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“Black Humor” in modern Europe. Freedom of speech v. Racist hate speech. Or
where is the line for racist humor?

Author: Leskova Anastasia

Supervisor: Prof. Dr. Carmen Márquez-Carrasco

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ABSTRACT

In this work, I will consider the question of possible limits for racist humour and its controversy with freedom of expression. First, I will lay out the philosophical landscape concerning theories of racist humour and racism, as well as consider main human rights theories of freedom of expression and its restrictions. Next, I will examine the relevant international, regional legal instruments trying to depict those that possibly can regulate racist humour. Trying to understand the way courts took when applying international and national norms concerning hate speech or derogatory racist humour, I will analyse current case law of European Court of Human Rights and Court of Justice of the European Union. Finally, I will conclude with evaluations concerning conducted social experiment as part of this work and point out the existing sociological theories of racist humour.

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INTRODUCTION

The idea to raise a problem of “black” or racist humor first came to my mind while analyzing the current unsatisfactory state of affairs in the sphere of racist speech in Russia and after recent scandals in Denmark with Danish cartoons affair, in France with famous comedians, whose performance had a quite big success (For example, french comedian Dieudonné). Nowadays, unfortunately, racist humor is not an individual case of a bad sense of humor. We easily can find racist jokes in a TV-show, in newspapers, in politicians’ speech but more often in the open sources of the Internet. Individuals tend to use the mask of “comedy” to speak up ideas that would never be tolerated by the society in other circumstances or use a “just joking” shield to avoid unpleasant consequences of his/her speech.

Analyzing legal cases of racist humor in different European countries in my thesis, I would like to examine the question of difference between acceptable jokes in modern society (which should not be regulated by law or can be regulated by public opinion) and “veiled” racist hate speech by comparing different approaches to this issue from philosophical, sociological, psychological and legal points. I believe that this interdisciplinary approach will help me to answer the question of where is the line for racist humour, if it can be drawn.

Another question that I would like to raise in my thesis and analyze is the possible impact of racist humor on establishing an intolerant attitude in civil society. To that end, I conducted a social experiment the results of which I will present in the third part of the thesis. The main purpose of the experiment is to show a possible link between the acceptance of racist jokes and readiness to tolerate discrimination.

Although, jokes (even racist jokes) cannot be forbidden, we should stop considering jokes as exceptionally harmless. Humour has a big impact on our attitude on individual level as well as it affects society in whole. With this work, I would like to bring attention to the problem of racist humour and to raise awareness regarding negatives effects of racist humour.

As long as European Master’s programme in Human Rights and Democratisation in teaching and practical training adopts an interdisciplinary approach,

I would like to follow it and analyse the topic of my thesis from different perspectives. The thesis divided into three parts in accordance with the involved disciplines.

In the first chapter, I would like to examine the philosophical theories of racism, racist humour and freedom of expression. To define terminology and understand the scope of the analysing phenomena classical and modern theories will be applied.

Second chapter of the work devoted to the legal analysis of the freedom of expression and its possible limitations in regard to racist humour. This chapter concerns an international human rights law with a focus on international instruments in the sphere racist hate speech and limitation of freedom of expression. The study includes an analysis of the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination. The second part of this chapter examines a European case law of racist hate speech with a focus on racist humour and satire. In the third part of the same chapter will be introduced a current freedom of expression controversy where the concept of the right to be offended will be shortly discussed.

The third part of the study deals with sociological and psychological aspect of the racist humour. Thus, the recent examples of British comedian Sacha Baron Cohen and its character Borat, post-Brexit racism and racist Artificial Intelligence of Microsoft will be considered to point out the seriousness of the racist humour.

In the same part, I will present the analyse of undertaken social experiments between two target groups: Russian one and European.

The overall approach of the thesis is an interdisciplinary analysis with precise evaluation of the social experiment results.

I chose this topic for my research because, unfortunately, a racist theme is still exists in a number of countries, if not in all. In a lot of them humor can be used as tool for racist speech and let the perpetrator stay in the “shadow” of the joke.

There are plenty of academic works written on the topic of racist hate speech. However, few of them raise questions of racist humor.

This research will not deal with analysis of historical grounds for racist jokes, but will focused on possible solutions of the dilemma between freedom of speech and racist humour.

1.1 PHILOSOPHICAL GROUNDS OF RACISM AND RACIST HUMOUR

-What's the difference between a boy scout and a Jew?

-The boy scout came back from camp¹.

The epigraph cited at the beginning of the present work was taken from one of the numerous websites dedicated to racist jokes. Judging by the numbers of these websites and the amount of different categories of racist jokes, public takes a strong interest in a subject. Is it a good or a bad joke or it is “just a joke”? Would anything change if this joke was told by a Jew or would it be the same if it was told by a nationalist activist to a random Jew? All these questions lead us to initiate a serious discussion on an “unserious” topic of humour. One could say that the sense of humour is too subjective and differs from person to person, so one cannot judge jokes objectively, and it will be absolutely true. Can we use the term “objectively”; is it possible to establish any objective categories in humour?

To proceed with the main theme of my research I think it is necessary to define the terminology in use. In the first part of this chapter, I would like to examine the question of what racism humour is and to find the determinative elements of racist humour. In order to define it, I believe that actual philosophical and psychological theories should be studied in detail. It is impossible to determine racist humour without understanding what racism is, what current theories cover the scope of this definition. Although, there is no generally accepted definition of neither racism nor racist humour I think that for research purposes it is crucial to give a general overview of the current theories in this sphere. This examination constitutes content of the present chapter.

In order to answer the question of where the line for racist humour is first I would like to address the following issue: what kind of humour can we consider racist? Nevertheless, in this chapter I shall leave behind the question of what humour by itself is as long as this discussion although close to the topic would lead me far away from my primary goal.

In academic literature, we can find several ways to define racism. Without intention to be exhaustive, I would like to point out the leading modern theories in this sphere. If before the Second World War racism theories took roots in the ideas of

¹Racist jokes, at <http://www.racist-jokes.info/jew-jokes/> (consulted on 14 July 2016).

biological differences, then observers have indicated “new forms of racism that draw on the ideas about cultural rather than biological differences” (e.g., Balibar, 1991a; Barker, 1981; Goldberg, 1993)². In accordance with Goldberg’s views, “there are thus two ideological strands to new segregationism: it naturalizes racial differences (pathology) in terms of culture; and it justifies segregation by naturalizing it”.³ I suggest to examine these “new” forms of racism further in this chapter.

To name several of them, I would like to look into a volitional conception of racism and to the concepts where racism is considered as “belief” and “ideology”, “bad faith” or “social power”, “discourse” and “disrespect”.

Jorge Garcia has defended what he calls a volitional conception of racism.⁴In a number of articles, Garcia has argued that racism is essentially found “in the heart.”⁵That is, for Garcia racism is at bottom, always derived from noncognitive states, which he refers to generally as “attitudes”. According to Garcia “racism is a form of morally insufficient (i.e., vicious) concern or respect for some others”⁶. Thus, Garcia has emphasized that the wrongness of racism lies in the ill will towards members of the targeted race. This sort of attitude can also result in injustice in the whole. Garcia states that racism will often “offend against justice, not just against benevolence, because one sort of injury to another is withholding from her the respect she is owed and the deference and trust that properly express that respect.”⁷ Furthermore, Garcia assumes that not only personal attitude can be racist but also the attitude that comes from institutions. Building on the idea of racism’s being “rooted in the heart,” he goes into developing what he calls an “infection model” of racism. According to this model, an act is racist insofar as a racist heart infects the conduct of the racist; and an institution is racist insofar as it is rooted in the racist attitudes and the resulting racist-infected actions of its founders and/or current functionaries.⁸

²Durrheim, Dixon, 2000, p.93.

³Idem, p.95.

⁴Garcia, 1996, p.7; Garcia, 1997, p.8.

⁵Garcia, 1999, p.10.

⁶Garcia, 1996, p. 9.

⁷Idem, p.10.

⁸Shelby, 2002, p.411.

Concerning “racially offensive speech”, Garcia’s theory does not find it racist unless such speech is “motivated by racial hatred”⁹. However, while attitudinal accounts like these can accommodate the hate-filled racism, it is not clear that they can capture the phenomena to which cognitivism and behaviorism are most responsive, namely, racist beliefs and actions. As Lawrence Blum notes, it seems that practices, among other things, can be racist even when they are not generated by racist attitudes; and Shelby and Charles Mills point out that we can imagine a well-intentioned racist who nonetheless persists in having racist beliefs.¹⁰

Analyzing racism theory of Garcia Tommie Shelby in his article “Is racism in the heart” has argued that “racist beliefs are typically rationalisations for racist attitudes, actions, and institutions”¹¹ and not the way around as Garcia defends. Contrary to Garcia, Shelby contends that “such beliefs are essential to and even sufficient for racism”¹². To support his theory, Shelby states that it becomes difficult to define person’s intention as a racist without making any assumptions that this person “holds some racist belief”.¹³

Tommie Shelby defined racism as “an ideology that legitimizes the subordination and exploitation of a race”¹⁴ and further suggests to view racism as “fundamentally a type of ideology” rather than “focus on the mental states of individuals without regard to their sociohistorical context, which can often lead us astray”.¹⁵

By sharing the view to racism as belief with T. Shelby, Anthony Appiah, however, focuses his theory more on *how* you believe: “does your belief rest on the evidence you have available to you (or could easily get), or are you unable or unwilling to take advantage of the available evidence?”¹⁶

Many philosophers identify racism with a belief in racial superiority. However, contrary to T. Shelby, we can argue that such belief appears to be neither necessary nor

⁹Garcia, 1996, p.10.

¹⁰Blum, 2004, p.72; Mills, 2003, p.51-57.

¹¹Shelby, 2002, p.411.

¹²Idem, p.413.

¹³Idem, p.413.

¹⁴Idem, p.415-416.

¹⁵Idem, p.415.

¹⁶Appiah, 1990, p. 5.

sufficient for racism. We can easily imagine the situation when the race-haters who do not associate their hatred with any beliefs nevertheless are considered racists. Some maintain that identifying racism with such beliefs has moral implications¹⁷. Assuming that what someone believes is not under his or her control in such fashion as to warrant moral condemnation, D'Souza insists that, because racism is simply a belief, it may be condemned only as false or ill supported, never as immoral.¹⁸ Working from the same assumption, Flew reasons that, because racism is surely a moral offense, it cannot be a matter of belief.¹⁹ Therefore, these authors introduce a new parameter – a moral component of racism.

Another theory among many others on the subject that appeared during the years of academic discussions was proposed by Gordon. Its strength rests primarily on its ability to challenge other theories of racism and bring out some of their strengths. Gordon insists that the idea of racism as a form of bad faith offers such possibilities. Going further, Gordon defines “a racist is someone who adopts the attitude that his race is superior to other races”.²⁰

David Theo Goldberg suggests considering racism in terms of a “field of discourse”²¹. According to Goldberg there is a number of various racist expressions. These racist expressions include “beliefs and verbal outbursts (epithets, slurs, etc.); acts and their consequences; and the principles on which racist institutions are based.”²² In order to incorporate all these various forms of the same phenomena, he proposes a theory that in his opinion is broad enough to accommodate all of them. Goldberg argues that “the issues concerning the discourse of racism may be addressed on three levels: sociodiscursive economies of power and value; formal or “grammatical” structures; subjective expression”.²³

Kwame Ture and Charles Hamilton in their book *Black Power* introduce another theory of racism. Describing racism as “social power”, they define it in terms

¹⁷Garcia, 1999, p. 2.

¹⁸ D'Souza, 1995, p.336.

¹⁹Flew, 1999, p.65.

²⁰Gordon, 2000, p.2.

²¹Goldberg, 1990, p.296.

²²Idem, p. 297.

²³Goldberg, 1990, p.312.

of “the predications of decisions and policies on considerations of race for the purpose of subordinating a racial group and maintaining control over that group”²⁴. Furthermore, they suggest that a distinction should be made between individual racism, or the overtly racist acts committed by individuals, and institutional racism. In its more radical version, institutionalists see racism as “an outgrowth of colonialism and institutional racism as the contemporary expression of this historical event”²⁵.

Joshua Glasgow proposed to understand racism in terms of disrespect.²⁶ According to Glasgow, we might say that one person is racist if and only if this person is racially disrespectful. Since “racially disrespectful” is not the most transparent expression, Glasgow instead presented the following formula, which he calls the Disrespect Analysis of racism:

(DA) J is racist if and only if J is disrespectful towards members of racialized group R as Rs.

Where “racialized groups” are, roughly, groups of people who have been identified and treated as if they were members of the same race²⁷.

Perhaps most obviously, disrespect can be predicated of the three main agential categories we are considering: “attitudes, beliefs (and the statements that express them), and behaviors”.²⁸

Having designated fundamental theories of racism I think further it would be practically necessary to analyse what racist humor is.

