

## **FACTORS OF DIFFERENTIATION BETWEEN EXTREME SPEECH AND LEGITIMATE EXPRESSION IN COMPARATIVE CASE-LAW**

*UDC 343.41:342.727*

*341.645.2(4-672EU):343.41*

**Darko Dimovski<sup>1</sup>, Luka Anđelković<sup>1\*</sup>**

<sup>1</sup>University of Niš, Faculty of Law, Republic of Serbia

\*Student of Master Studies

**Abstract.** *The article focuses on the factors which national and international courts take into consideration when making distinction between extreme speech and legitimate expression. It is often difficult to draw the line between these expressions. There are no general rules which can be automatically applied in such cases. However, certain factors, which can serve as guiding principles for courts, have been developed in the jurisprudence: the context of extreme speech, its content, the speaker's intent, the position of the speaker and audience, the scope and outreach of extreme speech, and the likelihood of resulting harm. The article explores the application of these factors in particular cases, mostly the ECtHR cases as this court has the most developed case-law on this matter. The authors give their critical opinion on certain decisions and, finally, evaluate the real significance of these factors.*

**Key words:** *freedom of expression, hate speech, incitement to violence, ECtHR.*

### INTRODUCTION

Freedom of expression is usually regarded as a cornerstone of a democratic society. However, this freedom is not absolute and it can be subject to limitations in particular situations, for example in cases of defamation, publishing information about someone's private life, or in cases involving extreme speech.

*Extreme speech* typically includes incitement to hatred, terrorism, violence and discrimination. It is prohibited under many international documents. The International Covenant on Civil and Political Rights envisages that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be

---

Received February 24<sup>th</sup>, 2016/ Accepted April 7<sup>th</sup>, 2016

**Corresponding author:** Darko Dimovski, Assistant Professor, University of Niš, Faculty of Law,  
Trg Kralja Aleksandra 11, 18000 Niš, Serbia, Tel. +381 18 500 244, E-mail: darko@prafak.ni.ac.rs

prohibited by law.<sup>1</sup> The International Convention on the Elimination of All Forms of Racial Discrimination goes even further. It obliges state parties to criminalize all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.<sup>2</sup> The European Convention on Human Rights implicitly authorizes state parties to limit extreme speech. It prescribes that the state's interference with freedom of expression may be necessary *inter alia* in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime or for the protection of the reputation or rights of other.<sup>3</sup>

There is a thin line between the expressions which can be considered as legitimate exercise of freedom of speech, and those considered as illegitimate extreme speech. In order to make the distinction, a number of factors concerning the impugned speech must be assessed. The UN Committee on the Elimination of Racial Discrimination suggests that the content and form of speech, the climate prevailing in the society, the position or status of the speaker and the reach and the objectives of the speech need to be examined (UNCERD, 2013). This article will follow a similar list of factors given by one of the leading world NGOs, *Article 19*, specializing in the protection of freedom of expression. The list of factors include: the context, the speaker, the intent of the speaker, the content, the extent of the speech and the likelihood and imminence of the advocated action (Article 19, 2012: 27).

#### THE CONTEXT OF EXTREME SPEECH

The first factor to be assessed is the context in which the impugned expression was given. According to the jurisprudence of the European Court of Human Rights (ECtHR), analysis of the context contains several issues.

The existence of on-going conflicts and tensions within society is certainly an aggravating factor. In *Zana v. Turkey*<sup>4</sup>, the ECtHR emphasized the fact that the applicant's statement of support for PKK coincided with the murderous attacks carried out in south-east Turkey by this group, labelled by Turkey as a terrorist organization. Therefore, the statement could fuel an already explosive situation in the region. The Court followed a similar reasoning in *Leroy v. France*.<sup>5</sup> The main argument was the fact that the applicant glorified the 2001 terrorist attacks on the United States. However, the Court added that the impact of such messages in the Basque Country, a politically sensitive region, was not to be overlooked.

---

<sup>1</sup> The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 20

<sup>2</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) Art. 4(a)

<sup>3</sup> The European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) Art. 10

<sup>4</sup> Case Ap. 18954/91 *Zana v. Turkey*

<sup>5</sup> Case Ap. 36109/03 *Leroy v. France*

Not only conflicts and tensions but also the problems relating to the integration of the group, which was attacked by a speech, should be given value. That was the case in *Le Pen v. France*,<sup>6</sup> which concerned anti-Islamic statements of a well-known French politician.

