Univerzita Karlova

Právnická fakulta

Robin Fleček

Nenávistné projevy napříč kontinenty

Diplomová práce

Vedoucí diplomové práce: doc. JUDr. Zdeněk Kühn, LL.M., Ph.D.

Katedra teorie práva a právních učení

Datum vypracování práce (uzavření rukopisu): 26. dubna 2017

Charles University

Faculty of Law

Robin Fleček

Hate speech throughout the continents

Master's thesis

Master's thesis supervisor: doc. JUDr. Zdeněk Kühn, LL.M., Ph.D.

Department of Legal Theory and Legal Doctrines

Date of completion (manuscript closure): 26 April 2017

Prohlašuji, že jsem předloženou diplomovou práci vypracoval samostatně a že jsem řádně uvedl všechny použité zdroje. Dále prohlašuji, že tato práce nebyla použita k získání žádného dalšího titulu.

I declare that this master's thesis is a result of my own independent research and that all the sources used have been duly quoted. I further declare that this master's thesis has not been used to obtain any other degree.

Robin Fleček

Poděkování

Rád bych zde využil příležitosti poděkovat doc. JUDr. Zdeňku Kühnovi, LL.M., Ph.D. za jeho ochotu, čas a odborné rady, jež mi věnoval při psaní této diplomové práce, včetně entusiasmu, se kterým k danému tématu přistupoval. Dále bych chtěl vyjádřit poděkování Prof. Dr. Ciaránu Burke, LL.M. a Mgr. Janu Exnerovi, za jejich cenné komentáře a rady, díky nimž se pro mne stalo psaní této diplomové práce radostí. V neposlední řadě bych také rád poděkoval svým přátelům a rodině za jejich trpělivost a podporu.

Acknowledgement

I would like to take this opportunity to express my sincere thanks doc. JUDr. Zdeněk Kühn, LL.M. for his willingness, time and expert advice during my work, as well as for his enthusiasm with which he approached the topic at hand. Additionally, I would like to thank Prof. Dr. Ciarán Burke, LL.M. and Mgr. Jan Exner for their valuable comments and advice, which brought me joy during the writing of this thesis. Last but not least, I thank my friends and family for their patience and support throughout this endeavour.

Obsah / Content

Introduction 1

1. Hate speech 5

1. 1. What is hate speech? 6

1. 2. When to regulate hate speech 9

Who, what, where and why 9

Harm of potential violence versus harm to human dignity 13

2. Hate speech in the case-law of the Supreme Court of the United States and the European Court of Human Rights 16

2. 1. Hate speech in the Supreme Court of the United States case-law 16

2. 1. 1. Content-based and content-neutral regulations 20

2. 1. 2. Types of speech restrictions 25

2. 1. 3. Free speech exceptions 27

2. 2. Hate speech in the European Court of Human Rights case-law 30

2. 2. 1. Article 10 of the Convention 31

2. 2. 2. Articles 14 and 17 of the Convention 35

3. Racial hate speech 38

3. 1. Racial hate speech in the case-law of the Supreme Court of the United States 39

R. A. V. v. City of St. Paul (1991) 44

Virginia v. Black (2003) 50

4. Ethnic and religious hate speech 52

4. 1. Ethnic and religious hate speech in the case-law of the European Court of Human Rights 54

Anti-Semitic hate speech 55

Anti-Islamic hate speech 60

Perinçek v. Switzerland (2015) 63

5. The paradigm shift 67

Conclusion 77

Teze diplomové práce v českém jazyce / Master's thesis summary in Czech I

Seznam zkratek / List of abbreviations XVII

Seznam použité literatury / Bibliography XVIII

Abstrakt / Abstract XXV

Klíčová slova / Key words XXVIII

Introduction

June 1991. A father and a mother, both African Americans, are awakened in the middle of the night by footsteps and a glowing light outside their bedroom window. What they see renders them speechless. A crudely assembled cross stood ablaze in the middle of their front lawn. Both of them are terrified and worried about their five children but they are also infuriated. The mother feels disbelief at first but then alarm, as she remembers the stories her relatives told about cross-burnings and things that followed. The father takes it as a direct threat and realizes that they are being told to get out of there or something bad is going to happen.

It was a group of teenagers, who set fire to the cross. They were disgusted by the fact a black family was living in their neighbourhood. They wanted them gone, never to return. The family naturally sought protection from the authorities and the case eventually reached the Supreme Court of the United States of America, where the right to freedom of expression collided with the right to live in peace where people wish.

A simple case, many would argue. Alas it was not so, for in the United States, nothing is simple when it comes to protection of freedom of expression. So how was the case resolved? Did the family have to move elsewhere? Or were the perpetrators of the attack punished for their actions? Which right ultimately prevailed? These and many more questions will be answered in this thesis.

The freedom of expression is one of the constitutionally guaranteed fundamental rights. It is also one of the main pillars of modern democratic societies. Bearing this in mind, it should be the duty of a state to provide and secure the right of all its citizens to freely voice their opinion on both public and private matters. Though most of the expressions aim to communicate ideas, suggestions or incite public discussion on various topics, it is hardly the only motive the speaker might have in mind. Speech that is made in an attempt to offend or intimidate certain groups of people, cause negative emotions like sorrow, fear or hate, or simply to vent anger and frustration

– these and many more, though they may make many people feel uncomfortable, also fall under the umbrella of the protection of freedom of expression. One might say that these particular expressions undermine principles upon which democratic societies stand and therefore should not be protected, while on the other hand, people would argue that restricting public debate in any way is contradictory to those democratic principles. There is truth to be found in both statements, which will result from the analysis of various court decisions.

One of the questions that this master's thesis aims to answer is not whether these hateful expressions should or should not be banned altogether, but rather where the borders of "hate speech" ought to be drawn, so that we may determine the extent to which the expression is still protected and differentiate this from situations where such protection is forfeited.

Some legal systems adopt a more restrictive approach than others when it comes to expressions considered hateful or discriminating, often viewing them solely as the means to cause harm and discomfort. However, this viewpoint, widely accepted in most of the states on the European continent, is but one side of the story. In the United States of America (hereinafter, "the US"), the freedom of expression – including "hate speech" – enjoys wide constitutional protection.[1] So wide in fact is this protection, that it pushes several other human rights and freedoms behind it. This remarkable difference will constitute one of the main focuses of this master's thesis.

To demonstrate this distinction, this thesis carefully examines standings and rulings as well as doctrines and principles of both the European Court of the Human Rights in Strasbourg (hereinafter, "the ECHR"), which handles certain disputes between states and individuals concerning human rights, in the present instance, relating to freedom of expression, and the Supreme Court of the US (hereinafter, "the Supreme Court"), which, for the purposes of this study, represents a counterpart to the Strasbourg Court. The judgments of

[1] Michel Rosenfeld: "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis",

these courts and the principles that govern them will be helpful in distilling the parameters that hold the key to decisions in hate speech cases.

Each court deals with different species of hate speech. In the United States, most of the hate speech cases that reached the Supreme Court included a racial dimension, while the ECHR more often deals with religious and ethnic hate speech. This is explained by the divergent histories of the respective continents. North America, and the US in particular, is haunted by a history of "*racial segregation, second-class citizenship, racist terrorism (lynchings, cross-burnings, fire-bombings of churches) and those memories of racial terror are nightmarishly awakened each time one of these*" – racial – "*postings or pamphlets is put out into the public realm.*"[2] Europe, on the other hand, still has a living memory of six million lives extinguished in pursuit of degenerate ideal of a "pure" and "superior" race. These historical factors unmistakably flavour the attitude towards hate speech and also permeate the number of relevant cases decided in the courts. This will become apparent in the following chapters.

In sketching the methodology of the present study, and in justifying the fora chosen for the purposes of comparison, it is worth mentioning why the Court of Justice of the European Union (further referred to as "the CJEU") was not included. The CJEU also deals with human rights cases, even those concerning freedom of expression[3], but unlike the ECHR, its case law in this area is fairly limited, and it often bases its decisions on previously-decided ECHR case-law. As such, its inclusion would not add much to an analysis that is intended to be empirical as well as analytical.

Similarly, national courts' decisions in free speech cases are also omitted from the present study. This choice was made for the purposes of simplicity, and in order to avoid overly broadening the scope of the thesis. While individual states in both USA and Europe have slightly different approaches when it comes to protecting freedom of expression, it is nonetheless the case that the

[2] Jeremy Waldron: „The Harm in Hate Speech" (2012) Harvard University Press, p. 31
[3] The key provision for deciding free speech cases in the CJEU is the Article 11 of the Charter of Fundamental Rights of the European Union.

50 States and commonwealths of the US (as well as the District of Colombia) as well as the 47 Member States of the Council of Europe will in almost all circumstances have to obey the ruling of the higher courts – the Supreme Court and the ECHR – when their own decisions are appealed. As such, the present study is intended to paint with a rather broad brush in order to sketch communalities between the respective European and US States, and distinctions between the respective economic blocs on either side of the Atlantic.

The ultimate question contemplated herein is whether either the ECHR or the Supreme Court *should* revise their methods of thinking and the principles by which they abide in their rulings concerning hate speech and whether they have the potential to "learn" from their counterparts across the ocean. However, it goes without saying that there are a number of obstacles, which each court would have to overcome if its justices thought it prudent to adopt new ways of deciding hate speech cases, not least based upon the fact that each court is applying an entirely different legal framework. Therefore, we must also determine if each court *could* in fact adopt new ways of deciding, which means discovering plausible doctrines to assimilate and effective means by which this might be achieved.

The research methodology of this thesis firstly consists of deriving general principles from the decisions of both courts concerning hate speech. These are then compared against one another as an attempt to discover some common ground, or at least to assess the possibility of implementing the principles obtaining in one jurisdiction in hate speech decisions in the other and therefore unifying at least some of the aspects that govern the decision-making process.

This thesis is divided into multiple chapters. The first chapter deals with the hate speech phenomenon in general, discusses various approaches to dealing with the problem, and presents the forms that hate speech can take. It also briefly considers the dominant historical, social and political elements in each of the societies examined, and their influence on the respective courts'

decisions in hate speech cases. The second chapter examines discourse on hate speech in light of ECHR and Supreme Court decisions in general, presents the respective relevant legal regulations and aims to shed light on the numerous doctrines and principles that govern the decision-making of both courts.

The third chapter deals with racial hate speech in the case-law of the Supreme Court, with an attempt to demonstrate the usage of the aforementioned principles and to present a number of relevant judgments. The fourth chapter deals with ethnic and religious hate speech in Europe.

The fifth chapter analyses the case-law of both the Supreme Court and the ECHR, as well as takes the historical and social climate into context, and attempts to determine, which avenues the courts should take in order to broaden the protection against hateful expressions either in their own case-law, or in the principles used by their counterpart.

In terms of the overall research methodology, it is certainly germane to note why only racial, ethnic and religious hate speech is analysed in this thesis, and why other means of communicating the message, such as political hate speech, were omitted from the study. This choice may be justified by the general goals of the thesis, one of which entails finding common ground between the courts on the basis of their case-law. For these purposes, it would appear sufficient to cover these three types of hate speech. Since political hate speech on both continents is very extensive and unique in the protection awarded it, and since the political traditions in Europe vary broadly from state to state, a more extensive study than that possible in a work of this scope would be necessary.

1. Hate speech

It is beyond discussion that the freedom of expression is vital for enforcing and maintaining democracy as well as the political, economic, scientific and cultural growth of society. However, one must always keep in mind that speech can also be used in attempts to incite violence, spread hate or endanger national security. Although the concept of free speech, which enables the voicing of radical and sometimes hurtful thoughts, contributes to increasing

tolerance in human society, I believe, it is necessary to differentiate it from those thoughts and expressions that are too harmful to express, and those should not enjoy legal protection.[4] Each state deals with this phenomenon in a slightly different way. This may be because of the legal system or because of the state of the society and its ability and willingness to deal with these expressions on its own. This will be further discussed in the next chapter, which focuses on presenting principles concerning the regulation of hate speech, legal documents and court judgments.

1. 1. What is hate speech?

What exactly is hate speech? No global definition of this term exists, though many states engage with the phenomenon in their legislation. However, this does not entail that it is impossible to answer this question. Perhaps the best way to start is to consider Recommendation 97(20) on "hate speech" which originates from the Committee of Ministers of the Council of Europe. It defines the term as follows:

"*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.*"[5] "*In this sense, "hate speech" covers comments which are necessarily directed against a person or a group of persons.*"[6]

Other international legal sources also somewhat partially outline the definition of hate speech. For example, the International Covenant on Civil and Political Rights (hereinafter, "ICCPR"), Article 20(2), provides that: "*Any advocacy of national, racial or religious hatred that constitutes incitement to*

[4] Examples of these unprotected expressions range from threatening speech (*Virginia v. Black* in the US) to holocaust denial (*Ivanov v. Russia* in Europe)
[5] Council of Europe Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"
[6] Anne Weber: „Manual on Hate Speech" (2009) Council of Europe Publishing, p. 3

discrimination, hostility or violence shall be prohibited by law."[7] This article does not restrict or regulate hate speech or free speech in general on its own. Instead, it requires the parties to the ICCPR to enact laws to restrict certain kinds of speech, in this case, hate speech. Although the ICCPR is legally binding, as opposed to the aforementioned Recommendation, the more precise wording of the Recommendation may be preferred as a means of framing the phenomenon to that of the ICCPR, which doesn't even speak of hate speech, but which deals with a broader, less bounded categorisation.

The International Convention on the Elimination of All Forms of Racial Discrimination prescribes in its Article 4 that: "*States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination...*"[8] This is not a definition of hate speech in itself, rather representing a prescriptive instruction, but it is nonetheless relevant. Whenever an individual subject to the state parties' jurisdiction justifies or promotes racial hatred and discrimination, the parties to this convention are obliged to discourage and prohibit such hateful expressions and acts in order to eliminate all forms of discrimination.

It is also possible to derive the notion of hate speech from the case law of various jurisdictions; however, any such derived definition would necessarily lack a certain degree of precision, which can be seen in the aforementioned Recommendation no. 97(20). For example, the ECHR in some of its judgments works with the following definition: *"all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance).*"[9]

---

[7] International Covenant on Civil and Political Rights, Article 20(2)
[8] International Convention on the Elimination of All Forms of Racial Discrimination, Article 4
[9] *Gündüz v. Turkey*, no. 35071/97, ECHR 2003, § 40; *Erbakan v. Turkey*, no. 59405/00, ECHR 2006, § 56

A number of concrete situations tend to fall within the scope of hate speech based on the above-mentioned definitions. In this respect, it is useful to refer to the work of Anne Weber on the subject. Such situations first and foremost encompass (1) incitement of racial hatred, or in other words, hatred directed against persons or groups of persons on the grounds of belonging to a race; followed closely by (2) incitement to hatred on religious grounds, including hatred on the basis of distinction between believers and non-believers; and finally, (3) incitement to other forms of hatred based on intolerance "*expressed by aggressive nationalism and ethnocentrism*."[10] On the basis of various court decisions, other forms of hatred mentioned above might range from apologies of violence,[11] to incitement to hatred and hostility towards race or religion,[12] condoning terrorism[13] and war crimes.[14]

Anne Weber in her Manual on hate speech also mentions homophobic speech, which, indeed, is tackled in certain judgments of both the ECHR[15] and the Supreme Court.[16]

Any definition of hate speech necessarily requires the definition of what is "speech". It is important for this thesis to define this word because speech in our context is not limited only to spoken word. Speech may also include expressions that are printed, published, or posted on the Internet. Sometimes, these "*visible, public, and semipermanent announcements,*"[17] have more impact than the spoken word. Words can often be more easily forgotten than an image burned into the brain.[18]

---

[10] Anne Weber (2009): op. cit., p. 4
[11] *Sürek v. Turkey*, no. 26682/95, ECHR 1999; *Günduz v. Turkey*, no. 35071/97, ECHR 2003
[12] *Jersild v. Denmark*, no. 15890/89, ECHR 1993; *Soulas a. o. v. France*, no. 15948/03, ECHR 2008; *Féret v. Belgium*, no. 15615/07, ECHR 2009; *Le Pen v. France*, no. 18788/09, ECHR 2010
[13] *Leroy v. France*, no. 36109/03, ECHR 2008
[14] *Lehideux and Isorni v. France*, no. 24662/94, ECHR 1998
[15] *Vejdeland ao. v. Sweden*, no 1813/07, ECHR 2012
[16] *Snyder v. Phelps*, 562 U. S. ___ (2011)
[17] Jeremy Waldron (2012): op. cit., p. 39
[18] *„Statues, monuments, and the like … perhaps because they are intended to be seen by large audience, … contribute to a climate of opinion that is injurious to members of the group single dout. … Tangible symbols have a quality that – spoken – words do not: They are enduring. Words disappear when they are spoken. They may resonate in the mind of the victim … But a flag or a monument … is always there."* – Richard Delgado, Jean Stefancic: "Understanding Words That Wound" (2004) Westview, p. 142

1. 2. When to regulate hate speech

Having briefly examined what passes as hate speech and having considered its various definitions, this section will now focus on how to approach hate speech: if, when and how to regulate it and to what extent. Some countries, especially the US, are reluctant to regulate speech in any way. Jeremy Waldron presents this approach as such: "*[A] government equipped with hate speech codes would become a menace to free thought generally and that all sorts of vigorous dissenters from whatever social consensus the government was supporting would be,*"[19] as Anthony Lewis puts it, "*hunted, humiliated, punished for their words and beliefs.*"[20]

European States, on the other hand, have no problem with restricting hateful speech. To quote the dissenting opinion of ECHR judge Türmen in the case *Gündüz v. Turkey*: "*Hate speech is undeserving of protection. It contributes nothing to a meaningful public debate and therefore there is no reason to think that its regulation in any way harms any of the values which underlie the protection of freedom of expression.*"[21] While in this case, it was a minority opinion, it is an idea that is present in some other ECHR cases on hate speech as well. This approach is, of course, not accepted in the United States. It is worth mentioning that some states are reluctant to follow others in restricting certain expressions, for example, unlike many central European states, Ireland or United Kingdom have no laws on holocaust denial.

Who, what, where and why

Deciding which expressions should be prohibited or restricted, how and to what extent; it is not an easy task. Michel Rosenfeld defines three key variables that help determine the severity of such speech and the necessity to regulate it: (1) *who* is involved; (2) *what* message is communicated; and (3) *where* and *under what circumstances* these cases arise.[22]

---

[19] Jeremy Waldron (2012): op. cit., p. 32
[20] Anthony Lewis, "Freedom for the thought we hate: a biography of the First Amendment" (2007) Basic Books, p. 106
[21] *Gündüz v. Turkey,* no. 35071/97, ECHR 2003
[22] Michel Rosenfeld (2002-2003): op. cit., p. 1526

"*The who is always plural, for it encompasses not only the speaker who utters a statement that constitutes hate speech, but the target of that statement and the audience to whom the statement in question is addressed.*"[23] This criterion is very important with regard to freedom of expression in general and even more so when considering hate speech. Concerning who (the speaker) there is a significant difference when hateful comment is voiced by a political figure with easy access to the press[24] and when it is uttered by an individual with no political sway or a group of people that represent a minority within the society – these people have more difficulties reaching a larger audience, because they lack the means for broad distribution of their ideas. A strong political figure benefits from being widely known in a particular society and therefore his message may have more influence on the crowd.

So the targeted group affiliation is not the only defining factor, as might seem the case at first glance. The matter of who is the target of the speech is a more complex one. Is white hate speech against blacks treated equally as black hate speech against whites? When looked upon from a religious perspective, when a Muslim (as a minority) criticizes Christianity is he treated equally as a Christian (representing majority) who criticizes Islam? Let us consider anti-Semitism from the perspective of the black minority. Is the goal of the message to assault a particular minority on the basis of its views, culture or history to be treated or even perceived as would be a white anti-Semitic speech, or is it a tool of the black minority to avert the searchlight to another minority and possibly forge some sort of alliance with the majority by rendering Jews a scapegoat?[25] Which of these options is more dangerous? White hate speech, regular black hate speech or defensive employment of hate speech as a tool?

Waldron's idea of who is harmed by hate speech is "*the groups who are denounced or bestialized in the racist pamphlets and billboards. It is not harm … to the white liberals who find the racist invective distasteful.*"[26]

---

[23] Michel Rosenfeld (2002-2003): op. cit., p. 1526
[24] *Lingens v. Austria,* no. 9815/82, ECHR 1986
[25] Michel Rosenfeld (2002-2003): op. cit., p. 1527
[26] Jeremy Waldron (2012): op. cit., p. 33

If we take historical context into account in order to reduce bias in hate speech regulation, an argument may be made that "*racist speech by a member of a historically dominant race against member of an oppressed race are likely to have a more severe impact than racist speech by the racially oppressed against their oppressors.*"[27] The same could be applied in the case of a religious majority vocalising hate against a minority. Of course, in order to fully answer these questions, all relevant variables must be present in the equation: who (the speaker), who (the target), what, where and under what circumstances.

When it comes to *what*, Rosenfeld divides hate speech into two categories. The first is "hate speech in form" – a speech that is considered hateful at first glance, e.g. defamation or insults on the base of race, religion, origin or political affiliation, et cetera. The second is "hate speech in substance," which does not seem so straightforward. It involves messages such as condoning terrorism, Holocaust denial and many others. Even though these utterances might aim to engage in a spirited, non-hateful debate, there are those that use the surrounding debate as an illusion to mask their true intent, that is insult, defamation of certain groups of people or an attempt to alienate the group from the majority; such persons may ultimately prove to be hateful and condemnatory even if it is in a more subtle way. However, even those with "pure" intentions, who seek only to communicate popular ideas, might unknowingly offend individuals or groups of people.

Not every "hate speech in form" aims to insult. "*For example, in the United States the word "nigger" is an insulting and demeaning word that is used to refer to a person who is black. When uttered by a white person to refer to a black person, it undoubtedly fits the label "hate speech in form." However, as used among blacks, it often serves as an endearing term connoting at once intra-communal solidarity and implicit condemnation of white racism.*"[28] This example is also instructive in light of the *who* criterion mentioned above because it shows how a word may be considered hateful only when spoken by a member of a certain group of people.