There is a number of things that people could call humor: gags or practical jokes, witticisms, word play, puns, impersonations, and jokes to name a few²⁹. First, I would like to point out that referring to jokes in my work I am not always meaning to restrict myself only to one form of humour but rather to address this issue in general.

There are several leading theories of racist humour. To classify them we can invoke a moral component as an assessment criterion and define the following positions to racist humour phenomena: moralism; ethicism and anti-moralism with division into

²⁴Bonilla-Silva, 2001, p. 26.

²⁵Idem.

²⁶Glasgow, 2009, p. 64.

²⁷Glasgow, 2009, p. 81.

²⁸Glasgow, 2009, p. 83.

²⁹Anderson, 2015, p.1.

amoralism and immoralism³⁰. Within this division a moralism position has assumed that ethically bad jokes under no event cannot be regarded as “funny”. As for the ethicism, it admits a possibility of these sort of jokes to be considered as humorous, however their quality is flawed due to the bad attitudes depiction. Amoralism position in its turn does not find any interaction between humour and ethics. On the contrary, immoralism determines a direct dependence between humour and ethically bad attitudes. Jokes are funny partly because they are immoral.

However, not everyone includes a moral component as integral part of racist humour. Thus, Ted Cohen sets humour apart from the moral by insisting on humour evaluation without the blame based on moral objections and meanness. Cohen is justifying his position by stating “the problem of finding a basis for any moral judgment passed upon fiction, and then there is the problem of establishing the impropriety of laughing at something especially when the something is fictional.”³¹

Michael Philips also argues that we should separate the moral evaluation of acts and individuals. Philips presents a general view of racism defining a “basic racist act” and applies it to the case of racist humour. In accordance with Philips’s view, a person performs a basic racist act when:

- A person commits an act in order to harm another person because of their membership of a certain ethnic group;
- Regardless of person’s intentions or purposes, an act of the person can reasonably be expected to mistreat another person as a consequence of this person being a member of a certain ethnic group³².

Talking about “basic racist acts” M. Philips underlines that racist acts are primary form of racism and racism is, first and foremost, characterized by actions. Philips’ view of racism emphasizes the harm or expected harm suffered by the victim as a necessary requirement of racist acts³³. Moreover, racist beliefs and racist structures are important only by virtue of their connection to racist acts. In accordance with Philips’

³⁰Gaut, 2010, p. 53.

³¹Cohen, 1999, p.77.

³²Philips, 1984, p. 77.

³³Anderson, 2015, p. 3.

philosophy “a belief is racist because it is the sort of thing that tends to result in or support racist action”³⁴.

Based on his definition of a basic racist act, Philips presents his view of racist humor. “Bits of humor”³⁵ may be racist in three ways:

(1) They may insult (or be intended to insult), humiliate or ridicule members of victimized groups in relation to their ethnic identity;

(2) They may create (or be intended to create) a community of feeling against such a group; and

(3) They may promote (or be intended to promote) beliefs that are used to “justify” the mistreatment of such a group³⁶.

Of particular interest is Philips’s idea that humour can form a community of feeling against a victimized group. By this, he emphasizes an important role that racist humour plays in creating and supporting racism within a community.

Richter Reed has criticized Philips’s view and pointed out a serious problem with before mentioned theory by making a thought experiment. Reed describes “a situation in which all of the racists are rounded up and banished to their own private island where they can cause no more mischief in the world. As a result, there is no longer any reasonable expectation of mistreatment of a person in virtue of their racial identity”³⁷. Given this, insisting Reed, it is still coherent to describe Mexican jokes as told by an inhabitant of this island as “racist”³⁸.

From the results of the experiment undertaken by Reed, he has concluded that jokes even in the absence of someone around to be mistreated can be considered as racist. This comes from the fact that people can care about things other than consequences. Reed considers jokes are racist solely because these jokes show a lack of proper regard for someone simply due to their membership of a different racial group.

David Benatar in his article “Prejudice in Jest: When Racial and Gender Humor Harms” presents a view very similar to Philips’s. Benatar first discusses what

³⁴Idem.

³⁵Idem, p. 87.

³⁶Idem, p.92.

³⁷Anderson, 2015, p. 3.

³⁸Idem, p. 3.

makes humor immoral. On his account, humor is immoral when (i) it is intended to harm, or (ii) it can be reasonably expected to harm, and (iii) the harm is wrongfully inflicted³⁹.

He defines racist humour as follows: “Racist and sexist humor are those forms of humor which are intended to, or can reasonably be expected to, inflict harms on racial or gender grounds, where these harms are wrongful. The terms "racist" and "sexist" denote moral defectiveness.”⁴⁰ Thus, Benatar presents what can be described as a harm-based view of racist humor⁴¹. According to Benatar, expressing a racist belief is a sufficient but not a necessary condition for a joke to be racist. Additionally, jokes can be racist when they “inculcate and spread racist views”⁴². Thus, the joke-teller need not have or express racist beliefs in order for the joke to be racist.

The relevance of moral values to aesthetic appreciation and evaluation of joke was discussed primarily by philosophers of art. Thus, BerysGaut presents a version of comic moralism (i.e., ethicism), which claims that if a speaker employs ethically bad attitudes in a joke token, this diminishes the joke’s funniness⁴³.

Luvell Anderson argues against a simple binary (racist/ not racist) division of humour. He states that as long as it is not all the time clear which category can include one or another humorous incident this division should be avoided. In his paper “Racist Humor” Anderson makes an example of the South Korean immigrant who tries to fit in by telling black jokes she has learned from TV. According to Anderson’s view one could argue that she is not guilty of making a racist utterance given her understandable ignorance of the U.S. racial landscape, but neither is her attempt at humor entirely innocent.⁴⁴

Rejecting the simplistic view that a joke either is or is not racist, Anderson suggests a distinction whereby a given joke may be classified as “merely racial”, “racially insensitive”, or “racist”.⁴⁵

³⁹Benatar 1999, p. 191

⁴⁰Benatar, 1999, p. 196.

⁴¹Anderson, 2015, p. 3.

⁴²Benatar, 1999, pp. 195–196.

⁴³Gaut, 2010, p. 62.

⁴⁴Anderson, 2015, p.5.

⁴⁵Idem, pp.5-6.

Under the merely racial jokes Anderson understands a racial joke when the speaker has an aim to subvert the stereotype associated with the target group and the audience can be reasonably expected to recognize this aim. When racial joke is racially insensitive, the speaker lacks an aim to subvert the associated stereotype and is motivated by a non-malevolent attitude, e.g. attempting to be funny, or has a subverting aim but cannot reasonably expect audience uptake of that aim. And finally, according to Anderson, a racial joke is racist when the speaker either endorses the stereotype or is motivated by a malevolent attitude or one of disregard⁴⁶.

To conclude I would like to emphasize that in academic sphere there is no single unified approach to define racist humour. This is partly due to the lack of clarity or shared understanding of the term “racism”. Thus, there can be identified a great number of different – and in some cases – conflicting racism theories. They is a volitional conception of racism, as well as “belief”, “ideology”, “bad faith”, “social power”, “discourse” and “disrespect” conceptions. In addition, a controversy around the concepts of racist humour impedes the development of a coherent approach to the definition of racist humour. Some theories of racist humour are based on a moral component as an assessment criterion; others necessitate a commitment to racist acts. According to some of the theories, a lack of regard in the joke-teller is sufficient to consider a piece of humour racist, other require an existence of harm.

In order to be able to define limits for racist humour, it is of great importance to establish common understanding of what should be limited. Otherwise, there is a high risk of abuse. Especially these risks should be scrutinized in situation when the right to freedom of expression is at stake. To evaluate possible limitations to freedom of expression, a controversy around freedom of expression should be examined.

1.2 A CONTROVERSY AROUND FREEDOM OF EXPRESSION

Freedom of opinion and freedom of expression are indispensable conditions for the full development of a person. They are essential for any society. They constitute

⁴⁶Idem, pp.5-6.

a foundation stone for every free and democratic society.⁴⁷ The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. The limitations of such freedom should not be applied by states arbitrarily. Philosophers of different schools and directions raised the problem of the limitations of freedom of expression in their works.

In this part of the chapter, I would like to analyse philosophical grounds for the limitation of freedom of expression by applying different human rights theories.

First, in order to analyse the problem of freedom of expression it would be interesting to consider John Locke's theory of human rights as natural rights.

Locke's theory of the state of nature is closely tied to his theory of natural law. In accordance with the Locke's philosophy the state of nature is "a state of perfect freedom to order their actions, and dispose of their (*men*) possessions and persons as they think fit", it is a state of an "uncontrollable liberty"⁴⁸. However, the state of nature has a law of nature to govern it. Thus, recognising all human beings as "equal and independent" the law of nature states that "no one ought to harm another in his life, health, liberty or possessions"⁴⁹. If we apply the idea of natural rights in the meaning that is given by J. Locke to the freedom of expression we should recognize that even in a state of "perfect freedom", Locke has accepted the necessity of an expression's limitation. In Locke's state of nature all human beings should recognize the freedom of each other and should not to harm another in their freedom. Later this principle with John Stuart Mill's theory became known as a "harm principle".

John Stuart Mill is one of the philosophers defending utilitarianism theory. Mill contends that rules are right insofar as they maximise utility. The most desirable actions are those that produce happiness for the greatest number of people. In its work "On liberty" (1859), Mill employs his utilitarian ethics in order to maintain the freedom of individuals to do whatever they like so long as they are not harming others.⁵⁰

⁴⁷General comment №34, at <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf> (consulted on 14 July 2016).

⁴⁸Hayden, 2001, p.72.

⁴⁹Idem, p. 73.

⁵⁰Idem, p. 136.

From Mill's point of view, such human liberty comprises "first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological"⁵¹.

In his work, Mill argues that there is no free society without these liberties. Such liberty of expression is necessary, from Mill's point of view, for the dignity of persons.

Thus, from this perspective freedom of expression leads to maximising the utility insofar as it produces happiness for the greater number of people and it should be recognized in society as the right rule or action. However, the limitation that Mill places on free expression is now known as the "harm principle". The harm principle states the following: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against their will, is to prevent harm to others".⁵² However, given his liberal background, "doing harm to others" has to be seen here in an individualistic sense and does not extend to collective harm. In this case, much of hate speech would be allowed, as it is argued that it does not provoke direct harm to another individual.

The theory of legal positivism understands the right in general and freedom of expression in particular as a legal right. It can be said that the champions of this theory argue that there are no legal rights without its existing in legal codes. From this point of view, we cannot consider moral rights or natural right as a right in its strict meaning of legal positivism, as long as they are not incorporated in legal system of a state. In this case it is more correct to name them moral claims, but not rights. For a legal positivist, such as the 19th Century legal philosopher Jeremy Bentham, the theories of social contract or natural law are nothing more than "fictions". He contends that laws are to be regarded only as the commands of state authority and not of nature or God.⁵³ In his work "Anarchical Fallacies: A critical examination of the Declaration of Rights" Jeremy

⁵¹Mill, 1995, p.13.

⁵²Idem, p. 9.

⁵³Hayden, 2001, p. 118.

Bentham clearly states that “right, the substantive right, is the child of law: from real laws come real rights; but from imaginary laws, from law of nature...come imaginary rights”.⁵⁴ Furthermore, Jeremy Bentham argues that if natural rights stand in opposition to legal rights, when they are claimed to be independent of any government, such rights present a threat to the general happiness and order of society.

From legal positivism perspective freedom of expression limitations exists only if the law of the state recognises and acknowledges such limits in a legal code and only in the scope defined by this law.

Supporters of the theory of human rights as moral rights as opposed to legal positivism believe in existence of rights besides those in legal acts. There is a number of historical examples when some groups or the whole nation were deprived of certain basic universal rights in their legal system. However, it can be said that they still have some fundamental universal rights such as moral rights. The suggestion of the supporters of this idea is to make all fundamental human rights legally recognized. Freedom of expression without any doubts is one of the essential human rights. Even if this right is wholly or partly excluded from formal legal recognition, in accordance with this theory it should be considered that this right remains valid regardless.

Immanuel Kant has elaborated his basic moral theory in the *Groundwork for the Metaphysics of Morals* (1785). He stated that a person’s action motivated nor the consequences that result from it, but the recognition that the action is obligatory or necessary. Using Kant’s terminology, this person acts in accordance with the categorical imperative. Kant’s categorical imperative represents a form of deontological ethical theory, which is the view that defines right action in terms of obligations and duties, rather than the consequences or results of an action. It can be formulated as “Act only on that maxim which you can at the same time will that it should be a universal law”.⁵⁵

Kant states that there is only one innate right; the right to freedom, all of the other, more specific restraints on government must be understood as aspects of that right, and so be reconciled with each other as aspects of it. Thus, in accordance with the

⁵⁴Hayden, 2001, p. 125.

⁵⁵Hayden, 2001, p. 109.

