



Addressing **hate speech in the media:** the role of regulatory authorities and the judiciary

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Hate speech and its exclusion from protection of the ECtHR

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The definition of hate speech

RECOMMENDATION No. R (97) 20 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON "HATE SPEECH" (Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies)

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.

The definition of hate speech

ECRI GENERAL POLICY RECOMMENDATION No. 15 ON COMBATING HATE SPEECH
(Adopted by the European Commission against Racism and Intolerance on 8 December 2015)

Hate speech is to be understood for the purpose of the present General Policy Recommendation as the 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 and sexual orientation and other personal characteristics or status.

The definition of hate speech

Stern Taulats and Roura Capellera v. Spain (nos. 51168/ 15 and 51186/15, § 41,
13 March 2018)

“the term which 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”

The Court's case-law facing the dilemma of tolerance:

- The need for pluralism requires the society to tolerate extreme speech:

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), **it is 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"**” (see *Handyside v. the United Kingdom*, no. 5493/72, §49, 7 December 1976).

– The need for combating hate speech which is not protected by the Convention:

“there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention” (see **Gündüz v. Turkey**, no. 35071/97, § 41, 4 December 2003).

Two approaches adopted by the Court in respect of Article 17 of the Convention

Article 17. Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

1. The cases where Article 17 was applied and the issue in question was not covered by Article 10 of the Convention.
2. The cases where Article 17 was not applied and the complaint was examined under Article 10 of the Convention.

The Court's general observations on the applicability of Article 17 of the Convention

- an application only on an exceptional basis and in extreme cases;
- the decisive point under Article 17 is whether the applicant's statements sought to stir up hatred or violence, and whether by making them he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it;
- it should only be resorted to if it is immediately clear that the impugned statements sought to deflect Article 10 from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention.

(see *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 114-115, ECHR 2015 (extracts)).

The most recent two examples concerning the application of Article 17 in the media context

ROJ TV A/S v. Denmark (dec.), no. 24683/14, 17 April 2018

The applicant TV channel was deprived of its licence to broadcast on account of the terrorist propaganda

Belkacem v. Belgium (dec.), no. 34367/14, 27 June 2017

The applicant was convicted of incitement to discrimination, hatred and violence on account of the videos that he had uploaded to the YouTube video-hosting website

Hate speech in the context of Article 10 of the Convention where Article 17 was not applied

Application of the three-layer test:

Lawfulness (legal basis, accessibility, foreseeability)

Legitimate aim (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)

Proportionality assessment

Elements to be taken into account in the analysis of proportionality in the “hate speech” cases

1. Purpose pursued by the applicant (intent and positioning of the media)
2. Content of the expression (examining the expression as such from the standpoint of an objective observer)
3. Context in which the impugned statement was made (political sensitivity of the issue in the region (e.g. explosive or unstable situation owing to the issue at stake), socially sensitive issues (including religious, migration, language questions))
4. Status and magnitude of the media and the actor (whether they are well-known and capable of influencing the audience (politicians, renowned academicians, sportsmen, etc.)) Special obligation imposed on the politicians to refrain from hate speech
5. Method, way and form of spreading the information (oral delivery, live transmission, artistic expressions, academic domain, fiction, documentary)
6. Vulnerability of the target group (minors (leaflets in educational context, animated films), minorities)

Leroy v. France (no. 36109/03, 2 October 2008): A cartoonist was fined to 1,500 euros for publication of a drawing concerning the attacks of 11 September 2001 with the following slogan:

“We have all dreamt of it ... Hamas did it”

The Court refused to apply Article 17 of the Convention finding that the drawing in question is covered by Article 10 of the Convention which was made in the humoristic context without targeting the denial of fundamental rights and could not be compared with the cases of antisemitism, racism or islamophobia.

However, taken into account the particular context, the Court did not find a violation of Article 10 of the Convention considering that the interference was proportionate.

Zana v. Turkey (no. 18954/91, 25 November 1997): Prison sentence imposed by Diyarbakır National Security Court on account of a statement to journalists: no violation of Article 10

Facts: In August 1987, while serving several sentences in Diyarbakır military prison, the applicant made the following remarks in an interview with journalists:

“I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ...”

As to necessity of interference: The applicant’s statement contained both a contradiction and an ambiguity – it could not, however, be looked at in isolation and had had a special significance in the circumstances of the case – interview had coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey – the support given to the PKK, described as a “national liberation movement”, by former mayor of Diyarbakır in interview published in major national daily newspaper had had to be regarded as likely to exacerbate an already explosive situation in that region – penalty imposed could therefore reasonably have been regarded as answering a pressing social need, and reasons adduced by the national authorities were relevant and sufficient.

Nur Radyo ve Televizyon Yayinciligi v. Turkey (no. 6587/03, 27 November 2007):

Violation of Article 10 for the interruption of a radio's activity for a period of 180 days for statements made by a person during a live radio programme

Medya FM Reha Radyo v. Turkey (dec., no. 32842/02, 14 November 2006):

No violation of Article 10 for the interruption of a radio's activity for a period of 365 days for clear calls for violence during various radio programmes