---

[27] Michel Rosenfeld (2002-2003): op. cit., p. 1566
[28] Ibid, p. 1528

Waldron believes the harm of the hate speech is caused by "*publication … through the disfiguring of our social environment by visible, public, and semipermanent announcements to the effect that … members of another group are not worthy of equal citizenship.*"[29]

When it comes to *where* and *under what circumstances*, the decision to either restrict or allow hate speech depends on the country, culture or society. For example anti-Semitic ideas and neo-Nazi viewpoints may have a larger impact in Europe, from where the vast majority of Holocaust victims originated, than in the US: "*Although American and German Jews are entitled to the same degree of dignity and inclusion within their respective societies, greater restrictions on anti-Semitism are required in Germany than in the United States in order to achieve comparable results.*"[30] On the other hand, US society might be less tolerant of defamation of the black minority, due to its historic mistreating of black slave labour from African colonies. Whether the speech occurs in an intra-communal versus inter-communal setting is as equally important. I.e. strong anti-white speech at an all-black social clubs in the US should not be scrutinized to the same degree as the same speech made in an open political rally.[31]

There is also the question of *why* a particular expression is voiced. Waldron believes that these expressions send a message to the minorities denounced by its content, such as: "*Don't be fooled into thinking you are welcome here. The society around you may seem hospitable and nondiscriminatory, but the truth is that you are not wanted, and you and your families will be shunned, excluded, beaten, and driven out, whenever we can get away with it. … Be afraid.*" He also points out that these expressions send a message to other members of the community besides those under attack: "*We know some of you agree that these people are not wanted here. We know that some of you feel that they are dirty (or dangerous or criminal or terrorist). Know now that you are not alone. … There are enough of us around to draw attention to what these*

[29] Jeremy Waldron (2012): op. cit., p. 33
[30] Michel Rosenfeld (2002-2003): op. cit., p. 1566
[31] Ibid., p. 1528

people are really like. Talk to you neighbors, talk to your customers. And above all, don't let any more of them in."[32]

That, in Waldron's point of view, is the point of hateful messages: to make minorities feel unwelcome and afraid and to seed hatred in the hearts of others, make them take up arms against the minority as well.

Harm of potential violence versus harm to human dignity

Another approach to regulating hate speech is presented by John C. Knechtle in his article *When to Regulate Hate Speech*. Knechtle identifies two "umbrella harms" that the regulation of hate speech seeks to address, namely *the harm of potential violence* and *the harm to human dignity.*[33] He also describes two critical factors for consideration in deciding when and how to regulate hate speech, namely a country's history with ethnic, racial and religious violence, genocide, and discriminatory practices; and its jurisprudential history, which reflects the hierarchy of its constitutional value choices;[34] these will be discussed at the end of the respective chapters concerning hateful and ethnic or religious speech.

"*The harm of potential violence refers to the propensity of hate speech to incite and cause violence.*"[35] Incitement to violence often goes hand-in-hand with hate speech. Out of many historical examples, Nazi Germany and national radio broadcasts in 1994 in Rwanda, which helped to incite the Tutsi genocide sufficiently illustrate this. Many states regulate hate speech to prevent the harm of potential violence, the United States being one of them, but it requires a high degree of correlation between hate speech and violence (the "Brandenburg test"[36]).

On the other hand, *harm to human dignity* is a concept unknown in the United States, unlike many European states, such as Germany. Human dignity is

---

[32] Jeremy Waldron (2012): op. cit., p. 2-3
[33] John C. Knechtle: „When to Regulate Hate Speech" *110 Penn St. L. Rev. 539* (2005-2006)
[34] Ibid*, p. 543*
[35] Ibid, *p. 546*
[36] The test requires the advocacy of the use of force or of law violation to be directed to inciting or producing imminent lawless action and to being likely to incite or produce such action in order for the speech to be prohibited. (See the Brandenburg test in Chapter 2)

hard to define, but it can be summed up as a concept that "*reflects a certain standard of respect by which all persons must be treated simply due to their intrinsic worth as human beings living in a community.*"[37] Waldron believes hate speech aims to compromise said dignity, "*to besmirch the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing.*"[38] Knechtle believes that this concept "*has played an important role in Europe in forming constitutional standards that the government must enforce to ensure the rights of its citizens.*"[39]

With that – the grounds for restricting speech – covered, there is also need to present at least some arguments for allowing hateful expression. To put aside fear of censorship or silencing "wrong ideas", Lewis used very interesting argument in his paper: "*one of the arguments for allowing hateful speech is that it makes the rest of us aware of terrible beliefs and strengthens our resolve to combat them.*"[40]

Although Waldron states that government today is strong enough to shrug off attacks, and that therefore it does not need to regulate political speech, he doubts the same could be applied to vulnerable – racial or religious – minorities; rather, they require the law's protection. This is because the position of minority groups as equal members of a society is not something that everyone takes for granted.[41]

Having briefly examined what both courts take into account when deciding hate speech cases, the next focus is on actual species of hate speech. There are many variants; the following is therefore an inexhaustive typology.

When it comes to species of hate speech, no list is likely to be able to include every variant of hate speech from around the globe. However, based on a cursory examination of a variety of judgments and legal documents, a certain

[37] John C. Knechtle (2005 – 2006): op. cit., p. 551
[38] Jeremy Waldron (2012): op. cit., p- 5
[39] John C. Knechtle (2005 – 2006): op. cit., p. 552
[40] Anthony Lewis (2007): op. cit., p. 162
[41] Jeremy Waldron (2012): op. cit., p. 30

number of types may be identified as hateful: racial[42], ethnic and religious hate speech[43], public figures' (or a political) hate speech[44], homophobic hate speech[45], apology of violence[46], incitement to hatred and hostility towards race, religion et cetera[47], condoning and denying terrorism and war crimes[48], and internet hate speech,[49] which is more of a means of communicating hateful message than a species on its own.

[42] R. A. V. v. St. Paul, 505 U.S. 377 (1992)
[43] Smith v. Collin, 439 U.S. 916 (1978)
[44] *Lingens v. Austria,* no. 9815/82, ECHR 1986
[45] *Vejdeland and others v. Sweden*, no. 1813/07, ECHR 2012; Snyder v. Phelps, 562 U.S. ___ (2011)
[46] *Faruk Temel v. Turkey*, no. 16853/05, ECHR 2011
[47] *Jersild v. Denmark*, no. 15890/89, ECHR 1993
[48] *Lehideux and Isorni v. France*, no. 24662/94, ECHR 1998
[49] *Delphi v. Estonia*, no. 64569/09, ECHR 2015

2. Hate speech in the case-law of the Supreme Court of the United States and the European Court of Human Rights

While a general introduction to hate speech phenomenon, its definition and types were presented in the previous chapter, the time has now come to present the laws, principles and doctrines that govern the decisions of both the ECHR and the Supreme Court in hate speech cases. This chapter is crucial, because these principles are vital to decision-making in every case presented in this thesis. To avoid repetition, only the general approach to these doctrines, their usage and influence are discussed, with a certain amount of reference to relevant case-law. It is in the chapters that follow where a more detailed approach takes place. The present chapter also discusses legal provisions that bind these courts and attempts to find similarities and differences between them while examining how they affect the process of decision-making. Since both American and European cultures have very different approaches to hate speech regulation, each will be covered in a separate chapter.

2. 1. Hate speech in the Supreme Court of the United States case-law

In the US, freedom of speech is considered to be one of the most sacred constitutional liberties. It is incorporated in the First Amendment to the US Constitution (hereinafter, "the First Amendment"), which states: "*Congress shall make no law ... abridging the freedom of speech or of the press,*"[50] and although today, there are very few limitations to this particular freedom, this was not the case in the past: "*Americans are freer to think what we will and say what we think than any other people, and freer today than in the past.*"[51]

For example in contemporary Western society, and American society more specifically, there hasn't been a person prosecuted for criticizing the head of state or any other public figure for quite some time. That does not mean, of

[50] First Amendment to the United States Constitution (1791)
[51] Anthony Lewis (2007): op. cit., p. ix

course, that no-one would think about it. Just recently, a group of fifty deputies of the House of Deputies of the Parliament in Czech Republic submitted a proposal of a law, according to which it would be criminally punishable to defame the president of the Republic. This proposal ignited a discussion on the matter, which resulted in most representatives refusing to accept it, as well as in the retraction of some of the signatures from the proposal. Although it is an alarming concept to criminalize defamation of a politically oriented head of state, many believe that the aim of the representatives behind this proposal was to make themselves visible before the upcoming election.

There is another example of possible restriction of speech on the horizon, more specifically of the press. The current president of the United States, Donald Trump, has set on a campaign to battle the so-called "fake news". He barred some of the news organisations, including the larger ones such as the NY Times or the CNN from participation on the briefing with the White House secretary, while allowing conservative publications such as the Washington Times and those friendly toward Trump to be part of the event. It was not the first time that Trump declared that much of the media was "the enemy of the American people" and specifically criticized "fake news" for not telling the truth. It is unclear how far will Trump go to ban "fake news" but one cannot exclude possible criminal sanctions.

In earlier times, such critical expression concerning the head of state was indeed sanctioned. Just seven years after the First Amendment was added to the Constitution, a group of editors were imprisoned for mockery after the Congress passed a law prohibiting disrespectful comments concerning the president. A century later, another group of people were sent to prison for criticising president's policy.[52] Why do the Americans exercise wider freedom than before? The simplest answer is progress. Lewis claims that the main reason for this change is that "*the understanding of those words* – that of the first amendment – *has changed.*"[53] This is the Supreme Court justices'

[52] Ibid., p. x
[53] Ibid

understanding as well as the public's. While the freedom of expression gained strength over the course of years, the courts raised the bar in protection other fundamental rights and freedoms as well.

The understanding of the Constitution and its amendments as a legally enforceable list of provisions is taken for granted in the present but, for this to be the case, this understanding had to undergo some changes. In the eighteenth century, these provisions were generally regarded as a species of guidelines for state legislatures. In other words, encouraging, not binding. It was in 1783 that the judges used the constitutional provision ("*All men are born free and equal*"[54]) to strike down common-law practice for the first time, namely slavery in Massachusetts in the case of *Commonweath v. Jennison*[55], by convicting a man for assault and battery when he beat his slave after he attempted to escape.[56] This was the first case in which the constitutional provisions – then still regarded as not binding – were recognised and utilised by the court as legally enforceable, and it was then, that the understanding and meaning of these provisions ultimately began to change. It is worth noting that not only the words of the Massachusetts constitution, but also of the Declaration of Independence itself state that *"All men are created equal,"*[57] so this change eventually reached every state of the U. S. and nowadays, the constitutional provisions – those regarding freedom of expression and ultimately including hate speech cases – are legally enforceable.

The Supreme Court of the United States believes in the free *"marketplace of ideas."*[58] In this concept, which was first introduces by Mr Justice Oliver Wendell Holmes, the truth should emerge from the competition of ideas in free and transparent public discourse and in conclusion, the ideas will be culled according to their superiority and widespread acceptance among the population.

---

[54] Constitution of Massachusetts (1780), Article I.
[55] Proceedings of Massachusetts Historical Society, Volume 1873-1875, pp. 292-295
[56] Anthony Lewis (2007): op. cit., p. 7
[57] The Declaration of Independence of the United States of America (1776)
[58] Board of Education v. Pico, 457 U. S. 853, 866 (1982)

Holmes also stated that "*If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.*"[59]

Contrary to the marketplace of ideas, one scholar wrote that "*[t]he real problem is that the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat). Racism is irrational and often unconscious. Our belief in the inferiority of non-whites trumps good ideas that contend with it in the market, often without our even knowing it. In addition, racism makes the words and ideas of blacks and other despised minorities less saleable, regardless of their intrinsic value, in the marketplace of ideas. It also decreases the total amount of speech that enters the market by coercively silencing members of those groups who are its targets.*"[60] This serves an example of the dangers of a completely unregulated marketplace of ideas.

There are virtually no federal legal provisions to speak of when it comes to freedom of speech, save the First Amendment. That does not entail, of course, that these fourteen words are sufficient for the purposes of distinguishing constitutional state laws from those that are unconstitutional. That is the role of the courts and precedents arising from their numerous decisions. And it is these decisions, where we can find numerous principles, which attempt to interpret the true meaning and extent of the First Amendment protection of free speech.

To determine the extent of free speech protection, it is best to take a negative enumeration approach. It would be near impossible the other way round, because each protected expression might be subject to exceptions or other rules concerning particular restrictions.

These principles could be divided between the types of *speech restrictions* and *exceptions from free speech protection.* The latter can include both cases of

[59] Gitlow v. New York, 268 U.S. 652, 673 (1925)
[60] Charles R. Lawrence III: "Frontiers of Legal Thought II The New First Amendment: If He Hollers Let Him Go: Regulating Racist Speech On Campus" (1990), p. 468

complete exception or diminished protection. Some of these doctrines play little to no part in hate speech cases – these are mentioned solely for the sake of completeness; others are paramount in regulating speech and are discussed in greater detail in the following chapters.

2. 1. 1. Content-based and content-neutral regulations

Before moving to individual restrictions, it is first worthwhile to shed light on *content-based* and *content-neutral regulations.* This is the stumbling block when it comes to restricting speech. A single hint of a content-based provision in a regulation may lead to it being struck down. On the other hand, it is a mistake to believe that a content-neutral regulation is guaranteed to pass Constitutional muster. It is also important to note that each and every regulation is either content-based or content-neutral.

"*The binary distinction between content-neutral and content-based speech regulations is of central importance in First Amendment doctrine.*"[61] When a State enacts a statute proscribing a certain kind of expression, it must be very careful about establishing the grounds of such a regulation. The ordinance can either be *content-based* or *content-neutral*. Both kinds are subject to judicial scrutiny when the constitutionality of the provision is in question but it is the amount of scrutiny that differentiates them.

Content-based regulations "*limit communication because of the message it conveys.*"[62] Examples are many, ranging from "*laws that prohibit seditious libel, forbid the hiring of teachers who advocate violent overthrow of the government, or outlaw the display of the swastika in certain neighbourhoods.*"[63] They are subject to extremely rigorous and most exacting judicial scrutiny.[64] This scrutiny traditionally has two requirements: a) that the regulation serves a compelling or overridingly important government interest and b) that the regulation must be narrowly tailored to the promotion of that interest.

---

[61] R. George Wright: "Content-Neutral and Content-Based Regulations of Speech: A Distinction That is No Longer Worth the Fuss", 67 Fla. L. Rev. 2081 (2016), p. 2081
[62] Ibid., p. 47
[63] Ibid
[64] United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012)

Both requirements have certain means by which they may be identified. Some even overlap. When considering the compelling government interest, the Supreme Court has set forth four means by which such an interest may be determined.

First, the government cannot have a compelling interest in favouring a particular subclass of core protected speech – such as discussion about economic or political matters – over other subclasses. "*An exercise of . . . basic constitutional rights* – in this case core protected speech – *in their most pristine and classic form, has always rested on the highest rung of the hierarchy of First Amendment values.*"[65]

Secondly, restricting "bad ideas" is not a compelling governmental interest: "*If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.*"[66]

Furthermore, a regulation must not be underinclusive: *"A law's underinclusiveness -- its failure to reach all speech that implicates the interest -- may be evidence that an interest is not compelling, because it suggests that the government itself doesn't see the interest as compelling enough to justify a broader statute.*"[67] This means that a law does not entirely satisfy the compelling governmental interest if it fails to restrict a significant amount of speech that harms the government to approximately the same degree as the already restricted speech.[68]

"*Underinclusiveness might suggest … that the interest isn't very important, or that the government's real interest wasn't the stated one but was rather just*

---

[65] Carey v. Brown, 477 U.S. 455, 466-467 (1980)
[66] Texas v. Johnson 491 U.S. 367, 414 (1989)
[67] Eugene Volokh: "Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny", 144 U. Pennsylvania L. Rev. 2417 (1997); See also concurring opinion of Justice Scalia in Florida Star v. B.J.F., 491 U.S. 524, 542 (1989): In it, Scalia states that "that a law cannot be regarded as protecting an interest "of the highest order," and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." He then presents the example, where a law proscribes publication of a rape's victim story by the media but fails to prevent dissemination of the events to victim's friends and acquaintances.
[68] Florida Star v. B.J.F., 491 U.S. 524, 540 (1989)

a desire to favor one form of speech over another, or to suppress offensive or otherwise disfavored speech."[69] This may also hint at content discrimination beyond the justified compelling interest. When an otherwise justified *content-based* regulation contains a provision that proscribes a particular type of speech or message and the State fails to justify this distinction, it can declare the law as being unconstitutional.

Lastly, the government cannot have a compelling interest in fighting a particular injustice, and then refuse to battle another which is practically identical.[70]

Some specific examples of valid reasons for overriding can be found in Supreme Court decisions, such as: maintaining a stable political system,[71] ensuring that criminals do not profit from their crimes,[72] protecting the right of members of groups that have historically been subjected to discrimination … to live in peace where they wish,[73] and many more. Determining what constitutes a compelling governmental interest is a key variable when the constitutionality of a *content-based* regulation comes into question. If such an interest exists, the regulation is likely to be upheld.

After determining the compelling governmental interest, the second requirement needed to satisfy this strict judicial scrutiny is the narrow tailoring of the regulation to the governmental interest. According to the Supreme Court, this requirement comprises four elements.

First, the *advancement of the interest* requires that if the law is to be narrowly tailored, the government must prove that it actually advances the interest.[74]

---

[69] Eugene Volokh (1997): op. cit.
[70] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991). The government had an interest in "ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries." But the court rejected this interested because the government's interest was too narrow and held that the compelling interest was in "ensuring that criminals do not profit from their crimes" in general.
[71] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989)
[72] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105
[73] R. A. V. v. St. Paul, 505 U.S. 377 (1992)
[74] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 228-9, 266 (1989)

Secondly, the *regulation must not be overinclusive*. No overinclusiveness means that the law is not narrowly tailored if it proscribes a significant amount of speech irrelevant to the government interest[75]. In other words: "*…if the government can serve the interest while burdening less speech, it should.*"[76]

Furthermore, the State must find *the least restrictive alternative*. A law is not narrowly tailored if there are less speech-restrictive means available to satisfy the interest.[77] This constitutes a crucial element of the principle of proportionality adopted in Europe[78] and which is very important when dealing with restrictions of fundamental rights.

Finally, as mentioned above, *the law must not be underinclusive*, meaning that the law is not narrowly tailored if it fails to restrict a significant amount of speech that harms the government to approximately the same degree as the already restricted speech.

"*Justices Stephen Breyer and Elena Kagan have raised the possibility of a constitutional test in which the degree of judicial rigor is merely proportionate or somehow fitting to the perceived degree of harm addressed by the regulation.*"[79] They mention the importance of the provision's objectives, the extent to which the provision will achieve the objectives and other, less restrictive methods[80]. However, this test – which strongly resembles *content-neutral* regulations policy – is only a hypothetical scenario. To date, *content-based* regulations are still subject to strict judicial scrutiny, the point being that speech cannot be banned simply because of the message it carries. When strict judicial scrutiny is applied it is presumed that the regulation is unconstitutional and it is the government who carries the burden of rebutting this presumption.[81]

---

[75] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 120-121 (1991)
[76] Eugene Volokh (1997): op. cit.
[77] Florida Star v. B.J.F., 491 U.S. 524, 538 (1989)
[78] *Gündüz v. Turkey*, no. 35071/97, ECHR 2003, § 40
[79] R. George Wright (2016): op. cit., p. 2083; see also United States v. Alvarez, 132 S. Ct. 2537, 2548-2549 (2012)
[80] United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012)
[81] Roe v. Wade, 410 U.S. 113 (1973) The State of Texas did not meet its burden of proof and the law was held unconstitutional.

After covering *content-based* regulations, it is necessary to examine *content-neutral* regulations as well, which, on the other hand "*limit expression without regard to the content or communicative impact of the message conveyed.*"[82] There are many examples, such as laws that ban billboards in residential areas or prohibit the destruction or damaging of draft cards.[83] They receive intermediate judicial scrutiny and the Supreme Court applies a broad range of standards to test the constitutionality of such *content-neutral* regulations.[84]

The first of these standards requires the *content-neutral* regulations "*to serve a significant or substantial government interest*,"[85] which, in comparison, is a lower standard than the compelling government interest required for *content-based* regulations.

The second requirement is that these "*restrictions are reasonably or proportionately tailored to that interest*."[86] This requirement also has a lower impact on the law-making process than the narrow tailoring of the *content-based* regulations. It is important to point out that the regulation can be narrowly tailored to serve a compelling government interest – thereby fulfilling the requirements for *content-based* regulations – and still be *content-neutral*.

Additionally, when a law restricts speech, "*[it] must leave open ample alternative channels for communication*" of the information.[87]

There is an underlying standard which applies to *content-based* as well as *content-neutral* regulations: governments should always attempt to apply the least restrictive methods when regulating free speech.[88]

With *content-based* and *content-neutral* regulations covered, let us move to individual speech restriction and exceptions.

---

[82] Geoffrey R. Stone: "Content-Neutral Restrictions", 54 University of Chicago Law Review 46 (1987), p. 48
[83] United States v. O'Brien, 391 U.S. 367 (1968)
[84] Geoffrey R. Stone (1987): op. cit., p. 48
[85] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 308 (1984)
[86] United States v. Grace, 461 U.S. 171, 178 (1983)
[87] Ward v. Rock Against Racism , 491 U.S. 781, 791 (1989)
[88] R. A. V. v. St. Paul, 505 U.S. 377, 378 (1992)

2. 1. 2. Types of speech restrictions

The Supreme Court has recognized several restrictions that are present in ordinances enacted by States and reflected in its case-law. They include *time, place and manner* restrictions, *prior restraints*, and *incidental burdens on speech*.

Time, place and manner restrictions

A *time, place and/or manner restriction* is justified "*when it is neutral as to content and serves a significant government interest and leaves open ample alternative channels of communication.*"[89] Such restrictions can be summarized as the when, where and how an expression can be uttered. To illustrate a few of many possible examples: a person may be fined for too loud a revelry in the streets at midnight (time and place), or prohibited from shouting in a public library (place), or it may be punishable spam someone's email address against the receiver's will (manner).

