



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

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**“Harmful speech” and ECtHR: striving
for a balanced approach**



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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A patchwork of “*Perinçek*” factors to assess measures against expressions *prima facie* perceived as harmful speech

- Whether the statement, fairly construed and seen in its immediate or wide context, could be seen as
 - A call for violence
 - Justification of violence, “hatred” or “intolerance”

+

- Manner and capacity to lead to harmful consequences

+

- Tense political or social context

+

Other *ad hoc* factors

Perinçek v. Switzerland [GC] = landmark case

Conceptual framework(s) for justifying “interferences” with speech

- speech, including offensive, disturbing or shocking



“Interference” with it as hateful speech

- Special (sector-, type- specific) legislation or (self-)regulation: eg, anti-extremist laws+
- Targeted victimisation on account of being part of a “group” or on a discriminatory ground, +
- Harshness of imputations/State’s reaction, restrictions or penalties; other signs of stigma



Need to **justify** “interference” with it or otherwise grant/refusal of protection

- “Hate speech”
- Other, eg “wanton denigration”



- Extreme cases of stirring up or justifying

- VIOLENCE
 - HATRED
 - INTOLERANCE
- (*Perinçek*, §§ 113-15)



Actual or potential harmful consequences

Highly context-specific

Justification of “interference”: a vicious / virtuous circle?

Freedom of expression



Grounds for justification (“legitimate aims”) on “hate speech”-type basis:

- Basic condition for a progressing “democratic society” and **personal self-fulfilment**
- Freedom of the press (“public watchdog”)
 - The public’s “right” to receive information and ideas

Putative:

- “Rights of others” (reputation, religion-related rights, etc)
- Prevention of disorder or crime (*E.S. v. Austria**)

Less putative:

- National security, territorial integrity, public safety
- Protection of morals

Where the views expressed do not comprise an incitement to violence the State (regulator, court) **cannot** rely on protecting territorial ~~integrity~~ and national security, maintaining public order and safety, or ~~preventing crime~~, to restrict the right of the public to be informed of them (*Dmitriyevskiy v. Russia*)

* the judgment is not final, as of November 2018

Justifying measures against “expressions”

Substantively

- Mere illegality of speech or conduct is a relevant but not sufficient justification by itself (*Perinçek*)
- Criminal prosecution / deprivation of liberty (suspended sentence) = strict scrutiny (*Dmitriyevskiy ; cf. Sinkova v. Ukraine*)
- Criminal laws applied to expressions that stir up, promote or justify violence, hatred or intolerance
 - clearly and precisely define the scope of relevant offences
 - be strictly construed to avoid that the State’s discretion becomes too broad and potentially subject to abuse through selective enforcement (*Savva Terentyev v. Russia**)

Methodologically and procedurally *stricto sensu*

- Insufficient scope of judicial assessment (excessive reliance on experts); failure to take heed of all pertinent factors / Equality of arms, adversarial procedure and other safeguards (*Ibragim Ibragimov v. Russia, Mariya Alekhina and Others v. Russia* (“Pussy Riot” case)*)

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Do we

- use the means that are reasonably capable of producing the desired result here and now?
- proceed on the basis of an acceptable assessment of all the relevant facts?

What is particular about the context of Internet speech and “mass media”?

Impact: Print media / Audio-visual media / Internet

- Higher risk of harm to individual freedoms (capacity to store and disseminate information): *Delfi AS v. Estonia* [GC]
- Availability of information on the Internet = a factor to ponder
 - when allowing restrictions on the free speech via the print media (*Mouvement raelien Suisse v. Switzerland* [GC]) or broadcast media (*Animal Defenders Intern'l v. UK* [GC])
 - when criticising such restriction (confidentiality breach whereas a book is already *de facto* available online)

“Duties and responsibilities” of Internet intermediaries to one’s speech

- Internet news portals in the context of online comments posted by users: to monitor and react to excessive user-generated content; to impose restrictions and penalties for failing to do it
- Other Internet forums such as Internet discussion groups, social media platforms

Pihl v. Sweden (dec.)

