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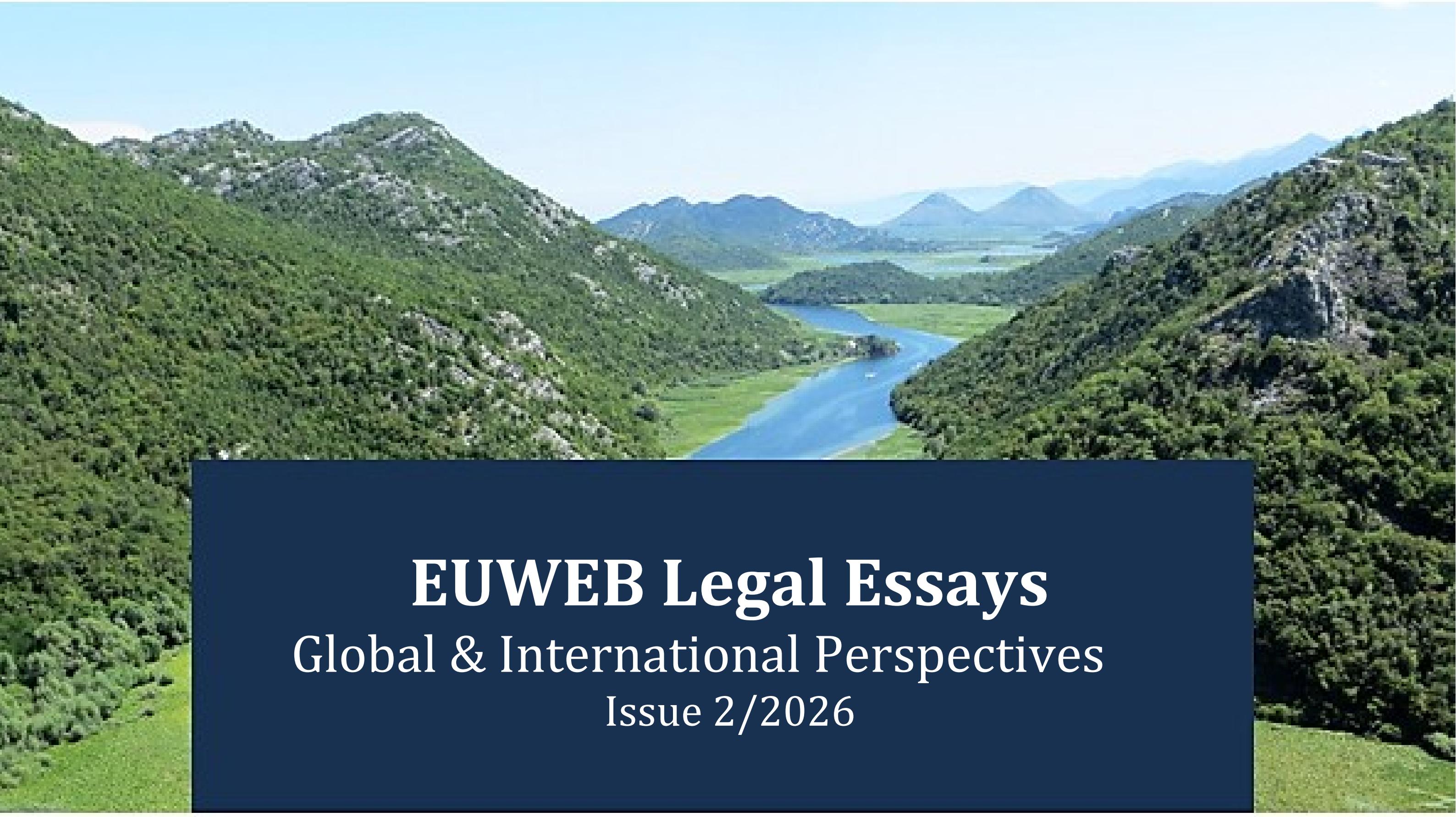

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HATE SPEECH AND DISCRIMINATION
IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

by Jelena Ristić[*]

1. Introduction

Freedom of expression constitutes one of the essential foundations of a democratic society, operating as a primary prerequisite for its progress and for the development of every individual. Under the umbrella of art. 10 of the European Convention on Human Rights (ECHR or the Convention), this right is afforded a remarkably wide scope. As the European Court of Human Rights (ECtHR or the Court) authoritatively pronounced in its landmark judgment *Handyside v. the United Kingdom* (1976), freedom of expression 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 shock, offend or disturb the State or any sector of the population*" as "*such are the demands of that pluralism, tolerance, and broadmindedness without which there is no 'democratic society'*"[1].