The Supreme Court held that time, place and manner restrictions must first and foremost be *content-neutral* and narrowly tailored, second, must serve a significant governmental interest, and lastly, must provide ample alternative channels of communication.[90]

These restrictions have in common that they are mostly held to be constitutional, as they are content-neutral and therefore subject only to intermediate scrutiny.[91] They do not restrict *what* people can or cannot communicate. In other words, they restrict everyone from saying anything in certain situations. Other requirement needed in order for potential restrictions to be constitutional is that "*they are narrowly tailored to serve a significant government interest.*"[92] In order for the restriction to serve a significant interest, it must protect other rights of the citizens, such as the protection of privacy. Lastly, the restrictions cannot threaten to prevent a person from

[89] Merriam-Webster Law Dictionary (online), retrieved 25 March 2017
[90] Ward v. Rock Against Racism , 491 U.S. 781, 782, 783 (1989)
[91] Time, Place, and Manner Regulations –The issue: What sorts of restrictions on speech will be upheld as valid content-neutral time, place or manner regulations? (online), retrieved 25 March 2017
[92] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)

communicating the message entirely. There must be sufficient alternatives, such as writing an article online or the chance to speak in another place at another time. At the same time it must not discourage potential listeners from hearing the message, for example by ordering a preacher to give his sermon in a side alley late at night rather than in the city centre during rush hour.

Prior restraints principle

The next type of speech restriction is *the prior restraints principle*. In these cases the government tries to restrain speech before it is expressed, rather than issuing punishments for it afterwards. It is important to note that this principle pertains specifically to freedom of the press. The reason for prior restraints is rather obvious: the potential damage caused by the expression in question is too great for it only to be punished ex post. Permitting the speech would "*surely result in direct, immediate, and irreparable damage to our Nation or its people.*"[93] Furthermore, "*[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity*"[94] and the government "*thus carries a heavy burden of showing justification for the imposition of such a restraint.*"[95] It is undoubtedly dangerous, however, to unequivocally censor speech before it can be expressed.

Incidental burdens on speech

A case of *incidental burdens on speech* is the case *United States v. O'Brien*[96], in which the Supreme Court upheld the conviction of O'Brien when he burned his draft card in protest against the war in Vietnam – a very sensitive issue at the time. In his concurring opinion to *Brandenburg*, Mr. Justice Douglas criticized this decision: "*O'Brien was not prosecuted for not having his draft card available … He was indicted, tried, and convicted for burning the card.*"[97]

There is more to these principles than illustrated in this chapter but since they play only a minor role in hate speech case-law, the main focus will be on

[93] New York Times Co. v Sullivan 376 U.S. 254 (1964)
[94] *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963)
[95] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)
[96] United States v. O'Brien, 391 U.S. 367 (1968)
[97] Brandenburg v. Ohio, 395 U.S. 444, 455 (1969)

exceptions from protection of freedom of speech, which are very important in decisions on hate speech.

2. 1. 3. Free speech exceptions

As mentioned above, free speech exceptions include instances of complete exception and diminished protection. Most of these exceptions, such as obscenity or child pornography, are irrelevant in regards to hate speech cases, but there are some exceptions that are – or were – crucial in the decision-making, such as *inciting imminent lawless action*, *true threats* principle and *fighting words* doctrine. There are also *libellous utterances*, which are outside the protection of the First Amendment and are relevant in one of the cases presented in the next chapter.

The Brandenburg test

Of the aforementioned exceptions, *inciting imminent lawless action* – or "the imminent lawless action principle" – is the most fundamental. It took over after overruling then dominating clear and present danger corrective. The first example dates to 1919 and the Supreme Court case *Schenck v. United States*. In this judgment, the Supreme Court held that: "*Words … may become subject to prohibition when of such a nature and used in such circumstances to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.*"[98] The example of a clear and present danger was presented by Justice Holmes, who delivered the opinion of the court. He claimed that it would be like yelling "Fire!" in a crowded theatre and causing panic.[99] In the case *Whitney v. California* from 1927, the court stated, that "*…a State in the exercise of its police power may punish those who abuse this freedom* – freedom of speech – *by utterances … tending to incite to crime, disturb the public peace, or endanger the foundations of organized government…*"[100]

[98] Schenck v. United States, 249 U.S. 47, 48 (1919) p. 48
[99] Ibid., p. 52
[100] Whitney v. California, 274 U.S. 357, 371 (1927)

It was not until 1969 and the case *Brandenburg v. Ohio*, that the Supreme Court struck down the principles originating from these cases and established a new one: clear and present danger and advocacy of the use of force or of law violation do not permit a State to prohibit speech unless "*…such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*"[101]

Fighting words

This doctrine was first used in the case *Chaplinsky v. New Hampshire*, in which the court stated that there are certain classes of speech which, when restricted, do not present a constitutional problem: "*These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*"[102] The effect of this decision is that the Supreme Court puts more emphasis on the protection of order and morality rather than on that of free speech, which is granted only when the speech itself has no meaningful message to convey. The court also held that fighting words are those which are "*inherently likely to provoke violent reaction*".[103]

The Supreme Court explained in R. A. V. that "*fighting words are categorically excluded from the protection of the First Amendment*" because "*their content embodies a particularly intolerable mode of expressing whatever idea…*"[104] and not because of the particular idea communicated.

True threats

Albeit similar in substance, the *true threats* doctrine differs from the *fighting words* doctrine.

---

[101] Brandenburg v. Ohio, 395 U.S. 444 (1969)
[102] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)
[103] Cohen v. California, 403 U.S. 15, 20 (1971)
[104] R. A. V. v. St. Paul, 505 U.S. 377, 393 (1992)

The true threats doctrine excludes threatening speech from the First Amendment protection.[105] The Supreme Court presents three justifications for this exemption: "*protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.*"[106] True threats were first introduced in *Watts v. United States* case, when a black man when responding to his impending draft remarked that, should he be forced to kill his black brothers, his first target will be the current president. The Supreme Court struck down his conviction and held that the remark was a crude political hyperbole and "*did not constitute a knowing and willful threat against the president.*" There is only one shortcoming in this case and that is the missing explicit definition of a "true threat".[107]

A "true threat" definition was not introduced until the *Virginia v. Black* case.[108] Here the Supreme Court permitted a State to ban a "true threat" and held that: "*true threats … encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.*"[109]

Regarding the exceptions from free speech protection, there is one further principle that is of relevance, namely *the overbreadth doctrine*. In the *R. A. V.* case – an important racial hate speech case – all justices who agreed with the outcome of the case but frowned upon the holding, presented this doctrine as a basis for their own decision.[110] This doctrine basically means that a statute is overly broad when it, aside from proscribing unprotected speech (obscenity,

[105] Virginia v. Black, 538 U. S. 343 (2003)
[106] R. A. V. v. St. Paul, 505 U.S. 377, 388 (1992)
[107] Watts v. United States, 394 U.S. 705 (1969)
[108] The Supreme Court held that outlawing cross burnings with the intent to intimidate did not violate the First Amendment protection of free speech. A more detailed analysis can be found in Chapter 3.
[109] Virginia v. Black, 538 U.S. 343, 344 (2003)
[110] R. A. V. v. St. Paul, 505 U.S. 377, 414, 416, 436 (1992)

fighting words or defamation), proscribes a significant amount of speech under the protection of the First Amendment as well.[111]

These are the principles that govern the Supreme Court's decision-making in the First Amendment cases in general. They have a strong influence on the ruling in hate speech cases and that is the reason for their rather broad introduction. Not every principle is present in hate speech cases, but they are apparent in the Supreme Court decisions regarding freedom of expression in general and therefore impact hate speech as well, even though not directly.

2. 2. Hate speech in the European Court of Human Rights case-law

Whilst freedom of expression is one of the most dominant human liberties in the United States, the European continent appears to have an entirely opposite view on its regulation.[112] Both the views of the Council of Europe and European Union on regulating freedom of speech are very different from those of the U. S. Supreme Court. As mentioned above, the United States relies on the fourteen words that form the First Amendment and leave the rest – its interpretation and application – to the courts. This is not too different in continental Europe. Although there are no common law systems, judicial precedents nevertheless play a major role. They have a large impact on the interpretation of law as well as the legislature and provide a certain amount of legal certainty. Much like the First Amendment, articles of the Convention of the Protection of Human Rights and Fundamental Freedoms (further referred to as "the Convention") would only be hollow words if the courts didn't bring them to life.

When it comes to hate speech and freedom of expression in general, the ECHR relies on the Convention and its protocols.[113] To be more specific, there are

[111] State University of New York v. Fox, 492 U.S. 469, 483 (1989)
[112] The extent of hate speech regulation in the world, including liberal democracies, sharply contrasts with that of the United States, where free speech interests prevail. – John C. Knechtle (2005-2006): op. cit., p. 539
[113] The Convention was signed on 4 November 1950, entered into force on 3 September 1953 and has been ratified by all 46 member states of the Council of Europe.

three articles with which the ECHR works in deciding hate speech cases: Article 10 (freedom of expression), Article 14 (prohibition of discrimination) and Article 17 (prohibition of the abuse of rights).[114] Although the circumstances of the cases do not always require all three to be applied, Art 10 of the Convention (freedom of expression) is prevalent in all cases.

Now would be a good time to ponder just how much freedom of expression in Europe is protected as opposed to the United States. The case law of the ECHR describes freedom of expression as "*one of the basic conditions for the progress of democratic societies and for the development of each individual.*"[115] When deciding whether to restrict or to protect the expression of speech, the ECHR has to weigh these freedoms and decide which should prevail in the specific case.

It is not uncommon that in many legal documents – ranging from ordinances to constitutions – the most important provisions can be found at the very beginning. This is the case for the Convention. Freedom of expression is protected under Article 10 of the Convention, whereas it is preceded by right to life (Art. 2), the prohibition of torture (Art. 3), the prohibition of slavery and forced labour (Art. 4), the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), *nulla poena sine lege* (Art. 7), the right to respect for private and family life (Art. 8) and freedom of thought, conscience and religion (Art. 9).

It is paramount to note that this does not mean that these liberties will always have "the upper hand" when there is a conflict with Article 10 of the Convention. The circumstances and, more importantly, a certain balance between individual freedoms in each case are the key to determining which of the liberties should ultimately prevail.

2. 2. 1. Article 10 of the Convention

Article 10 of the Convention is an important article which the ECHR tends to apply when deciding freedom of expression cases. It states that:

---

[114] The European Convention of Human Rights (1949)
[115] *Handyside v. the United Kingdom,* no. 5943/72, ECHR 1979, § 49

"*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of 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."[116]

While paragraph 1 states what a freedom of expression is and grants it to every human being, paragraph 2 provides States with grounds for the possible restriction of this liberty.

As in the United States, the freedom of expression as enshrined in the Convention is not an absolute right. Paragraph 2 of Article 10 clearly states that States may interfere with the freedom of expression if certain circumstances arise. According to the ECHR, there are criteria which must be met in order to successfully restrict the freedom of expression: "*Under Article 10, paragraph 2, of the Convention, the Court will examine successively if an interference in the freedom of expression exists, if this interference is prescribed by law and pursues one or more legitimate aims, and, finally, if it is necessary in a democratic society to achieve these aims.*"[117]

The ECHR must first establish that there has been an infringement on the freedom of expression. This is established by a rather straightforward process

[116] The European Convention of Human Rights, Article 10
[117] European Court of Human Rights: Hate speech – factsheet (March 2017), p. 4

involving careful examination of the facts presented to the national courts as well as the application lodged with the ECHR.[118]

When this has been established the ECHR must then determine whether the restriction is prescribed by law.[119] This requirement is explicitly examined in the majority of cases which deal with a State restricting the freedom of expression. It is important that the law in question is accessible to a person who is likely to be affected by the rule and that it is sufficiently clear so as to allow individuals to govern their behaviour accordingly. Failure to meet this criterion results in the law being held to be incompatible with the requirements of the Convention.

Established case law of the ECHR suggests that reasons for such an incompatibility can be due to a lack of sufficient legal basis as was the case in the *Herczegfalvy v. Austria* case,[120] or due to a certain definition being imprecise, such as "to be of good behaviour" in the *Hashman and Harrup v. the United Kingdom* case.[121] Lastly, in the case *Gaweda v. Poland*, the ECHR held that the interpretation of an ordinance introduced new and unforeseen criteria and therefore did not satisfy the prescribed by law demand.[122]

If the restriction is, however, prescribed by law, the ECHR then discusses whether the legal provision restricting speech pursues one of the following legitimate aims recognized by the Convention: "*national security, territorial integrity or public safety, protection of health and morals, prevention of disorder or crime, protection of the reputation or rights of others, prevention of*

---

[118] Council of Europe Publishing: "Freedom of expression in Europe" – *Human rights files, No. 18* (Case-law concerning Article 10 of the European Convention of Human Rights) (2007), p. 8
[119] *I. A. v. Turkey*, no. 42571/98, ECHR 2005, § 22
[120] *Herczegfalvy v. Austria,* no. 10533/83, ECHR 1992 (In it, the ECHR concluded that there was no legal basis for the restriction imposed upon applicant, who wanted acccess to reading matter, radio and TV to acces information during his psychiatric treatment and confinement.)
[121] *Hashman and Harrup v. the United Kingdom*, no. 25594/94, ECHR 1999 (The ECHR found that "to be of good behaviour," defined in English law as behaviour which is "wrong rather that right in the judgment of the majority of contemporary fellow citizens," was imprecise and did not give the applicants sufficiently clear guidance as to how they should behave)
[122] *Gaweda v. Poland*, no. 26229/95, ECHR 2002 (The ordinance in question stipulated that „registration – of periodicals – could be refused if it would be inconsistent with the real state of affairs". The national courts inferred from this notion the power to refuse registration where they considered that the title of a periodical conveyed an essentially false picture. According to the Court, such an interpretation would require a legislative provision clearly authorising it.)

the disclosure of information received in confidence or maintenance of the authority and impartiality of the judiciary."[123]

Lastly, the ECHR needs to find that the restriction in question is necessary in a democratic society. To do so, the ECHR uses the principle of proportionality. This principle of proportionality requires a reasonable relationship between the objective sought and the means to achieve it.[124] This test must be applied to the particular circumstances. It consists of two elements: whether the restriction in question corresponds to the pressing social need (the legitimate aim of the Convention article in question) and whether the restriction constitutes a proportionate response to that need.[125]

All restrictions on freedom of expression must be "*necessary in a democratic society*."[126] As the ECHR stated in its case law – hate speech cases included – the adjective necessary implies "*a pressing social need*" to restrict particular expression. When dealing with this criterion, states have some degree of discretion, or in other words "*margin of appreciation*" when assessing the existence of that pressing need. The extent of this margin is highly case-dependent and will vary under different circumstances.[127] This margin is subject to European review as the ECHR stated in numerous cases.[128] And it is *the margin of appreciation*, where the ECHR has a potential to strengthen the protection grated against hateful expressions, but more on that in the final chapter.

---

[123] The European Convention of Human Rights, Article 10, § 2
[124] R. Clayton, H.Tomlinson: "The Law of Human Rights", (2000) Oxford, p. 278
[125] *Gündüz v. Turkey*, no.35071/97, ECHR 2003, § 40: *„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, povided that any „formalities", „conditions", „restrictions" or „penalties" imposed are proportionate to the legitimate aim pursued."*
[126] "Freedom of expression in Europe" – *Human rights files, No. 18* (Case-law concerning Article 10 of the European Convention of Human Rights) (2007): op. cit., p. 9
[127] Ibid.
[128] *Remer v. Germany*, no. 25096/94, ECHR 1995 (The ECHR stated that *„The contracting states have a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision."*

Even if a restriction of a fundamental right is fulfilling *a pressing social need*, it may not be disproportionate, as this would not be deemed *necessary in a democratic society* and would thus contravene the Convention.[129]

There are hints in some judgments, such as *Fáber v. Hungary*, in which the assessment of proportionality seems reminiscent of some of the Supreme Court doctrines such as "*clear and imminent danger*."[130] Even though *clear and present danger* doctrine is already out-dated in the United States, it is nevertheless interesting to see it on the European continent. It is apparent from many judgments such as *Fáber* that the extent of the protection of freedom of expression varies when it comes to different types of speech. The ECHR stressed that "*there is little scope…for restrictions on political speech or on the debate of questions of public interest.*"[131] Political speech and public debate obviously enjoy higher protection under Article 10 than other forms of speech, which results in a narrower *margin of appreciation* for states when assessing *a pressing social need*.

2. 2. 2. Articles 14 and 17 of the Convention

Article 10 is not the only relevant provision of the Convention, albeit being the most important in hate speech cases. It needs to be interpreted and applied in the light of Articles 14 and 17 of the Convention.[132] Unlike Article 10, which can stand on its own, Articles 14 and 17 must be applied in connection with other articles of the Convention.

The prohibition on discrimination is provided by *Article 14* and Protocol No. 12 of the Convention. Article 14 states: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,*

---

[129] "Freedom of expression in Europe" – *Human rights files, No. 18* (Case-law concerning Article 10 of the European Convention of Human Rights) (2007): op. cit., p. 9

[130] *Fáber v. Hungary*, no. 40721/08, ECHR 2012 (concurring opinion by judge Pinto de Albuquerque)

[131] *Fáber v. Hungary*, no. 40721/08, ECHR 2012, §35

[132] *Ivanov v. Russia,* no. 35222/04, ECHR 2007

national or social origin, association with a national minority, property, birth or other status."[133]

This article is always applied in connection to another article, which is why Protocol No. 12 to the Convention was established. It cites Article 14 and states that "*[t]he current non-discrimination provision of the European Convention on Human Rights is of a limited kind because it only prohibits discrimination in the enjoyment of one or the other rights guaranteed by the Convention … The Protocol removes this limitation and guarantees that no-one shall be discriminated against on any ground by any public authority.*"[134] This protocol therefore enables EU citizens to seek protection against discrimination on any grounds, not just those provided by the Articles of the Convention.

The ECHR confirmed this in for example the *Ivanov v. Russia* case, in which the applicant complained that his right to freedom of expression was infringed and that he was discriminated against because of his religious beliefs.[135] The court maintained that the applicant's complaints were inadmissible according to Article 17 of the Convention and therefore, in accordance with its established case law, "*there is no room for application of Article 14 … it has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention.*"[136]

Article 17 of the Convention aids in the interpretation and application of the Article 10 and states that: "*[n]othing 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*

---

[133] The European Convention of Human Rights, Article 14

[134] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2005)

[135] *Ivanov v. Russia,* no. 35222/04, ECHR 2007 (*The applicant was found guilty of inciting to racial, national and religious hatred because through mass media he called for exclusion of Jews from social life and maintained that the „Ziono-Fascist leadership of the Jewry" was the source of all evils in Russia)*

[136] Ibid.; see also *Norwood v. the United Kingdom*, no. 23131/03, ECHR 2004 or *W. P. ao. v. Poland*, no 42264/98, ECHR 2004

forth herein or at their limitation to a greater extent than is provided for in the Convention."[137]

This article's purpose is to prohibit the abuse of the rights guaranteed by the Convention. Many of the mentioned cases were decided on the grounds of this particular article, for example in *W. P. and others v. Poland,* this article was used on the basis of the applicant's attempt to revive anti-Semitism through his ideas and submission to the Court.[138]

This article prevents the applicant from depending on the protection of other articles of the Convention if his behaviour contravenes them, as the ECHR stated for example in *Ivanov* case, "*by reason of the Article 17 of the Convention, the applicant may not benefit from the protection afforded by Article 10 of the Convention.*"[139] The reasons for this decision were manifold and are discussed in Chapter 4.

When applying Article 17, the court must determine which fundamental values were violated by the applicant. In the *Ivanov* case, the right to human dignity and non-discrimination based on ethnic origin or religious beliefs were violated. In other cases, such as *Garaudy v. France*, the ECHR found that the applicant's behaviour "*ran counter to the fundamental values of the Convention, namely justice and peace.*" In the Court's opinion, the "*applicant had sought to deflect Article 10 of the Convention from its intended purpose by using his right to freedom of expression to fulfil ends that were contrary to the Convention.*" [140]

---

[137] The European Convention of Human Rights, Article 17
[138] *W. P. ao. v. Poland,* no. 42264/98, ECHR 2004
[139] *Ivanov v. Russia,* no. 35222/04, ECHR 2007; see also *Norwood v. the United Kingdom*, no. 23131/03, ECHR 2004; *W. P. ao. v. Poland*, no 42264/98, ECHR 2004 or *Garaudy v. France* no. 65831/01, ECHR 2003
[140] *Garaudy v. France* no. 65831/01, ECHR 2003 (The applicant published a book entitled *The Founding Myths of Modern Israel* in which he disputed the existence of crimes against humanity and incited to discrimination and national hatred)

3. Racial hate speech

Racial discrimination can be dated all the way to ancient Greece. Aristotle labelled non-Greeks as barbarians and in his opinion, all barbarians were slaves and meant to be ruled by the Greeks as it was their nature: "*among barbarians no distinction is made between women and slaves, because there is no natural ruler among them: they are a community of slaves, male and female. Wherefore the poets say, "It is meet that Hellenes should rule over barbarians;" as if they thought that the barbarian and the slave were by nature one.*"[141]

When discussing racial hate speech, defining *racism* is an absolute necessity. There are a lot of definitions of this term which each differ slightly and focus on particular characteristics. Some definitions blame social differences on biological or genetic heredity, while others divide humankind into stocks based on solely physical characteristics.

1. "*Racism in its simplest and most obvious form is defined as the belief that groups of human beings differ in their values and social accomplishments solely as a result of the impact of biological heredity.*"[142]

2. "*Racism is any set of beliefs that organic, genetically transmitted differences (whether real or imagined) between human groups are intrinsically associated with the presence or the absence of certain socially relevant abilities, hence that such differences are a legitimate basis of invidious distinctions between groups socially defined as races.*"[143]

3. "*Racism rests upon two basic assumptions: (1) the moral qualities of a human group are positively correlated with their physical characteristics, and (2) all humankind is divisible into superior or inferior stocks upon the basis of the first assumption.*"[144]

---

[141] Aristotle: "The Politics" (translated by Benjamin Jowett) (1999) Batoche Books, p. 6
[142] William B. Cohen: "The French Encounter With Africans: White Response to Blacks", 1530-1880, Indiana University Press, Bloomington (1980), p. 95.
[143] Pierre L. Van den Berghe: "Race and Racism. A Comparative Perspective" (1978) Wiley, NY, p. 11
[144] Robert Berkhofer, Jr.: "The White Man's Indian: Images of the American Indian from Columbus to the Present", (1978) Alfred A. Knopf, NY, p. 55

Since each of those definitions has something the other is missing, they can be summarized as such: *racism* rests on the idea that one group of people is superior or inferior to the other because of the differences (whether real or imagined) in social, moral or cultural values or backgrounds as well as the differences in both physical and psychological characteristics arising from biological or genetic heredity inherent to that particular group.

This definition is not exhaustive. For it to be so, it would require a very detailed analysis and comparison, which is unnecessary for reaching the goals this thesis has set.