The history of violence and discrimination should also be taken into account. Thus, in *Vona v. Hungary*,<sup>7</sup> the ECtHR upheld the dissolution of an extremist organization known for organizing military-style marches in villages with large Roma population. These marches gave the impression that the organization could organize paramilitary force reminiscent of the Hungarian Nazi movement, which was responsible for mass extermination of Roma in Hungary. This case also shows that general principles on limitation of freedom of expression are also applicable to freedom of association.

Apart from these aggravating factors, on the other hand, a speech should not be sanctioned if it contributes to a debate of public interest. For example, in *Gunduz v. Turkey*,<sup>8</sup> the ECtHR ruled for the applicant who, as a leader of a religious sect, participated in a TV programme in order to present its views. The applicant stated *inter alia* that democratic values were incompatible with Islam. However, the audience was already familiar with these views and they were widely debated in Turkish media.

Finally, apart from these factors which were affirmed by courts, it is suggested that a number of other circumstances may be taken into account when assessing the context. Depending on the nature of a case, it may be important whether there is an absence of criticism of government and whether the audience has access to a range of alternative and easily accessible views and speeches (Article 19, 2012: 30).

#### THE SPEAKER AND THE AUDIENCE

In cases of extreme speech, courts should also take into account the status of the speaker, his/her position if he/she is a political or public figure, and the level of influence he/she exercises over the audience.

Even though political speech generally enjoys high protection, politicians and government officials do not enjoy the same level of freedom in cases of allegedly hateful or violent comments. It is expected from them to show more responsibility than ordinary people, due to the position they occupy and the level of influence which they have. Thus, in *Feret v. Belgium*,<sup>9</sup> the ECtHR ruled against the applicant who was the leader of the political party which distributed anti-immigrant leaflets during an election campaign. It held that it is crucial that politicians, in their public speeches, avoid messages which are likely to provoke intolerance. Public officials, as well as persons in similar position such as teachers and religious leaders, also enjoy narrower freedom of expression. In *Malcolm Ross v. Canada*,<sup>10</sup> the case which concerned anti-Semitic statements, the UN Human Rights Committee ruled against the petitioner. The Committee emphasized that he was a teacher and, therefore, he had special duties and responsibilities because of the authority he had to his students.

---

<sup>6</sup> Case Ap. 18788/09 *Le Pen v. France*

<sup>7</sup> Case Ap. 35943/10 *Vona v. Hungary*

<sup>8</sup> Case Ap. 35071/97 *Gunduz v. Turkey*

<sup>9</sup> Case Ap. 15615/07 *Feret v. Belgium*

<sup>10</sup> Case Comm. 736/1997 *Malcolm Ross v. Canada*

On the other hand, if speaker does not have much influence, it would be an argument not to interfere with his/her right to freedom of expression. An example from the jurisprudence is the case *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*.<sup>11</sup> The Court ruled for the applicants taking into account the fact that the group making the statements, which contained fierce anti-Bulgarian declarations, had no real influence, even locally. Therefore, its rallies were not likely to become a platform for the propagation of violence or intolerance.

There are not many judicial decisions which focus on the audience to which the speech is given. In our opinion, in some cases, this can be an equally important factor. Courts should analyse issues such as the degree of vulnerability and fear of the various communities, including those targeted by the speaker, as well as whether the audience is characterised by excessive respect for authority (Benesh, 2011). It is argued that one of the factors which influenced mass complicity of Hutu population in Rwandan genocide was the culture of unbending obedience to authority (Prunier, 1999: 245). This, along with strong propaganda, caused ordinary people to take weapons and kill their Tutsi neighbours.

The most important case in which the ECtHR emphasized the audience factor is *Vejdeland and others v. Sweden*.<sup>12</sup> It concerned the distribution of leaflets in a school by leaving them in pupils' lockers. The leaflets carried messages against homosexuals, claiming that they were the main reason for the spread of HIV and AIDS, and that they wanted to play down paedophilia. The Court ruled against the applicants taking into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them. In his concurring opinion, judge Zupančič stated that, if the same messages were published in leading Swedish newspapers, they would probably not be considered as a matter for criminal prosecution and condemnation.