However, this wide protection is not boundless. The Convention framework recognizes that the exercise of freedom of expression carries with it duties and responsibilities, meaning that not all forms of expression deserve protection. Individuals and groups propagating hate speech or discriminatory ideologies cannot use the guarantees of art. 10 to undermine the democratic values the Convention was designed to protect. Consequently, Contracting States are legally permitted, and in certain scenarios strictly obligated, to take proportionate measures against expressions that cross the line into intolerance. As the Court's case-law has firmly established, it can be "*necessary in a democratic society to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance*"[2].

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[1] European Court of Human Rights, Judgement of 7 December 1976, Application no. 5493/72, *Handyside v. the United Kingdom*, para. 49.

[2] European Court of Human Rights, Judgement of 6 July 2006, Application no. 47434/99, *Erbakan v. Turkey*, para. 56.

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While the classical legal analysis of hate speech has historically focused on the extent to which a State may legitimately interfere with an individual's right to speak, the contemporary landscape has fundamentally shifted. Namely, hate speech rarely exists in a vacuum. Rather, it frequently includes an explicit or implicit incitement to discrimination against specific marginalised groups or individuals. Recognising this dangerous link, the ECtHR has developed an extensive body of case-law that increasingly views hate speech through an intersectional lens, which recognises how multiple aspects of marginalised identity, such as race, gender, and socio-economic status, interact and compound to produce distinct forms of vulnerability and discrimination. Rather than analysing these cases purely as freedom-of-expression disputes under art. 10, the Court has dynamically expanded the protection of hate speech victims by linking the issue to the prohibition of discrimination under art. 14 of the Convention.

This paper provides a comprehensive review of the ECtHR's approach in cases related to hate speech and discrimination. By employing a qualitative and systematic analysis of the ECtHR's case-law, as well as a comprehensive literature review, this paper analyses the dual perspectives that characterise modern Strasbourg litigation: the "author" of the speech claiming a violation of art. 10, and the "target" of the speech claiming a violation of their rights under art. 8 taken in conjunction with art. 14. Ultimately, this paper assesses the extent of consistency in the Court's approach, arguing that while the Court's case-law for restricting hate speakers under art. 10 seems well-established and predictable, its case-law concerning the State's positive obligations to shield and uphold the rights of the targets of hate speech remains less evident and cohesive when compared to cases that revolve around freedom of expression and have been initiated by alleged hate speakers.

2. Hate Speech: Definition and International Legal Framework

2.1. The Conceptual and Doctrinal Dilemma of Definition under the Convention

A primary systemic challenge in addressing the intersection of hate speech and discrimination within the pan-European human rights architecture is the absence of a universally binding legal definition of "hate speech" within the primary text of the ECHR. The Convention was structurally designed to safeguard democratic processes and individual liberties, placing a high importance on robust public debate under art. 10, which famously protects not only information or ideas that are favourably received, but also those that offend, shock, or disturb[3]. Consequently, the text of the Convention does not explicitly mention "hate speech" as a distinct legal category or automated ground for the restriction of rights.

It seems that this omission is not an accidental legislative oversight, but rather reflects a doctrinal preference for judicial flexibility. By leaving the concept textually undefined, the drafters allowed the ECtHR the interpretive latitude to develop an autonomous, evolutionary concept capable of responding to changing societal norms, technological advancements, and emerging forms of intolerance[4].