3. 1. Racial hate speech in the case-law of the Supreme Court of the United States

Racial hate speech is dominant in the United States. Three out of four hate speech cases before the Supreme Court are concerning racism. This is the main reason I've chosen this particular type of hate speech to demonstrate how the Supreme Court deals with these cases. Due to history, racial segregation, oppression of the African Americans and their enslavement is a highly sensitive issue in America - much like the holocaust in Europe.

First case discussed in this chapter is *Beauharnais v. Illinois* from 1952. Since judicial precedents play crucial role in common-law jurisprudence and other cases are decided on their basis, it is, I believe, prudent to start from the beginning. Second, working our way up might enlighten us about the progress made in the First Amendment jurisprudence and how the views on hate speech change in time.

In the present case, the petitioner was convicted of violating a provision of the Illinois Criminal Code, when he "*did unlawfully … exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes citizens of Illinois of the Negro race and color to contempt, derision or obloquy…*"[145]

[145] Illinois Criminal Code, §224a, Division 1

The lithograph in question was a leaflet setting forth a petition "*to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.*" It also contained the statement: "*If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, the aggressions … rapes, robberies, knives, guns and marijuana of the negro, surely will.*"[146]

It was held that, as construed and applied in the present case, the statute did not violate the liberty of speech and of the press.

Furthermore, since libelous utterances were not within the area of constitutionally protected speech, it was not necessary for the Court to consider the issues raised by the denial of the petitioner's request and that the jury should be instructed that, in order to convict, they must find that the publication complained of was likely to produce a "clear and present danger" of a substantial evil.[147]

The majority quotes *Chaplinsky* (see above in Chapter 2) and emphasizes *libelous utterances* as not being safeguarded by the Constitution.[148] The Court pronounces that "*[n]o one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns and user of marijuana.*"[149]

Illinois' reasoning behind the statute in question is based on past experiences with racist tensions between the whites and the blacks.[150] The Supreme Court agreed that "*willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.*"[151] It also stated that Illinois has been the scene of exacerbated tension between races often flaring into violence and destruction – including murders and riots.

---

[146] Beauharnais v. Illinois, 343 U.S 250 (1952)
[147] Ibid., points 1. and 5. of the holding
[148] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)
[149] Beauharnais v. Illinois, 343 U.S 250, 258 (1952)
[150] Ibid., 261-262
[151] Ibid., 255-259

This case is one of the very few, if not the only American case, to mention the word "dignity" in the decision – the Court refused to deny "*that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.*"[152] This is very surprising reasoning, considering the Supreme Court never works with the concept of dignity because, as mentioned above, this concept never truly reached American shores. The possibility of implementing the concept of dignity into the Supreme Court case-law is assessed in the final chapter.

This decision was not unanimous. There are four dissenting opinions, making this case a close call. Those who dissented on the grounds of the First Amendment lamented that the ultimate protection given by the First Amendment is diminishing. For example, Justice Douglas stated that "*[t]here is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment.*"[153] There is substantial case law that shows this protection is not absolute, for example *Chaplinsky* (fighting words) or *Watts* (true threats). An even more recent case from 2003 – *Virginia v. Black* denies this absolutistic approach when the Supreme Court upheld a law that made all cross burnings with the intention to intimidate punishable.[154]

Some scholars, such as Judge Richard Posner, believe that "*though Beauharnais … has never been overruled, no one thinks that the First Amendment would today be interpreted to allow group defamation to be prohibited.*"[155]

Brandenburg v. Ohio from 1969 is a very important case when it comes to restrictions of freedom of expression, although it did not have such a high

[152] Ibid., 263
[153] Ibid., 285
[154] Virginia v. Black, 538 U.S. 343 (2003)
[155] Nuxoll v. Indian Prairie School District, 523 F3d 688, 672 (7th Circuit, 2008)

impact on hate speech as the following two cases, it is still important because it introduced the "imminent lawless action" principle mentioned in Chapter 2.

In this particular case the appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for "*advocat[ing]…the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means for accomplishing industrial or political reform*" and for "*voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.*"[156] The appellant phoned a reporter and invited him to come to a Ku Klux Klan "rally" at a farm. Reporter and a cameraman attended the meeting and filmed the events, part of which was later broadcasted on a national network.

One film showed twelve hooded figures, some of whom carried firearms, gathered around a large wooden cross, which they burned. Some scattered phrases assaulting Negroes and Jews could be understood such as "*Bury the niggers.*" or "*Send the Jews back to Israel.*" The appellant also made a speech, part of which went as follows: "*We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. … We are marching on Congress July the Fourth, four hundred thousand strong.*" Second film contained sentences uttered by the applicant such as: "*Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.*"[157]

The Supreme Court of Ohio dismissed the appellant's appeal and therefore upheld the statute on the ground that "*advocating violent means to effect political and economic change involves such danger to the security of the State, that the State may outlaw it.*"[158]

The Supreme Court held in *Noto v. United States* that "*the mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling*

[156] Brandenburg v. Ohio, 395 U.S. 444 (1969)
[157] Ibid., 446-447
[158] Ibid., 447

it to such action."[159] Based on this, "*[t]he statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.*"[160]

The Supreme Court ultimately held that: "*Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*"

This is undoubtedly one of the most important cases concerning freedom of expression in general because it overruled the previous case of *Whitney v. California*[161] and introduced "*the imminent lawless action*" principle or "*the Brandenburg test.*"

To this day, *Brandenburg* remains the standard for restricting or protecting inflammatory speech – speech that seeks to incite others to lawless action – since it has not been challenged since. This case was a major victory for the freedom of speech as it made very difficult for the government to punish people for advocating violence. The *imminent lawless action* principle has three basic elements: intent, imminence and likelihood. First, the speaker must intentionally convince others to resist the law either by using force or by other means at their disposal. Second, the lawless action must be imminent, meaning the illegal act needs to be intended to be committed in the immediate or near future. Third, the advocacy is likely to incite or produce such illegal action. Everything short of these elements is protected speech. To set an example: if during the march on the Congress the applicant called out to his

[159] Noto v. United States, 367 U.S. 290, 297-298 (1961)
[160] Brandenburg v. Ohio, 395 U.S. 444, 448 (1969)
[161] Whitney v. California, 274 U.S. 357 (1927), p. 19 (This was not a hate-speech case, therefore there is no need to discuss it in more detail, but it nevertheless established an important doctrine, which served as a precedent for deciding following cases concerning freedom of expression. Until the *Brandenburg* case overruled it, that is.)

fellow Klan members to incapacitate members of the law enforcement unit in order for the march to run more smoothly, that would be inciting imminent lawless action. However, should the applicant shout at the rally that revenge may be taken if Congress or the Supreme Court continued to suppress the white race, the expression would fall short of the imminent lawless action principle as there would be no imminent or likely danger of producing an unlawful action.

This shows that the content of the message and actions performed at the rally are completely irrelevant. When it comes to the content, the Supreme Court believes that the hateful message will correct itself in the free "marketplace of ideas," hence utterances such as "Bury the niggers!" are meant to be countered by more speech directed against such expressions. However, some First Amendment scholars are not so certain today about this answer to hate speech: "*In an age where words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in [Justice] Brandeis's phrase, should be good ones.*"[162]

Interestingly, the *Brandenburg* ruling was *per curiam* with two concurring opinions. Similar cases would be much more controversial on the European continent, as can be seen in the case *Jersild v. Denmark*. Even though the majority held that the statements were protected under Article 10 of the Convention, the dissenting opinions regarded the statements, such as "*[j]ust take a look at a picture of a gorilla, man, and then look at a nigger, it's the same body structure…*" or "*[p]eople should be allowed to keep slaves,*"[163] highly insulting. Nevertheless, the majority regarded the remarks in question to be ridiculing the authors as opposed to insulting a group of people.

R. A. V. v. City of St. Paul (1991)

To better understand the views of the Supreme Court on racial hatred and discrimination relating to freedom of expression, we must look at another case

[162] Anthony Lewis (2007): op. cit., p. 166
[163] *Jersild v. Denmark*, no. 15890/89, European Commission of Human Rights 1993, § 17

– *R. A. V. v. City of St. Paul*[164] from 1991. Much like *Brandenburg*, there were concurring opinions that disagreed with the principles used and with the disregard of established case law but, as opposed to *Brandenburg*, these opinions were very fierce, which makes this opinion more detailed and therefore it thoroughly discusses the principles mentioned in Chapter 2. And it is the fact that the Supreme Court diverts from its established case law which it is so focused on keeping as it is, that is particularly interesting in this case.

In the predawn hours, petitioner and several other teenagers – skinheads – assembled a crudely made cross and then burned it inside a fenced yard of a black family that lived across the street from the petitioner's house. He was charged under the St. Paul Bias-Motivated Crime Ordinance, which provides: *"Whoever places on public or private property a symbol, object … including, but not limited to, a burning cross or Nazi swastika, which one knows … arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender … shall be guilty of a misdemeanor.*"

Minnesota Supreme Court stressed the modifying phrase "arouses anger, alarm or resentment in others" and stated that this limits the reach of the ordinance to conduct that amounts only to *fighting words* and therefore the ordinance reached only expression "*that the first amendment does not protect*"[165] (as mentioned in Chapter 2).

The Supreme Court held in the first place that it is bound by the state court's construction of the ordinance as reaching only expressions constituting *fighting words*, but ultimately stated that it is "*unnecessary to consider this issue*" since "*the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.*"[166]

Secondly, the Court held that some categories of speech, such as obscenity, defamation or *fighting words* may be regulated, but not when based on hostility or favoritism towards a nonproscribable message they contain. It may

[164] R. A. V. v. St. Paul, 505 U.S. 377 (1991)
[165] Ibid., 381
[166] Ibid.

be underinclusive though, addressing some offensive instances while leaving other, equally offensive, ones alone, so long as the selective proscription is not based on content.

Thirdly, the Court next held that the ordinance is facially unconstitutional because it imposes special prohibitions on speakers who express views on the disfavored subjects of "race, color, creed, religion or gender," and at the same time permits displays containing abusive invective if they do not address mentioned topics. It also said that St. Paul's desire to communicate to minority groups that it does not condone the "group hatred" of bias motivated speech – which was one of the reasons St. Paul used the ordinance in question – does not justify selectively silencing speech on the basis of content.

Finally, the Supreme Court declared that the content-based discrimination in the ordinance does not rest on the reasons why this particular class of speech is proscribable; it is not aimed at the "secondary effects" of speech – avoiding crime or other content-neutral aims – and most importantly, the ordinance is not narrowly tailored to serve a compelling state interest in ensuring the basic human rights of groups historically discriminated against, since an ordinance not limited to the favored topics would have precisely the same beneficial effect.[167]

As is apparent from the holding of this case, the Supreme Court does indeed work with many principles mentioned in Chapter 2 of this thesis and with more than one in a single case, since the Supreme Court often uses its decisions as a platform for educating about the usage of its principles. Since points a) and b) of the holding are quite self-explanatory and do not demand further clarification, I will focus on points c) and d) and the reasons behind them.

What alarmed the Supreme Court was not mere content discrimination, but "*actual viewpoint discrimination.*" It concluded that if the ordinance would be in force, it would prohibit displays of aversion to a certain race, color or gender while leaving its opponents – those in favor or racial tolerance and equality –

[167] Ibid., 378

free to express themselves in any way possible. It is perhaps germane here to quote Justice Scalia's stab at St. Paul's ordinance, where he makes an analogy to boxing: "*St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.*"[168] Justice Stevens cleverly extended the metaphor in his concurring opinion, where he disagreed with this particular viewpoint, stating that "*the St. Paul ordinance simply bans punches "below the belt" – by either party.*"[169]

Viewpoint discrimination from the state may be seen as a danger to the freedom of expression and thought in general. Millions still remember its severe consequences in the then Eastern Bloc. The Court even responded to St. Paul's intention to communicate the idea that the majority does not condone "group hatred" via the ordinance by stating that "*The point of First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content.*"[170] However, there is more to this point, which will be further discussed, with reference to Justice Stevens' concurring opinion.

Concerning point d) of the holding, the Supreme Court agreed that burning a cross in someone's front yard is reprehensible, that the state's interests are compelling, and that the ordinance can be said to promote them. On the other hand, the existence of adequate *content-neutral* alternatives, such as an ordinance not limited to particular topics, significantly undercuts any defense of such a statute, rather leading to the conclusion that St. Paul has sufficient means at its disposal to prevent the behavior in question without adding the First Amendment to the fire.[171]

The majority of the Supreme Court was shocked about St. Paul's statute; however, the concurring justices were alarmed about majority opinion and the grounds upon which it was based. Justices White, Blackmun and Stevens all agreed that the ordinance in question was unconstitutional but on entirely

[168] Ibid., 392
[169] Ibid., 435
[170] Ibid., 392
[171] Ibid., 395, 396

different grounds than the majority held. While Justice White's concurring opinion is certainly the most emotional in tone, and is perhaps rather difficult to rationally analyse. As such, the present analysis will focus on the other two justices.

However, not to entirely ignore Justice White, his decision will also be briefly examined, a decision with which justices Blackmun and Stevens joined. Justice White ultimately defended his claim that the ordinance was *prima facie* overbroad by holding that: *"those* – criminal statutes – *that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.*"[172] He continued, stating that the St. Paul anti-bias ordinance is such a law, because besides touching upon the unprotected conduct, it also renders conduct that causes only hurt feeling, offense or resentment a criminal matter, while such conduct is protected by the First Amendment.[173]

Justice Blackmun labeled the majority opinion as "folly", and stated that "*by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not,*" the majority sets the law and logic on their heads.[174] He also expressed fear that this decision, which results in weakening the First Amendment protection, would serve as a precedent for future cases, which it ultimately did but, fortunately for Blackmun, not on the grounds by which he was so alarmed.

Justice Stevens raised several points. First, the Supreme Court revised the categorical approach by stating that it is not certain "categories" of expression that are "unprotected,"[175] rather, certain "elements" of expression are wholly "proscribable." Stevens opined that it was unwise to craft "*a new doctrine based on such highly speculative hypotheticals.*"[176] Such hypotheticals are nevertheless irrelevant to the focus of the present thesis.

---

[172] Houston v. Hill, 482 U.S. 451, 459 (1987)
[173] R. A. V. v. St. Paul, 505 U.S. 377, 414 (1992)
[174] Ibid.
[175] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)
[176] R. A. V. v. St. Paul, 505 U.S. 377, 419 (1992)

Second, Stevens defended the alleged content-based ordinance by using established case-law. More precisely, he stipulated that "*[j]ust as Congress may determine that threats against the President entail more severe consequences than other threats,*"[177] so "*St. Paul…may determine that threats based on the target's race, religion or gender cause more severe harm to both the target and to society than other threats.*"[178]

Third, Stevens challenged the alleged "viewpoint discrimination" of the ordinance. He argued that the ordinance only regulates a subcategory of expression that causes *injuries* based on race, etc., not a subcategory that involves *discussions* that concern those characteristics. It is easy to sympathize with Stevens' contention that this is not a mere wordplay as the majority suggests. Stevens finalized his analysis by stating that "*Petitioner is free to burn a cross to announce a rally or to express his views about racial supremacy…on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to by its very execution inflict injury.*"[179] This then apt opinion is now somewhat passé in light of *Virginia v. Black*, which will be discussed below.

However, although Stevens would eventually vote to uphold the law as constitutional, he too found it overbroad, for it also significantly proscribed conduct falling under the protection of the First Amendment.

This case could be summed up on one page or it could be the sole focus of an entirely separate paper. The shorter presentation attempted here endeavoured to expose the reasoning and the contradictions between individual judges, which, as shall be seen, are important for determining possible changes to First Amendment jurisprudence.

---

[177] Watts v. United States, 394 U.S. 705, 707 (1969)
[178] R. A. V. v. St. Paul, 505 U.S. 377, 424 (1992)
[179] Ibid., 436

Virginia v. Black (2003)

This is most recent case concerning cross burning to reach the Supreme Court. It actually consolidates three separate prosecutions and two alleged cross burnings in Virginia.

In the first case, a Ku Klux Klan leader, Black, led a gathering on a private property in view of a state highway. Some of the intelligible sentences exchanged were overheard by a witness, for example one speaker said that he "*would love to take a 30./30. and just randomly shoot the blacks.*"[180] The assembly then burned a large cross, while Amazing Grace played over loudspeakers. Black was charged with burning a cross with the intent of intimidating a person or group of persons.

The second case involved two respondents, who drove a truck onto another's property, planted a cross, and set it on fire. Their motive was to "get back" at the owner for his earlier complaint to the mother of one of the respondents, because he was shooting a gun in the backyard. Both respondents were charged with attempted cross burning and conspiracy to commit cross burning.

The Supreme Court held that burning a cross is intertwined with the history of the Ku Klux Klan, which "*imposed a reign of terror throughout the South, whipping, threatening and murdering blacks and whites who disagreed with the Klan's policy.*"[181] It also stated that cross burning is a tool of intimidation and also a potent symbol of shared group identity and ideology of the Ku Klux Klan but regardless of these uses, it is a "symbol of hate."

The Court also stressed that the protections of the First Amendment are not absolute and that "*[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat*"[182] – an exception mentioned in Chapter 2 of the thesis.

Finally, the Court held that the First Amendment permits Virginia to outlaw cross burnings carried out with the intention to intimidate because such

[180] Virginia v. Black, 538 U.S. 343, 349 (2003)
[181] Ibid., 343
[182] Ibid., 344

practice represents a particularly virulent form of intimidation and Virginia was able to do this, even without prohibiting other intimidation messages, due to "*cross burning's long and pernicious history as a signal of impending violence.*"[183]

This case shows that the United States is willing to proscribe speech on the basis of content through the use of the *true threats* principle, which constitutes an exception from the First Amendment's protection. It also shows the importance of the historical impact of the Ku Klux Klan on the Negro race over the past two hundred years. It is perhaps arguable that this stance represents a good springboard towards a higher degree of protection of human dignity and preservation of equality enjoyed by Europeans but more on this connection in the final chapter.

[183] Ibid.

4. Ethnic and religious hate speech

Having discussed racial hate speech in the United States, it is now timely to present the species of hate speech that occurs the most frequently in the ECHR's jurisprudence, that is, ethnic and religious hate speech in Europe. The question may be asked, however: why ethnic *and* religious? What do these terms have in common? Two terms require a definition before these questions can be answered and before we can proceed any further.

The first term is religion? "*It is undeniable that the task of defining religion for legal purposes is extremely difficult…Neither the organs of the European Convention on Human Rights, nor the International Covenant on Civil and Political Rights have developed a detailed definition.*"[184] Since a precise legal definition would require an extensive research unnecessary for the purposes of this thesis, a simple definition of religion will suffice. The Oxford Dictionary defines religion as "*The belief in and worship of a superhuman controlling power, especially a personal God or gods," "[a] particular system of faith and worship,*" or "*[a] pursuit or interest followed with great devotion.*"[185]

Robert C. Cummings also defines religious attitudes and beliefs as "*forming the basic ways in which cultures and individuals imagine how things are and what they mean,*"[186] and identifies religious practices and rituals, which constitute "*a finite set of repeatable and symbolizable actions that epitomize things … crucial to defining the normative human place in the cosmos*" – such as – "*acknowledgment of political authority (worship of gods as lords), acts of commitment to other individuals.*"[187]

The second question is: what does 'ethnic' entail? An ethnic group or ethnicity is defined by the Oxford Dictionary as "*the fact or state of belonging to a social group that has a common national or cultural tradition.*"[188] To put it into perspective and detail, J. Peoples and G. Bailey defined an ethnic group as

[184] Peter W. Edge: "Religion and law: an introduction" (2006) Ashgate, p. 29
[185] The Oxford Dictionary (online), retrieved 12 April 2017
[186] Robert Cummings Neville, in Foreword to Rodney L. Taylor's "The Religious Dimensions of Confucianism" (1990)
[187] Ibid.
[188] Oxford Dictionary (online), retrieved 12 April 2017

"*a named social category of people based on perceptions of shared social experience or one's ancestors' experiences. Members of the ethnic group see themselves as sharing cultural traditions and history that distinguish them from other groups. Ethnic group identity has a strong psychological or emotional component that divides the people of the world into opposing categories of "us" and "them"."*[189]

Each religion has its own followers and code, but also its culture and history. This is what draws these two terms together. A person or a group of persons may be connected via a shared religious belief. However, there are many people who do not practice a religion, do not follow a code or even do not believe in a religion, yet still identify with culture and history shared over the course of years. For example, Jews can be brought together by a shared religious belief, that is Judaism, they can relate to each other through a national identity – their homeland – even though many of them do not live in Israel, or they can "only" share history and culture, such as music, art, stories or practices that are not necessarily originating from Judaism, yet are a part of Jewish tradition.

This is one view on ethnicity and religion. Having demonstrated how these two terms fit together through the beliefs and actions of people belonging to a particular group, it is perhaps useful to experiment with views on ethnicity and religion through the eyes of the beholder, the uninformed, if you will. Ethnicity (or a nationality) and religion can be easily confused by outsiders, with the latter being swayed, for example, by looks. Consider Islam, the Muslims and the Arabs. There are an estimated 1.6 billion Muslims in the world, making Islam the second largest religion after Christianity. The total estimated number of Arabs is about 450 million.

Since Arabia was the cradle of the Islamic religion, many people associate it with the Middle East. The fact is that two thirds of the Muslims live in the Asia-Pacific region of the world (Indonesia, India). Further, with over 300 million Muslims living in Middle-East and North-African area, we can safely

[189] James Peoples and Garrick Bailey: "Humanity: An Introduction to Cultural Anthropology", (2010) Wadsworth Cengage Learning, p. 389

assume that not all Muslims are Arabs. Yet, when we see an Arabian in Europe for example, many of us will immediately associate him or her with being a Muslim. Sometimes, the visual identification leaves no room for doubts, such as a man wearing a Yarmulke – which shows him identifying himself with Judaism. On the other hand, an Arabian woman wearing a Burqa is not necessarily of Islamic faith.

Many people mistake non-religious objects and garments with being a part of particular religion. This is understandable. Of more concern is a more serious issue that has gained currency in recent years, namely an association of Muslims or Arabs with terrorism. There is no doubting that not every Arab is a terrorist and not every Muslim is a terrorist or terrorist sympathizer. Yet many people are unable to resist the urge to label every Arabian they see in their town as a potential terrorist, be it because of ignorance or because of fear for their safety or the safety of their loved ones in the light of a growing number of terrorist attacks in the last few years.