The Court's reasoning that pupils "had no possibility to decline to accept" the leaflets is an application of "captive audience" standard, which was developed in the US jurisprudence. A captive audience is one that finds itself in an inescapable situation and is bombarded with information that is offensive to some of the members of that audience. Before the *Vejdeland* case, this standard was applied by minority of judges in the aforementioned *Feret* case. The majority argument was that content from the leaflets, for which the applicant was convicted, was also available on a website which made its impact stronger. In response to that, the dissenting judges stated that content on a website can be downloaded only by those who actively search for particular kind of material. Therefore, the ideas were not imposed to the audience. A year after *Vejdeland*, in the already mentioned case *Vona v. Hungary*, the ECtHR explicitly referred to the captive audience standard. It stated that the applicant organization's marches in the villages with large Roma population had intimidating effect to this population, especially because they were in their homes and as such they constituted a captive audience.

*Vona* is similar to the famous *Skokie*<sup>13</sup> case from the United States, which was adjudicated by Illinois Supreme Court with a different outcome. The court allowed Nazi party members to march in their uniforms with swastikas in Skokie, a village where many Jewish families who survived the Holocaust lived. It did not consider the march to be the case of captive audience because there was an advance notification of Nazis' intention. Moreover, the fact that Nazis

<sup>11</sup> Case Ap. 29221/95 29225/95 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*

<sup>12</sup> Case Ap. 1813/07 *Vejdeland and others v. Sweden*

<sup>13</sup> *National Socialist Party of America et al. v. Village of Skokie*

wore swastikas was not regarded sufficient to ban the march. The decision was criticized because it implicitly told the Jewish people to leave their village during the march if they felt intimidated by swastikas. However, leaving their homes could be seen as nothing else but surrender to Nazis (Cohen-Almagor, 2001:17). In the end, in spite of the favourable judgment, Nazis decided not to hold to march. This case is one of the best examples of different conceptions of freedom of expression on different sides of the Atlantic, and of a very broad protection of this freedom in the US jurisprudence.

The fact that speech is directed to a captive audience is certainly an aggravating one. However, it does not *a contrario* mean that a speech which can be reasonably avoided should automatically not be sanctioned. The one purpose of hate speech legislations is to protect targeted groups from insult and intimidation. However, these laws have another purpose, at least equally important: to prevent spreading of hateful ideas and their acceptance by wider population. As for the second purpose, the question who is the audience (members of a targeted group or other citizens) is of no relevance as the speech has equally harmful effects.

#### THE INTENT IN EXTREME SPEECH

Courts should also examine whether the speaker had an intention to incite hatred or violence. It is widely accepted principle that only intentional incitement should be punishable.<sup>14</sup> The UK Terrorism Act is a notable exception to this standard. It criminalizes encouragement of terrorism, even when the speaker is reckless as to whether the audience would be encouraged by his expression.<sup>15</sup> This element of the offence was strongly criticized (Barendt, 2009: 456).

When determining intent, courts should examine the purpose and the objectives of the speech. It should be established whether there was a reason for the speech other than to incite to hatred: for example, to start a historical debate, to present a scientific research, to disseminate news or to expose the wrongdoings of government in the interests of public accountability (Article 19, 2012: 33).

As it is difficult to prove the existence of intent, courts may rely on the language used by the speaker. For example, in the *Faurisson*<sup>16</sup> case, the term “magic gas chamber” was seen by the UN Human Rights Committee as suggesting that the author was motivated by anti-Semitism rather than pursuit of historical truth. By contrast, in *Lehideux and Isorni v. France*,<sup>17</sup> the ECtHR ruled for the applicants who defended marshal Pétain’s policy during the Second World War. The Court found that their intent had been “to create a shift in public opinion which, in their view, would increase support for a decision to reopen the case.” Certainly, the Holocaust denial cannot be equated with the support for controversial collaborationist.

---

<sup>14</sup> See for example: Council of Europe Convention on the Prevention of Terrorism, art 6 and Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21, art 1 para 1

<sup>15</sup> The Terrorism Act 2006, section 1

<sup>16</sup> Case Comm. 550/1993 Robert Faurisson v. France

<sup>17</sup> Case Ap. 24662/94 Lehideux and Isorni v. France

In *Aksu v. Turkey*,<sup>18</sup> the ECtHR scrutinized the freedom of academics to carry out research and publish their findings. The application was lodged by an ethnic Roma who claimed that certain academic publications funded by the government painted the negative picture of Roma people. The works associated this group with criminal activities and they gave the negative definition on terms “Gypsy”, “Gypsy money”, etc. However, the Court held that the author had not been driven by racist motives and it accepted that his intention was to shed light on the unknown world of the Roma community in Turkey, who had been ostracised and targeted by vilifying remarks based mainly on prejudice. It follows that academic expression enjoys special protection.