Kantian idea, if freedom of expression appears to come into conflict with the fundamental entitlements of equal citizenship – as is sometimes argued in the context of hate speech - any restriction on the former right must be justified as an expression of the underlying and more basic innate right of humanity that gives rise to both.⁵⁶

Immanuel Kant also argued that the freedom of expression might need to be controlled and restricted when it came to its use by those in authority. The danger of the call for “responsible” use of freedom of expression when applied to the ordinary citizen is that it can amount to a pressure for self-censorship.⁵⁷

The idea of rights as trumps is based on the Ronald Dworkin philosophy. He writes that, “rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”⁵⁸ He argues that rights are “trumps”, and neither political decisions nor acts can be justified on utilitarian or wealth-maximizing reasons if they violate human rights.

Dworkin distinguishes what he calls right-based political theories by saying that such theories “place the individual at the center and take his decision or conduct as of fundamental importance.”⁵⁹ The “basic idea” of a right-based theory, writes Dworkin, “is that distinct individuals have interests that they are entitled to protect if they so wish.”⁶⁰

To apply the Dworkin’s philosophy to the problem of freedom of expression and its limits, I would suggest we take an example of government new restriction of freedom of speech. When evaluating a proposed government act, those in authority should consider whether to approve this act or disapprove it, by trying to anticipate the new restriction's effects on various states of affairs that are of interest and concern to various people in the society. In case this act violates someone’s freedom of expression, this act should not be justified. In this case, freedom of expression as being

⁵⁶Ripstein, 2009, p. 214.

⁵⁷Sturges, 2006, p. 4.

⁵⁸Dworkin, 1984, p.153.

⁵⁹Dworkin, 1977, p. 172.

⁶⁰Dworkin, 1977, pp. 172, 176.

something to which every individual has a right is a “trump” over the community’s other goal.

For Dworkin, freedom of speech is one example of a special right: the government cannot routinely constrain it in the pursuit of otherwise legitimate goals. Thus, even speech that would seriously undermine a government’s economic and distributive strategy must not be abridged. Government may not infringe that special freedom unless it has what American lawyers have come to call a “compelling” justification.⁶¹

Robert Nozick’s theory of rights as “side-constraints” was inspired by a basic moral principle of Immanuel Kant. The main Nozick’s idea is that all human beings are self-owners. They are endowed with self-awareness, free will, and the possibility of formulating a plan of life. No one should be treated as a thing or used against their will to gain any goal, legitimate by itself or not. From this idea follows, Nozick says, that they have certain rights, in particular rights to their lives, liberty, and the fruits of their labor. These rights function as side-constraints on the actions of others; they set limits on how others may, morally speaking, treat a person. For example, if you have a right to act in a particular manner, your actions should not violate rights of others. The role of state in this theory should be restricted by the role of a minimal state or “night-watchman”, a government that protects individuals, via police and military forces, from force, fraud, and theft, and administers courts of law, but does nothing else.⁶²

To consider freedom of expression and its limits in Nozick’s state and taking into consideration his theory of rights as “side-constraints”, we should agree that no limitations by state can be accepted. The “night-watchman” state cannot control and interfere with self-owned freedom of expression of a person. The only restriction that is legitimate is not to violate rights of others.

It can also be interesting to consider freedom of expression from the “asian values” perspective of human rights. Asian values perspective refers to values which, distinct from those emerging from European discourse, advocate the particularity of human rights and deny their universality. The difference between the Eastern and

⁶¹Laborde, 2014, p. 1259

⁶²Wolff, 1991, p. 10

Western perspective starts from understanding of place of human being in society. The West often emphasizes human beings as autonomous beings, whereas the East sees them as members of a family, group and society who are inseparable and dependable.

The main characteristic of communitarianism is its focus on the interests of community over an individual, and duties over rights.

In defending particularity over universality, relativists criticise the dysfunction of Western societies caused by individualism.

Lee Kwan Yew claims that in the U.S., so-called human rights are in reality an overemphasis of the individual's interests. This forces them to forget their duties and abandon the community. The freedom of the individual has thus led to the violation of human rights, due to the crime rate increasing and the devaluation of morality.⁶³

From this perspective, individual's freedom of expression does not play any significant role as long as it cannot be considered as leading to interest of the community. Following the idea of communitarianism freedom of expression can be broadly limited in public interests.

As was stated in an established case-law of the European Court of Human Rights, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.⁶⁴

This idea of freedom of expression is closely aligned with liberty theory of John Stuart Mill. Mill argued that truthful ideas, as well as strong and vital arguments for doctrine can be discovered only in open discussion. Mill stated that it can be useful to hear an opposite opinion in order to elaborate a more sophisticated or supported idea⁶⁵. The only purpose, from Mill's point of view, for which power can be rightfully exercised over any member of a civilized community, against their will, is to prevent harm to others. It should be noted that under the harm Mill understands only physical harm or actions that can lead to a use of physical force. However, Joel Feinberg argued that harm principle cannot shoulder all of the work necessary for a principle of free

⁶³Hoang, 2009, p. 6.

⁶⁴*Handyside v. the United Kingdom* (ECtHRm 1976), paragraph 49.

⁶⁵Mill, 1995, p.13.

speech. Thus, at Feinberg's idea, "offence principle" should be used to guide public censure.

Feinberg suggests that a variety of factors need to be taken into account when deciding whether speech can be limited by offense principle. These include the extent, duration and social value of the speech, the ease with which it can be avoided, the motives of the speaker, the number of people offended, the intensity of the offense, and the general interest of the community at large.⁶⁶ This principle gives us a justification of freedom of expression limitation on the ground of subjective perception of those who are feeling offended by acts of racist humour. Incorporation of this principle into a modern legal system can lead to an arbitrary and subjective application of hate speech laws by those in authority. From this perspective, this argumentation cannot be accepted to justify possible restrictions applied to freedom of expression.

This more positive emancipatory perception of the state has led to a more balanced and relativistic approach to freedom of speech. As such, in many countries a collective – rather than an individualistic – harm-principle prevails over the freedom of speech principle allowing for direct (legal) intervention when it concerns racism and discrimination.⁶⁷

Applying these theories to possible limits on freedom of expression in regard to racist humour, we can observe that some of human rights theories tend to justify this limitation whereas other proclaim an absolute character of freedom of expression. Thus, Locke's and Mill's theories of freedom of expression restrictions should be a matter of serious concern whether the harm produced by racist humour is actual or not. Given it is often difficult to detect actual harm caused by racist humour, racist humour would most likely fail to complete the criteria for freedom of expression limitations. For legal positivism these restrictions would be justified insofar they are specifically stated in law. In opposite for theory of human rights as moral rights, every individual has a legal and moral right to enjoy the freedom of expression. Applying Kant's views, we should state that racist humour limitations can lead to unnecessary self-censorship within a society and, by this, can violate a freedom of expression as a core freedom. In

⁶⁶Freedom of speech, at <http://plato.stanford.edu/entries/freedom-speech/>, (consulted on 14 July 2016).

⁶⁷Cammaerts, 2009, p. 562.

accordance with Dworkin's "trumps" theory, freedom of expression will act as a trump over any right not to be offended by racist humour. As well as in Nozick's theory, a state as a "night-watchman" cannot intervene in personal life and personal freedom to joke even when these jokes offend the feelings of others. The opposite conclusions should be made from communitarianism theory. In the case of racist humour, the right not to be a target of such humour should prevail over the individual right to express their view.

We should bear in mind the seriousness of every limitation imposed on freedom of expression. These limitations should not be used as instruments to preserve society from dissenting views or to establish one "official truth". Racist humour legal restrictions should not offer legitimate means of suppression of unpopular in the state movements. The purpose of any restriction on freedom of expression must be to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism⁶⁸.

Finally, I would like to stress that the possibility for human beings to think critically is essential for their self-fulfillment and for philosophical thoughts in general, even if this criticism concerns thoughts and feelings of others.

A democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values.⁶⁹

However, even within the tradition of radical democracy where a radical pluralism of ideas and voices is deemed beneficial for democracy, a hegemony of basic democratic values is considered crucial. According to the opinion of Mouffe "[a] democracy cannot treat those who put its basic institutions into question as legitimate adversaries"⁷⁰.

⁶⁸Blasphemy, insult and hatred: finding answers in a democratic society, 2010, p. 24.

⁶⁹Idem, p.23.

⁷⁰Mouffe, 2005, p. 120.

We should take into consideration that both free speech and the spirit of democracy sometimes are being used against democracy itself and its basic values. The question thus becomes of an even more complex nature; can/should a democracy defend itself against such anti-democratic forces and discourses and if so, how, in what circumstances, to what extent?⁷¹

⁷¹Cammaerts, 2009, p. 564.

2.1 INTERNATIONAL AND REGIONAL REGULATION

In this chapter, I would like to introduce key human rights treaties and other international instruments relating to racism, free speech limitations and hate speech. In a first part of the present chapter I will focus on analyse of international human rights documents with particular regard to any grounds for possible racist humour regulations. To look more precisely on the regional regulation of the topic in the second part of this chapter, I would like to examine a racist hate speech regulation in Europe. Dwelling on judicial practice in the part three of the current chapter will enable me to fully understand and address cross-cutting issues relating to the freedom of expression and racist humour controversy.

I would like to start my legal analysis from the United Nations Charter (hereinafter referred as to UN Charter) and Universal Declaration of Human Rights (hereinafter referred to as the UDHR). Human rights principles have been conditioned in the UN Charter⁷² by the notion of enjoyment of rights without distinction as to race, sex, language or religion, a provision subsumed into the UDHR 1948⁷³ onwards. These documents in explicit form recognize the importance of the right to equality and freedom from racism. Thus, the UDHR proclaims “All are entitled to equal protection against any discrimination in violation of this Declaration and against *any incitement to such discrimination*”⁷⁴ (emphasis added by author). This core idea of the UN Charter and the UDHR has determined the vector of further development and was reflected in specific documents on international, regional and national level.

The oldest international agreement to outlaw a very specific example of hate speech is the Convention on the Prevention and Punishment of the Crime of Genocide. The Genocide Convention was adopted by the United Nations (hereinafter referred to as the UN) in 1948 in the aftermath of the Holocaust and declared in the Article 3 (c)a

⁷²United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.un.org/en/charter-united-nations/> (accessed on 14 July 2016)

⁷³UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217A (III), available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (consulted on 14 July 2016)

⁷⁴Universal Declaration of Human Rights, 10 December 1948, article 7.

“direct and public incitement to commit genocide”⁷⁵ unlawful. During the discussions on the Article 3, the inclusion of a broader concept of hate speech was proposed however never accepted. It reads as follows:

“all forms of public propaganda (the press, radio, cinema, etc...) aimed at inciting racial, national or religious enmity or hatred and on provoking the commission of the crime of genocide [should be punishable by law]”⁷⁶.

This proposition had anticipated the provisions of another international human rights treaty on 15 years. In the 1960s the international concern with anti-Semitism, apartheid, and racial discrimination led to the development of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as the CERD).⁷⁷

CERD adopted by the UN General Assembly on December 21, 1965, with 177 States expressed its consent to be bound by a human rights treaty under international law⁷⁸, contains the most far-reaching international provisions on the suppression of hate speech. The International Convention on the Elimination of All Forms of Racial Discrimination⁷⁹ is the most important and specific piece of multilateral antiracism legislation.

As a result of academic discourse around racism term, Convention by itself do not define racism but only referred to it in the context of “racist doctrines and practices” in the preamble, “dissemination of ideas of racial superiority” in Article 4. Although, the term hate speech is not explicitly used in the Convention. This lack of reference has not impeded from identifying and naming hate speech phenomena and exploring in analysis the relationship between speech practices and the standards of the Convention⁸⁰.

In its text, the Convention condemns and criminalizes racist speech while recognizing a free speech right. According to Article 4 of the CERD, “the dissemination

⁷⁵Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Article 3(c).

⁷⁶Abtahi, Webb, 2008, p 903.

⁷⁷Marc, Sottiaux, 2004, p. 433.

⁷⁸United Nations, Office of the High Commissioner on Human Rights, Status of ratification. Interactive Dashboard, available at: <http://indicators.ohchr.org/> (accessed on 14 July 2016)

⁷⁹International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

⁸⁰CERD/C/GC/35, 26 September 2013, para. 5.

of ideas based on racial superiority or hatred” and “incitement to racial discrimination” should be declared “punishable by law.”⁸¹ However, together with these provisions, the Convention has implicitly emphasized the importance of the right to free speech by inserting that the States should adopt measures “with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention”⁸². With this phrase the Convention obliged State parties to fulfil the requirements of the Article 4 and to give an appropriate weight in decision-making processes to the principles of the Universal Declaration of Human Rights and the rights in article 5.

By this statement, the academic discourse around free speech and freedom from racist hate speech was brought to the international level.