In the absence of an explicit textual basis, the normative definitions and substantive boundaries of hate speech have been constructed through a dynamic dialogue between soft-law instruments developed by the political and specialised organs of the Council of Europe and the evolving case-law of the Strasbourg Court itself. This developmental

[3] European Court of Human Rights, *Handyside v. the United Kingdom*, cit., para. 49.
[4] G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, 2007.

process is grounded in the Court's evolutionary approach to treaty interpretation – the well-established principle that the Convention is a "living instrument" to be interpreted in the light of present-day conditions. This symbiotic relationship ensures that while the core values of the Convention remain constant, its protective scope expands to counter modern manifestation patterns of discriminatory expression[5].

2.2. The Council of Europe Regime: From Public Order to the Protection of Intolerance Boundaries

The foundational soft-law text within the European human rights system is Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe, adopted on 30 October 1997. This instrument remains the primary conceptual baseline used by national legislatures and international judges alike to outline the contours of prohibited speech. The Recommendation provides a broad, multi-layered definition, establishing that the term "hate speech" shall be understood as covering "*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*"[6].

A close doctrinal analysis of this definition reveals that from its inception, the European standard has refused to treat hate speech merely as a minor breach against public order or State security. Instead, the framework positions hate speech as a direct assault on human dignity, pluralism, and the structural prohibition of discrimination. By explicitly including the concepts of "promoting" or "justifying" hatred based on "intolerance", Recommendation No. R (97) 20 expanded the regulatory scope beyond direct, imminent incitement to physical violence[7].

It recognised that speech which gradually normalises hostility or marginalises a minority group creates a socially permissible environment for unequal treatment and systematic exclusion. Thus, the Committee of Ministers established a clear legal link, subsequently affirmed by the Strasbourg Court, demonstrating that hate speech is not merely an aggressive exercise of expression, but a functional mechanism of discrimination that erodes the democratic fabric of a pluralistic society[8].

2.3. The ECRI Shift: The Modern Evolution of Protected Grounds and Systemic Discrimination

The aforementioned conceptual link has been systematically deepened and updated by the European Commission against Racism and Intolerance (ECRI), a specialised human rights monitoring body of the Council of Europe. Recognising that the 1997 framework focused heavily on classical models of xenophobia and racial hatred, ECRI intervened to adapt the definition to contemporary realities through its General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015.

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[5] T. MCGONAGLE, *The Council of Europe Against Online Hate Speech: Conundrums and Challenges*, Expert Paper, Doc. No. MCM(2013)005, Belgrade, 2013.
[6] Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe, *on Hate Speech*, of 30 October 1997.
[7] A. BUYSE, *Dangerous Expressions: The ECHR, Violence and Free Speech*, in *The International and Comparative Law Quarterly*, 2014, pp. 491-503.
[8] European Court of Human Rights, Judgement of 6 July 2006, Application no. 47434/99, *Erbakan v. Turkey*, para. 56.

ECRI fundamentally broadened the definition by separating it from purely racial or nationalistic contexts, explicitly recognising that modern hate speech targets a much wider spectrum of human identity. Under Recommendation No. 15, hate speech is defined as the advocacy, promotion, or incitement of denigration, hatred, or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatisation, or threat. Notably, ECRI expanded the protected characteristics to encompass: "*'race', colour, language, religion or belief, nationality or national or ethnic origin, as well as sex, gender, gender identity, sexual orientation, disability or age*"[9].

This expansion marks a major paradigm shift in the international legal framework. By incorporating sex, gender, gender identity, and sexual orientation (SOGI grounds), ECRI formally acknowledged that the structural harms of hate speech, such as marginalisation, vulnerability, and the denial of equal dignity, operate identically whether the target is an ethnic minority or an LGBTQ+ individual[10].

Furthermore, ECRI's definition directly addresses the digital age, recognising that the form and reach of contemporary expression require a more sophisticated understanding of how harassment and negative stereotyping manifest online. Consequently, under this modernised framework, hate speech is treated as a severe, intersectional expression of discrimination that actively impedes the victim's ability to participate equally in public life, thereby triggering positive duties of protection on the part of the State.