The speech objectives were also under the ECtHR’s careful scrutiny in *Jersild v. Denmark*.<sup>19</sup> The applicant was a journalist who was convicted because of a TV programme which featured hateful statements by a group of extremists. The Court concluded that the journalist’s intention was not to give support to this group and their opinion but rather to expose specific aspects of a matter already perceived as being of great public concern.

Finally, the repetition of the speech is a factor which can show the speaker’s intent. If he/she repeats the statements over a period of time, it is more likely that he/she intends to incite certain action (Article 19, 2012: 33).

#### THE CONTENT OF EXTREME SPEECH

The content of the speech is a central factor when determining the lawfulness of the expression. Courts should analyze the uttered words, the form of speech, the targeted group, and how the speech was presented. In that respect, the ECtHR does not protect speech which can be seen as a direct or indirect call for violence, or as a justification of violence, hatred or intolerance. Thus, in *Zana v. Turkey*,<sup>20</sup> the Court ruled against the applicant who expressed her support for the PKK, even though she stated she was not in favour of massacres committed by this group. The Court held that this contradictory message still represents a justification of violence.

In cases involving more ambiguous expressions, the ECtHR interpreted the impugned statements in light of the context in which they were expressed. This shows that the analysis of these two factors is inseparable. For example, in *Surek v. Turkey (No. 4)*,<sup>21</sup> the ECtHR held that the phrase “it is time to settle accounts”, in the overall literary and metaphorical tone in which it was written, cannot be seen as an appeal to violence. In *Yagmurdereli v. Turkey*,<sup>22</sup> the applicant stated that the number of people staying in the mountains (the home of the on-going uprising) will be “more and more numerous”. The Court ruled in his favour holding that this statement can also be understood as “an implicit invitation to the reunion to raise certain political demands, although it could not be excluded that such remarks conceal different objectives and intentions.”

Decisions rendered by national courts in Europe on this issue generally reflect the stronger protection of freedom of expression. It is only natural given that the ECtHR only

---

<sup>18</sup> Case Ap. 4149/04 41029/04 *Aksu v. Turkey*

<sup>19</sup> Case Ap. 15890/89 *Jersild v. Denmark*

<sup>20</sup> Case Ap. 18954/91 *Zana v. Turkey*

<sup>21</sup> Case Ap. 24762/94 *Surek v. Turkey (No. 4)*

<sup>22</sup> Case Ap. 29590/96 *Yagmurdereli v. Turkey*

creates a minimum set of standards on freedom of expression (Keller, 2011: 277). One of the most illustrative examples is the Polish Supreme Court case<sup>23</sup> from 2007 which dealt with incitement to hatred. The court acquitted the defendants who were accused of holding a placard reading “We shall liberate Poland from [among others] Jews”. It referred to the ordinary meaning of the word “liberate” and to the use of the indicative, as opposed to the imperative. This judgment was criticized by the European Commission against Racism and Intolerance (ECRI).<sup>24</sup> Another national decision which was criticized by the ECRI was the acquittal of Geert Wilders, a prominent Dutch politician, by Amsterdam District Court.<sup>25</sup> He was charged with incitement to hatred against Muslims, *inter alia* because of publishing an offensive anti-Islamic film. The Dutch court held that “although a film contains passages which could incite hatred, they need to be considered in conjunction with the rest of the film and in the context of the public debate”. In simple terms, words must not be chosen and combined by chance and assessed in isolation from the rest of the speech.

The target of speech is to be carefully examined as well. Is the speech aimed against the government or some minority group in a society? In a number of Turkish cases,<sup>26</sup> the ECtHR stated that the limits of permissible criticism were wider with regard to the government because of the dominant position it occupies in a society. On the other hand, minority groups enjoy more protection. It is considered as a particularly aggravating factor if statements attack or cast a negative light on entire ethnic, religious or other groups.<sup>27</sup> In the aforementioned *Feret* case, the statement that “refugee centres which poison the lives of people” was seen as falling under this category, even though it also represents criticism of the government’s immigration policy. In *Mohammed Hassan Gelle v. Denmark*,<sup>28</sup> the UN Committee on the Elimination of Racial Discrimination gave an opinion that even indirect comparison of an ethnic group with criminals is intolerable. The case concerned a statement by a member of the Danish parliament who stated that ethnic minorities should not be consulted about the prohibition of genital mutilation since it would be the same as “asking paedophiles whether they have any objections to a prohibition against child sex or asking rapists whether they have any objections to an increase in the sentence for rape.” This opinion seems to be limiting the freedom of expression excessively, particularly given that the statement was part of an important public debate. Even the sensitive ethnic and religious groups should not be exempt from any offensive comment. The ECtHR often reiterates that freedom of expression also applies to statements which shock, offend and disturb the state or any sector of the population.