No violation of privacy rights because of dismissal of the applicant's civil claim against a small NGO in relation to a random anonymous and clearly offensive comment made on its Internet blog (sitting there for 9 days and being taken down, with an apology, the day after the applicant had complained)

- Context of the comments, measures by the company to prevent/ remove defamatory comments; practicability to identify and sue the actual authors of the comments as an alternative to the intermediary's liability; consequences of the domestic proceedings for the company; possibility of still being able to find the comment via search engines (request that the search engines remove any such traces of the comment)

OFFENSIVE BUT NOT
INCITEMENT TO VIOLENCE OR
“HATE SPEECH”

= protected



See also *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*

“Incitement to violence”?

A **real risk** of violence occurring, in particular against the “target”

Risk assessment methodology/-ies

Post pactum assessment of actual violence (if ensued)

Examples:

To advocate recourse to violent action or bloody revenge

To justify the commission of terrorist offences in pursuit of their supporter’s goals or likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons

Dmitriyevskiy v. Russia: Editor of a regional newspaper published articles, presumably by Chechen separatist leaders, on governmental policies in the region (= part of a political debate on a matter of general and public concern)

Very sensitive nature of that debate +

That the presumed authors were leaders of the Chechen separatist movement and were wanted in Russia on a number of very serious criminal charges could not in itself justify interfering with free speech

Acerbic criticism remaining within acceptable limits (that are particularly wide with regard to the government)

Example: (non-)verbal expression around fire

A symbolic expression of dissatisfaction or protest rather than incitement to unlawful actions such as violence

- * the burning of a photograph of the Spanish royal couple (*Stern Taulats and Rourra Capellera v. Spain*)

- * a virulent/offensive comment (inter alia, "ceremonial incineration of infidel cops in Auschwitz-like ovens") within a discussion on a publicly accessible Internet blog = provocative metaphor on cleansing the police of corrupt officers (*Savva Terentyev**)

Compare with:

Frying eggs on the Eternal Flame of the the Tomb of the Unknown Soldier Memorial, allegedly, to protest against wasteful use of natural gas by the State while turning a blind eye to poor living standards of veterans: a suspended prison term is justified because eternal flames are a long-standing tradition for commemorating a person or event of national significance; other suitable opportunities to express her views or participate in genuine protests (*Sinkova v. Ukraine*)

Form of expression

Poems with frequent use of pathos and metaphors called for self-sacrifice for “Kurdistan” and particularly aggressive passages directed at the Turkish authorities. While inciting readers to hatred, revolt and the use of violence, the form used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers (*Karatas v. Turkey*)

Compare:

A nationwide famous singer's rap music video on YouTube containing rhymed lyrics that incite to hatred, revolt and use of violence?

Timing and location factor

Specific reasons (on account of nuances of translation or local context) need to ban a book that is not banned elsewhere in the Council of Europe (*Ibragim Ibragimov and Others v. Russia*)

Savva Terentyev v. Russia:

small readership of a publicly accessible Internet blog without any notoriety or followership: actual stats of visits, including reposts, "likes" or the like

the police, a "social group" under Russian anti-extremism legislation, is not a minority or group that has a history of oppression or inequality, or faces deep-rooted prejudices, hostility and discrimination, or otherwise vulnerable

imminent unlawful actions; real risk/threat of violence, eg toward a specific group or its individual members

“Pussy Riot” case

*Perinçek-type
issue*

- *Mariya Alekhina and Others v. Russia**: pre-trial detention and prison terms for hooliganism motivated by religious hatred on account of attempting to perform an anti-Putin “punk prayer” at the altar of Moscow’s Christ the Saviour Cathedral; related videos were classified as “extremist” and made inaccessible by a filter on the website’s IP address
- Conduct + verbal expression: here, artistic and political expression (=strong(er) protection)
- Prosecution to protect the “rights of others”
- They breached rules of conduct in a place of religious worship but disrupted no religious services, no injuries to people inside the cathedral, no damage to church property = prison terms too severe since no explanation how “religious hatred” was stirred by way of wearing balaclavas, bodily movements and strong language; or whether the actions in question could have led to harmful consequences; no “relevant and sufficient” reasons to justify the prison terms

* not final, as of November 2018



Thank you for your attention!

Further reading:

- Factsheets on hate speech, Internet (ECtHR's website)

This presentation **only** reflects the author's views and understandings. The ECtHR's official position is stated in its (final) judgments and decisions available in HUDOC.