The next chapter, focusing on ECHR cases pertaining to these issues will, I believe, demonstrate why I presented these problems because, unlike in the United States, for every one racial hate speech case, there are many more cases concerning religion or ethnicity in the ECHR case-law. Covering this type of hate speech will be more than enough for the purposes of determining the pattern for deciding hate speech cases in Europe.

4. 1. Ethnic and religious hate speech in the case-law of the European Court of Human Rights

When it comes to the ECHR case-law, it is considerably more straightforward than the Supreme Court case-law, since the ECHR follows one single pattern in each case, when determining whether there has been a breach of Article 10 of the Convention (freedom of expression). This results in the discussion of each case being slightly shorter than that of the Supreme Court. As mentioned in Chapter 2, when the ECHR concludes that there has been an interference with freedom of expression, it must determine whether the restriction is

prescribed by law. If the restriction is prescribed by law, the ECHR then moves to discuss, whether the legal provision restricting speech pursues one of the legitimate aims recognized by the Convention. Lastly, the ECHR needs to determine whether the restriction in question is necessary in a democratic society.

Finding the interference and its legal origin is fairly easy. The ECHR places more emphasis and thought into determining the alleged legitimate aim and most of all, it focuses on the necessity in a democratic society, that is, weighing individual liberties and determining whether the restriction in question corresponds to the pressing social need (the legitimate aim of the Convention) and if the restriction constitutes a proportionate response to that need.

Since the Jews were the first major group of people to suffer from hateful speech in Europe, and due to their unfortunate fate during the Nazi regime, it is perhaps useful to begin by discussing cases concerning anti-Semitism and anti-Semitic messages. In the past, the Jews were persecuted mainly on the grounds of their religious affiliation. Nowadays, the issue of their ethnicity has gained in importance, and the attention has shifted away from their religion.

Anti-Semitic hate speech

In the first case – *Remer v. Germany*, the applicant (an editor and an author) of a publication named "Depeschen" distributed 80 000 copies of an issue, which contained articles suggesting that the gas chambers in the concentration camps during the Nazi regime had never existed. Further publications contained an effort to fight against 'lies' about the gassing of four million Jews in Auschwitz. According to the Schweinfurt Regional Court, the applicant knew the historical truth about the gassing of Jews and intended to open a public discussion on the matter, but also instigate hatred against Jews, as the inventors of the lie. He was convicted of incitement to hatred and racial hatred.

The ECHR held that the interference with applicant's exercise of freedom of expression was prescribed by law and pursued a legitimate aim under the Convention, i.e. the prevention of disorder and crime and the protection of the

reputation of others. The court held that the public interest in the prevention of crime and disorder and protection of the reputation of others outweighed the applicant's freedom to impart publications containing above-mentioned articles. Therefore there was no violation of Article 10 of the Convention.[190]

This is one of the cases portraying the Jews as perpetrators of the lie concerning the Jewish genocide during the Second World War. This case shares the proscribable content with the United States, namely *libellous utterances*. The applicant sought to instigate hatred against Jews through the lie about the gassing of the Jews in concentration camps, which makes it one of the very few cases that might have been decided the same way in the US.

In the case *Garaudy v.* France, the applicant (author of a book entitled *The Founding Myths of Modern Israel*) was found guilty of disputing the existence of crimes against humanity, public defamation of a group of people – the Jewish community – and incitement to discrimination and racial hatred. The applicant argued that his book was a political work with an aim to combat Zionism and criticize Israeli policy and that it had no racist or anti-Semitic content.

The ECHR held that the real purpose of this work was to rehabilitate the National-Socialist regime and to accuse the victims of the Holocaust of falsifying history. Further, disputing the existence of crimes against humanity was held to be one of the most severe forms of racial defamation and of incitement to hatred of Jews. While the ECHR agreed with the national courts that the interference with the right to freedom of expression was necessary in a democratic society, it also held that, according to Article 17 of the Convention, the applicant's views in the book ran contrary to the fundamental values of the Convention (justice and peace), and therefore forfeited the protection of Article 10.[191]

As is apparent from both of these judgments, holocaust denial is a very serious offense, and considered undeserving protection under the Convention. The

[190] *Remer v. Germany,* no. 25096/94, ECHR 1995
[191] *Garaudy v. France*, no. 65831/01, ECHR 2003

ECHR obviously leaves no room for compromises in this particular area, since the holocaust and gassings in concentration camps are an established historical fact. It is important to note that not every state deems it necessary to proscribe such expressions. While Ireland and the United Kingdom are parties to the Convention, they have no laws punishing holocaust denial.

Another case of defamation of Jewish community is *Balsyte-Lideikiene v.* Lithuania. The applicant distributed a calendar containing xenophobic and offensive assertions with regard to the people of Jewish and Polish origins in particular. The calendar raised many negative reactions to the publication from a part of Lithuanian society and from foreign embassies. The applicant was fined and all the copies of this issue of the calendar were to be confiscated.

The Court held that under international law, Lithuania had an obligation to prohibit any advocacy of national hatred and protect those who might me subject to threats as a result of their ethnic identity. The Court also held that the interference was necessary in a democratic society for the protection of reputation or the rights of others; therefore there had been no breach of Article 10.[192]

This case differs greatly from those in the US. As the Supreme Court held in *Brandenburg*, the state cannot punish any advocacy of ideas without the threat of imminent lawless action. It is nothing new or out of the ordinary to punish "mere" advocacy of hatred or segregation on the European continent. This distinction is mainly due to the strength of the First Amendment protection but also to the higher emphasis on the protection of human dignity in Europe.

In the case *Ivanov v. Russia*, the applicant, through publications in his newspapers, called for the exclusion of Jews from social life and alleged the existence of a causal link between social, economic and political discomfort and the activities of Jews. At trial, he maintained that the "Ziono-Fascist leadership of the Jewry" was the source of all evil in Russia. He also claimed the Jews did not exist as a race or a nation, and that therefore, he could not be

[192] *Balsyte-Lideikiene v. Lithuania*, no. 72596/01, ECHR 2005

guilty of denying Jews their national dignity. He was charged of public incitement to ethnic, racial and religious hatred through the use of the mass media.

The ECHR held that "*such a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination.*" The applicant could not therefore benefit from the protection of Article 10 by reason of Article 17.[193]

What is interesting about this case are the statements communicated. Denying Jews their national dignity, calling for their exclusion from social life and associating them with Fascists created such a hateful message that the ECHR ruled to deny Ivanov the protection of Article 10. Were it not such a vehement attack, and were he able to call for the protection of Article 10, the interference might still be deemed necessary in a democratic society on the grounds of protection of the reputation and the rights of others.

Another interesting case, which disguised the display of hatred as an artistic production was *M'Bala M'Bala v.* France. The applicant (a comedian) put on a performance, to which he invited an academic who had received a number of convictions in France for his opinions, mainly his denial of the existence of gas chambers. Afterwards, he called up an actor who was wearing a pair of striped pyjamas reminiscent of those worn by Jewish deportees with a yellow star bearing the word "Jew", to award the academic a "*prize for unfrequentability and insolence*". The applicant was found guilty of public insults directed at a person or group of persons on account of their origin of belonging, or not belonging, to a given ethnic community, nation, race or religion, specifically in this case, persons of Jewish origin or faith.

The ECHR noted the highly anti-Semitic connotation of honouring an individual known for his negationist ideas. The ECHR also agreed with the Court of Appeal that the nature of the offending scene transformed entertainment into something approaching a political meeting. The Court also stressed that the degrading portrayal of Jewish deportation victims faced with

[193] *Ivanov v. Russia*, no. 35222/04, ECHR 2007

a man who denied their extermination constituted a demonstration of hatred and anti-Semitism and support for Holocaust denial. Ultimately, the ECHR held that such a blatant display of hatred and anti-Semitism disguised as an artistic production was as dangerous as a head-on and sudden attack and it did not deserve protection under Article 10 on the grounds of Article 17 of the Convention.[194]

This very recent case shows that the Jewish minority is still under attack to this date. The applicant announced before the performance that he wished to do better than last time – the last time having being described as "the biggest anti-Semitic rally since the Second World War" – which gave the audience an idea of what was going to happen. These two most recent cases (the other being *Ivanov*) show that these attacks are calculated and more virulent that previous ones, rendering them unable to benefit from right to freedom of expression altogether.

This case was also one of those that concretized the meaning of Article 17, by stating that the applicant had sought to deflect Article 10 from its real purpose by using his right of freedom of expression for ends which were incompatible with the letter and spirit of the Convention and which could contribute to the destruction of Convention rights and freedoms.

If we sail across the Atlantic, in light of the Supreme Court's case-law, such a case would most likely be decided exactly the opposite way, since the U. S. did not suffer as much from the Holocaust as Europe, and since the Supreme Court places rather high emphasis on the free marketplace of ideas. The Court would most likely hold that, since there was an audience, there were plenty of other ways to protect people against this hateful message that proscribing anti-Semitic speech.

This case is demonstrative of the different harms against which the respective courts are trying to defend. As noted in Chapter 1, the protection against harm to human dignity is still a big unknown in the US, and if this approach is not changed, we cannot expect the Supreme Court to decide this case in any other

[194] *M'Bala M'Bala v. France*, no. 25239/13, ECHR 2015

way than in favour of free speech, as shall be discussed in detail in the next chapter.

With anti-Semitic expression behind us, we shall turn our focus on anti-Muslim and anti-Islamic speech. Unlike anti-Semitic speech, Muslims and Islam became a target of hate speech much later, with the first major case decided by the ECHR in December 2003. It is not uncommon for people to label all people of Muslim faith as terrorists, as will be demonstrated.

Anti-Islamic hate speech

First of the anti-Islamic cases is already mentioned *Gündüz v.* Turkey. The applicant (a leader of an Islamic sect) took part in a debate on a live television programme. After one listener claimed that the applicant's aim was to "destroy democracy and set up a regime based on sharia", the applicant agreed. Later, in court, he added that said regime would be established not by duress or force but by convincing and persuading the people. The applicant also stated that "*if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a piç,*"[195] which means bastard child. He was charged with inciting the people to hatred and hostility on the basis of a distinction founded on religion.

The ECHR noted that this topic concerned a matter of general interest – "*a sphere in which restrictions on freedom of expression are to be strictly construed*"[196] – and also that the programme was designed to encourage an exchange of views. Ultimately, the Court held that the applicant's conviction infringed Article 10 of the Convention because the fact that the applicant defended sharia without calling for violence cannot be regarded as hate speech, even though he declared democracy in Turkey despotic, merciless and impious. The Court also regarded the possibility of intervention of other participants in a public debate as a contributing factor to the applicant's innocence.

This case is one of the more complex ones when it comes to hate speech in Europe. This is not only because of strained political climate in Turkey but

[195] *Gündüz v. Turkey*, no. 35071/97, ECHR 2003, §11
[196] *Gündüz v. Turkey*, no. 35071/97, ECHR 2003, §43

also because it involved a public debate, which strengthened the applicant's position as a speaker. It is no surprise, then, that there is a dissenting opinion.

Judge Türmen (a Turkish national) argues that while the Court states that defending sharia is not hate speech, it fails to do so with the word "piç." Türmen regards this word as hate speech based on religious intolerance and as an attack on the feelings of secular people in an unwarranted and offensive manner. Lastly, Türmen argued that the applicant's assertion of reflecting God's wishes when describing Turkish democracy as impious is a good example of hate speech because it depicts those who do not share his opinions as ungodly.

While one may agree with the Court's decision regarding the public debate, judge Türmen's opinion also clearly possesses merit. Per his position, the ECHR should have placed more emphasis on the word "piç" and on describing democracy as ungodly.

In the case *Norwood v. the United Kingdom*, the applicant (a regional organiser of an extreme right wing political party) displayed in the window of his first-floor flat a large poster with a photograph of the Twin Towers aflame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. He was charged with an aggravated offence of displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within sight of a person likely to be caused harassment, alarm or distress by it.

Much like in *Ivanov* the ECHR held that "*such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination,*" which constitutes an act within a meaning of Article 17. Therefore the applicant could not rely on the protection of Article 10.

This case shows that grave assaults and accusations against any group (be it Jewish or Muslim) forfeit the protection of Article 10 of the Convention. What

is interesting is the submission of the applicant, where he states that "*free speech includes not only the inoffensive but also the irritating, contentious, eccentric, heretical, unwelcome and provocative, provided that it does not tend to provoke violence.*"[197]

Such defence is often observed in the Supreme Court's case-law on free speech. This message would most definitely be protected by the First Amendment, with this argument being one of the main reasons for awarding that protection.

In the case *Soulas and others v.* France, one of the applicants (an author of the book entitled "*The colonisation of Europe*", with the subtitle "*Truthful remarks about immigration and Islam*") sought to emphasize what he regarded as the incompatibility between European and Islamic civilization in a specific geographical area. The grounds for his conviction were passages from the book, which were intended to give rise to a feeling of rejection and antagonism in readers, namely his suggested solution – a war of ethnic re-conquest.

The ECHR held that the interference with the applicant's right to freedom of expression had been necessary in a democratic society for the protection of the reputation and rights of others.[198]

The main reason for mentioning this case is that the Court specifically stated that the disputed passages in the book were not sufficiently serious to justify the application of Article 17, which demonstrates that this article is applied only in the most serious instances of abuse of rights guaranteed by the Convention.

Next case dealing with anti-Muslim hate speech is *Le Pen v. France*. The applicant (president of the French "*Front National*" political party) was fined 10,000 euro for incitement to discrimination, hatred and violence towards a group of people because of their religion. In an interview with *Le Monde*, he asserted, *inter alia*, that the day on which there are no longer 5 million, but 25 million, Muslims in France, they will be in charge.

---

[197] *Norwood v. the United Kingdom*, no. 23131/03, ECHR 2004
[198] *Soulas and others v. France*, no. 15948/03, ECHR 2008

The Court took it into account that the applicant was a political figure and that the nature of political statements awards a higher degree of protection under Article 10; however, in the present case, his comments had presented the Muslim community as a whole in a disturbing light, likely to give rise to a feeling of rejection and hostility. It ultimately held that the interference with the applicant's right to freedom of expression was necessary in a democratic society.

The Court explicitly stated in this case that it attached the highest importance to freedom of expression in the context of political debate in a democratic society, and that freedom of expression applied not only to "information" or "ideas" that were favourably received, but also to those that offended, shocked or disturbed.[199]

This is highly reminiscent of the Supreme Court's position towards both political speech and the nature of the ideas and views that are "not favourably received." It also clearly shows that, while the ECHR used argumentation "native" and "sacred" in the United States, it still chose to proscribe the speech – a move unthinkable under the current circumstances in the US.

Perinçek v. Switzerland (2015)

This is perhaps the most discussed recent European hate speech case. This is not merely because it is one of the most recent, but because it is markedly controversial, with seven dissenting judges in the Grand Chamber of the ECHR. This case touches upon both issues of Jewish ethnicity and Muslim religion, yet the main focus is the alleged Armenian genocide in Turkey beginning in 1915.

Here, the applicant, Doğu Perinçek, was a Turkish national and chairman of the Turkish Workers' Party. In 2005, he participated in three public events in Switzerland. At these events, he expressed his view that the mass deportations and massacres suffered by the Armenians living in the Ottoman Empire from 1915 onwards had not amounted to genocide. He stated that allegations of an

[199] *Le Pen v. France*, no. 18788/09, ECHR 2010

'Armenian genocide' are an international lie, and later denied the existence of the 'Armenian problem'. He was found guilty because of the racist and nationalistic nature of his statements, which did not contribute to the historical debate.

The Court concluded that the interference pursued a legitimate aim – the protection of the rights of others, "*namely the honour of the relatives of the victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards.*"[200] The Court assessed that the applicant had not expressed contempt or hatred, nor had he called the Armenians liars; therefore, his statements could not be seen as a call for hatred.

The ECHR then explained why criminalizing Holocaust denial is different from the denial of the alleged genocide of Armenians. First, it stated that for such denial to be criminalized, it had to be considered as implying anti-democratic ideology and anti-Semitism, in the historical context. Second, the Court considered that Holocaust denial was especially dangerous in States that had experienced the Nazi horrors, and that such States could be regarded as having a special moral responsibility to distance themselves from these mass atrocities by, for example, outlawing their denial. On the other hand, according to the majority, there was not a direct link between Switzerland and the events in the Ottoman Empire since 1915.

While the Court was aware that questioning, whether the events were to be regarded as genocide, is of immense importance to the Armenian community, it held that the applicant's statements had not been as detrimental to the dignity of the Armenians as to deserve criminal punishment. Finally, the Court concluded that, since a significant amount of time had elapsed since the events, and since the statements were being voiced in a public debate, the interference was not necessary in a democratic society, and therefore the statements came under the protection of Article 10. The ECHR also found no grounds to apply Article 17.

[200] *Perinçek v. Switzerland*, no. 27510/08, ECHR 2015, p. 67, § 141

An examination of this highly controversial case would not be complete without considering the dissenting opinions. One group of judges disagreed with the interference not being necessary in a democratic society. First, they assessed the applicant's statements and concluded that they were intended to insult an entire people. "*The applicant's speech depicted the Armenians as the aggressors of the Turkish people and described as an "international lie" the use of the term "genocide" to refer to the atrocities committed against the Armenians.*"[201]

Second, the dissenting judges disagreed with the usage of "geographical and historical factors" in classifying the interference. They believe that "*[m]inimising the significance of the applicant's statements by seeking to limit their geographical reach amounts to seriously watering down the universal, erga omnes scope of human rights – their quintessential defining factor today.*"[202] It is also suggested in the dissent that this geographically restricted approach might result in protecting the freedom of expression to deny genocides that have occurred on other continents, such as the Rwandan or Cambodian genocides.

Third, the judges mentioned the time factor, and voiced concerns about "*the amount of time that had elapsed since the events to which the applicant was referring, leads the Court to the conclusion that his statements cannot be seen as having the significantly upsetting effect sought to be attributed to them,*"[203] mentioned by the majority. The dissenters infer that in a few decades, the Holocaust denial itself might be a protected form of expression.

Lastly, the judges mention the lack of international consensus about the characterization of the massacres as genocide and claim that it could be seen as the reason to broaden the Swiss margin of appreciation. This is a tricky issue. The 'Armenian genocide', unlike Jewish, Rwandan or Cambodian is not necessarily considered to have constituted genocide under international law. There were no criminal punishments, no tribunals for prosecuting the alleged perpetrators of the massacres, and the crime of genocide did not exist in terms of black-letter law in

[201] Ibid., § 4 – Joint dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kuris
[202] Ibid., § 6
[203] Ibid., § 252

1915. Should it be left to the States to determine whether the events should be characterized as genocide or is it not their place to do so?

But let us leave Switzerland for the time being. In the centre of Europe, in Czech Republic, the House of Deputies of the Parliament condemned the massacres of Armenians in the Ottoman Empire and proclaimed that the event had amounted to genocide. Miloš Zeman, the current president of the Czech Republic, recommended the House of Deputies to resolve the question of Armenian genocide. The president, along with many leading politicians of the Czech Republic, is of the opinion that the atrocities committed on Armenian people had amounted to genocide. This resolution was supported even by the members of the opposition and its outcome stemmed from the resolution of German Federal Assembly. One of the politicians also suggested that Turkey should acknowledge the Armenian genocide as well, while another added that the events concern the Ottoman Empire, not present-day Turkey.[204]

This is an extremely interesting case which raises many questions. Since they will play an important role in the future, attempts will be made to find answers to them in the next chapter.

This concludes the chapter on the European Court of Human Rights decisions concerning ethnic and religious hate speech. As mentioned previously, it is apparent from these judgments that the ECHR awards a lesser degree of protection to the freedom of expression than the Supreme Court of the United States. This divergence is also demonstrative of how history influences the positions taken when discussing hate speech.

The next chapter presents similarities and differences between the approaches of both courts towards hate speech and value principles used in their decisions and compares them with the social history and climate on both continents. It also attempts to determine what should change in the attitudes of both courts towards hate speech, and whether a shift in values protected by either the US Constitution or the European Convention of Human Rights is prudent.

[204] "Sněmovna poprvé odsoudila arménskou genocidu. Erdogan bude dělat bengál, řekl Schwarzenberg", *Aktuálně.cz*, 25 April 2017, retrieved 26 April 2017

5. The paradigm shift

What have we learned from our analysis? We discovered the nature of hate speech and the factors that regulate it in the respective jurisdictions. We also covered the principles utilized by the Supreme Court of the United States and the European Court of Human Rights and discussed them in more detail using examples furnished by key judgments of the respective courts. Now is the time to ask a lot of questions and seek answers to them.

First, is the history and political or social climate in the United States or Europe relevant when deciding hate speech cases? To what degree do they influence, or should they influence, the rulings of the courts?

We have already learned that history plays a major role in hate speech cases. Both societies were thoroughly scarred by the events of the past. In the US, the enslavement of the Negro, racial segregation and assaults on blacks and also whites who sympathized with them, influenced many decisions of the Supreme Court. It led to the establishment of principles such as the Brandenburg test, fighting words or true threats, which are used even today in many cases concerning freedom of expression.

Aside from history, social climate also plays a part. Before *Virginia v. Black* reached the Supreme Court, attacks on blacks were many and violent. This forced the Supreme Court to hold that burning a cross is, with regard to the events of the past, a threatening form of expression undeserving of the protection of the First Amendment.

What is regrettable is that the United States perhaps does not accord enough value to the effects of slavery and historical mistreatment of blacks and other minorities, such as Native Americans. One would think that an advanced society such as the United States would opt to release its tight grasp on the First Amendment in favour of combating hatred and providing equal place in its society for all people – be it by amending the case-law or the Constitution itself.

If there is something the America can learn from Europe, it is the concept of human dignity. The adoption of such a concept would disallow burning crosses and publicly assaulting minority groups. As mentioned in Chapter 2, the free marketplace of ideas is insufficient for providing such protection, because the voices of minorities will always be muffled in such a discourse. Rather, it is the government's responsibility to teach the majority to respect people of all races, religions or creeds deserve. It may be hard, considering how society reacts to restrictions on freedom of speech. For the first amendment scholar, all it takes is voice a doubt about the near-absolute strength of the First Amendment to be called "a totalitarian asshole".[205] However, much like societies, people and their ideas change. And for us to survive and coexist peacefully, all it takes is to make compromises to find a common ground.