The most dangerous expressions are those which dehumanise potential victims, the ones which present them as insects, beasts or animals (Article 19, 2012: 33). During the Rwandan genocide in 1994, the notorious RTL radio station constantly referred to Tutsis as cockroaches.<sup>29</sup> The purpose was to prove that their lives were worthless. These broadcasts, amounting to a worst form of propaganda, caused a large number of ordinary people to take part in mass murders.

<sup>23</sup> IV KK 406/06

<sup>24</sup> See 2010 report on Poland, available at <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Poland/POL-CbC-IV-2010-018-ENG.pdf> accessed 14. January 2016.

<sup>25</sup> ECL:NL:RBAMS:2011:BQ9001

<sup>26</sup> See for example *Arslan v. Turkey*, Ap. 23462/94 and *Karataş v. Turkey*, Ap. 23168/94

<sup>27</sup> Case Ap. 27510/08 *Perinçek v. Switzerland*

<sup>28</sup> Case Comm. 34/2004 *Mohammed Hassan Gelle v. Denmark* (CERD)

<sup>29</sup> *Prosecutor v. Nahimana, Barayagwiza and Ngeze* (ICTR)

When examining the content of speech, courts should also pay attention to its form. There are certain forms of expression which enjoy particular protection. The artistic form is one of them. The ECtHR stated that any interference with an artist's right to freedom of expression must be examined with particular care.<sup>30</sup> However, as shown in the cases which we will discuss next, the Court does not seem to give particular attention to this principle. In *Leroy v. France*,<sup>31</sup> the applicant was convicted as the author of a drawing published in a local weekly magazine immediately after the terrorist attacks on 11<sup>th</sup> September. The drawing presented the collapse of the twin towers with a comment: "We have all dreamt of it, Hamas did it", which was a parody of a popular marketing slogan of a famous trademark. The ECtHR ruled against the applicant and it accepted the domestic court's argument that the applicant glorified terrorist acts. In our opinion, the Court should have given more weight to the fact that the applicant's intention was to criticize American imperialism, as well as to the satirical nature of the drawing. This case also opens the issue of whether mere apology or glorification of violence, which cannot be qualified as incitement, should be sanctioned. Such criminal offences have been criticized by international bodies which monitor the observance of human rights (UN Special Rapporteur, 2006).

In *Otto-Preminger-Institut v. Austria*,<sup>32</sup> the ECtHR ruled against the applicant whose film, which caricatured "trivial imagery and absurdities of the Christian creed", was seized. It held that the respondent state had a wide margin of appreciation in relation to ensuring religious peace in the region and preventing attacks on majority religious beliefs in an unwarranted and offensive manner. In a more recent case *I.A. v. Turkey*,<sup>33</sup> the Court also ruled against the applicant, a managing director of a publishing house which published a controversial novel. In the Court's view, the boundaries of the freedom of expression have been overstepped because the novel featured not only shocking and provoking comments but also an abusive attack on the Islamic prophet. In these two cases, the Court failed to make a distinction between expressions aimed at attacking a specific ideology, religion or important religious figures and those aimed at a specific religious group and its members. The former should not be sanctioned as blasphemy laws are incompatible with contemporary conception of freedom of expression (Hare, 2009: 303).

In *Karataş*<sup>34</sup> and *Alınak*,<sup>35</sup> the ECtHR provided protection to controversial artistic expression. However, the Court did not reach such decisions because of the artistic nature of the expressions. It emphasized that the media used by the applicants were poetry and novel (respectively), which appeal to a relatively narrow audience as compared to the mass media, for example. Therefore, the Court found violations in these cases because of the small scope and outreach of the speech, which is a separate factor to be examined.