The conflict between freedom of speech and freedom from racist hate speech created considerable discord when delegates debated the adoption of article 4 as part of the final version of the Convention. The United States argued in favor of banning the direct incitement to acts of racial violence section. The United States also sought to explicitly include free speech rights within the text of the Convention. The final decision rejected the United States' view and adopted article 4 as it now reads, banning acts of violence and the dissemination of racist ideas, while giving due regard to freedom of speech.⁸³

The decision to punish the mere dissemination of ideas, without regard to additional requirements such as incitement or the likelihood of subsequent violence, was highly controversial⁸⁴.

Another human rights international instrument that recognized the necessity to eliminate racist hate messages is the International Covenant on Civil and Political rights, 1966 (hereinafter referred to as the ICCPR)⁸⁵.

In accordance with the Article 19 of the ICCPR everyone shall have the right to freedom of expression. The exercise of the right may therefore be subject to certain

⁸¹International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

⁸²International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

⁸³Chow, 1991-1992, p.890.

⁸⁴Marc, Sottiaux, 2004, p. 434.

⁸⁵International Covenant on Civil and Political Rights, 16 December 1966.

restrictions, but these shall only be such as are provided by law and are necessary: for respect of the rights or reputations of others; or for the protection of national security or of public order (*ordre public*), or of public health or morals.⁸⁶ This provision represents the legal grounds for free speech limitations, including the cases of racist hate speech. The prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence directly defined in the Article 20 (2) of the ICCPR⁸⁷.

To provide the unified interpretation of provisions of the above treaties, competent monitoring bodies were created: the Committee on the Elimination of Racial Discrimination and Human rights Committee under the Article 8 of the CERD and Article 28 of the ICCPR respectively.

To clarify the provisions of Article 4 the Committee on the Elimination of Racial Discrimination has adopted a number of General Recommendations relating to its implementation. Thus, in its General Recommendation No 7 (1985), the Committee stressed a preventive nature of article 4 that among other issues has a purpose “to deter racism and racial discrimination as well as activities aimed at their promotion or incitement”⁸⁸. Further in its General Recommendation No 15 adopted 17 March 1993, the Committee raised a question of correlation between free speech provisions and prohibition of racist hate speech by stating that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression”⁸⁹.

Of particular significance is the adoption in 2013 by the Committee on the Elimination of Racial Discrimination of General Recommendation No 35 Combating the racist hate speech.

First, in this document the Committee has summarized the findings of previous General Recommendations and named groups against whom racist hate speech can be directed - such as indigenous peoples, descent-based groups, and immigrants or non-

⁸⁶Idem.

⁸⁷Idem.

⁸⁸A/40/18, preamble.

⁸⁹A/40/18, para. 4.

citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups⁹⁰.

Of special importance for the current work in the present document is the reference to indirect forms of racial hatred such as use of “indirect language in order to disguise its targets and objectives”. Thus, the Committee states that racist hate speech can take many forms and is not confined to explicitly racial remarks. It can be disseminated in whatever forms it manifests itself, orally or in print, or through electronic media, including the Internet and social networking sites, as well as non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings, including sporting events⁹¹. In this case States parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them. The Committee did not specify what should we understand under the term of “indirect language”. Potentially racist humour might fall within the scope if this category as long as often racist humour uses indirect language to disguise its targets. However, every limitation of freedom of expression should be explicitly defined leaving no room for doubts.

Furthermore, the Committee declared its position more clear. In the light of present research, I found interesting a proposition of Committee to consider punishable by law, inter alia, “expression of insults, *ridicule* or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds of their race, colour, descent, or national or ethnic origin, when it clearly amounts to incitement to hatred or discrimination”⁹² (emphasis added by author). However, no further elaborations were made in this respect to clarify or directly name racist jokes out law.

In its Recommendations the Committee emphasizes the specific role of the Article 4 “in underlining the international community’s abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society”⁹³.

⁹⁰CERD/C/GC/35, para.6.

⁹¹CERD/C/GC/35, para.7.

⁹²CERD/C/GC/35, para.13.

⁹³CERD/C/GC/35, para.10.

Regarding the right to free speech the Human Rights Committee in its General Comment No. 10, adopted 29 June 1983, expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole.⁹⁴

In response to a need for further elaboration of the linkages among racist hate speech limitations and freedom of expression provisions the Human Rights Committee on 29 July 1983 in its General Comment No. 11 states that prohibitions contained in Article 20 of the ICCPR are “fully compatible with the right of freedom of expression, the exercise of which carries with it special duties and responsibilities”⁹⁵.

To analyse more precisely the linkage between freedom of expression and racist hate speech regulations Human Rights Committee has adopted General Comment No. 34. Thus, the Committee clears up the interrelation between Articles 19 and 20 of the ICCPR. In accordance with the Committee, these articles are compatible with and complement each other. The Article 20 may be considered as *lex specialis* with regard to article 19. Committee pointed out that it is only in relation to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19⁹⁶.

In the same General Comment the Committee has also specified that the right to freedom of expression includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others such as political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse or commercial advertising. Particularly the Committee stressed that the scope of paragraph 2 embraces even expression that may be regarded as deeply offensive⁹⁷.

⁹⁴UN Human Rights Committee (HRC), CCPR General Comment No. 10: Article 19 (Freedom of Opinion), 29 June 1983, para. 4.

⁹⁵UN Human Rights Committee (HRC), CCPR General Comment No. 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred, 29 July 1983, para. 2.

⁹⁶CCPR/C/GC/34, para 51.

⁹⁷CCPR/C/GC/34, para. 11.

Within the Council of Europe framework, a number of other non-binding texts, treaties or instruments have been adopted that merit to be mentioned.

Regarding to racist hate speech regulation on the regional level the European Convention on Human Rights (hereinafter referred as to ECHR)⁹⁸ plays an important role. The European Convention within the scope of its Article 10 guarantees freedom of expression and introduces the free speech limitations by pointed out that an exercise of the freedom of expression is associated with duties and responsibilities. It states that the restrictions should be “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”⁹⁹. Part two of the present chapter gives a more detailed analysis on this issue through the European Court of Human Rights case-law examination.

The European Social Charter¹⁰⁰ and the Framework Convention for the protection of national minorities¹⁰¹ both prohibits all forms of discrimination.

The revised European Social Charter contains measures aimed to protect against any discrimination on grounds such as “race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status”¹⁰². As for the Framework Convention the States parties have agreed to prohibit any discrimination on the basis of belonging to a national minority¹⁰³.

Council of Europe has an important role in shaping a unified position on hate speech topic. Recommendation (97)20 on “hate speech”, adopted by the Committee of Ministers on 30 October 1997, provides a definition of “hate speech”. According to this Recommendation hate speech should be understood as covering “all forms of expression

⁹⁸European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

⁹⁹European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Article 10 (2).

¹⁰⁰ETS 163.

¹⁰¹ETS 157.

¹⁰²ETS 163, Part V, Article E.

¹⁰³ETS 157, Article 4, para. 1.

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”.¹⁰⁴ This Recommendation contains an important idea of necessity to find a balance between fight against racism and intolerance and the need to protect freedom of expression. Otherwise, in this struggle we have a risk to undermine democracy on the grounds of defending it.

Recommendation (97)21 on the Media and the Promotion of a Culture of Tolerance, also adopted by the Committee of Ministers on 30 October 1997, targets the different sectors of society that are in position to promote a culture of tolerance. It points out that the media can make a positive contribution to the fight against intolerance by to refuse carrying advertising messages which portray cultural, religious or ethnic difference in a negative manner, for example by reinforcing stereotypes¹⁰⁵. This recommendation provides an imposition of self-regulation or even self-censorship that raised questions of possible freedom of expression limitations in this regard. This provision forces us to recall Kant’s statement that was quoted in the first part of the present work about danger of the call for “responsible” use of freedom of expression when applied to the ordinary citizen. Kant stressed that it can amount a pressure for self-censorship.¹⁰⁶

In order to combat racism and racial discrimination from the human rights perspective, the European Commission against Racism and Intolerance (ECRI) was established under the umbrella of the Council of Europe.

In its General Policy Recommendation No. 7, ECRI defines racism as “the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons”¹⁰⁷. In accordance with Explanatory Memorandum to the present General Policy Recommendation, the term “racism” should

¹⁰⁴CM Rec(97)20, Appendix, Scope.

¹⁰⁵CM Rec(97)21,Appendix, para. 2.

¹⁰⁶Sturges, 2006, p. 4.

¹⁰⁷CRI(2003)8, para. I (1a).

be understood in a broad sense, including phenomena such as xenophobia, antisemitism and intolerance¹⁰⁸.

According to paragraph 3 of the Recommendation,¹⁰⁹ the constitution should states that the exercise of freedom of expression may be restricted with a view to combating racism. Although the fight against racism is not mentioned as one of the freedom of expression restrictions in the European Convention on Human Rights, in its case-law the European Court of Human Rights has considered that it is included.

In ECRI's recent General Policy Recommendation No. 15 adopted on 8 December 2015, a hate speech is defined as "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status"¹¹⁰. Although, this definition is similar to those that was given by Committee of Minister of Council of Europe, this definition encourages State party to combat negative stereotyping and stigmatisation. In its Recommendations the ECRI is trying to find a balance between freedom of speech and the need to hate speech limitations. The ECRI stressed that any efforts to tackle hate speech should never exceed the limitations to which freedom of expression, as a qualified right, can legitimately be subjected¹¹¹. The ECRI also pointed out that in some cases hate speech can be effectively responded to without restricting freedom of expression by this excluding excessive regulation. At the same time, the Recommendation specifically avoid in the definition of hate speech such form of expression as satire. By doing so, the Recommendations are following the official position on this account of the European Court of Human Rights.

To look more closely to this position I would like to analyze the European Court of Human Rights practice in the next part of my legal research.

¹⁰⁸CRI(2003)8, Explanatory Memorandum, para.6.

¹⁰⁹CRI(2003)8.

¹¹⁰CRI (2016)15, para. B(h).

¹¹¹CRI (2016)15, para. A(2).

2.2 RACIST HUMOUR AND HATE SPEECH IN EUROPEAN CASE-LAW

The European Court of Human Rights in its case-law has adopted different approaches to the cases concerning hate speech, incitement to hatred and violence, freedom of expression. The European Convention on Human Rights provides with “the approach of exclusion from the protection of the Convention”¹¹² in accordance with Article 17 (prohibition of abuse of rights) and “the approach of setting restrictions on protection”¹¹³, provided for by Article 10, paragraph 2, of the Convention. In cases of the exclusion from the protection of the Convention the comments in question amount to hate speech and negate the fundamental values of the Convention, when the second approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention¹¹⁴.

The European Court of Human Rights and the former Commission considers statements or opinions containing Holocaust denial and related questioning of the historical facts of World War II under Article 17, hence categorically excluding applicants’ claims from the protection provided by Article 10 ECHR (the right to freedom of expression and information)¹¹⁵. In contrast, other forms of (racist) hate speech are not as such restrained from the scope of Article 10, as Article 17 is not applied in these cases.

Taking into consideration this dual stance in the Strasbourg organs’ jurisprudence, it can be questioned whether all hate speech should be treated equally, under Article 10, or under Article 17.¹¹⁶

The sphere of application of Article 10 of the Convention is very broad. Under the terms of Article 10, the right to freedom of expression applies to “everyone”, physically and morally, and includes both freedom of opinion and the freedom to receive and impart information and ideas¹¹⁷. The notion of “information” has includes

¹¹²Council of Europe, European Court of Human Rights, Factsheet - Hate Speech, available at: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf (consulted on 14 July 2016).

¹¹³Idem.

¹¹⁴Idem.

¹¹⁵Cannie, Hannes, Voorhoof, Dirk, 2011, p.55.

¹¹⁶Idem, p.58.

¹¹⁷*Markt intern Verlag GmbH v. Germany*(ECtHR, 1989).

“freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds”¹¹⁸

When applicants bring a case claiming a violation of freedom of expression under Article 10 of the Convention concerning certain comments, or other forms of expression, the Court first has to check if these comments fall within the ambit of Article 10. The Court should analyze the following four elements: the existence of an interference, which should be prescribed by law; pursue one or more of the legitimate aims set out in Article 10(2) and be necessary in a democratic society to achieve these aims.

The European Court has always recalled that freedom of expression, as set out in Article 10, goes hand in hand with exceptions calling for a strict interpretation, and the need to restrict this right must be determined in a convincing manner¹¹⁹.

Perhaps the greatest problem in Court’s dispute resolution pose the assessment of what is “necessary in a democratic society”. According to the European case-law it amounts to determining whether the reasons adduced by the national authorities to justify the interference appear “relevant and sufficient”, or in other words whether it corresponds to a “pressing social need”, and whether the means used were proportionate to the legitimate aim pursued. For this purpose, the Court grants the national authorities a certain “margin of appreciation”¹²⁰.

However, the wide scope of the margin of appreciation does not exclude the intense supervision from the Court’s side. On the whole the Court’s supervision is at its most strict when it concerns statements that constitute an incitement to hatred. Conversely, there is no uniform approach between States relating to those kind of issues as morals or religion, in these cases “a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion”¹²¹.

