thinking about the impact of what has recently been called "hybrid media" is more fruitful. By examining the inter-relations between political actors, media institutions and new practices of participatory communication, we can start to examine how extreme speech is (a) in part a product of accelerated competition for public attention, and as such, is shaped by identifiable practices and rituals of communication (b) that "hate speech" has an economic value in a media environment shaped by intensive competition for clicks, hits and "interaction" and that (c) the public contest over what can and cannot be said, a contest often

organised around instances of extreme speech, has become a central tactic in and dimension of political positioning in contemporary societies.

26. Secondly, political parties and politicians have also not only a role but a social responsibility to restrain and avoid any discriminatory language and hate speech. Here it is above all a question of self-regulation.

27. Thirdly, education and training, including human rights education, at all levels is certainly the best tool. Inter-cultural understanding is something that should be learned. In this respect,, cooperation among stakeholders, including institutions that are neutral, e.g., churches., could be envisaged. The place of civil society is self-evident. Civil society has a key role in maximising persuasion but strategies of persuasion require more discussion.

28. Finally, to maximise persuasion, dissemination of best practices or promising practices could be envisaged through different means (e.g. consensus conference).

5. Recommendations

29. It should be recognised that tackling hate speech is a multidimensional task. Since there is a differentiation in hate speech, there is a need for a differentiation of responses.

30. First and above all, learning and training programmes aimed at diversity should be set up not only in schools but also in continuing education.

31. The criminalisation of hate speech should be envisaged where there is direct incitement to violence.

32. Politicians and other political figures have a greater responsibility to speak out about hate speech and to promote a climate where diversity is a value.

33. The media also have a responsibility in fighting against hate speech. The media community should develop a system of collective self-regulation based on an agreed code of ethics and a mechanism to receive and respond to complaints. Social media platforms such as Twitter and Facebook have an enormous potential for dissemination. Internet is a space for citizenship. Therefore the issue of anonymous hate speech should be addressed.

34. Concerning the question of the definition of hate speech, there are many for and against arguments. . At the end of the day, it would seem more appropriate to have a flexible approach when taking into consideration new targets and contents of hate speech.

35. It is indispensable to ask for scientific research (based on empirical data) on the reasons, the scope, the forms, the targets of hate speech in the Member States.

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Annex
Programme of the Warsaw Conference of 18-19 September 2013

THE HATE FACTOR IN POLITICAL SPEECH
Where do responsibilities lie?

18-19 September 2013
Airport Hotel Okęcie, Warsaw

18 September 2013

13:00 Registration of participants

14:00 **Opening session**
Welcome by **Mr Michał Boni**, Minister of Administration and Digitization of Poland, Chairman of the Conference

Remarks by **Mr Thorbjørn Jagland**, Secretary General of the Council of Europe

14:30 **Keynote: Ms Ingrid Schulerud**, Ambassador, Section for Central Europe and EEA/Norway Grants in the Norwegian Ministry of Foreign Affairs

14:45 **Session 1 European legal standards on hate speech – is there an *acquis*?**

- How do existing domestic and international legal frameworks and mechanisms tackle the issue of hate factor in political speech?
- What role does prohibition of discrimination by means of law play?
- Is it clear what hate speech is and is there a shared understanding of it?
- Is a legally binding definition of 'hate speech' possible or desirable?
- How to reach greater consistency and clarity in the case-law of the European Court of Human Rights?

Moderator: **Mr Tarlach Mc Gonagle**, Senior researcher, Institute for Information Law, University of Amsterdam

Panellists:

Ms Françoise Tulkens, former Judge and Vice-President of the European Court of Human Rights
Mr Mirosław Wyrzykowski, Bureau member of the European Commission against Racism and Intolerance (ECRI)
Mr Morten Kjaerum, Director, European Union Agency for Fundamental Rights (FRA)
Mr Kerem Altiparmak, Director of Human Rights Centre, Faculty of Political Sciences, Ankara University

15:30 **Questions and discussion**

16:15 **Coffee break**

16:45 **Session 2 Pluralist democracy, populism and political calculus**

- What is the impact of hate speech originating from politicians compared to that originating from ordinary citizens?
- When political actors introduce hate speech in the public and political debate, what are the responsibilities of their fellow politicians; is indifference an option? What role does political opportunism and calculus play in tolerating hate speech?
- Can politicians overcome political divergences and unite in ethical alliances against hate speech? What can be accepted in the name of pluralist democracy?
- Where and how to counter hate speech, which mechanisms could be put in place?

Moderator: **Ambassador Urszula Gacek**, Permanent Representative of Poland to the Council of Europe

Panellists

Mr Robert Biedroń, Member of the Polish Parliament, member of the Parliamentary Assembly of the Council of Europe
Mr Boriss Cilevičs, Deputy, Saeima of the Republic of Latvia, member of the Parliamentary Assembly of the Council of Europe
Ms Floriane Hohenberg, Head of the Tolerance and Non-Discrimination Department Office for Democratic Institutions and Human Rights
Mr Marley Morris, Researcher, Counterpoint, London

17:30 **Questions and discussion**

18h15 **Presentation of the "No Hate Speech Movement" youth campaign, Rui Gomes,** Head of Education and Training Division, Youth Department, Council of Europe

18:30 **End of first day**

19:30 **Buffet dinner hosted by the Ministry of Administration and Digitization of Poland**

19 September 2013

09:30 **Welcome by Michał Boni,** Minister of Administration and Digitization of Poland

09:40 **Keynote by Mr Frank La Rue**, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

10:00 **Session 3 Minimising compulsion – maximising persuasion**

- Does hate factor have a role in the formation of public debate? How to tackle it: inclusion or exclusion?
- How citizens (victim groups, civil rights activists, scholars, and ordinary citizens) can contribute to social responses, vibrant dialogue and civic action? What role for civil society?
- How can media lend its voice and power to indignation against hate speech?
- What possibilities and challenges does the Internet bring?
- What are the best practices to maximise persuasion of people that they need to live together accepting all their differences? Which mechanisms can be put in place?

Moderator: **Ms Esra Arsan,** Lecturer on Political journalism, Institute of Social Sciences, Bilgi University, Istanbul

Panellists:

Mr Radosław Markowski, Professor at the University of Social Sciences and Humanities & Polish Academy of Sciences
Mr Gavan Titley, Lecturer in Media Studies, National University of Ireland
Ms Erika Mann, Managing Director, Europe, Facebook
Mr Andrew Smith, Legal Officer, Article 19

10:45 **Coffee break**

11:00 **Questions and discussion**

12:00 **Conclusions by Mr Michał Boni,** Chairman of the Conference

12:30 **Press conference of the Polish Minister and the Secretary General**

http://hub.coe.int/programme Warsaw Conference 18-19.09.13