The US Supreme Court, on the other hand, takes a very liberal position concerning the contents of controversial messages. Thus, it is irrelevant whether the statement is arguably of inappropriate or controversial character as long as it deals with a matter of public concern.<sup>36</sup> The US Supreme Court takes the view that the government must not intervene

<sup>30</sup> Case Ap. 68354/01 Vereinigung Bildender Künstler v. Austria

<sup>31</sup> Case Ap. 36109/03 Leroy v. France

<sup>32</sup> Case Ap. 13470/87 Otto-Preminger-Institut v. Austria

<sup>33</sup> Case Ap. 42571/98 I.A. v. Turkey

<sup>34</sup> Case Ap. 23168/94 Karataş v. Turkey

<sup>35</sup> Case Ap. 40287/98 Alınak v. Turkey

<sup>36</sup> Rankin v. McPherson, 483 U.S. 378, 387



in the “marketplace of ideas” (Heyman, 2009: 168). This is the reason why there is no hate speech prohibition in America. Only the most serious cases of incitement to violence may be sanctioned. According to the *Brandenburg*<sup>37</sup> test, the state cannot pass laws that “forbid or proscribe advocacy of the use of force” or make it illegal to advocate breaking the law, except where the speech is “directed to inciting imminent lawless action and is likely to incite or produce such action.”

#### THE SCOPE AND OUTREACH OF EXTREME SPEECH

As regards the scope and outreach of the disputed speech, it is a well-established principle that only the speech which was delivered in public may be sanctioned. For example, the European Union framework decisions oblige member states to criminalize public provocation to commit a terrorist offence<sup>38</sup> and public incitement to violence or hatred against a particular group.<sup>39</sup> In some cases, it may be disputed whether the speech has public nature or not. Then, courts should determine whether the statement was circulated in a restricted environment or whether it was widely accessible to the general public, as well as whether it was directed to a number of individuals or to members of the general public (Article 19, 2012: 37).

If the speech is public, its reach is to be assessed next. In *Perinçek v. Switzerland*,<sup>40</sup> the ECtHR considered the impact of the applicant’s statements, which were given at three public events, to be “rather limited”. On the other hand, in *Féret v. Belgium*, it attached particular significance to the fact that the statements had been made on leaflets distributed in the course of an electoral campaign, thus reaching the entire population of the country. Therefore, the means of dissemination are equally important. As already said, the reach of poetry and similar artistic forms is not the same as that of mass media such as television, radio and the Internet.

Finally, courts may examine the intensity and the frequency of the disputed speech. Was the speech delivered once, or was it given or broadcast on more occasions? In *Radio France and Others v. France*,<sup>41</sup> the ECtHR considered as an aggravating factor the fact that the statement was broadcast sixty-two times by a radio station which could be received throughout the French territory.

#### LIKELIHOOD OF HARM OCCURRING

The final issue is whether the speech is likely to provoke any harm. Unlike speaker’s intent which is a subjective element, this probability is to be assessed objectively. This factor is more important in cases involving incitement to violence. A court examines whether the speech produces a risk of violence. Hate speech, on the other hand, does not necessarily entail a call for action.<sup>42</sup> In those cases, it would be difficult to assess and to

<sup>37</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447

<sup>38</sup> Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21, art 1, para 1

<sup>39</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55, art 1, para 1

<sup>40</sup> Case Ap. 27510/08 *Perinçek v. Switzerland*

<sup>41</sup> Case Ap. 53984/00 *Radio France and Others v. France*

<sup>42</sup> Case Ap. 1813/07 *Vejdeland and others v. Sweden*,

prove the likelihood of acceptance of hateful ideas by the audience. However, courts should, at least, examine whether the speech can be reasonably understood as a call for violence or hatred.<sup>43</sup>

This factor does not mean that a lawless act must be committed as a consequence of the speech. Incitement to violence is a criminal offence which does not depend on the actual commission of the incited action. The fact that acts of violence actually occurred can be only considered as an aggravating circumstance when deciding about the appropriate sanction.<sup>44</sup>

Furthermore, the possibility of harm should be imminent. The time that has passed between the speech and the time when the intended acts could take place should not be so long that it makes the speaker's sanctioning for the eventual harm unreasonable (Article 19, 2012: 40). The requirement of imminence can be justified by two reasons. First, abstract advocacy of violence at some unspecific or even indefinite time cannot be regarded as incitement. It is rather a form of archetypical political speech, the preaching of a revolution by Marxists being the best example. Second, such advocacy of violence can be countered in long term by other speech (Barendt, 2009: 457). The latter argument is similar to the concept of "the marketplace of ideas" of the US Supreme Court's famous Justice Holmes. He argued optimistically that the best idea will always be accepted in "the competition of the market".<sup>45</sup>

The requirements of likelihood and imminence are most strictly applied in the US practice. According to the aforementioned Brandenburg test, the government may forbid advocacy of the use of force only if it is directed to inciting imminent lawless action and is likely to incite or produce such action. In *Brandenburg v. Ohio*,<sup>46</sup> the Supreme Court ruled in favour of the appellant, the leader of a Ku Klux Klan group, who was convicted of advocacy of the use of force. During a rally of this group, he threatened that the group will, among other things, "march on the Congress", "bury the niggers" or expel them along with Jews. The Court held that these statements fell under abstract advocacy which could not be sanctioned under the newly formulated test.