2.4. The UN Substantive Paradigm: Harmonising Art. 19 and Art. 20 of the ICCPR

The European framework does not operate in isolation. Namely, it functions as part of a broader international legal order, interacting continuously with United Nations (UN) standards. The global baseline for balancing expression and non-discrimination is found in the International Covenant on Civil and Political Rights (ICCPR) of 1966. The ICCPR addresses this tension through two distinct yet interrelated provisions: art. 19, which guarantees the right to freedom of expression, and art. 20, para. 2, which establishes a strict, mandatory prohibition against certain forms of speech.

Art. 20, para. 2, of the ICCPR explicitly commands that: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*"[11]. In international legal theory, the relationship between art. 19 and art. 20 has been the subject of extensive debate. The UN Human Rights Committee, in its General Comment No. 34, clarified that art. 20 functions as a specific, mandatory limitation that is entirely compatible with, and sub-categorised under, the general restrictions allowed by art. 19, para. 3[12]. For an expression to fall within the mandatory prohibition of art. 20, it must cross the high threshold of "advocacy" and "incitement", meaning there must be a clear intent to promote hatred and a predictable probability that such speech will trigger actual discrimination, hostility, or violence. This is supplemented by art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which goes even further by requiring States to declare

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[9] ECRI General Policy Recommendation No. 15 of the European Commission against Racism and Intolerance, *on Combating Hate Speech*, of 8 December 2015.

[10] Explanatory Memorandum to ECRI General Policy Recommendation No. 15, *on Combating Hate Speech*, Strasbourg, 2015.

[11] International Covenant on Civil and Political Rights of the United Nations General Assembly, of 16 December 1966, in UN Treaty Series, Vol. 999, p. 171, art. 20, para. 2.

[12] M. O'FLAHERTY, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34*, in *Human Rights Law Review*, Oxford, 2012, pp. 627-654.

as an offence punishable by law the dissemination of ideas based on racial superiority or hatred[13].

The ECtHR has systematically relied upon these global UN standards, utilising art. 31, para. 3(c) of the Vienna Convention on the Law of Treaties to interpret the provisions of the ECHR in harmony with other relevant rules of international law[14]. When evaluating whether a State's domestic restriction on an individual's speech was "necessary in a democratic society" under art. 10, para. 2 of the ECHR, the Strasbourg Court frequently references the State's binding obligations under art. 20 of the ICCPR or art. 4 of the ICERD to justify the interference.

Through this convergence of international norms, the Court has established a firm principle: while political, controversial, or highly offensive speech receives protection under the Convention, expressions that cross the threshold into incitement to hatred or systemic discrimination are stripped of protection[15]. The historical expansion of these protected grounds within the international framework, in the sense of moving from traditional racial and religious categories to modern identity markers, reflects a victim-centred approach that shapes the modern litigation paths before the ECtHR.

3. Approach of the European Court of Human Rights in Cases Related to Hate Speech and Discrimination

3.1. The Two Preliminary Procedural Pathways: Exclusion (Art. 17) vs. Restriction (Art. 10, para. 2)

When evaluating expressions involving intolerance, animosity, or incitement to hatred, the European Court of Human Rights does not employ a uniform method. Instead, the systemic architecture of the Convention forces the Court to choose between two divergent procedural pathways at the admissibility stage: the approach of total exclusion under art. 17, and the approach of setting conditional restrictions under art. 10, para. 2[16]. The choice between these two structural mechanisms represents one of the most conceptually contested aspects of the Court's freedom of expression jurisprudence, as it marks the boundary between engaging with problematic speech through balancing tests and its complete removal from the protective scope of the Convention[17].

The first procedural pathway is based on art. 17 of the Convention, which captures the classic democratic defence mechanism known as the "prohibition of abuse of rights". The philosophical foundation of art. 17 stems from the post-World War II imperative to prevent democratic mechanisms from being manipulated to achieve totalitarian ends. It establishes that no provision of the Convention may be interpreted as implying any right

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[13] International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations General Assembly, of 21 December 1965, in UN Treaty Series, Vol. 660, p. 195, art. 4.