¹¹⁸*Markt intern Verlag GmbH v. Germany*(ECtHR, 1989).

¹¹⁹Weber, 2009, p. 30.

¹²⁰Weber, 2009, p.31.

¹²¹*Wingrove v. the United Kingdom* (ECtHR, 1996), para. 58.

The provision of Article 17 of the Convention aimed to guarantee permanent maintaining of the system of democratic values underlying the Convention. The purpose of this article is therefore to prevent the principles enshrined in the ECHR from being embezzled by applicants, at their own advantage, whose actions aim at destroying these same principles. In academic literature, this article is addressed as abuse clause.¹²² In case *Seurot v. France* the Court underlined that “there is no doubt that any remarks directed against the values underlying the Convention would see themselves excluded from the protection of Article 10 by Article 17 (unofficial translation).”¹²³ However, the concept of these remarks “directed against the values underlying the Convention” was not clear and experienced substantial development over the time. At first, this Article was used notably to prevent totalitarian groups from exploiting principles set out by the Convention in their own interests. Now its potential is fully exploited when the Court finds itself confronted with a form of “hate speech” not covered by Article 10.

By its nature, the Article 17 of the Convention cannot be invoked independently. Its application is always linked to a Convention right that is deemed to be abused, that is, in the wordings of Article 17, used with the intention to destroy other rights and freedoms enshrined in the Convention.¹²⁴ In practice of the Court, the abuse clause’s applications are more often linked to the right to freedom of expression and information (Article 10 of the Convention).

The European Court of Human Rights can apply Article 17 when freedom of expression being used to promote revisionist or negationist statements. An example can be found in the European Commission’s decision on *Honsik v. Austria*¹²⁵.

In the *Garaudy* case the Court clearly affirms that “denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents

¹²²Weber, 2009, p 23.

¹²³*Seurot v. France* (dec.), No. 57383/00, 18 May 2004

¹²⁴Cannie, Hannes, Voorhoof, Dirk, 2011, p.58

¹²⁵*Honsik v Austria* (ECtHR, 1995).

indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.”¹²⁶Of particular interest is that the Court, in its decision, associates the combat against racism and anti-Semitism with the fundamental values of the Convention and refers expressly to infringement to the rights of others.

However, direct recourse to Article 17 nevertheless rare, since the abuse clause has regularly been applied indirectly, as an interpretative aid when assessing the necessity of State interference under Article 10(2)¹²⁷. In such cases, “the Court will begin considering question of compliance with Article 10, whose requirements it will however assess in the light of Article 17.”¹²⁸

One of the first European Convention of Human Rights cases to address hate speech problem was *Handyside v. the United Kingdom*, where the European Commission of Human Rights¹²⁹ expressed its position in the following terms: “Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.”¹³⁰

Another case brought the issue of correlation between racial hate and freedom of expression was *Glimmerveen and Hagenbeek v. The Netherlands* (1979)¹³¹. In this case the European Commission on Human Rights considered the convictions of two members of a right-wing political party for possessing leaflets inciting racial discrimination by urging the removal of all non-white immigrants from the Netherlands. The Commission declared the application inadmissible, finding that Article 17

¹²⁶*Garaudy v France* (ECtHr, 2003).

¹²⁷Cannie, Hannes, Voorhoof, Dirk, 2011, p.58.

¹²⁸*Lehideux and Isorni v. France* (ECtHR, 1998), para. 38.

¹²⁹Together with the European Court of Human Rights and the Committee of Ministers of the Council of Europe, the European Commission of Human Rights, which sat in Strasbourg from July 1954 to October 1999, supervised Contracting States’ compliance with their obligations under the European Convention on Human Rights. The Commission ceased to exist when the Court became permanent on 1st November 1998.

¹³⁰*Handyside v. the United Kingdom*, (ECtHR, 1976), para. 49.

¹³¹*Glimmerveen and Hagenbeek v. The Netherlands* (ECtHR, 1979).

(prohibition of abuse of rights) of the Convention did not permit the use of Article 10 (freedom of expression) to spread ideas which are racially discriminatory. In the Commission's view, the applicant's discriminatory immigration policy was contrary to the text and the spirit of the Convention and likely to contribute to the destruction of the rights and freedoms of others.

However, considering the racist remarks, the European Court of Human Rights (hereinafter referred to as ECtHR) does not give in its case-law a direct reasoning for excluding racist remarks from the protection of the rights to freedom of expression. For example, in *Jersild v. Denmark* (1994)¹³², the Court stated, without further explanation, that "there can be no doubt" that racist remarks insulting to members of the targeted groups do not enjoy the protection of the right to freedom of expression.

Of great importance is an examination of case-law in regard to artistic freedom of expression, parody and satire. To form a position concerning the possibility of racist humour limitation we should consider the existing practice of the European Court of Human Right and the Court of Justice of the European Union.

In the case of *Deckmyn v. Vandersteen* (Case C-201/13, 3 September 2014),¹³³ the Court of Justice of the European Union had interpreted the meaning of parody. It states that the concept of "parody" is an autonomous concept of EU law. The Court of Justice of the European Union further emphasized that "the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery". In its decision the Court of Justice of the European Union found that the parody by itself not necessarily "should display an original character of its own". Following the clarification of the parody concept the Court in its decision analyzed how it should be properly applied. The Court stressed that dealing with the cases of parody the court must strike a "fair balance" between the interests and rights of right holders and, on the other, the freedom of expression. Such balancing exercise is to be applied on a case-by-case basis by the national courts. With this decision the Court had acknowledged the particularly wide margin of appreciation associated with parody in the context of artistic

¹³²*Jersild v Denmark* (ECtHR, 1994), paragraph 35.

¹³³*Deckmyn v. Vandersteen* (Court of Justice of the European Union, 2014).

expression, noting that those who created parody contributed to the exchange of ideas and opinions, which are essential to a democratic society.

Referring to the case of *Vereinigung Bildender Künstler v. Austria* (no. 68354/01, 25 January 2007), the Court of Justice of the European Union stated “satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate”¹³⁴. Referring to the case of *Nikowitz and Verlagsgruppe News GmbH v. Austria* (no. 5266/03, 22 February 2007), the Court pointed out that the reasonable reader should be able to grasp the text's satirical character and, in particular, the humorous element of the impugned passage. At the Court's view, the critical passage could at most be understood as the author's value judgment on sportsman's character, expressed in the form of a joke. By such statement the Court introduced the criterion of a “reasonable reader” when approaching the legal analysis of freedom of artistic expression and artistic satirical materials. In this judgement the Court states that the interference complained of was not “necessary in a democratic society”.

For the purposes of this study of particular interest is a *Sousa Goucha v Portugal* case brought before the ECtHR¹³⁵. In this case, the ECtHR considered the situation when during a live television comedy show, a joke was made about the applicant, a well-known homosexual TV host, who was referred to as a “female”. In this regard, the applicant lodged a complaint for defamation against the television and production companies, the presenter and the directors of programming and content. The Court considers that the need to protect the freedom of expression should be placed above the applicant's right to protection of reputation. In its judgment, the Court took into account the lack of intent to attack the applicant's reputation and assessed the way in which a reasonable spectator of the comedy show in question would have perceived the impugned joke – rather than just considering what the applicant felt or thought towards the joke. Thus, it states that a limitation on freedom of expression for the sake of

¹³⁴*Vereinigung Bildender Künstler v. Austria* (Court of Justice of the European Union, 2007), paragraph 33

¹³⁵*Sousa Goucha v Portugal* (ECtHR, 2016)

the applicant's reputation would therefore have been disproportionate under Article 10 of the Convention¹³⁶.

As it can be seen from the case-law analysis, the European Court of Human Rights when faced with a restriction of the right to freedom of expression looks at the impugned interference "in the light of the case as a whole". Although, the Court will therefore always base its decision on the particular circumstances of the case, a number of elements can be identified. They are the following: a purpose pursued by the applicant or applicant's intention; the context of the incriminating remarks; the content of impugned remarks; the potential impact of means of expression.

The essential criterion used by the Court concerns the aim pursued by the applicant. The fundamental question the Court asks is whether the applicant intended to disseminate racist ideas and opinions through the use of "hate speech" or whether he was trying to inform the public on a public interest matter. This criterion nevertheless seems a delicate one to implement, because it is so difficult to determine an individual's inner state of mind¹³⁷. The absence of a racist intention in case plays an important role in the Court's ruling of a violation of the right to freedom of expression. Notably, in its decision on *Garaudy v France*, the Court emphasised that "the aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history". In this case the Court founds possible to examine the real reasons when in case of racist humour, it would seem extremely difficult, if not impossible, to determine the real intention of the person making a racist joke. In the cases of racist comments or jokes the Court often in details analyze the content and the context in which these incriminating remarks were been disseminated.

Furthermore, in its case law the Court attempts to identify if the applicant seeking to inform the public about a matter of general interest? If so, the Court generally concludes that the impugned interference with the applicant's right was not "necessary in a democratic society"¹³⁸.

¹³⁶*Sousa Goucha v Portugal* (ECtHR, 2016), para. 55.

¹³⁷Weber, 2009, p. 33.

¹³⁸*Gündüz v. Turkey* (ECtHR, 2003), para. 44

The potential impact of the means of expressions used is an equally important factor. To measure the potential impact of a statement, the Court takes particular account of the form of the expression employed and of the medium used for its dissemination, but also of the context in which this dissemination took place.¹³⁹

All these elements are not decisive and can vary on a case by case basis. However, the assessment of all these factors and elements should enable the Court to draw a demarcation line between those forms of expressions, which, although shocking or offensive, nevertheless, are protected by the scope of Article 10, and expressions, which cannot be tolerated in a democratic society.

In conclusion, I wish to emphasize that there is no direct regulations of racist humour. In the international and regional sources it is possible to trace the normative attempts to restrict racist stereotyping, ridicule or mockery. However, there is no clear position on European level concerning this issue. There were taking attempts to impose on so-called soft censorship or self-regulation to jokes content for those means of expression that are able to attract an attention of big auditory, such as media, internet. Nevertheless, these initiatives are controversial and place additional restrictions on freedom of expression. Opposite to formal regulation, the ECtHR elaborates in its case law a specific approach to racist humour controversy. Thus, expressing its position on issue the ECtHR stressed the importance of satire and parody as forms of artistic freedom and social comment in democratic society. Furthermore, the ECtHR tends to put the need to protect freedom of expression above the right to protect reputation of one individual. To argue otherwise would be considered as excessive restrictions of freedom of expression.

2.3 HATE SPEECH CONTROVERSY OR THE RIGHT TO BE OFFENDED

Although hate propaganda is seen as a major societal and political problem, in particular in those countries confronted with racial, ethnic, or religious tension in a past or in present, attempts to suppress hate speech are controversial. At the center of this controversy is the question about the extent to which hate speech restrictions may be

¹³⁹ Weber, 2009, p. 35

reconciled with the right to freedom of expression¹⁴⁰. In the first part of the present chapter, I reviewed the international legal instruments regulating the freedom of expression and racist hate speech with a focus on European case law. In this part, I would like to introduce a current hate speech controversy.

In addition to and as a means of implementing before mentioned international standards, many countries have adopted laws limiting hate speech, widely referred as to hate speech laws. In compliance with the international agreements, these national laws envisage different kinds of expression. Some are rather broadly worded and encompass a great variety of offensive speech (e.g., the laws in France, Germany, Denmark, and the Netherlands);¹⁴¹ others are more narrowly tailored and require, for instance, incitement and/or the intention to incite hatred, or the likelihood of a breach of peace (e.g., the laws in Canada, Great Britain, and Belgium).¹⁴²

If the European Court of Human Rights could be said reflecting one perspective, the case law under the U.S. Constitution would surely represent the opposite side. In the U.S. concerning hate speech laws the situation is quite different. The U.S. has a longstanding practice of unlimited freedom of speech practices. This debate involves balancing the First Amendment's protection of free speech. The advocates for hate speech legislation have not been as successful; however, America has recently been more accepting of laws that have a similar effect as hate speech laws.¹⁴³ Such laws are known as hate crimes legislation. In recent decades, many states have enacted hate crimes legislation,¹⁴⁴ and President Obama even signed a federal hate crimes bill in 2009.¹⁴⁵ Thus, the U.S.'s approach is drastically different from the international community when it comes to regulating speech deemed hateful or offensive. Nearly every other advanced nation has enforced hate speech legislation for

¹⁴⁰Marc, Sottiaux, 2004, p.433.

¹⁴¹Rosenfeld, 2003, p. 1524.

¹⁴²Marc, Sottiaux, 2004, p.436.

¹⁴³Bob Unruh, 'Senate Vote for 'Hate Crimes' Sparks Warning: 'The People Will Not Remain Silent Forever'', in the WORLDNETDAILY, July 18, 2009), available at: <http://www.wnd.com/2009/07/104278/> (consulted on 14 July 2016).