The ECtHR, by contrast, does not apply the tests of likelihood and imminence systematically. The *Leroy* case is the best example. The applicant was convicted of glorifying terrorist acts in a satirical drawing. This cannot even be considered as incitement. Yet, it seems that the Court's jurisprudence has slightly changed in the last decade. In *Erbakan v. Turkey*,<sup>47</sup> the Court found that the applicant's freedom of expression had been violated. The applicant was convicted of incitement to religious and ethnic hatred at a public event on account of promoting a vision of a society structured exclusively around religious values. The criminal proceedings were instituted four years after the speech had been given. The Court held that, at that moment, the offensive speech did not cause immediate risk and imminent danger for society. In *Gül and Others v. Turkey*,<sup>48</sup> it ruled that the applicants' statements (such as "Political power grows out of the barrel of the gun") represent well-known, stereotyped leftist slogans even though they were articulated in a violent tone. The Court went on to conclude that they did not advocate violence, nor did they present clear and imminent danger for society. Further, in *Vajnai v. Hungary*,<sup>49</sup> it ruled in favour of the applicant who

---

<sup>43</sup> Case Ap. 27510/08 Perinçek v. Switzerland

<sup>44</sup> See for example: Criminal Code of Serbia (2005), art. 317, para. 3

<sup>45</sup> *Abrams v. United States* 250 US 616, 630 (1919), J. Holmes, dissenting

<sup>46</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447

<sup>47</sup> Case Ap. 59405/00 *Erbakan v. Turkey*

<sup>48</sup> Case Ap. 4870/02 *Gül and Others v. Turkey*

<sup>49</sup> Case Ap. 33629/06 *Vajnai v. Hungary*

was convicted for wearing the communist symbol, the five-pointed red star, at a political demonstration. The ECtHR emphasized that Hungary had been a stable democracy at the time of the demonstration and that there had been no real and present danger that the communist dictatorship would be restored. These cases show that the American jurisprudence may be influencing the ECtHR (Keller, 2011: 275).

## CONCLUSION

As formerly stated, there is a thin line between the legitimate and illegitimate expression. The issue whether such line has been overstepped often depends on the subjective feeling of judges or other persons applying the law. The six factors discussed in this article do not offer principles which can be automatically applied in cases of extreme speech. Courts inevitably have to decide on a case-by-case basis. It can also be concluded that the significance of these factors varies depending on the nature of speech. Moreover, international and national courts and bodies are inconsistent in applying these factors, as well as in assessing their relevance. However, these factors can serve as guiding principles for the courts, especially in cases where there are strong arguments for both the protection and the sanctioning of extreme speech. In all incitement cases, courts must be aware of the fact that they are deciding about a limitation of the fundamental human right to freedom of expression. The inclusion of the discussed factors in the judicial reasoning will prove that courts have properly examined the issues of legitimacy, necessity and proportionality of such limitation.

**Acknowledgements:** *The research is conducted within the projects no. 179046 financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia.*

## REFERENCES

1. Barendt, E. (2009). Incitement to, and glorification of, terrorism; in Hare I and Weinstein J (eds). *Extreme Speech and Democracy* (OUP 2009).
2. Benesh, S. (2011) *Dangerous Speech: A Proposal To Tackle Violence*.
3. Cohen-Almagor R, *Speech Media and Ethics The Limits of Free Expression: Critical Studies on Freedom of Expression: Freedom of the Press and the Public's Right to Know* (Palgrave 2001).
4. Hare, I. (2009) Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine; in Hare I and Weinstein J (eds), *Extreme Speech and Democracy* (OUP 2009).
5. Heyman, S. (2009) Hate Speech, Public Discourse, and the First Amendment; in Hare I and Weinstein J (eds), *Extreme Speech and Democracy* (OUP 2009).
6. Keller P. (2011) *European and International Media Law: Liberal Democracy, Trade and New Media*, OUP.
7. *Prohibiting incitement to discrimination, hostility or violence* (2012).
8. Prunier, G. (1999). *The Rwanda Crisis: History of a Genocide* (2nd ed.). Kampala: Fountain Publishers Limited.
9. UNCERD General Recommendation No 35, *Combating racist hate speech* (2013) CERD/C/GC/35.
10. UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2006) **UN Doc A/61/267**.