In Europe, the mass deportation of Jews and their systematic and brutal extermination in concentration camps took the lives of up to 6 million Jews alone along with many more non-Jewish civilians[206] and destroyed lives of many more. This harrowing experience also left a mark on the European Court of Human Rights' decisions in hate speech cases. It elevated human dignity and equality above individual freedom of expression. The denial of the Holocaust denial is a crime punishable in many European countries such as Russia, Switzerland or Czech Republic and as it is apparent from the aforementioned cases, the ECHR has very little tolerance of denigrating the Jewish community and suggesting that this part of history never happened.

Second: What degree of protection of freedom of expression exists in these societies? How easy is it to restrict this freedom by law and uphold such a law as constitutional? Which interests are in conflict with freedom of expression?

It is unmistakable that free speech enjoys a very high degree of protection in the United States, and although some scholars might believe it is – or should be – absolute, the case-law shows that it is not so. Fighting words, true threats, libellous utterances and other principles allow for exceptions from free

[205] Jeremy Waldron (2012): op. cit., p. 10
[206] United States Holocaust Memorial Museum website, retrieved 22 April 2017

speech protection. However, it is not easy for States to restrict freedom of expression. The government must tread very carefully when construing ordinances and regulations, for they must fit into these exceptions and cannot restrict speech either too much, or indeed, too little.

There are many interests that compete with the right to freedom of expression, such as national security, preserving the lives of a large number of individuals, and not violating explicit constitutional protections, with the former two being the focus of the imminent lawless action principle mentioned in Chapter 2.

The ECHR is somewhat more relaxed when it comes to the protection of free speech. The key principle the court uses is the balancing of individual freedoms – a tool used to weigh each competing freedom against the other with an aim of limiting as few freedoms as possible in the least restrictive manner.

There are also many values that can conflict with the right to free speech, such as justice, peace, the protection of reputation and the rights of others, human dignity, public order and many more. And while in the US, the First Amendment does seem to have the upper hand, in Europe, Article 10 does not.

Third: An important factor in the ability and willingness of the courts to change their views over time is the respective decision-making processes employed. If the system is too rigid, there is little room for change, and if change is to occur, it definitely cannot happen all at once. It would take decades to establish new case law and principles and overrule the old ones. Of the two courts, the Supreme Court's case law is definitely more rigid than that of the ECHR.

It would be difficult, but not impossible, to overrule cases such as *Brandenburg*. This case is mentioned intentionally because this is the chain on a gate leading towards a more relaxed approach to free speech. This is the draw-bridge built across the Atlantic. By allowing any expression besides that, which implies a risk of "imminent lawless action", leaves the public debate open to dangerous ideas commonly proscribed in Europe.

The Supreme Court is very unlikely going to seek enlightenment in the ECHR cases on hate speech. However, in light of recent case-law – namely *Virginia*

v. Black – it might be possible to extend its *true threats* principle to other forms of expression. It is fairly common in Europe to prohibit utterances causing harm to others.

In *Virginia*, the Supreme Court denied the protection of threatening expression. Of course, it was on the basis of the history of the Ku Klux Klan and rested on a premise that burning a cross had led to violence far too often in the past. But is protection of interests such as rights and freedoms of others a place for a ruthless calculus of probability of harm? If we assume that for example three out of four cross burnings led to violence, we may proscribe it because that is a rather large proportion. But what if incitement to racial, ethnic or religious hatred or intolerance led to, say, only one of ten instances of inflicting bodily harm? Are these 10% undeserving of protection? Is it too small a number to grant those affected the assurance of living in peace and as equals? One might well argue not. Every person should enjoy this protection, regardless of social stature or skin colour.

It is arguable that the Supreme Court took a step back when overruling the *clear and present danger* doctrine. As mentioned above in Chapter 2, in the case *Whitney v. California* from 1927, the court stated, that "*…a State in the exercise of its police power may punish those who abuse this freedom* – freedom of speech – *by utterances … tending to incite to crime, disturb the public peace, or endanger the foundations of organized government…*"

Knechtle states that "*the U. S. focus on individual liberty rights to free speech reflects … a deep-seated distrust of government.*"[207] Even though the United States have a history of fear of abusing state power, its own Declaration of Independence gives people the right and obligation to defend itself against such usurpations: "*But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.*"[208]

[207] John C. Knechtle (2005 – 2006): op. cit., p. 578
[208] The United States Declaration of Independence

If the change should happen, it cannot be, of course, too violent. Baby steps are necessary in shifting the majority's standpoint on important issues towards a better home for all. If the prohibition of hate speech inciting imminent lawless action were to be joined by the prohibition of threatening expressions, it would be a step in the right direction.

As mentioned in Chapter 1, the United States seeks to defend against the harm of potential violence and protect its citizens rather than focusing on promotion of equality and protection of human dignity. It would be naïve to expect the focus of protection to shift to human dignity and equality. The concept is as of now still unknown and unable to be grasped in the same spirit as in Europe by American society. However, the true threats principle applied to speech that not only threatens but that also has a potential to wound or defame another would further the aim of promoting the equality of American citizens and protecting them from harm, while still leaving a significant amount of expression under the protective wings of the First Amendment.

So to sum up, there is a real possibility for the United States to change its views on the matters of hate speech. But is the U. S. *willing* to change? Is there a carrot on a stick to get the mule moving? Perhaps there is.

Knechtle observes "*that the events in international terrorism appear to have swung the pendulum in the U. S. in the direction of greater government protection, even if it impinges on rights of speech.*"[209] He asserts that expanding the surveillance power through the USA Patriot Act,[210] and authorizing eavesdropping on Americans and others in the United States without a warrant by George Bush[211] shows that "*when a majority of the population feels that its safety is seriously threatened, people in the United States are willing to make compromises between their rights and their safety.*"[212] If only the same could be said about making compromises between their rights and

[209] John C. Knechtle (2005 – 2006): op. cit., p. 549
[210] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) – Act of 2001, Pub.L. No. 107-56, 115 Stat. 272, 50 U.S.C.
[211] "Bush Lets U.S. Spy on Callers Without Courts", *NY Times*, 16 December 2005, retrieved 26 April 2017
[212] John C. Knechtle (2005 – 2006): op. cit., *p. 550)*

the safety of others. But alas, most people are not willing to make sacrifices if they do not benefit from them personally.

It is questionable whether American citizens would be willing to sacrifice their freedoms to help others without some sort of guidance or a nudge from the government. And when it comes to the Justices of the Supreme Court, we observed that they are okay with revising the principles, but it sometimes seems as such revision only suits the ad hoc need to satisfy the First Amendment protection. It is unclear whether the Justices would feel the need to make changes in favour of generally increasing the protection of some other aspects of life, or whether they would consider it to represent a wasted effort.

Therefore, we may argue that the United States *could* and *should* change its viewpoint on the protection of hate speech. It would be probably too much to ask that it should take inspiration from the European approach, but there are plenty of opportunities to utilize its own (even overruled) case-law to revise its standpoints concerning this issue. It is intentional that this thesis only speaks of changing the views of the Court. It would be most definitely considered sacrilege if it were suggested that the First Amendment itself would require a tune-up.

When it comes to the European Court of Human Rights, by contrast, the amount of protection awarded to freedom of expression represents a careful balance with other freedoms, with the values set forth by the Convention presenting appropriate legitimate aims for restricting speech.

Generally, the ECHR's decision-making in hate speech cases appears coherent, and follows a particular pattern, thus creating a sufficient amount of legal certainty. Not that the case-law of the Supreme Court does not create legal certainty but its doctrine renders the usage of its precedents a bit more chaotic than that of the ECHR.

On the other hand, as one of the most recent cases showed, controversial issues do arise. As already mentioned, in this regard, it is germane to return to *Perinçek*, in order to analyse some of the factors that led the majority to its

decision, ponder the implications to other hate speech cases and suggest other possible avenues of approaching this sensitive issue.

When an act committed in the past or present is characterized as genocide, it is unquestionable that great horrors have occurred. Whether the events are ultimately classified as genocide, as it is understood in international law, or not, is still a very sensitive issue. There are two ways of looking at the ECHR's resolution of the alleged genocide denial.

We can regard as genocides only those events, whose perpetrators were convicted of genocide before international courts and ad hoc tribunals. In this manner, the events that occurred during the Second World War and massacres in Rwanda and Cambodia are recognized as genocides. But what if there is simply no competent tribunal to convict such persons?

On the other hand, since the ECHR refused to authoritatively characterize events in Turkey as genocide, we can leave this question as one to be answered by the contracting States of the Convention. As previously mentioned, States have a certain margin of appreciation when it comes to assessing whether an interference with the freedom of expression is necessary in a democratic society.

It is also prudent to define the act of genocide: "*'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*"[213]

The argument of the majority in *Perinçek* that "*…it has not been argued that there was a direct link between Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years. The only such link may come*

[213] Rome Statute of the International Criminal Court (2002), Article 6

from the presence of an Armenian community on Swiss soil…"[214] is not entirely convincing. This is *Virginia v. Black* all over again. As mentioned, it is not the case that only cross burnings may be proscribed because they convey an intimidating message and most likely lead to violence, while other harmful expressions have a smaller chance of provoking a violent reaction.

Equally, it seems that the mere "*presence of an Armenian community on Swiss soil*" is not enough for Switzerland to justify criminalization of the statements in question. Is this the way a society prizing itself for upholding dignity and promoting equality should function?

The geographical remoteness and detachment of Switzerland from the events in Turkey should not diminish its options to criminalize those statements the government believes to be a threat to the identity of the Armenian community. I believe this should fall within the scope of the margin of appreciation of each State, to decide whether to regard and punish the denial of a historically proven event as genocide.

It gets still trickier. Doğu Perinçek is a Turkish national, but the statements in question were made on Swiss soil. How do we resolve this? Both States are parties to the *Convention on the Prevention and Punishment of the Crime of Genocide*, which requires States to criminalize genocide and, by extension, even genocide denial. What differentiates both States is the approach to the massacres of Armenians.

While Turkey refuses to characterize these events as genocide, Switzerland does not. What should have the ECHR done about this? An extension of the margin of appreciation of the States would seem the obvious answer. In this case, the ECHR reduced itself to dictating to Switzerland that the Armenian genocide is not in fact genocide and therefore cannot be criminalized as such. If it were the other way round, the ECHR would command Turkey to regard these events as genocide and therefore criminalize them. It is not the ECHR's place to influence the States in such a direct manner. But again, a whole other paper could be dedicated to this issue alone.

[214] *Perinçek v. Switzerland*, no. 27510/08, ECHR 2015, § 244

To summarize the above-mentioned point, it would seem that the ECHR overstepped its bounds by interfering with the internal affairs of Switzerland. When there is no European consensus, whether about a historical fact or the questions of euthanasia or homosexual marriage, the States should be given a wider margin of appreciation when considering possible breaches of the Articles of the Convention.

It is also useful to briefly consider the ECHR's time factor argument. To be blunt, a hundred years is far too short to diminish the impact of such horrendous acts. While all those who suffered may be dead it is does not mean that their descendants and those who share their culture should not be protected. One may well agree with the dissenting judges that by this logic, the Holocaust's time is almost up as well. The ECHR's strong opposition towards genocide denial, as seen in the abovementioned cases, shows that the Court is willing to protect the victims of those events. Why not do so in this case as well?

While most people today may have forgotten, history still remembers, for example the Cathar Crusade in the 13th century France. It was genocide as we know it today – committed on the basis of the different religious affiliation of the Cathars. The grievous acts we saw in the past century should not fall into oblivion like the Cathar Crusade. People are destined to repeat the mistakes of the past – it is our nature. Is restricting speech which denies these events such a high price in order to prevent people from repeating the wrongs of the past?

One final criticism may be appended concerning the ECHR's position on Perinçek's statements. The Court assessed that he had not expressed contempt or hatred, had not called the Armenians liars, and that therefore his statements could not be seen as a call for hatred. However, there is reason to disagree with this position, while the Court contradicts itself in its statements.

The Court states that it *"is aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years are to be regarded as genocide, and of that community's acute sensitivity to any statements bearing on that point"* and also noted *"that the rights*

of Armenians to respect for their and their ancestors' dignity, including their right to respect for their identity [are] constructed around the understanding that their community has suffered genocide."

Therefore it is beyond doubt that Armenian identity and self-determination is guided by the belief that the crimes committed in Turkey amounted to genocide. Armenian National Institute is dedicated to the study, research, and affirmation of the Armenian genocide as well.[215] A Turkish political figure, such as Doğu Perinçek, surely knew this when he made the statements. By publically claiming that the allegations of the Armenian genocide represent an international lie, he, perhaps inadvertently, presented the Armenians as liars. A political figure should be aware of the impact his speech can have on others. And while he could have just meant that "the imperialists" are liars, as the ECHR believed, his words nonetheless had a major impact on a whole community of people.

On another note, there are a growing number of cases of hateful expressions posted on the Internet as well as on social networks. While some have already reached the ECHR, others are still in a phase of criminal proceedings. In Czech Republic, a politician is being prosecuted for publicly defaming the Muslim community on a social network. Out of his many statements, these were the most alarming: "*Dear Muslims, we will grind you to the meat-bone meal,*" or "*Gas (the Muslims), rabies must be battled by any means.*" He also expressed "a relief" that there will luckily be concentration camps for Muslims.[216]

This is clearly a reaction to growing number of immigrants in Europe and it could very likely be the next case the ECHR will have to deal with in the future.

[215] Armenian National Institute website, retrieved 24 April 2017
[216] "Konvičku stíhají za muslimy do koncentráků i do plynu. Univerzita ctí presumpci neviny", *Aktuálně.cz*, 25 November 2015, retrieved 26 April 2017

Conclusion

Contrary to popular belief, there are always three sides in war – the winners, the losers and the victims. It is the victims who suffer the most. Wars play a role in shaping our land, our history, and our society. Yet they also shape how authorities deal with those who deny the atrocities of war or persecute their victims.

We have seen that on both American and European continents, the events of the past have left an impact in many areas of life. One of these areas is the decisions of the United States Supreme Court, and the European Court of Human Rights. We have learned that history of racial segregation shapes the hate speech case-law in America, where racial hate speech is dominant form thereof. On the other hand, the history of Jewish persecution and genocide gave rise to many ECHR cases mostly concerning ethnic and religious hate speech.

We have defined what "hate speech" is and presented grounds upon which to regulate hateful expression. We have also learned that speaker, listener, message and circumstance are just as important as the potential harms of hate speech itself. While the harm of potential violence prevails as a principal reason for restricting speech in the United States, Europe partly sacrificed individual freedom of expression for the elevation of equality, human dignity and reputation.

Principles governing decisions in the majority of free speech cases were also influenced by historical and social climate, and while it may be too difficult to try and adopt these principles by opposing courts, it is possible for them to seek enlightenment in their own backyard.

When it comes to free speech protection and restriction, the United States relies on the First Amendment to the United States Constitution and principles of speech restriction and exceptions from the First Amendment protection such as the "imminent lawless action," "fighting words," or "true

threats" principles. Each of these principles was established by a different, iconic decision of the Supreme Court.

The European Court of Human Rights' decisions regarding freedom of expression in general are based on the European Convention of Human Rights, notably on its Article 10. This Article is sometimes tempered by Article 17, which the Court uses to deny the protection of Article 10 to the most virulent attacks on the values safeguarded by the Convention.

In conclusion, while it would be possible and prudent for the Supreme Court to find inspiration the European concept of equality and human dignity, it would possibly be too big a step. Instead, the Supreme Court should try to extend the reach of the "true threats" principle established in *Virginia v. Black* to other expressions, aside from cross burnings, which present potential harm to individuals or groups of people. It would be a good start to slightly release the grasp on the First Amendment and turn its gaze to the better protection of all people and possible implementation of human dignity.

While the ECHR's protection of freedom of expression seems correctly balanced, there are a number of issues with its recent case-law. In *Perinçek*, the lack of European consensus on historical events led to the besmirching of an entire group of people. Clearly, when a European consensus is lacking, it is best to widen States' margin of appreciation when assessing whether a pressing social need of interfering with Article 10 exists. The ECHR should not interfere in States' internal affairs and should let them decide for themselves whether a certain controversial idea deserves protection or not. This argument is supported by the growing number of European states, which acknowledge the Armenian genocide such as Germany or the most recently Czech Republic.

On another note, the present author does not deem it wise to give time limitations to the crime of genocide. Preserving the criminalization of denying historically proven such as genocide is vital in keeping the atrocities committed in living memory and a way to honour the victims and to protect

the identity and right to self-determination of communities that have been subjected to such atrocities.

On another note, it is perhaps prudent to mention that not all states in both the US and Europe have tackled with these hateful expressions. For example in Czech Republic, the hate speech case-law consists primarily of political speech. However in the light of past years and with growing number of immigrants in Europe, the first racially or ethnically flavoured hate speech case in the Czech Republic might be closer than we would think.

Hate speech case-law is abundant. It has many avenues and side alleys and many forms of communication. This thesis focused on racial, ethnic and religious hate speech but there are many more forms of communicating it. In modern society, internet hate speech is gaining in importance. Internet speech is loosely regulated worldwide and in a manner that is practically borderless in the United States. There are way too many questions to be answered about this phenomenon, most of all whether internet hate speech should be regarded and restricted like regular hate speech and how such a regime may be best achieved.

This is far too interesting a topic to be just left to gather dust on a shelf. This is the issue the present author hopes to tackle in the future. However, that discussion is best left to another day.

Teze diplomové práce v českém jazyce / Master's thesis summary in Czech

1. Nenávistné projevy

Dnes již málokdo pochybuje, že svoboda projevu je neoddělitelnou součástí demokratického právního státu a zároveň důležitým nástrojem pro politický, ekonomický a kulturní růst společnosti. Nicméně nelze zapomínat, že existují projevy, které jsou zaměřeny na podněcování k násilí, šíření hněvu a ohrožování národní bezpečnosti.[217] Takové projevy je nutné odlišit od výroků, jež pouze umožňují vyjadřování radikálních názorů, které mohou svým obsahem obohatit diskurs a přispět k posílení tolerance ve společnosti a které nepochybně mají být prezentovány svobodně. Naopak výroky, které jsou útočné či ponižující, je vždy třeba určitým způsobem regulovat ze strany státu.

Každý stát se s tímto fenoménem potýká jiným způsobem ať už z důvodu rozdílných právních systémů, nebo kvůli postavení společnosti k této problematice a její ochotě a schopnosti ji řešit. Co tedy vlastně jsou nenávistné projevy? Výbor ministrů Rady Evropy je definoval takto: „*Pojmem „nenávistných projevů" se rozumí všechny formy projevu, které šíří, podněcují, podporují nebo ospravedlňují rasovou nenávist, xenofobii, antisemitismus či jiné formy nenávisti založené na netoleranci, včetně netolerance vyjádřené agresivním nacionalismem a etnocentrismem, diskriminací a nepřátelstvím vůči menšinám, migrantům a lidí přistěhovaleckého původu."*[218] Existuje i řada mezinárodních dokumentů zabývajících se nenávistnými projevy, jako je Mezinárodní pakt o občanských a politických právech nebo Mezinárodní úmluva o odstranění všech forem rasové diskriminace, žádný z nich ale nedefinuje tyto projevy tak vyčerpávajícím způsobem, jako právě doporučení Výboru ministrů Rady Evropy.

---

[217] J. Kmec, D. Kosař, J. Kratochvíl, M. Bobek: *Evropská úmluva o lidských právech. Komentář.* 1st edition. (Praha: C.H. Beck, 2012), str. 996

[218] Council of Europe, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"

Známe celou řadu forem nenávistných projevů. Mohou to být projevy vyjadřující nenávist k rase, náboženství, etniku a národnosti, ale i projevy podněcující násilí proti těmto skupinám obyvatel. Dále se může jednat o schvalování terorismu a válečných zločinů nebo popírání genocidy. Účelem této práce je tyto formy analyzovat a skrze rozhodování Nejvyššího soudu USA (dále jen „Nejvyšší soud“) a Evropského soudu pro lidská práva (dále jen „ESLP“) dovodit, jak se oba soudy mohou navzájem poučit při rozhodování o nenávistných projevech, potažmo zda se mohou inspirovat svou vlastní judikaturou a tím tak posílit ochranu před těmito projevy.

2. Kdy regulovat nenávistné projevy

Jak již bylo předestřeno, některé formy projevu by bylo záhodno ze stran států regulovat. Otázkou ovšem je, kdy je toho opravdu třeba. Předně je nutno identifikovat, kdo je autorem projevu a kdo je jeho cílem. Je znatelný rozdíl v následcích způsobených nenávistným výrokem, jehož autorem je osobnost známá napříč politickým spektrem, oproti omezeným možnostem mediálně neznámé osoby zapůsobit na společnost. Z hlediska konkrétního cíle nenávistného projevu budou bezpochyby závažnější výroky většiny proti menšině nežli naopak, protože menšiny se mohou obtížněji bránit a jejich projevy nebudou mít ve většině společnosti natolik razantní dopad.

Rozhodující pro účely regulace nenávistných projevů je také obsah daného projevu. Z něj může být nenávistný projev patrný na první pohled, například při přímém podněcování k nenávisti proti určitému etniku, nebo se naopak za projevem schvalování terorismu může skrývat nenávistná myšlenka útočící proti určitému etniku tím, že činy proti němu schvaluje a podporuje.

Důvody, z jakých státy regulují tyto projevy, lze rozdělit do dvou kategorií podle újmy: újma skrývající se v hrozbě potenciálního násilí a újma na lidské důstojnosti.[219] Ve Spojených státech amerických převládá první kategorie, jak vyplývá z judikatury Nejvyššího soudu, převážně pak z případu *Brandenburg*

[219] John C. Knechtle: „When to Regulate Hate Speech“ 110 Penn St. L. Rev. 539 (2005-2006), p. 546

proti Ohiu. Naopak v evropských zemích je primární kategorie újmy na lidské důstojnosti, což je pro USA koncept dosud neznámý.

3. Principy Nejvyššího soudu USA při rozhodování o nenávistných projevech

Soudy USA se ve svém rozhodování o nenávistných projevech spoléhají na První dodatek k Ústavě Spojených států amerických (dále jen „První dodatek"), který zní: „*Kongres nesmí vydávat zákony … omezující svobodu slova nebo tisku.*"[220] Není žádným tajemstvím, že Američané požívají vyšší ochrany svobody slova než kdokoliv jiný.[221] To vyplývá jak z výše zmíněného Prvního dodatku, tak ze samotné judikatury Nejvyššího soudu, který při rozhodování o nenávistných projevech používá celou řadu principů. Důležité je zmínit, že První dodatek a ochrana, kterou poskytuje, nejsou v žádném případě absolutní, ačkoliv existují v tomto směru odborné názory. Existují výjimky z této ochrany a právě jim se tato práce věnuje.

