Slipping in Spiral
Questioning Harm Caused by Hate Speech and its Potentiality

Author: Viktor Kundrák
Supervisor: Guy Haarscher
Abstract

The public debate is overwhelmed with discriminatory speech targeting vulnerable groups. Despite “hate speech” legislations, most of the malicious messages remain in the environment through the abuses of rhetoric. There are doctrinal disputes about how far should hate speech legislations go. Confusions seem to be about the interests we are protecting and the potentiality of the harm caused by hate speech. My ambition is firstly to shed light at the philosophical basis for the notions and concepts related to hate speech in order to reveal especially the seriousness of that harm. Both “American” and “European” doctrines will be briefly discussed for the latter, represented by case law of the European Court of Human Rights, be put under a detailed scrutiny. It will be argued that free speech is not a value as such as it is its particular content that counts and that in most cases a thorough contextual analysis will be necessary. The second task of the thesis is to determine contextual elements that influence the final harm of hate speech and the probability thereof. It will be argued that the both seriousness and the high probability of the harm caused to already stigmatised communities demand nuanced but stiff criminal restrictions.
Table of Contents

Introduction ......................................................................................................................... 4

1. Difficulties with Terminology .................................................................................... 9
   1.1 Hate Speech ............................................................................................................ 9
       1.1.1 Notion of Hate ............................................................................................... 9
       1.1.2 Notion of Speech .......................................................................................... 11
       1.1.3 Speech and Action ....................................................................................... 13
   1.2 Harm, Dignity and Racism ..................................................................................... 14
       1.2.1 Notion of Harm ............................................................................................ 14
       1.2.2 Notion of Dignity ........................................................................................ 17
       1.2.3 Racism ......................................................................................................... 19
       1.2.4 Religious and Ethnic Racism ......................................................................... 20
   1.3 Conclusive Remarks ............................................................................................... 24

2. American vs. European Position to Hate Speech ...................................................... 26
   2.1 The “American Way” ............................................................................................ 27
       2.1.1 Market of Ideas vs. State’s Business ............................................................. 27
       2.1.2 Problem with the Group Libel Concept ......................................................... 28
       2.1.3 Rejection of the Bad Tendency Doctrine ....................................................... 31
       2.1.4 Refusal of the Content-based Approach ....................................................... 32
   2.2 The “European Way” ............................................................................................ 33
       2.2.1 The Shoah Experience .................................................................................. 33
       2.2.2 Council of Europe and European Union ....................................................... 35
       2.2.3 ECtHR and Hate Speech ............................................................................. 36
   2.3 Conclusive Remarks ............................................................................................... 39

3. ECtHR and the Content-based Approach .................................................................. 41
   3.1 Excluding Protection under Article 17 ECHR .................................................... 41
       3.1.1 The Glimmerveen Case ............................................................................... 43
3.1.2 The Norwood Case ................................................................. 44
3.2 Balancing under Article 10 § 2 ECHR .............................................. 45
  3.2.1 The Jersild Case ........................................................................ 46
  3.2.2 The Féret Case ........................................................................ 47
  3.2.3 The Le Pen Case ...................................................................... 49
3.3 Shielding the Values of the Convention ............................................ 50

4. ECtHR and the Contextual Approach ................................................. 54
  4.1 Usual Contextual Approach ............................................................. 54
    4.1.1 The Author’s Position ............................................................... 55
    4.1.2 Form, Means and Impact of Expression .................................... 56
  4.2 Need for a More Thorough Assessment ........................................... 58
    4.2.1 What Interests Do We Balance? ............................................... 59
    4.2.2 On the Abuse of Rhetoric ....................................................... 63
    4.2.3 Position of the Targeted Group ............................................... 69
  4.3 The “Effect of Environmental Spiral” ............................................... 71

Conclusion ......................................................................................... 76

Bibliography ...................................................................................... 80
Slipping in spiral: questioning harm caused by hate speech and its potentiality

Kundrák, Victor

https://doi.org/20.500.11825/302

Downloaded from Open Knowledge Repository, Global Campus' institutional repository