[14] European Court of Human Rights, Judgement of 12 November 2008, Application no. 3455/05, *Demir and Baykara v. Turkey*, paras. 65-68.

[15] European Court of Human Rights, Judgement of 9 February 2012, Application no. 1813/07, *Vejdeland and Others v. Sweden*, paras. 54-56.

[16] H. CANNIE, D. VOORHOOF, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*, in *Netherlands Quarterly of Human Rights*, 2011, pp. 54-83.

[17] *Ibidem.*

to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth therein[18].

When the Court deals with speech that is so flagrant, violent, or explicitly destructive that it threatens the core foundations of the ECHR legal order, such as explicit Holocaust denial, aggressive anti-Semitism, justification of totalitarian atrocities, or direct incitement to racial violence, it invokes the "guillotine effect" of art. 17[19]. By applying art. 17, the Court declares the individual's application inadmissible *ratione materiae* at the outset, bypassing any examination on the merits. The speaker is thus denied the protection of art. 10, and the Court refuses to perform a full merits review or examine whether the domestic State's penalty was proportionate[20].

This mechanism serves as a clear limit around the European public space, signalling that certain forms of hateful expression do not merit legal protection. For example, in *Pastörs v. Germany* (2019), where the Court applied art. 17 to an elected politician's statements that qualified the Holocaust as a tool for political extortion, ruling that such statements ran counter to the text and spirit of the Convention[21]. Similarly, in *M'Bala M'Bala v. France* (2015), the Court used art. 17 to exclude an anti-Semitic performance disguised as an artistic production, emphasising that the misuse of artistic expression to promote hate speech cannot enjoy protection under art. 10[22].

The second procedural pathway occurs under art. 10, para. 2, of the Convention. This path is applied to all other cases of hate speech that do not cross the extreme threshold of attempting to destroy the entire Convention legal order. Under this pathway, the Court does not dismiss the case immediately. Instead, it accepts that the State's criminal sanction or civil penalty constitutes an "interference" with the applicant's right to freedom of expression under art. 10, para. 1. It then subjects that interference to the classic three-part test on the merits, evaluating whether the State's measure is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society[23].

To determine whether an interference with hate speech was truly "necessary in a democratic society", the Court relies on a detailed approach to balancing rights. The definitive guidelines for this balancing test were formalised by the Grand Chamber in its landmark judgment *Perinçek v. Switzerland* (2015)[24]. The Court establishes that judges must look beyond the bare text of the statement and evaluate four fundamental balancing factors: the context, the content, the form of the statement, and its capacity to lead to harm[25]. The *Perinçek* framework requires an examination of the specific historical and social realities of the responding State. The Court balances the right to open historical debate against the right of vulnerable communities to be protected from systemic hostility, striking a balance between individual liberty and public safety.

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[18] European Court of Human Rights, *Guide on Article 17 of the Convention – Prohibition of abuse of rights*, Strasbourg, 2026, paras. 5-8.
[19] P. LOBBA, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, in *European Journal of International Law*, 2015, pp. 237-253.
[20] A. BUYSE, *op.cit.*, pp. 491-503.
[21] European Court of Human Rights, Judgement of 3 October 2019, Application no. 21156/18, *Pastörs v. Germany*, paras. 36-48.
[22] European Court of Human Rights, Decision of 20 October 2015, Application no. 25239/13, *M'Bala M'Bala v. France*, paras. 33-42.
[23] European Court of Human Rights, Judgement of 19 May 2026, Application no. 41585/23, *Miladze v. Georgia*, paras. 60-69; European Court of Human Rights, Judgement of 21 October 2025, Application no. 16756/24, *Mortensen v. Denmark*, paras. 28-34; European Court of Human Rights, Grand Chamber, Judgement of 15 October 2015, Application no. 27510/08, *Perinçek v. Switzerland*, paras. 124-280.
[24] European Court of Human Rights, Judgement of 15 October 2015, Application no. 27510/08, *Perinçek v. Switzerland*, paras. 158-280.
[25] European Court of Human Rights, *Perinçek*, cit., paras. 158-280.