¹⁴⁴Unruh, Bob, 'Holder: 'Gays' Protected, Ministers Not: Attorney General's Testimony on 'Hate Crimes'', in the WORLDNETDAILY, July 3, 2009, available at: <http://www.worldnetdaily.com/2009/07/102919> (consulted on 14 July 2016).

¹⁴⁵Schilling, Chelsea, 'Obama Signs 'Hate-Crimes' Bill Into Law: 'It's a Very Sad Day for America and for Religious Liberties'', in the WORLDNETDAILY, 28 October 2009, available at: <http://www.wnd.com/2009/10/114305/> (consulted on 14 July 2016).

decades. In America, however, the interests of free speech have won out, resulting in a rejection of content-based speech regulations, such as hate speech laws¹⁴⁶.

Between these two extreme positions, the regulation of other countries is searching to impose a balanced solution to the conflicts caused by hatred and racist propaganda. The jurisprudence of the Canadian Supreme Court constitutes a good example of this. In *Regina v. Keegstra* (1990) it upheld a criminal statute prohibiting the communication of statements, other than in private conversation, that willfully promote hatred against an identifiable group¹⁴⁷. Recognizing an interference with the right to freedom of expression, the Court however considered such interference justified. To support its decision the Court referred to, among other things, “the negative psychological results of hate propaganda, the importance of values such as equality and multiculturalism, the fact that the provision was narrowly tailored”¹⁴⁸. After its careful analysis, the majority therefore concluded that the benefits of the challenged law outweighed its speech restrictive effects¹⁴⁹. However, in *R. v. Zundel* (1992), a case decided two years later, the Court struck down a much more broadly worded statute, which had been used to silence the author of anti-Semitic literature. In the majority’s view the law, which prohibited the publication of false statements that cause or are likely to cause injury or mischief to a public interest, could “be abused so as to stifle a broad range of legitimate and valuable speech.”¹⁵⁰

The argumentation of those who is in favor and against the so-called hate speech laws can be equally convincing.

Those who favor some form of regulation emphasize the different kinds of harm caused by hate speech, to both the individual person and society as a whole. Expressions of hatred, it is often argued, “inflict psychological or even physical injuries on members of the targeted group”.¹⁵¹ The psychological responses to such stigmatization consist of “feelings of humiliation, isolation, and self-hatred”¹⁵². As a

¹⁴⁶Wahl, 2012, p 390.

¹⁴⁷*Regina v. Keegstra* (Canadian Supreme Court, 1990)

¹⁴⁸*Idem*.

¹⁴⁹Marc, Sottiaux, 2004, p. 435.

¹⁵⁰*Idem*, p. 435.

¹⁵¹*Idem*, p.435.

¹⁵²Delgado, 1982, p. 137.

result to this psychological response, stigmatized individuals tend to feel ambivalent about their self-worth and identity. This ambivalence arises from the stigmatized individual's awareness that others perceive him or her as falling short of societal standards, standards which the individual has adopted. Stigmatized individuals thus often are hypersensitive and anticipate pain at the prospect of contact with “normal”.¹⁵³

Critics of regulation do not deny possible risk to moral health of those who can feel hurt, humiliated or offended by hate speech. They insist that hate speech laws are inefficient and even counterproductive. Eliminating racist speech “would not effectively address the underlying problem of racism itself, of which racist speech is a symptom”.¹⁵⁴ It is difficult not to agree with this argument as long as attempts to eliminate racism without addressing to core of the problem will hardly deliver the expected outcomes.

Another frequently heard argument is that the suppression of hate speech drives racist attitudes underground, which may result in explosions of racist violence at a later time. To support this argumentation as an example can be mentioned the so-called post-Brexit racism. More detailed analysis of this phenomena presented in the third part of the present work.

Finally, a more principled reason for protecting hate speech is that speech restrictions based on their content are unduly paternalistic and violate the principle of personal moral responsibility. According to this view, “it is not for the government or the legislature to decide which ideas are false and which ideas people should be allowed to express or can be trusted to hear.”¹⁵⁵

Opposing hate speech laws, the concept of the right to be offended became widespread, especially it finds a wide response in the U.S. The right to be offended, and to offend others, helps to maintain free speech truly free.

Advocates of this idea point out the subjectivity of what citizens and government officials consider hateful or offensive speech. Everyone has different levels

¹⁵³Idem.

¹⁵⁴Marc, Sottiaux,2004, p. 436.

¹⁵⁵Idem.

of tolerance, and what one considers offensive speech, another may consider as expressing an alternative viewpoint.¹⁵⁶

However, continuing the advocates of this theory, it is a high risk that under hate crimes legislation government intervention will be used to silence and suppress dissenting opinions, open debates and free discussions of various viewpoints. Hate speech laws become a dangerous weapon in the hands of political groups with hidden agendas making them capable of silencing those they do not agree with regarding political and religious topics. A better way to address hate speech is to allow bigots to express themselves and then combat hate with loving, enlightening, and educated speech¹⁵⁷. Rather than protecting someone from being offended by regulating free speech, the preferred policy is to facilitate additional speech.¹⁵⁸

When dealing with racism and hate speech on the one hand, and restrictions on the freedom of expression on the other, we undeniably are weighing evils. Finding a balance in each context is a delicate process to which there is no ideal solution that satisfies all concerns. Nonetheless, the process of searching undoubtedly bring us closer to realizing the mutually reinforcing values of free speech and equality¹⁵⁹.

Equality, dignity rights, as well as free speech rights, are best advanced by narrow clearly formulated restrictions on hate speech. In most countries, hate speech laws either have used to substantial degree to suppress the rights of government critics and minorities or else have been used arbitrarily or not at all.¹⁶⁰ To the extent that they have served a beneficial purpose it has been to improve the ton of civility in legal democracies. In those countries the laws do not seem to have improved under conditions of discrimination and hatred and, in some countries may be justified inattention to those conditions. The possible benefits to be gained by laws simply do not seem to be justified by their high potential for abuse¹⁶¹.

To conclude, it should be stressed that existence of different perspectives invokes an intercultural dialogue on racist humour issue. More wide analysis of present

¹⁵⁶Wahl, 2012, p. 400.

¹⁵⁷Wahl, 2012, p. 415

¹⁵⁸Wahl, 2012, p. 416.

¹⁵⁹Coliver, 1991, p 374

¹⁶⁰Coliver, 1991, p 363.

¹⁶¹Coliver, 1991, p 363.

controversy allows us to take into consideration of argumentation of those who are in favour of free speech limitation and those who are against.

3.1 RACIST HUMOUR

I would like to start this chapter with several recent examples of racist humour that I found essential to recall for the purpose of the work.

One of these examples is a satirical character, Borat Sagdiyev, featured in the movie “Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan”, created and performed by Sacha Baron Cohen. This figure is highly controversial and odious; nevertheless, only the opening weekend grosses came to a nearly USD 26,5 million and worldwide grosses reached USD 128,505,958 to 25 March 2007¹⁶².

The Guardian wrote on this occasion: “Borat is the hero of this extraordinary mocu-reality adventure: a film so funny, so breathtakingly offensive, so suicidally discourteous, that strictly speaking it shouldn't be legal at all”¹⁶³. Interviewing Peter Tatchell, human rights campaigner, the Guardian wrote “Cohen is often parodying prejudice and, because it is so over the top, he arguably ridicules and undermines bigotry. However, I worry that certain people might take Borat seriously. They could see him as reinforcing and validating their lumpen mentality”¹⁶⁴. This movie contains a substantial amount of anti-Semitic, racist, sexist jokes that are constantly pushing the limits of free speech.

As an example, in the film, Borat finds himself in a house of a kind old Jewish couple who offers him a bed and sandwiches. In the night, while trying to "escape", he throws money at two cockroaches that have crawled into his room, apparently fearing that the Jewish owners have transformed into these cockroaches. He was amazed that they had managed to look human and states that one "can hardly see their horns".

¹⁶²IMDB, available at: http://www.imdb.com/title/tt0443453/business?ref_=tt_dt_bus, (consulted on 14 July 2016)

¹⁶³Bradshaw, Peter, ‘Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan’, in The Guardian, 27 October 2006, available at <https://www.theguardian.com/film/2006/oct/27/comedy.sachabaroncohen> (consulted on 14 July, 2016).

¹⁶⁴Aasen, Helene, ‘Is Borat offensive?’, in the Guardian, 26 October 2006, available at <https://www.theguardian.com/film/2006/oct/26/features.features11> (consulted on 14 July 2016).

During another scene, while recalling his acting career, Borat states “Yes, I have been in a movie Dirty Jew. I play the one who eh... the hero, the one who shot him”¹⁶⁵.

Another instance of derogatory humour associated with sexist jokes can be found in the comparison of women driving a car with a monkey flying a plane or requesting to talk with someone who has a right to vote in a conversation with a woman. An especially big surprise for Borat transpired to be the ability of a woman to vote, as he made clear with the statement: “Democracy is different in America. For example: women can vote but horse cannot!”¹⁶⁶

Being a famous comedian and half Jewish, with his racist sentiments Sacha Baron Cohen argued that a primary goal of his comedy is not to ridicule other races. As he has explained, the segments are a “dramatic demonstration of how racism feeds on dumb conformity, as much as rabid bigotry.”¹⁶⁷ His statements show to be a parody of actual racist statements. He points out how ridiculous racist views are by exaggerating them to a comic extreme. Simultaneously, he humiliates his interviewees who are unable to distinguish his comically exaggerated racist views from actual racist views. However, where does the comedy stop being funny and become cruel instead?

As a reaction to this controversial work, the movie was banned in Russia and Kazakhstan. Russian officials motivated their decision not to grant this motion picture a cinema license because there are moments in the film which could be judged as “insulting and humiliating by a certain group of cinema-goers”.¹⁶⁸

Another scandalous story surrounding racist humour has occurred recently in the Microsoft office in March 2016. It appears that Microsoft's new Artificial Intelligence chatbot “Tay” starts posting a deluge of incredibly racist messages in response to questions in the chat. With “Tay” Microsoft planned to “experiment with

¹⁶⁵Borat World, available at: <http://boratworld.com/borat-sayings-quotes-lingo.php> (consulted on 14 July 2016).

¹⁶⁶Borat World, available at: <http://boratworld.com/borat-sayings-quotes-lingo.php> (consulted on 14 July 2016).

¹⁶⁷Langley, William, ‘Sacha Baron Cohen, the mysterious master of public misbehaviour’, in the Telegraph, 6 June 2009, available at: <http://www.telegraph.co.uk/culture/film/5461920/Sacha-Baron-Cohen-the-mysterious-master-of-public-misbehaviour.html> (consulted on 14 July 2016).

¹⁶⁸Sudakov, D., ‘Borat banned in Russia, Kazakhstan infuriated and humiliated’, in the Pravda.ru, 9 November 2006, available at: <http://www.pravdareport.com/history/09-11-2006/85443-borat-0/#sthash.akC5IMyX.AIxjUHqv.dpuf> (consulted on 14 July 2016).

and conduct research on conversational understanding", particularly with Tay's ability to learn from "her" conversations and get progressively "smarter."¹⁶⁹ However, Microsoft was forced to stop the experiment at the launch date when "Tay" started to use racial slurs, defend white-supremacist propaganda, and even call for outright genocide.

In addition to this, a recent concern has been the situation concerning a so-called post-Brexit racism. More than 3,000 hate crimes were reported to police just before and after the vote for Brexit¹⁷⁰.

Reports of xenophobia and racism have piled up in the media: the firebombing of a halal butchers in Walsall, graffiti on a Polish community centre in London and laminated cards reading: "No more Polish vermin" apparently posted through letterboxes in Huntingdon.¹⁷¹ These cases of racial abuse and hate crimes were aimed not just at immigrants from European Union nations but also at black people, Muslims and Asians from other places who were not central to the debate over European immigration. A Polish family's home in Plymouth was set on fire on Thursday; the family was sent a letter that read, "Go back to your country," and a warning that the family itself would be targeted next¹⁷².

These acts of vandalism, hatred and racial abuse were widely accompanied by derogatory jokes and slurs addressed to those who do not look enough British in the abuser's opinion.

All these controversial examples of satire, comedy, political discourse and even AI experiment illustrate the importance of the critical approach to humour, and racist humour in particular. Racist jokes and humour tend to challenge existing taboos, limits

¹⁶⁹Price, Rob, 'Microsoft is deleting its AI chatbot's incredibly racist tweets', in Business Insider, 24 March 2016, available at: <http://uk.businessinsider.com/microsoft-deletes-racist-genocidal-tweets-from-ai-chatbot-tay-2016-3>(consulted on 14 July 2016).

¹⁷⁰Nagesh, A., 'Brexit racism: More than 3,000 hate crimes reported in just two weeks', in Metro, 8 July 2016, available at: <http://metro.co.uk/2016/07/08/brexit-racism-more-than-3000-hate-crimes-reported-in-just-two-weeks-5994553/#ixzz4EPhr471> (consulted on 14 July 2016).