### *List of cases*

1. *Abrams v. United States* 250 US 616, 630 (1919)
2. *Brandenberg v. Ohio*, 395 U.S. 444, 447

3. Case Ap. 13470/87 Otto-Preminger-Institut v. Austria
4. Case Ap. 15615/07 Feret v. Belgium
5. Case Ap. 15890/89 Jersild v. Denmark
6. Case Ap. 1813/07 Vejdeland and others v. Sweden
7. Case Ap. 18788/09 Le Pen v. France
8. Case Ap. 18954/91 Zana v. Turkey
9. Case Ap. 23168/94 Karataş v. Turkey
10. Case Ap. 23462/94 Arslan v. Turkey
11. Case Ap. 24662/94 Lehideux and Isorni v. France
12. Case Ap. 24762/94 Surek v. Turkey (No. 4)
13. Case Ap. 27510/08 Perinçek v. Switzerland
14. Case Ap. 29221/95 29225/95 Stankov and the United Macedonian Organisation Ilinden v. Bulgaria
15. Case Ap. 29590/96 Yagmurdereli v. Turkey
16. Case Ap. 33629/06 Vajnai v. Hungary
17. Case Ap. 35071/97 Gunduz v. Turkey
18. Case Ap. 35943/10 Vona v. Hungary
19. Case Ap. 36109/03 Leroy v. France
20. Case Ap. 40287/98 Alınak v. Turkey
21. Case Ap. 4149/04 41029/04 Aksu v. Turkey
22. Case Ap. 42571/98 İ.A. v. Turkey
23. Case Ap. 4870/02 Gül and Others v. Turkey
24. Case Ap. 53984/00 Radio France and Others v. France
25. Case Ap. 59405/00 Erbakan v. Turkey
26. Case Ap. 68354/01 Vereinigung Bildender Künstler v. Austria
27. Case Comm. 34/2004 Mohammed Hassan Gelle v. Denmark (CERD)
28. Case Comm. 550/1993 Robert Faurisson v. France (HRC)
29. Case Comm. 736/1997 Malcolm Ross v. Canada (HRC)
30. ECLI:NL:RBAMS:2011:BQ9001 (The Netherlands)
31. IV KK 406/06 (Poland)
32. National Socialist Party of America et al. v. Village of Skokie (USA)
33. Prosecutor v. Nahimana, Barayagwiza and Ngeze (ICTR)
34. Rankin v. McPherson, 483 U.S. 378, 387

#### *Treaties and legislations*

1. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
2. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965), entered into force 4 January 1969) 660 UNTS 195 (ICERD).
3. European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR).
4. Council of Europe Convention on the Prevention of Terrorism.
5. Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21.
6. UK Terrorism Act (2006).
7. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55.
8. Krivični zakonik Republike Srbije [The Criminal Code of the Republic of Serbia]. *Službeni glasnik RS. [Official Gazette RS]*. No. 85 (2005), 88 (2005 - ispr.), 107 (2005 - ispr.), 72 (2009), 111 (2009), 121 (2012), 104 (2013), 108 (2014).

## **FAKTORI RAZLIKOVANJA IZMEĐU EKSTREMNOG GOVORA I LEGITIMNOG IZRAŽAVANJA U UPOREDNOJ SUDSKOJ PRAKSI**

*Tema članka jesu faktori koje međunarodni i nacionalni sudovi razmatraju prilikom pravljenja razlike između ekstremnog govora i legitimnog izražavanja. Često je teško povući granicu između ova dva. Ne postoje opšta pravila koja bi se automatski mogla primeniti u takvim slučajevima. Međutim, u praksi su se razvili pojedini faktori koji mogu služiti kao rukovodna načela sudovima: kontekst, sadržaj govora, namera govornika, pozicija govornika i publike, domašaj govora, kao i verovatnoća da će govor dovesti do štetnih posledica. Članak istražuje primenu ovih faktora u konkretnim slučajevima, i to uglavnom slučajevima Evropskog suda za ljudska prava, čija je praksa po ovim pitanjima najrazvijenija. Autori daju svoje kritičko mišljenje o pojedinim i odlukama i, konačno, ocenjuju stvarni značaj ovih faktora u praksi.*

**Ključne reči:** *sloboda izražavanja, govor mržnje, podsticanje na nasilje, ECtHR.*