3.2. The Dual-Scenario Jurisprudential Model: Authors vs. Targets of Hate Speech

To fully understand how hate speech and discrimination intersect within Strasbourg case-law, the legal analysis must distinguish between two separate litigation scenarios. These scenarios involve entirely different legal provisions, burdens of proof, and systemic focus points.

3.2.1. Scenario 1: Cases Brought by Authors of Hate Speech (The Art. 10 Track)

In this scenario, the applicant before the ECtHR is the author, publisher, or distributor of the hateful expression. The litigation is framed around a negative obligation of the State: the author argues that the domestic authorities violated their fundamental right to free expression by imposing criminal convictions, fines, or professional bans[26]. The Court's analytical focus is centred on whether the State's interference crossed the line into censorship. The jurisprudence demonstrates that when dealing with actual authors of hate speech, the Court consistently supports national authorities, allowing States a wide margin of appreciation to punish or suppress speech that undermines social cohesion.

This strict approach toward authors is evident in recent Grand Chamber and Chamber judgments. In *Atamanchuk v. Russia* (2020), the Court supported the domestic criminal conviction of an applicant who had published text columns inciting intense ethnic animosity against non-Russian populations, affirming that States have a legitimate right to use criminal law to combat xenophobia[27].

This protective stance was reaffirmed by the Grand Chamber in *Sanchez v. France* (2023). In this key ruling, the Court found no violation of art. 10 where a local politician was convicted under domestic law for failing to rapidly delete explicitly Islamophobic and xenophobic comments posted by third-party users on his public Facebook wall[28]. The *Sanchez* judgment shows that the Court looks closely at the form and reach of digital communications. It holds public figures to a high standard of accountability, reinforcing that the failure to police known hate speech on one's platform constitutes a justifiable ground for State interference under art. 10, para. 2.

3.2.2. Scenario 2: Cases Brought by Targets of Hate Speech (The Art. 8 + 14 Track)

The alternative litigation scenario arises when the applicants before the Strasbourg Court are the victims, targets, or affected marginalised groups. In these disputes, the legal

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[26] European Court of Human Rights, Judgement of 16 July 2009, Application no. 15615/07, *Féret v. Belgium* (upholding a domestic sentence of community service and a ten-year ban on parliamentary eligibility following the distribution of xenophobic electoral leaflets); European Court of Human Rights, Judgement of 10 July 2008, Application no. 15948/03, *Soulas and Others v. France* (finding no violation of art. 10 where domestic courts imposed a €7,600 fine on authors and publishers for a book inciting hatred against immigrant populations); European Court of Human Rights, Judgement of 9 July 2013, Application no. 35943/10, *Vona v. Hungary* (upholding the judicial dissolution of an association and organizational ban following anti-Roma paramilitary rallies); and compare with the exceptional threshold in European Court of Human Rights, *Perinçek v. Switzerland*, cit. (finding a violation of art. 10 where a criminal conviction and fine for public genocide denial were deemed disproportionate and unnecessary in a democratic society).

[27] European Court of Human Rights, Judgement of 11 February 2020, Application no. 4493/11, *Atamanchuk v. Russia*, paras. 51-73.

[28] European Court of Human Rights, Judgement of 15 May 2023, Application no. 45581/15, *Sanchez v. France*, paras. 122-210.

framing shifts from a negative restriction on State power to a positive obligation under the Convention[29].

The targets argue that private individuals or media entities subjected them to severe hate speech, and that the domestic State failed to protect them, investigate the incident, or provide an adequate legal remedy. This track brings into play the intersection between art. 8 (the right to respect for private and family life, which includes psychological and physical integrity) and art. 14 (the prohibition of discrimination in the enjoyment of Convention rights). The Court's task here is to determine whether the State failed to protect vulnerable individuals from a hostile, degrading environment that impairs their equal standing in society.

A. The Art. 8 Threshold of Seriousness and Balancing Criteria

When a hate speech victim seeks a remedy under the Convention, the application must first satisfy a key procedural requirement: Art. 8 does not automatically apply to every offensive comment or discriminatory remark. The Court has established that for hate speech to successfully engage the right to private life, the expression must cross a specific threshold of seriousness[30].