Z těch nejdůležitějších principů je třeba nejdříve zmínit rozlišování mezi zákony a nařízeními založenými na obsahu a těmi, které na obsahu založené nejsou (neutrálními). Obsahem se v tomto případě rozumí obsah projevu, který je na základě daného zákona omezován či trestán. Zákony založené na obsahu omezují komunikaci kvůli zprávě v ní obsažené.[222] Tyto zákony podléhají té nejpřísnější soudní kontrole a při napadení jejich ústavnosti u soudu mají vysokou presumpci protiústavnosti. Aby zákon mohl projít touto kontrolou, musí být dokázáno, že slouží přesvědčivému a důležitému zájmu státu a zároveň že je danému zájmu úzce přizpůsoben. Zákony, které na obsahu projevu založené nejsou, omezují projev bez ohledu na obsah nebo dopad sdílené informace.[223] Tyto zákony prochází pouze střední intenzitou soudní kontroly, která vyžaduje, aby zákony sloužily významnému nebo značnému zájmu státu a byly rozumně přizpůsobeny tomuto zájmu.

---

[220] První dodatek k Ústavě Spojených států amerických
[221] Anthony Lewis, *Freedom for the thought we hate: a biography of the First Amendment* (Basic Books 2007), p. ix
[222] Geoffrey R. Stone, "*Content-Neutral Restrictions*," 54 University of Chicago Law Review 46 (1987), p. 47
[223] Ibid, p. 48

Další principy se týkají omezení svobody projevu a výjimek z ochrany připisované těmto projevům. Asi nejčastějším omezením svobody projevu jsou omezení času, místa a způsobu, která stanovují kdy, kde a jakým způsobem lze vyjádřit své postoje. Z příkladů lze zmínit zákaz hlasitých projevů v dobách nočního klidu či v místech, která vyžadují ohleduplnost k ostatním, jako například knihovny.

V případech, kde se rozhoduje o nenávistných projevech, jsou výjimky z ochrany svobodného projevu častější. První důležitou výjimkou je takzvaný Brandenburg test neboli test podněcování bezprostřední protiprávní aktivity. Tento test byl představen v případu *Brandenburg proti Ohiu* a spočívá v nemožnosti států omezovat svobodu projevu, pokud daný projev nesměřuje k podněcování nebo vyvolání bezprostřední protiprávní aktivity a pokud není pravděpodobné, že k této aktivitě dojde. Druhou z výjimek představují útočná slova neboli „fighting words". Nejvyšší soud již v roce 1942 judikoval, že některé třídy projevů, jako právě urážející či útočná slova, nepředstavují ústavní problém.[224] V případu *R. A. V. proti městu St. Paul* Nejvyšší soud prohlásil, že „*útočná slova jsou kategoricky vyloučena z ochrany Prvního Dodatku, protože jejich obsah představuje zvlášť nesnesitelný způsob vyjádření jakékoliv myšlenky.*"[225] Poslední výjimkou jsou skutečné hrozby neboli „true threats", což jsou „*prohlášení, kterými mluvčí míní komunikovat vážný projev úmyslu spáchat akt nezákonného násilí proti určitému jednotlivci nebo skupině osob.*"[226] Důvodem této výjimky je ochrana jednotlivců před strachem z násilí, před narušením, které strach představuje, a před možností, že k danému násilí dojde.[227]

4. Principy Evropského soudu pro lidská práva při rozhodování o nenávistných projevech

ESLP zakládá své rozhodování o nenávistných projevech na třech článcích Evropské úmluvy o ochraně lidských práv a základních svobod (dále jen

[224] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), p. 571-572
[225] R. A. V. v. St. Paul, 505 U.S. 377 (1992) (1992), p. 393
[226] Virginia v. Black, 538 U. S. 343 (2003)
[227] R. A. V. v. St. Paul, 505 U.S. 377 (1992) (1992), p. 388

„Úmluva“). Základním článkem je článek 10, který v prvním odstavci stanoví: „*Každý má právo na svobodu projevu. Toto právo zahrnuje svobodu zastávat názory a přijímat a rozšiřovat informace nebo myšlenky bez zasahování státních orgánů a bez ohledu na hranice.*“[228] Druhý odstavec dává členským státům možnost omezit svobodu projevu, neboť podle něj „*[v]ýkon těchto svobod, protože zahrnuje i povinnosti a odpovědnost, může podléhat takovým formalitám, podmínkám, omezením nebo sankcím, které stanoví zákon a které jsou nezbytné v demokratické společnosti v zájmu národní bezpečnosti, územní celistvosti nebo veřejné bezpečnosti, ochrany pořádku a předcházení zločinnosti, ochrany zdraví nebo morálky, ochrany pověsti nebo práv jiných, zabránění úniku důvěrných informací nebo zachování autority a nestrannosti soudní moci.*“[229] Dalším je článek 14, který zakazuje diskriminaci při užívání práv a svobod přiznaných Úmluvou, a dále pak článek 17, který zakazuje vykládat Úmluvu způsobem, kterým by mohlo dojít k popření Úmluvou přiznaných práv a svobod ve větším rozsahu, než ona sama stanoví. Zajímavostí tohoto článku je, že pokud se jej ESLP rozhodne použít, ztrácí stěžovatel právo ucházet se o ochranu svobody projevu podle článku 10.

Mimo výše zmíněných článků užívá ESLP při rozhodování o nenávistných projevech také určité specifické postupy. Předně zjišťuje, zda došlo k porušení svobody projevu garantované článkem 10 Úmluvy. Pokud shledá, že ano, určí dále, zda toto porušení bylo předepsáno zákonem a zda sleduje legitimní cíl. Konečně ESLP rozhodne, zda dané porušení bylo v demokratické společnosti nezbytné. K tomu mu slouží vyvažování jednotlivých svobod garantovaných Úmluvou a princip proporcionality, kterými se snaží zjistit, zda omezení koresponduje naléhavému sociálnímu zájmu a zda je toto omezení proporcionální reakcí na tento zájem. Členské státy mají v tomto případě prostor pro uvážení při určování, zda porušení svobody slova bylo nezbytné v demokratické společnosti.

[228] Evropská úmluva o ochraně lidských práv a základních svobod, čl. 10, odst. 1
[229] Ibid, čl. 10, odst. 2

5. Nenávistné projevy proti rase

Tento typ nenávistných projevů je „populární“ zejména v USA, kde je zároveň dominantním typem. Naprostá většina judikátů týkajících se těchto projevů obsahuje rasový prvek. Bezpochyby je to dáno především americkou historií, která je protkána zotročením Afroameričanů a rasovou segregací, která následovala po jeho zrušení.

Prvním ze čtyř případů rozebíraných v této kapitole je případ *Beauharnais proti Illinois* z roku 1952. Stěžovatel byl odsouzen za distribuci letáků, které dle znění trestního zákoníku státu Illinois zobrazovaly *„zkaženost, zločinnost, nečistost nebo nedostatek ctnosti občanů černošské rasy a barvy a který vystavuje černošské občany Illinois pohrdání, posměchu nebo pomluvě.“*[230] Nejvyšší soud judikoval, že toto zákonné ustanovení neporušuje svobodu slova, protože hanlivé výroky nespadají do ústavně zaručené a chráněné svobody projevu. Nejvyšší soud svá zjištění odůvodnil mimo jiné také prohlášením, že *„zlovolné šíření falešných informací týkajících se rasových a náboženských skupin podporuje spory a brojí proti mnohým úpravám potřebným pro svobodný a řádný život ve společnosti.“*[231] Soud vzal dále v potaz i situaci ve společnosti, kdy ve státě Illinois vládlo stále se zvyšující napětí mezi rasami, které často vyúsťovalo v násilí, včetně vražd a nepokojů. Toto rozhodnutí nebylo ani zdaleka jednoduché, se čtyřmi soudci připojujícími nesouhlasné stanovisko k rozhodnutí většiny. Někteří soudci „lamentovali“ nad oslabením ochrany poskytované Prvním dodatkem mimo jiné s odůvodněním, že v „říši“ Prvního dodatku není prostor pro regulaci projevů.

V případu *Brandenburg proti Ohiu* byl stěžovatel odsouzen za *„obhajování povinnosti, nezbytnosti nebo vhodnosti zločinu, sabotáže, násilí nebo protiprávních metod terorismu jako prostředku k uskutečnění průmyslové nebo politické reformy.“*[232] Stěžovatel pozval reportéra s kameramanem na setkání Ku Klux Klanu, které bylo natočeno a později vysíláno v národní televizi. Snímky ukazovaly dvanáct postav v kápích, z nichž některé měly zbraně,

[230] Illinois Criminal Code, §224a, Division 1
[231] Beauharnais v. Illinois, 343 U.S, 250, 255-259 (1952)
[232] Brandenburg v. Ohio, 395 U.S. 444 (1969)

stojících okolo velkého dřevěného kříže, který následně spálily. Na snímcích bylo možno zaslechnout výroky jako například: „*Osobně si myslím, že by se negr měl vrátit do Afriky a žid do Izraele.*“ Stěžovatel pronesl mimo jiné tato slova: „*Nejsme pomstychtivá organizace, ale pokud náš prezident, Kongres, náš Nejvyšší soud budou pokračovat v potlačování bělošské rasy, je možné, že bude muset na nějakou mstu dojít. … Čtvrtého července pochodujeme na Kongres, čtyři sta tisíc mužů.*“ Nejvyšší soud rozhodl, že zákon, na jehož základě byl stěžovatel odsouzen, prosušuje svobodu projevu, a je tedy protiústavní, a to z důvodu, že „*[s]voboda projevu a tisku nedovoluje státu zakázat obhajování užití síly nebo porušení práva, pokud toto obhajování není zaměřeno na podněcování nebo vyvolání bezprostřední protiprávní aktivity a pokud není pravděpodobné, že takové jednání podnítí či vyvolá.*“[233] Dodnes zůstává Brandenburg standardem pro omezování či ochranu pobuřujících projevů. Na základě tohoto rozhodnutí se pro státy stalo obtížné kriminalizovat ty, kteří obhajují použití násilí či porušování práva, převážně z důvodu užití kritéria bezprostřednosti. Tento případ by byl bezpochyby rozhodnut odlišně na evropském kontinentu. Nejenže obhajování použití násilí a porušení práva je trestné v mnoha členských státech Úmluvy, ale také obsah výroků jako „*pohřběte negry*“ by konstituoval porušení práva na ochranu soukromí, garantovaného článkem 8 Úmluvy, a zároveň újmu na lidské důstojnosti černošské rasy.

5. 1. R. A. V. versus St. Paul

Velmi významným případem pro účely analýzy rozhodování o nenávistných projevech v USA je *R. A. V. proti městu St. Paul*. Na tomto případu lze spatřovat množství rozporů mezi jednotlivými soudci, které je patrné ze čtyř odlišných stanovisek k rozhodnutí většiny.

Několik hodin po půlnoci vzbudilo černošskou rodinu světlo vycházející z jejich zahrady. Šokovaná rodina pozorovala, jak skupinka teenagerů na jejich pozemku zapálila latinský kříž. Stěžovatel, jeden z teenagerů, byl odsouzen na základě nařízení města St. Paul, které pod hrozbou odsouzení za přečin

[233] Brandenburg v. Ohio, 395 U.S. 444 (1969)

zakazuje komukoliv, aby na veřejný nebo soukromý pozemek umístil symbol či předmět, včetně hořícího kříže či nacistické svastiky, pokud si je vědom, že tento symbol vzbuzuje hněv, strach nebo odpor u ostatních na základě rasy, barvy pleti, náboženství či pohlaví.[234]

Nejvyšší soud uznal, že nařízení se týká pouze takzvaných „fighting words". Zároveň prohlásil, že je možné „figthing words" regulovat, avšak regulace nesmí být založena na nepřátelství či protekcionářství vzhledem ke sdělované informaci. Nejvyššímu soudu se nelíbilo, že nařízení zakazuje projevy vzhledem k „neoblíbeným" tématům, jako je rasa, barva, náboženství či pohlaví, a zároveň umožňuje projevy, které jsou urážlivé, ale do těchto kategorií nespadají. Konečně soud judikoval, že nařízení není úzce přizpůsobené tak, aby sloužilo důležitému státnímu zájmu, a poznamenal, že město má dostatek prostředků, aby dosáhlo účelu, k němuž nařízení směřuje, mírnějšími prostředky, nezaloženými na diskriminaci na základě obsahu.

Zatímco většina byla znepokojena nejen diskriminací na základě obsahu, ale dokonce diskriminací názorovou, ostatní soudci nesouhlasili s odůvodněním většiny hned v několika pasážích. Soudce Blackmun nazval odůvodnění většiny „hloupostí" a prohlásil, že rozhodnutím, že nařízením nelze regulovat projev, který způsobuje velkou újmu, pokud zároveň nereguluje projev tuto újmu nepůsobící, obrátila většina právo a logiku „vzhůru nohama". Soudce Stevens zmínil několik poznámek k rozhodnutí většiny. Prvně, většina se odchýlila od ustálené judikatury a namísto „kategorií" nechráněných projevů postavila určité „elementy" těchto projevů. Je pozoruhodné, že se Nejvyšší soud odchýlil od ustálené judikatury místo toho, aby využil možností, které mu jeho case-law nabízí. Dále Stevens podotkl, že stejně jako může Kongres rozhodnout, že hrozby proti prezidentu mohou mít závažnější následky, tak také St. Paul může rozhodnout, že hrozby na základě rasy, barvy pleti či náboženství působí větší újmu jednotlivci a společnosti než jiné. Tento argument v mírně odlišné úpravě nakonec převládl v dalším zmiňovaném rozhodnutí: *Virginia proti Blackovi*.

[234] R. A. V. v. City of St. Paul, 505 U.S. 377 (1991)

5. 2. Virginia versus Black

Zde se jedná o nejmladší případ pálení křížů na americké půdě. Rozhodnutí rozebírá dva různé incidenty. V prvním případě Black, vedoucí Ku Klux Klanu, uspořádal setkání nedaleko státní dálnice, při němž byl spálen třicet stop vysoký kříž. V druhém případě šlo o dva muže, kteří se chtěli pomstít sousedovi stěžujícímu si na hluk, který působili střílením ze zbraně na své zahradě. Dvojice najela s nákladním automobilem na pozemek souseda a následně na něm umístila a zapálila latinský kříž.

Tento případ je v USA speciální tím, že soud vzal v potaz historické pojítko pálení křížů a Ku Klux Klanu, který *„způsobil panování teroru na jihu, bičování, vyhrožování a vraždění černochů, ale i bělochů, kteří nesouhlasili s politikou Klanu.*“[235] Soud v tomto případě poprvé definoval význam slova „true threat“ a judikoval, že *„zastrašování ve smyslu ústavně zakázaného projevu je druhem skutečných hrozeb.*“[236]

Na tomto případu lze spatřovat, že Nejvyšší soud je ochoten zakázat projev, jakým je například pálení křížů, kvůli jeho krvavé minulosti a naznačování hrozícího nebezpečí nejen ze strany členů Ku Klux Klanu. Toto stanovisko je dobrým odrazovým můstkem na cestě k lepší ochraně lidské rovnosti a důstojnosti, jak je tomu v Evropě.

6. Nenávistné projevy proti etniku a náboženství

Tento druh projevů se nejčastěji vyskytuje v Evropě, kterou v minulosti postihla těžká rána ve formě židovské perzekuce a holocaustu a která se v současnosti potýká s rostoucím počtem imigrantů převážně z Blízkého východu. Z toho důvodu jsou v této kapitole posuzovány pouze případy řešené ESLP.

Prvním z případů je *Remer proti Německu*, kde autor ve svém časopise popíral existenci plynových komor v koncentračních táborech za nacistického režimu a vyzýval k boji proti lžím o násilném usmrcení čtyř miliónů židů v Osvětimi. Cílem těchto autorových výroků bylo podněcování nenávisti proti židům. ESLP

[235] Virginia v. Black, 538 U.S. 343 (2003)
[236] Virginia v. Black, 538 U.S. 343, 344 (2003)

zde judikoval, že odsouzením autora pro podněcování k nenávisti nedošlo k porušení svobody slova garantované článkem 10 Úmluvy, jelikož veřejný zájem na prevenci zločinu a zachování veřejného pořádku, včetně ochrany práv druhých, převažuje nad svobodou slova stěžovatele. Tento případ se potýkal s projevem, jehož obsahem jsou hanlivé výroky. Tento druh projevu není chráněn ani v USA, pročež se jedná o jeden z mála případů, který by byl pravděpodobně v USA rozhodnut stejně, jak rozhodl ESLP.

Dalším významným rozsudkem je *Garaudy proti Francii*. V tomto případě autor ve své knize popíral existenci zločinů proti židovskému obyvatelstvu, za což byl odsouzen pro popírání činů proti lidskosti a veřejného hanobení skupiny lidí. Rozdílným faktorem v tomto případu je použití článku 17 Úmluvy. ESLP judikoval, že postoje stěžovatele v jeho knize jdou proti smyslu a základním hodnotám Úmluvy, jmenovitě proti spravedlnosti a míru, a že tedy stěžovatel pozbývá práva na ochranu svobody projevu podle článku 10 Úmluvy.

V případu *Ivanov proti Rusku* zašel stěžovatel o krok dál, když ve svých novinách publikoval články volající po vyloučení Židů ze společenského života a označující židovskou komunitu za zdroj všeho zla v Rusku. U soudu mimo jiné tvrdil, že Židé nejsou národem. Byl odsouzen za veřejné podněcování k etnické nesnášenlivosti skrze užití hromadných sdělovacích prostředků. Zde ESLP prohlásil, že tak vehementní útok proti etnické skupině je v rozporu s hodnotami, na nichž stojí Úmluva, konkrétně se zásadami tolerance, sociálního míru a zákazu diskriminace, a že tedy stěžovatel nemůže být chráněn článkem 10 Úmluvy.

Zajímavým případem je rovněž *M'Bala M'Bala proti Francii*, kde stěžovatel uspořádal představení, při němž si na podium pozval herce oblečeného do pruhovaného pyžama s židovskou hvězdou – oděv připomínající ten, který nosívali deportovaní Židé – aby udělil cenu za „nevšednost a drzost" akademikovi veřejně známému pro jeho názory a popírání plynových komor. Stěžovatel byl odsouzen za veřejné urážení skupiny osob na základě jejich původu. ESLP konstatoval vysoce antisemitistický podtext stěžovatelova

konání spočívajícího ve vyjádření pocty osobě, která je natolik známá svými postoji popírajícími zločiny proti Židům. I zde pro tak očividný projev nenávisti a antisemitismu, prezentovaných jako herecké vystoupení, odepřel ESLP stěžovateli ochranu svobody projevu garantovanou článkem 10 Úmluvy.

Nejen židovské, ale i muslimské etnikum bylo a stále je terčem nenávistných projevů. V případu *Norwood proti Spojenému Království* stěžovatel vylepil v okně svého bytu plakát, který zobrazoval Světové obchodní centrum v plamenech a slova „Islám z Británie – chraňte britský lid". Byl odsouzen za vystavování obrazů obsahujících hrozbu či urážku vůči náboženské skupině. ESLP rozhodl, že stejně jako ve věci *Ivanov proti Rusku* nemá Norwood právo spoléhat se na ochranu článku 10 Úmluvy, jelikož jeho jednání bylo v rozporu s jejími základními zásadami.

Případ *Le Pen proti Francii*, kde stěžovatel vyjadřoval obavy z rostoucího počtu muslimů ve Francii, se liší v jedné podstatné okolnosti, tedy že stěžovatel byl politikem. ESLP prohlásil, že v kontextu politické debaty považuje ochranu svobody projevu za nejdůležitější a že je nutné ji vztáhnout i na informace a myšlenky, které nejsou příznivě přijímány a které uráží a šokují. Tímto výrokem se ELSP přiblížil Nejvyššímu soudu, který podobný obrat ve svých rozhodnutích často používá. Nicméně na rozdíl od Nejvyššího soudu ESLP rozhodl, že omezení stěžovatelovy svobody projevu bylo v tomto případě v demokratické společnosti nezbytné.

6. 1. Perinçek proti Švýcarsku

Nejmladší a bezpochyby jedno z nejkontroverznějších rozhodnutí ESLP představuje případ *Perinçek proti Švýcarsku*. Stěžovatel – turecký občan a předseda politické strany – se účastnil tří veřejných událostí ve Švýcarsku, na nichž opakovaně prohlašoval, že masové deportace a masakry spáchané na arménské populaci okolo roku 1915 nebyly genocidou a že nazývání těchto událostí „arménskou genocidou" je mezinárodní lží. Byl shledán vinným za svá rasisticky a nacionalisticky orientovaná prohlášení, jež nijak nepřispívala historické debatě.

ESLP shledal legitimní cíl v ochraně práv druhých, konkrétně zachování cti příbuzných obětí hrůzných činů spáchaných Osmanskou říší proti arménskému lidu.[237] Na druhou stranu prohlásil, že stěžovatel nevyjadřoval pohrdání či nenávist ani nenazýval arménský lid lháři. Soud si byl vědom, že pro arménskou komunitu je nesmírně důležité přesvědčení, že se stala obětí genocidy. I přesto však odmítl uznat, že by Perinçekovy výroky natolik poškodily důstojnost Arménů, aby za to byl trestně stíhán.

ESLP nakonec judikoval, že zásah do svobody projevu stěžovatele nebyl v demokratické společnosti nezbytný, mimo jiné také z důvodu, že od událostí uběhla dostatečně dlouhá doba a že Švýcarsko je geograficky příliš vzdálené na to, aby projevy popírající údajnou arménskou genocidu způsobily narušení veřejného pořádku.

Sedm soudců velkého senátu ESLP připojilo k rozhodnutí svá nesouhlasná stanoviska. Rozporovali mimo jiné geografický a časový faktor a vyjádření většiny, že stěžovatelovy výroky nebyly urážlivé. Více k těmto rozporům v následující kapitole.

7. Změna paradigmatu

Jak Nejvyšší soud USA, tak ESLP mají prostor pro zlepšení, co se týče ochrany jednotlivců a skupin lidí proti nenávistným projevům. Oba soudy při svém rozhodování zvažují historické a sociální klima. Ve Virginii bylo například možno zakázat pálení křížů na základě vysokého počtu následných násilných aktivit. V rozhodování ESLP je patrný především vliv židovské perzekuce, který se projevuje v minimální toleranci projevů popírajících tyto události.