¹⁷¹Khaleeli, Homa, 'A frenzy of hatred': how to understand Brexit racism', in the Guardian, 29 June 2016, available at: <http://www.theguardian.com/politics/2016/jun/29/frenzy-hatred-brexit-racism-abuse-referendum-celebratory-lasting-damage> (consulted on 14 July 2016).

¹⁷²De Freytas-Tumira, K., 'After 'Brexit' Vote, Immigrants Feel a Town Turn Against Them', in the New York Times, 10 July 2016, available at: <http://www.nytimes.com/2016/07/10/world/europe/brexit-immigrants-great-britain-eu.html?smid=fb-nytimes&smtyp=cur&r=1> (consulted on 14 July 2016).

of free speech and expression, often with a high risk to move into the realm of offensiveness.

Historically, all cultures use humour to maintain social codes, but as long as no universal social codes can be adopted, no universal humour exists. Within all cultures, there will be debates about the appropriateness, morality and funniness of humour. Thus, humour is a matter of moral, political and aesthetic debate.

Regardless of the apparent ridiculousness of the topic, there are several reasons why humour should be taken seriously and why it has to be considered in the question of whether there are valid limits, if any, to racist humour.

In this regard, the sociologists Sharon Lockyer and Michael Pickering emphasize the following points. First, humour is far from trivial. It is integral to social relationships and social interaction. It may be taken in certain contexts as light-hearted banter, but in other contexts it can injure people's social standing, or cut deeply into relationships and interaction between people within and across different social groups. Second, humour is not set diametrically in opposition to seriousness, not least because it can have serious implications and repercussions. Some forms of humour, as for example those involving sexist assumptions about gender roles and identities, are far from inconsequential. Third, to take humour seriously is not being anti-humour¹⁷³.

The category "racist humour" is itself contested. Racist humour is a form of comic malice, but like any form of humour, according to Sharon Lockyer and Michael Pickering, it involves both ethics and aesthetics¹⁷⁴. In the analysis of racist humour, there is on the one hand a need to take into account how humour not only permits but can also legitimate and exonerate a racist insult. On the other hand, the ethics of humour necessitate attention to the difficult relationship between free expression and moral censure. However, usually people tend to consider humour, including racist humour, harmless. The prevailing in society standards condemn prejudice, racism and xenophobia. Thus, people will like to believe that their behaviour, including their taste in humour, does not offend those standards. Those who laugh at ethnic jokes are likely

¹⁷³Lockyer, Pickering, 2008, p.809.

¹⁷⁴Lockyer, Pickering, 2008, p.811.

to deny that their humour is racist. They will typically claim that they are ‘just joking’, defending themselves with a phrase from accusation in racism or sexism.

There is a further reason for countenancing a link between prejudice and humour. The use of the “just joking” defense reinforces a stereotype of humour as a harmless issue. This potentially creates a problem of differentiation between offensive statements that are covered with the “just joking” shield and those that are not. Joke-tellers convince themselves that they are “only joking” and that their jokes do not express real prejudices. Under the cover of the joking situation, prejudiced thoughts can be expressed and socially enjoyed. In this way, the downgrading of outsiders escapes the censure that would inevitably accompany the expression of “serious” prejudice in many contemporary discursive situations. The joking context creates a temporary situation which seems to permit laughter at exaggeratedly stereotyped unreal members of the outgroup, as jokers celebrate the funniness of their joking and deny their own racism¹⁷⁵.

There are a number of academics who consider that jokes using unflattering ethnic stereotypes are dangerous. According to Husband and De Souza, the repetition of such jokes serves to sediment stereotypes in the public mind, thereby perpetuating prejudice and racism¹⁷⁶. Boskin advances a similar argument in relation to white jokes about blacks in the United States¹⁷⁷.

The context of reproduction is greatly significant. To understand the meaning of jokes sometimes it is not enough to analyse a context of person-to person conversation. Commonly it is of high importance to be familiar with a general ideological and political context as long as it can affect the meaning and understanding of a joke¹⁷⁸.

Thus Palmer argues that a piece of racist humour is likely to be perceived as offensive according to three main variables: the structure of the joke; the relationship

¹⁷⁵Bilig, 2005, p. 14.

¹⁷⁶Husband, 1988, p. 153.

¹⁷⁷Boskin, 1987, 257.

¹⁷⁸Billig, 2005, p.12.

between the joke-teller and the audience; and the nature of the occasion on which the attempt at humour is made¹⁷⁹.

The theory of Thomas E. Ford and Mark A. Ferguson – psychologists from Western Michigan University – can be of particular interest. They have conducted a research on the effects that sexist and racist humor has on people, and how prejudiced attitudes combined with disparaging humor may affect one's tendency to discriminate against others¹⁸⁰. He argues that “disparagement humor”¹⁸¹ has negative social consequences and plays an important role in shaping social interaction.

The researchers observe that an “exposure to disparagement is not likely to create or reinforce negative stereotypes or prejudiced attitudes. Exposure to disparagement humor does, however, have a negative social consequence: It increases tolerance of discriminatory events for people high in prejudice toward the disparaged group”¹⁸². To explain these findings Thomas Ford and Mark Ferguson propose “a prejudiced norm theory”¹⁸³. This theory delineates “the psychological processes that mediate the effects of disparagement humor on tolerance of discrimination; it also specifies variables that potentially moderate those effects”¹⁸⁴. The theory addresses the case in which a person finds him or herself in a social context in which he or she is an intended recipient of disparagement humor¹⁸⁵. For people high in prejudice, disparagement humor changes the rules in a given context that dictate appropriate reactions to discrimination against members of the disparaged group¹⁸⁶. That is, argue T. Ford and M. Ferguson, it expands the bounds of appropriate conduct, creating a norm of tolerance of discrimination.

Studies conducted by Ford, Ferguson and others, reveal some aspects of humour that people generally tend to ignore, thinking about humour as something that is innocuous. Firstly, humor depends largely on the context and on the personality and the

¹⁷⁹Palmer, 2005, p.17.

¹⁸⁰Ford, 2008, p.159.

¹⁸¹ Ford, Ferguson, 2004, p. 78.

¹⁸²Ford, Ferguson, 2004, p. 81.

¹⁸³Ford, Ferguson, 2004, p. 79.

¹⁸⁴Idem.

¹⁸⁵Idem, p.81.

¹⁸⁶Idem, p.79.

attitudes of the audience. The same joke can be funny or not, but can also be racist or not racist depending on who tells it and to whom and in what context.

Previous studies by Ford and others on sexist humor showed similar findings. People who are sexist or high on prejudice against women and enjoy sexist jokes show higher tolerance for sexist events, tend to accept rape myths, and tend to show greater willingness to discriminate against women¹⁸⁷.

Being inspired by Ford and others, I decided to make a social experiment. The essence of my experiment is as follows: I prepared two questionnaires for two target-groups. One of the questionnaires was produced in Russian for a Russian auditory and another was in English for a broader auditory, mostly European recipients. Every questionnaire consists of a number of statements where the respondent was asked to express his/her opinion. These statements were divided into two blocks, the first block was about recent controversial legislative initiatives or actual laws, while the second contained a number of jokes that were taken from internet web-sites dedicated to racist jokes. The aim of this experiment was to discover whether we can find a link between the person's racist humour perception and propensity to tolerate discriminatory legal acts and initiatives. For each target group I had prepared a number of statements that were recently pronounced by politicians or parliamentarians concerning contradictions around groups of individuals who are most likely to suffer from racial discrimination, xenophobia, sexism and related intolerance. Taking into consideration the specifics of each region (Russia and Europe), for Europe (Annex 2) I took the following examples: the current migrant crisis and controversies around the agreement between European Union Heads of State or Government and Turkey concerning the return of irregular migrants to Turkey; another example is existing legislation in a number of countries resulting in a contradictory ban for gay and bisexual men to donate blood, which attracted widespread public attention after the tragedy in Orlando¹⁸⁸; and anti-migration

¹⁸⁷Ford, 2008, p.161.

¹⁸⁸McKeinze, S. 'Gay men outraged over continued ban on blood donation', in the CNN, 14 June 2016, available at: <http://edition.cnn.com/2016/06/13/health/orlando-shooting-gay-men-donate-blood/> (consulted on 14 July 2016).

slogans during the Brexit campaign¹⁸⁹. In the realities of the Russian Federation (Annex 1) I focused on migration issues from post-soviet countries of Central Asia and legislative initiatives and laws relating to gay discrimination. These surveys were published on my personal page in social networks Facebook.com and Vkontakte.ru (social network in the Russian Federation and Ukraine).

I would like to specify that all examples of racist jokes are taken strictly for academic research and by quoting them I did not intend to offend or abuse anyone who can find such jokes derogatory. All jokes were published without any decorum or censorship. Having mentioned this, I would like to explain the usage of non-academic language for the survey. When talking about humour, we should take into consideration the context of the jokes. Thus, “the joking context creates a temporary situation which seems to permit laughter at exaggeratedly stereotyped unreal members of the outgroup”¹⁹⁰. As a survey implies a seriousness of topic for academic research, I had a task to create a more informal atmosphere in order to avoid additional influence on the perception of jokes. For this task, the decision was taken to insert playful, informal answers to serious questions.

First, I would like to analyze the result of survey destined for the Russian-speaking auditory, the full text of which can be found in Annex 1. The present survey was completed 89 individuals of different age categories:

- between 18 years old (y.o.) to 25 y.o.: 34,8%;
- between 25-35: 58,4%;
- between 35-....: 6,7%.

Question 1 asks to express a personal opinion on the law adopted in Russia in 2013 prohibiting propaganda of same-sex relationships (in the terminology of the Russian legislation, referred as to “non-traditional” relationships) between minors. According to the survey of 89 individuals, 57.9 per cent showed their support for the above-mentioned law.

¹⁸⁹Our Case- Vote Leave, available at: http://www.voteleavetakecontrol.org/why_vote_leave (consulted on 14 July 2016).

¹⁹⁰Billig, 2005, p. 33.

Question 2 of the survey asks to give an opinion on the legislative initiative for a new migration program. In accordance with this program, it was proposed to reduce migration flows from former soviet republics and replace irregular migrants with Russians. This initiative was supported by 82 per cent of those who were questioned.

As opposed to the first question, the third question did not give way to clear support from the respondents. 79 per cent found the initiative to prohibit the public expression of sexual orientation of those who are not heterosexual discriminatory. However, it is of considerable concern that 19 individuals expressed their support for this initiative.

As for question 4, there was no consensus between those who were questioned about the adoption of children by same-sex couples. Here opinions were divided between those who consider this law as discriminatory (35.2 %); those who express their unequivocal protest against the adoption of children by same-sex couples (20.5 %); and 44.3 per cent did not find this law to be discriminatory, although they do not identify themselves as arguing against LGBTQ rights.

After analyzing racist jokes, the assessment that has been suggested within the scope of survey, I can conclude the following. Most of the racist jokes were found not funny or even insulting, with several exceptions.

Most notable in this regard is the fact that those who consider that the presented racist jokes are funny, are more likely to accept discriminatory or controversial laws or legislative initiatives. Thus, 7 individuals in total enjoyed all the presented racist jokes, 5 out of these 7 supported three or four initiatives from the first part of the survey.

Annex 2 contains a survey that was prepared for a multinational, mostly European auditory. In this survey, 76 individuals of different age groups took part :

- between 18 y.o and 25 y.o: 31.6%;
- between 25-35: 59.2 %;
- between 35-...: 9.2 %.

It should be taken into consideration that there is a possible high amount of individuals with a degree in human rights as this survey was published in my personal page on Facebook.com, also on Facebook's page of E.MA students of 2015-2016

academic year as well as on Facebook's page of E.MA alumni. This fact makes the results of this research more predictable. The primary goal of this survey was to establish the connection between loyalty to controversial acts and examples of racist humour.

Thus, Question 1 of the survey proposes to express an opinion on the recent treaty between European Union Heads of State or Government and Turkey as was mentioned before. 66.6 per cent of all respondents expressed their strong opposition to the proposed decision on the migrant crisis, while 33.3 per cent of those who were asked have totally supported this initiative.

In connection to the ban on blood donations from gay and bisexual men, the results were more consolidated and 90.7 per cent out of 76 questioned individuals declared the legislation discriminatory.

Respondents have been asked to give their opinion about one of the main arguments of the Brexit's "Leave Campaign". To quote the website of this campaign, "Nearly 2 million people came to the UK from the EU over the last ten years. Imagine what it will be like in future decades when new, poorer countries join"¹⁹¹. 82.8 per cent of those who completed a survey recognized this statement as populist.

Considering the examples of racist, sexist, anti-Semitic jokes that were taken for assessment, the vast majority of survey respondents did not find these jokes funny. However, a number of those who found jokes funny varies between 10.5 per cent to 21.6 per cent (an example of a sexist joke).