Je nepravděpodobné, skoro až nemožné, aby Nejvyšší soud přijal za své principy používané ESLP a to samé platí naopak. Americká a evropská právní kultura jsou natolik odlišné, že tak radikální změna v doktríně by byla možná až po mnoha letech a nesmírném úsilí. To však nebrání tomu, aby se Nejvyšší soud pokusil ve svých rozhodnutích více zohledňovat právo na lidskou důstojnost. Takový přístup by znemožňoval nejen pálení křížů, ale i veřejné

[237] *Perinçek v. Switzerland*, no. 27510/08, ECHR 2015, str. 67, § 141

hanobení minorit. Samozřejmě by to znamenalo, že by se snížila ochrana garantovaná Prvním dodatkem. Trochu problematickým by se mohl jevit vzdor, který panuje v americké společnosti vůči omezování svobody projevu. Ale stejně jako společnost, i názory lidí se mění, a pokud spolu lidé mají žít v míru, je třeba tu a tam učinit kompromisy a najít společné řešení. Je nepochybné, že vedle možnosti se změnit je nutná také vůle této změny dosáhnout.

Inspirace evropskou úpravou ochrany lidské důstojnosti však není jediným způsobem, jak by Nejvyšší soud mohl změnit svůj postoj k nenávistným projevům. Jak jsme mohli spatřit ve věci *Virginia proti Blackovi*, soud je ochoten omezit svobodu slova, pokud je určité chování spojené s násilím a hrozbami vůči jednotlivci či skupině obyvatel, k nimž v historii došlo. A právě toto rozhodnutí by mohlo být dobrým odrazovým můstkem na cestě k posílení ochrany rovnosti a důstojnosti. Soud svoje rozhodnutí odůvodnil tím, že pálení křížů vedlo k násilí příliš často a že je tedy možné ho zakázat. Nejvyšší soud se zde ale uchýlil k nemilosrdnému počítání obětí násilných aktivit. Hypoteticky, pokud například tři že čtyř případů pálení křížů povedou k násilí, lze je zakázat. Ale co když k násilí povede jedno z deseti podněcování k rasové nesnášenlivosti? Nezaslouží si těchto deset procent ochranu? Je to příliš nízké číslo na omezení svobody projevu tak, aby ostatní mohli žít v bezpečí?

Koncept „true threats“ představený v tomto rozhodnutí by se pro účely ochrany rovnosti a důstojnosti dal aplikovat nejen na projevy obsahující výhrůžku, ale i na další formy projevu, jakými jsou projevy působící újmu druhým, ať už skrze podněcování k násilí, nebo k rasové nesnášenlivosti. Nejvyšší soud v rozsudku *Brandenburg proti Ohiu* zrušil precedent vyplývající z případu *Whitney proti Kalifornii*, který umožňoval kriminalizovat projevy podněcující k násilí, rušení veřejného pořádku a ohrožování základů státu. To by se dalo považovat za krok zpátky ve světle možného přiblížení americké a evropské doktríny.

Jak již ale bylo zmíněno, ke změně nemůže dojít bez vůle jí dosáhnout. Je diskutabilní, zda by byli američtí občané ochotni obětovat své svobody pro

pomoc druhým. Ačkoliv se Nejvyšší soud ve své judikatuře sám odchýlil od ustálené judikatury ve prospěch ochrany projevu, jednalo se pouze o *ad hoc* rozhodnutí. Nelze s jistotou tvrdit, že by soudci Nejvyššího soudu byli ochotni zásadněji revidovat vlastní case-law, aby tak zvýšili ochranu některých aspektů života.

Historie naznačuje, že pokud se občané USA cítí ohroženi, jsou ochotni vzdát se částečně svých základních práv a svobod za účelem zvýšení vlastní bezpečnosti. Vyplývá to například z umožnění odposlechů lidí na americké půdě bez souhlasu, k němuž došlo v reakci na teroristický útok z 11. září 2001. Bohužel je nepravděpodobné, že bychom se s podobným přístupem setkali, kdyby se jednalo o práva a svobody druhých.

Rozhodování ESLP o nenávistných projevech se zdá být obecně více koherentní a předvídatelné než rozhodování Nejvyššího soudu. Při svém rozhodování se ESLP drží zavedeného postupu posuzování porušení práva na svobodu projevu, avšak v poslední době se občas obrací proti své vlastní judikatuře. Například výše uvedený případ *Perinçek proti Švýcarsku* byl vše, jen ne jednomyslný. Pokud je nějaký akt spáchaný v minulosti nazván genocidou, je nepochybné, že se odehrály skutečně hrůzné události. Existují mezinárodně uznané genocidy, jako například genocida ve Rwandě či v Kambodži, události označované jako „arménská genocida“ však mezi ně nepatří. ESLP odmítl autoritativně rozhodnout, zda se dané události dají označit za genocidu, z důvodu, že mu rozhodování o těchto věcech nepřísluší. A právě v těchto věcech, kde chybí evropský konsenzus, by ESLP měl ponechat státům větší prostor pro uvážení, aby si samy mohly určit, zda konkrétní činy považují za genocidu, aby případně mohly následně stíhat projevy, jež to popírají.

Soudcům prezentujícím ve věci *Perinçek proti Švýcarsku* odlišné stanovisko leželo v žaludku geografické hledisko, které většina uplatnila při rozhodování. Většina argumentovala tím, že jediným pojítkem mezi Švýcarskem a událostmi v Osmanské říši v roce 1915 byla přítomnost arménské komunity ve Švýcarsku. Zde vidíme podobnost s úvahami užitými v rozhodnutí ve věci *Virginia proti Blackovi*. Copak pouhá přítomnost menšiny ve státě, v němž

byla takto otevřeně napadena, není dostatečným důvodem pro omezení svobody slova v její prospěch? Je toto způsob, jakým by měla fungovat společnost, která si tolik zakládá na prosazování rovnosti a ochraně důstojnosti? Jak vyplývá z odlišných stanovisek k rozhodnutí, bezohlednou aplikací geografického kritéria je snižován rozsah ochrany lidských práv, který je povinností *erga omnes*. Nakonec by mohlo dojít k tomu, že popírání genocidy spáchané na jiném kontinentu nebude v Evropě stíháno vůbec.

Dalším rozporuplným argumentem je časový faktor. Stručně řečeno, sto let je příliš krátká doba na zlehčování důsledků těchto hrozivých událostí, a to jak z důvodu ochrany a úcty k potomkům a příbuzným jejich obětí, tak převážně z důvodu respektování identity a ochrany práva na sebeurčení komunit, jež se staly oběťmi zločinů proti lidskosti. Naprostá většina přeživších holocaust je již dnes po smrti, ESLP ale přesto přiznává velmi silnou ochranu těm, kteří byli touto historickou etapou poznamenáni. Aplikováním časového hlediska by mohlo dojít například i k tomu, že za dvacet let bude v pořádku popírání holocaustu. Soud, který zastává tak silné stanovisko ke konkrétnímu činu proti lidskosti, by měl přiznat stejnou ochranu všem dotčeným jako obětem.

Posledním z rozporovaných argumentů většiny bylo tvrzení, že stěžovatel nenazval Armény lháři. Zde si však soud protiřečí, neboť sám vyzdvihl, že práva Arménů na respektování důstojnosti jich i jejich předků, včetně jejich práva na respektování jejich identity, jsou postavena na tom, že se jejich společenství stalo obětí genocidy. Perinçek tedy tím, že arménskou genocidu nazval mezinárodní lží, označil za lež i to, v co arménská komunita věří a co tvrdí.

8. Závěr

Závěrem lze tedy říci, že se Spojené státy americké mají čím inspirovat, ať už zahraničním konceptem rovnosti a lidské důstojnosti, nebo rozšířením ochrany principu „true threats“ v domácím prostředí. Stejně tak ESLP má prostor pro zlepšení, konkrétně by ve sporných otázkách, kde chybí evropský konsenzus a které odmítá řešit, měl ponechat větší prostor pro uvážení členských států Úmluvy a zároveň nedávat příliš velký důraz na roli času a zeměpisné polohy

při rozhodování o nenávistných projevech, zejména pokud jde o popírání zločinů proti lidskosti.

Seznam zkratek / List of abbreviations

Seznam zkratek:

ESLP	Evropský soud pro lidská práva
Nejvyšší Soud	Nejvyšší soud USA
Úmluva	Úmluva o ochraně lidských práv a základních svobod
První dodatek	První dodatek s Ústavě USA

List of abbreviations:

ECHR	European Court of Human Rights
Supreme Court	Supreme Court of the United States
CJEU	Court of Justice of the European Union
ICCPR	International Covenant on Civil and Political Rights
Convention	European Convention on Human Rights
First Amendment	First Amendment to the US Constitution

Seznam použité literatury / Bibliography

Legal documents

- Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- The First Amendment to the United States Constitution (1791)
- Charter of Fundamental Rights of the European Union (2000)
- Council of Europe, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"
- International Covenant on Civil and Political Rights (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- The Declaration of Independence of the United States of America (1776)
- Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000)
- Illinois Criminal Code, §224a, Division 1
- Ohio Revised Code: Ohio Rev.Code Ann. § 2923.13 (1919)
- St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)
- Code of Virginia: Va. Code Ann. § 18.2–423 (1996).
- Constitution of Massachusetts (1780)
- Rome Statute of the International Criminal Court (2002)

Cases

United States Supreme Court

- Snyder v. Phelps, 562 U. S. ___ (2011)
- United States v. Alvarez, 132 S. Ct. 2537 (2012)
- R. A. V. v. St. Paul, 505 U.S. 377 (1992)
- Smith v. Collin, 439 U.S. 916 (1978)
- Snyder v. Phelps, 562 U.S. ___ (2011)
- Board of Education v. Pico, 457 U. S. 853 (1982)
- Gitlow v. New York, 268 U.S. 652 (1925)
- Carey v. Brown, 477 U.S. 455 (1980)
- Texas v. Johnson, 491 U.S. 367 (1989)
- Florida Star v. B.J.F., 491 U.S. 524 (1989)
- Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)
- Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989)
- Roe v. Wade, 410 U.S. 113 (1973)
- United States v. O'Brien, 391 U.S. 367 (1968)
- Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)
- United States v. Grace, 461 U.S. 171 (1983)
- Ward v. Rock Against Racism, 491 U.S. 781 (1989)
- Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983)
- New York Times Co. v Sullivan, 376 U.S. 254 (1964)
- Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)

- Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)
- Brandenburg v. Ohio, 395 U. S. 444 (1969)
- Schenck v. United States, 249 U.S. 47 (1919)
- Whitney v. California, 274 U.S. 357 (1927)
- Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
- Cohen v. California, 403 U.S. 15 (1971)
- Watts v. United States, 394 U.S. 705 (1969)
- Virginia v. Black, 538 U.S. 343 (2003)
- State University of New York v. Fox, 492 U. S. (1989)
- Beauharnais v. Illinois, 343 U.S 250 (1952)
- Nuxoll v. Indian Prairie School District, 523 F3d 688, 672 (7th Circuit, 2008)
- Noto v. United States, 367 U. S. 290 (1961)
- Houston v. Hill, 482 U. S. 451 (1987)

European Court of Human Rights

- *Gündüz v. Turkey*, no. 35071/97, ECHR 2003
- *Erbakan v. Turkey*, no. 59405/00, ECHR 2006
- *Sürek v. Turkey*, no. 26682/95, ECHR 1999
- *Jersild v. Denmark*, no. 15890/89, ECHR 1993
- *Soulas a. o. v. France*, no. 15948/03, ECHR 2008
- *Féret v. Belgium*, no. 15615/07, ECHR 2009
- *Le Pen v. France*, no. 18788/09, ECHR 2010
- *Leroy v. France*, no. 36109/03, ECHR 2008
- *Lehideux and Isorni v. France*, no. 24662/94, ECHR 1998

- *Vejdeland ao. v. Sweden*, no. 1813/07, ECHR 2012
- *Faruk Temel v. Turkey*, no. 16853/05, ECHR 2011
- *Delphi v. Estonia*, no. 64569/09, ECHR 2015
- *Lingens v. Austria,* no. 9815/82, ECHR 1986
- Handyside v. the United Kingdom, no. 5943/72, ECHR 1979
- *I. A. v. Turkey*, no. 42571/98, § 22 ECHR 2005
- *Herczegfalvy v. Austria,* no. 10533/83, ECHR 1992
- *Hashman and Harrup v. the United Kingdom*, no. 25594/94, ECHR 1999
- *Gaweda v. Poland*, no. 26229/95, ECHR 2002
- *Remer v. Germany*, no. 25096/94, ECHR 1995
- *Fáber v. Hungary*, no. 40721/08, ECHR 2012
- *Ivanov v. Russia,* no. 35222/04, ECHR 2007
- *W. P. ao. v. Poland,* no. 42264/98, ECHR 2004
- *Norwood v. the United Kingdom*, no. 23131/03, ECHR 2004
- *Garaudy v. France*, no. 65831/01, ECHR 2003
- *Balsyte-Lideikiene v. Lithuania*, no. 72596/01, ECHR 2009
- *M'Bala M'Bala v. France*, no. 25239/13, ECHR 2015
- *Soulas v. France*, no. 15948/03, ECHR 2008
- *Le Pen v. France*, no. 18788/09, ECHR 2010
- *Perinçek v. Switzerland*, no. 27510/08, ECHR 2015

Bibliography

Books

- Jeremy Waldron: „The Harm in Hate Speech“ (Harvard University Press, 2012), ISBN: 978-0-674-06589-5
- Anne Weber: „Manual on Hate Speech“ (Council of Europe Publishing 2009), ISBN: 978-92-871-6613-5
- Richard Delgado, Jean Stefancic: “Understanding Words That Wound” (Westview 2004), ISBN: 978-0813341408
- Anthony Lewis, “Freedom for the thought we hate: a biography of the First Amendment” (Basic Books 2007), ISBN: 978-0465018192
- Council of Europe Publishing: “Freedom of expression in Europe” – *Human rights files, No. 18* (Case-law concerning Article 10 of the European Convention of Human Rights 2007), ISBN: 978-92-871-6087-4
- R. Clayton, H.Tomlinson: “The Law of Human Rights”, (Oxford 2000), ISBN: 978-0199263578
- Aristotle: “The Politics” (translated by Benjamin Jowett), (Batoche Books 1999), ISBN: 978-0486414249
- William B. Cohen: “The French Encounter With Africans: White Response to Blacks”, 1530-1880, (Indiana University Press, Bloomington 1980), ISBN: 978-0253216502
- Pierre L. Van den Berghe: “Race and Racism. A Comparative Perspective” (Wiley, New York 1978), ISBN: 978-0471042662
- Robert Berkhofer, Jr.: “The White Man’s Indian: Images of the American Indian from Columbus to the Present”, (Alfred A. Knopf, New York 1978), ISBN: 978-0394727943
- Peter W. Edge: “Religion and law: an introduction” (Ashgate 2006), ISBN: 978-0754630487

- Robert Cummings Neville, in Foreword to Rodney L. Taylor's "The Religious Dimensions of Confucianism" (1990), ISBN: 0-7914-0311-4
- James Peoples and Garrick Bailey: "Humanity: An Introduction to Cultural Anthropology", (Wadsworth Cengage Learning 2010), ISBN: 978-1-111-30152-1

Articles

- Michel Rosenfeld: "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" in *24 Cardozo L. Rev. 1523* (2002-2003)
- John C. Knechtle: „When to Regulate Hate Speech" in *110 Penn St. L. Rev. 539* (2005-2006)
- Time, Place, and Manner Regulations – The issue: What sorts of restrictions on speech will be upheld as valid content-neutral time, place or manner regulations? (online), retrieved 25 March 2017: http://law2.umkc.edu/faculty/PROJECTS/FTRIALS/conlaw/timeplacemanner.htm
- Proceedings of Massachusetts Historical Society, Volume 1873-1875
- R. George Wright: "Content-Neutral and Content-Based Regulations of Speech: A Distinction That is No Longer Worth the Fuss" in *67 Fla. L. Rev. 2081* (2016)
- Charles R. Lawrence III: "Frontiers of Legal Thought II The New First Amendment: If He Hollers Let Him Go: Regulating Racist Speech On Campus" (1990)
- Eugene Volokh: "Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny" in *144 U. Pennsylvania L. Rev. 2417* (1997)
- Geoffrey R. Stone: "Content-Neutral Restrictions" in *54 University of Chicago Law Review 46* (1987)

News Articles

- "Bush Lets U.S. Spy on Callers Without Courts", *NY Times*, 16 December 2005, retrieved 26 April 2017: http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?_r=0
- "Konvičku stíhají za muslimy do koncentráků i do plynu. Univerzita ctí presumpci neviny", *Aktuálně.cz*, 25 November 2015, retrieved 26 April 2017: https://zpravy.aktualne.cz/domaci/trestni-oznameni-na-konvicku-podala-statni-zastupkyne-za-jeh/r~55d9ea24937e11e5979c0025900fea04
- "Sněmovna poprvé odsoudila arménskou genocidu. Erdogan bude dělat bengál, řekl Schwarzenberg", Aktuálně.cz, 25 April 2017, retrieved 26 April 2017: https://zpravy.aktualne.cz/domaci/snemovna-poprve-uznala-armenskou-genocidu-traskave-usneseni/r~d0fc9da229d511e7a8d6002590604f2e/?_ga=2.106885446.433277670.1493139483-904217348.1466619519&redirected=1493158160

Other

- Merriam-Webster Law Dictionary (online), retrieved 25 March 2017
- European Court of Human Rights: Hate speech – factsheet (March 2017)
- The Oxford Dictionary (online), retrieved 12 April 2017: https://en.oxforddictionaries.com/definition/religion https://en.oxforddictionaries.com/definition/ethnicity
- United States Holocaust Memorial Museum website, retrieved 22 April 2017: https://www.ushmm.org/wlc/en/article.php?ModuleId=10008193
- Armenian National Institute website, retrieved 24 April 2017: http://www.armenian-genocide.org

Abstrakt / Abstract

Abstrakt:

Účelem této práce je představit a zhodnotit postoje a rozhodování Nejvyššího soudu USA a Evropského soudu pro lidská práva při posuzování nenávistných projevů. Práce definuje pojem nenávistných projevů neboli „hate speech" a uvádí principy, na jejichž základě zmíněné soudy omezují svobodu projevu. Na základě představení principů, na nichž je rozhodování soudů založeno, a jejich analýzy se autor snaží nastínit případné změny, které by mohly vést ke zvýšení ochrany proti nenávistným projevům.

V práci jsou dále zkoumány historické a sociální důsledky, které ovlivňují judikaturu a rozhodování jak Nejvyššího soudu USA, tak Evropského soudu pro lidská práva, a shledává, že právě tyto důsledky vedly k vytvoření klíčových postojů, bez nichž by dnes spory týkající se nenávistných projevů byly těžko rozhodovány. Autor je však toho názoru, že se oba soudy mohou i nadále inspirovat historií a fungováním společnosti na cestě za lepší ochranou proti nenávistným projevům.

Autor je přesvědčen, že by měl Nejvyšší soud USA omezit už tak vysokou ochranu svobody projevu garantovanou Prvním dodatkem Ústavy Spojených států amerických a aplikovat princip vážných hrozeb neboli „true threats" nejen na projevy, které zastrašují, ale i na ty, jež způsobují újmu – jak fyzickou, tak psychickou. Nejvyšší soud USA by měl dále zvýšit ochranu soukromí na úkor svobody projevu, nejlépe skrze inspiraci v evropském konceptu ochrany rovnosti a lidské důstojnosti – institutu, jenž by garantoval vyšší ochranu menšinám na americké půdě. Tyto teze jsou v práci podloženy rozborem významných judikátů Nejvyššího soudu USA, např. *R. A. V. proti St. Paul* nebo *Virginia proti Blackovi*.

Na druhé straně se tato práce zároveň snaží za pomoci analýzy rozsudků ve věci *M'Bala M'Bala proti Francii* nebo *Perinçek proti Švýcarsku* znázornit, že by Evropský soud pro lidská práva neměl užívat časového a geografického hlediska při posuzování potenciální újmy způsobené nenávistnými projevy, zejména projevy popírajícími zločin genocidy. A to převážně z důvodu ochrany

identity a respektování práva na sebeurčení komunit, které se historicky staly obětí činů proti lidskosti. Dalším možným způsobem zvýšení ochrany proti nenávistným projevům by se jevilo rozšíření prostoru pro uvážení jednotlivých států při posuzování důležitého sociálního zájmu při vyvažování jednotlivých základních svobod. V případech, kdy chybí evropský konsensus o klíčových otázkách, by zůstalo v kompetenci jednotlivých států posoudit povahu případného narušení svobody projevu.

Abstract:

The aim of this thesis is to shed light on standings and rulings of the United States Supreme Court and the European Court of Human rights in hate speech cases. It defines the term "hate speech" and presents grounds used for its restrictions when it comes to freedom of expression. Through introducing established principles that govern the decision-making of both courts and analysing them in key judgments on both continents, the author is trying to determine possible alterations that may lead to enhancing the protection given by hate speech case-law.

The author also analyses historical and social impact on the case-law of both the Supreme Court and the ECHR and finds that this influence has led to establishment of crucial principles without which the hate speech cases could hardly be decided today. Both historical and social factors lead the author to the conclusion that the protection against hate speech could still use a tune-up.

In author's point of view, the Supreme Court should ease the grip on the First Amendment and give the "true threats" principle, established in *Virginia v. Black,* leave to prohibit not only intimidating expressions but harmful expressions as well – both physical and mental. The Supreme Court should also strengthen the protection of privacy through inspiration in the European concept of human dignity and equality – an institute that would better the protection of minorities on the American soil.

This thesis also attempts to convince the ECHR not to utilize time and geographical factor used in the case *Perinçek v. Switzerland*, when it comes to decisions about criminalization of genocide denial, mainly for the reasons of respecting the identity and a right to self-determination of communities who were historically victims of these war crimes. The author also promotes the widening of States' margin of appreciation when determining pressing social need in hate speech cases where the European consensus is lacking, leaving the States to determine the nature of the interference for itself.

Klíčová slova / Key words

Klíčová slova:

Svoboda projevu

Nenávistné projevy

Hate speech

První dodatek

Úmluva

Perinçek

Key words:

Freedom of expression

Hate speech

First Amendment

Convention

Perinçek