However, of special interest is the fact that those who found at least one joke funny in the survey expressed their support to initiatives listed in Annex 2 (exceptions are four individuals who enjoyed one joke out of four but did not express their support to any of contradictory acts and statements).

The study shows that there is a clear connection between our joke perception and the decisions that we tend to accept.

With this regard, it is useful to refer to Popper's "paradox of tolerance". According to Popper, an open and tolerant society cannot survive if tolerance is

¹⁹¹Our Case- Vote Leave, available at: http://www.voteleavetakecontrol.org/why_vote_leave (consulted on 14 July 2016).

unlimited: “Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.”¹⁹²

The Danish cartoons scandal of 2005 arising from the dissemination of a set of cartoons that allegedly defamed the Prophet Mohammed, the Muslim religion and Islam’s believers, shows that humour or satire should not be considered as harmless or unserious. This case reinforces subsequent discussions around limitations of freedom of expression with new passion.

In order to understand the consequences of the Danish cartoons case, a socio-cultural context should be taken into consideration. In Denmark, since the early 1990s, neo-nationalism and neo-racism have become once again ascendant, the rise of the anti-immigrant Danish People’s Party (DPP)¹⁹³ has negatively targeted and stereotyped the Muslim minority prepared an abundant ground for further event.

A set of cartoons resulted in a number of transnational protests and riots occurred, some peaceful, others involving the torching of Danish embassies in Beirut and Damascus and resulting in a total of 130 deaths¹⁹⁴ related in some way to the violence.

These events can be explained by the racial biases and fears over Islam fundamentalist terrorism in a society, the attempts to reinforce stereotypes against Muslims as terrorists. The Danish cartoons issue is widely discussed in the academic sphere and to delve deeper into this topic is beyond the sphere of my research. However, after these events the concept of decorum was introduced, which “can be defined as a decision about the form of expression which is publicly judged appropriate for a given setting and theme”¹⁹⁵.

Thus, there need to be clear ideas on how and why this is done if expression is to be assessed as to whether it is appropriate for a given setting or theme. If that is not the case, there is increased potential for indirect means of suppressing urgent and

¹⁹² Cammaerts, 2009, p.563.

¹⁹³ Lockyer, Pickering, 2008, p.815.

¹⁹⁴ Idem.

¹⁹⁵ Palmer, 2005, p.80.

necessary comment. These types of indirect suppressions, including self-censorship, are sometimes referred to as soft censorship¹⁹⁶.

The freedom of speech is considered one of the cornerstones of democracy and may be limited only in exceptional circumstances. It is at the same time also one of the most contested rights. The recent example of the Danish cartoons is a case in point. Dworkin argues that “freedom of speech and the press needs to be almost absolute, preventing state interference in determining which speech is acceptable and which not”¹⁹⁷. However, in democratic societies embedded in the social responsibility tradition, freedom of speech is more carefully weighed against other rights and protections and considered relative rather than absolute¹⁹⁸.

¹⁹⁶Sturges, 2010, p. 280.

¹⁹⁷Cammaerts, 2009, p. 557.

¹⁹⁸Cammaerts, 2009, p. 567.

CONCLUSION

Humour has a great power in society. Historically, we can argue that humour plays a significant role in establishing social conduct norms. However, within the great power came great responsibilities. Although, primary goal of jokes is to entertain, often jokes bring a particular message that joke-teller wants to pronounce.

Examined the current theories of racism and racist humour, I should conclude that there is no uniform understanding of the issues. Thus, there can be identified a great number of different – and in some cases – conflicting racism theories. They is a volitional conception of racism, as well as “belief”, “ideology”, “bad faith”, “social power”, “discourse” and “disrespect” conceptions. The difficulty to define the scope of racism term affects the uncertainty of racist humour.

As was pointed in the first chapter, some theories of racist humour are based on a moral component as an assessment criterion; others necessitate a commitment to racist acts. According to some of the theories, a lack of regard in the joke-teller is sufficient to consider a piece of humour racist, other require an existence of harm. Although, there is a number of philosophical theories formulating racist humour in different, if not to say an opposite way, this allows us to depict common features. The individual perception of jokes depends on number of factors, such as who tells a joke, in what context the joke is brought, what the structure of the joke. It should be noticed that referring to context of the joke we should take into consideration both individual context and wide context of particular society.

However, in order to be able to define limits for racist humour, to draw a line between acceptable in modern society and not, it is of great importance to establish common understanding of what should be limited. Otherwise, there is a high risk of abuse. Especially these risks should be examine in details in situation when the right to freedom of expression is at stake.

To identify philosophical grounds for freedom of expression restrictions, the scope of classical and modern theories of free speech limitation was considered in the second part of the first chapter. Applying these theories to possible limits on freedom of expression in regard to racist humour, we can observe that some of human rights theories tend to justify this limitation whereas other proclaim an absolute character of

freedom of expression. In sum, we should conclude that the absence of uniform understanding of the issue restrict our possibilities in regulation of the sphere.

We should bear in mind the seriousness of every limitation imposed on freedom of expression. These limitations should not be used as instruments to preserve society from dissenting views or to establish one “official truth”. Racist humour legal restrictions should not offer legitimate means of suppression of unpopular in the state movements. The purpose of any restriction on freedom of expression must be to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism¹⁹⁹.

Finally, I would like to stress that the possibility for human beings to think critically is essential for their self-fulfillment and for philosophical thoughts in general, even if this criticism concerns thoughts and feelings of others.

By analysing the scope of international and regional documents, as well as case law of European Court of Human Right and Court of Justice of European Union, we have to conclude that no direct regulations of racist humour exist. In the international and regional sources it is possible to trace the normative attempts to restrict racist stereotyping, ridicule or mockery. However, there is no clear position on European level concerning this issue. There were taking attempts to impose on so-called soft censorship or self-regulation to jokes content for those means of expression that are able to attract an attention of big auditory, such as media, internet. Nevertheless, these initiatives are controversial and place additional restrictions on freedom of expression. Opposite to formal regulation, the ECtHR elaborates in its case law a specific approach to racist humour controversy. Thus, expressing its position on issue the ECtHR stressed the importance of satire and parody as forms of artistic freedom and social comment in democratic society. Furthermore, the ECtHR tends to put the need to protect freedom of expression above the right to protect reputation of one individual. To argue otherwise would be considered as excessive restrictions of freedom of expression.

To conclude, it should be stressed that existence of different perspectives invokes an intercultural dialogue on racist humour issue. More wide analysis of present

¹⁹⁹Blasphemy, insult and hatred: finding answers in a democratic society, 2010, p. 24.

controversy allows us to take into consideration of argumentation of those who are in favour of free speech limitation and those who are against.

The freedom of speech is considered one of the cornerstones of democracy and may be limited only in exceptional circumstances. It is at the same time also one of the most contested rights. Also racist humour has a possibility to reinforce negative stereotypes and prejudice at the individual level, as well as to maintain cultural or societal prejudice at the macrosociological level²⁰⁰, the evaluation of rights in stake should be made. We cannot ignore the possibility of racist humour to support racist ideas and even to affect actions of individual. The result of conducted social experiment shows a link between actions and perception of racist humour. Thus, humour potentially can influence the making of personal decision, also in spheres distant from humour.

In conclusion, it should be pointed that there are no a lot of academic works consider racist humour from legal point of view or by implying several approaches to its examination. With this regard, the further development of the topic is needed. Serious examination of racist humour grounds does not restrain us from enjoying humour, but help us to fully understand it.

²⁰⁰Ford, Ferguson, 2004, p. 79.

ANNEX 1
Survey
(original language: Russian²⁰¹)

Question 1:

An act to prohibit a propaganda of non-traditional sexual relationships among minors was signed in 2013.

Under the law a propaganda understood as a dissemination of information aimed at developing juvenile unconventional sexual attitudes, the attractiveness of non-traditional sexual relationships, distorted ideas about the social equivalence of traditional and non-traditional sexual relationships, or an imposition of information on non-traditional sexual relationships, causing interest in such relationships.

- Totally support.
- Do not support.

Question 2:

Deputies of the Legislative Assembly of St. Petersburg adopted on first reading a legislative initiative , in accordance with a foreign national in order to get work on the territory of Russia should receive an invitation to enter . Its author, the deputy Andrei Anokhin believes that in this way it will be possible to reduce migration flows from former Soviet republics , and to force employers to replace foreign workers by Russians.

- Excellent. For a long time it is time to do something with this number of migrants.
- Well, we all fraternal peoples.
- The initiative is good. Measures ineffective.

Question 3:

Earlier, a draft law to establish a fine for public display of sexual affection of those whose orientation is not heterosexual has been submitted to the State Duma of the Russian Federation. If adopted, those with different sexual orientations would be forced to pay fines for publicly expressing of their feelings.

The Russian parliamentary committee rejected the initiative.

²⁰¹Note: author's translation

- It would be an excellent law. Such a pity!
- We have no homosexuals. Why do we need this law?
- Nonsense.

Question 4:

In 2013, the Family Code of the Russian Federation was amended introducing new paragraph that prohibit adoptions by “persons who are in alliance concluded between persons of the same sex.” This rule was introduced to deal with the “artificial imposition of non-traditional sexual behavior.”

- What is actually a difference for children? This is pure discrimination.
- Definitely not. Children should grow up in a normal family.
- I certainly have nothing against LGBT people, however for children it is better to grow up in a normal family. I do not see here any discrimination.

Question 5:

I found this joke in the Internet:

- What three white things has a black?
- Eyes, teeth and master.

- Good joke. On a historical theme.
- Not funny.
- I would feel insulted.

Question 6:

And this one:

- What are the similarities between sneakers “Nike” and the Ku Klux Klan?
- They make blacks run fast.

- Again. Joke is good, and has historical grounds.

- Horrible. Nothing is funny, it is pure racism.
- It is just a joke. Take it easier.

Question 7:

The same source - an Internet:

- How does a black woman fight against crime rates?
- Does an abortion.

- Funny
- Not funny
- Insulting

Question 8:

And the last one:

- What headphones should I buy, white or black?
- Black
- Why?
- Must work

- Funny
- Not funny, but true
- Not funny. Who is writing this nonsense?

Question 9:

And for the research purposes, how old are you?

- 18-25
- 25-35
- 35-...

ANNEX 2 Survey

Question 1:

As some of you probably heard on 18 March 2016, EU Heads of State or Government and Turkey signed the agreement with the aim to replace disorganised, chaotic, irregular and dangerous migratory flows.

In accordance with a before mentioned agreement all new irregular migrants whether persons not applying for asylum or asylum seekers whose applications have been declared inadmissible crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey.

(the internet source: European Commission http://europa.eu/rapid/press-release_MEMO-16-1221_en.htm)

The legality of this treaty is disputed by international human rights organisations and academics in a number of aspects.

Could you express your opinion to this treaty?

- absolutely illegal and immoral;
- questionable but still necessary for Europe to overcome migrant crisis;
- total support;
- other.

Question 2:

There are several countries who introduce the rules prohibiting gay and bisexual men from donating blood. The rationale being that they were more likely to be HIV-positive.

Could you express your attitude to this question?

- Discriminatory and insulting. Shouldn't be dependent from sexual orientation.
- C'mon, it is nothing with discrimination, just statistics. It is a risk-group.
- Other.

Question 3:

And of course a little bit of Brexit :)

One of the main arguments of the Brexit “Leave Campaign” is the possibility to control immigration. If to cite the website of this campaign “Nearly 2 millions people came to the UK from the EU over the last ten years. Imagine what it will be like in future decades when new, poorer countries join”.

(internet source: http://www.voteleavetakecontrol.org/why_vote_leave)

- It is absolutely normal reaction of government to migrants flow. Would do the same for my country! We do not need unqualified workers.
- Absolutely populist and racist remarks.
- In current situation it is unfortunately necessary to stay afloat.
- Other.

Question 4:

And a little bit of humour from internet

- How do you stop 5 black guys from raping a white girl?
- Throw them a basket ball.

- OMG. Really? Offensive and racist.
- Take it easy. It is just joke.
- Notfunny.
- Funny.
- Other.

Question 5:

Another joke:

- What do you do when your woman's watch breaks?
- Nothing there's a clock on the stove.

- It is sexism. Do not funny.
- Maybe a lit bit sexist, but still funny.
- Good joke! It is funny!
- Other.

Question 6:

And another joke:

- What do you call a black woman who has had a dozen abortions?
- A crime fighter.

- Funny.
- Notfunny.
- Wow! Offensive.
- Other.

Question 7:

And the last one :)

- What's the difference between a boy scout and a Jew?
- The boy scout came back from camp.

- Funny joke on historical theme.
- Cmon, the joke is not funny.
- Not funny at all. Offensive.
- Other.

Question 8:

And just for statistics, how old are you?

- 18-25
- 25-35
- 35-...

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Leskova, Anastasia

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