As stated in *Kaboğlu and Oran v. Turkey* (2018), an attack on an individual or a group's reputation or identity must attain a certain level of severity and directly prejudice to the personal enjoyment of the right to respect for private life[31]. According to the standards set out in *Beizaras and Levickas v. Lithuania* (2020) and *Association ACCEPT and Others v. Romania* (2021), the Court reviews several specific criteria to decide if this threshold of seriousness has been crossed. These include the characteristics of the group, the precise content of the negative statements, and the form, context, and reach of the expression[32]. The historical vulnerability, marginalisation, or systemic stigmatisation faced by the targeted group heightens the psychological impact of the attack. Furthermore, the public nature of the statement, the size of the audience it reached, and the authority or public status of the author are central to the evaluation[33].

Once the Court determines that the hate speech has crossed this threshold and engaged art. 8, it must strike a fair balance between these competing rights. Because the speech was uttered by a third party who enjoys rights under art. 10, the Court must balance the victim's right to respect for private life against the public interest in protecting freedom of expression. Critically, the Court's doctrinal framework emphasises that no hierarchical relationship exists between art. 8 and art. 10. Both rights are of equal value under the Convention framework. The Court's role is to verify whether the domestic authorities struck a fair balance between these competing rights, keeping in mind that

[29] S. FREDMAN, *Emerging from the Shadows: Substantive Equality and art. 14 of the European Convention on Human Rights*, in *Human Rights Law Review*, Vol. 16, No. 2, 2016, pp. 273-301.
[30] European Court of Human Rights, Judgement of 11 January 2021, Application nos. 12567/13 and 26431/14, *Budinova and Chaprazov v. Bulgaria*, para. 62; European Court of Human Rights, Judgement of 9 April 2009, Application no. 28070/06, *A. v. Norway*, para. 64.
[31] European Court of Human Rights, Judgement of 30 October 2018, Applications nos. 1759/08, 50766/10 and 50782/10, *Kaboğlu and Oran v. Turkey*, para. 65.
[32] European Court of Human Rights, Judgement of 14 January 2020, Application no. 35243/17, *Beizaras and Levickas v. Lithuania*, para. 109; European Court of Human Rights, Judgement of 1 June 2021, Application no. 19237/16, *Association ACCEPT and Others v. Romania*, para. 68.
[33] European Court of Human Rights, *Budinova and Chaprazov v. Bulgaria*, cit. para. 63; European Court of Human Rights, Judgement of 16 February 2021, Application no. 29335/13, *Behar and Gutman v. Bulgaria*, para. 67.

speech targeting core identity markers requires far stronger protection for the victim than speech involving ordinary political debate[34].

B. The Art. 14 Evidentiary Standard and the Procedural Duty to "Unmask Bias"

To establish a violation of the prohibition of discrimination under Art. 14 taken in conjunction with art. 8, target applicants face a specific evidentiary requirement. The Court's established standard dictates that the applicant must produce *prima facie* evidence demonstrating that the impugned statements carried a discriminatory intent or produced a clearly discriminatory effect against them based on their protected characteristics[35].

As highlighted in *Budinova and Chaprazov v. Bulgaria* (2021) and *Behar and Gutman v. Bulgaria* (2021), once the applicant provides this initial proof, showing that widespread public slurs or media campaigns targeted their ethnic or social group, the burden shifts to the State to prove that its authorities took sufficient, non-discriminatory action to address the harm[36]. Furthermore, under the *Beizaras and Levickas* standard, the target can satisfy this evidentiary requirement by demonstrating that their belonging to a particular protected group played a decisive role in the dismissive way they were treated by domestic law enforcement when they attempted to report the harassment[37].

Intersectional protection is significantly strengthened through the creation of a strict procedural duty to unmask bias motives. The Court has ruled that when alleged bias-motivated treatment or severe verbal harassment interferes with an applicant's right to private life, national authorities cannot remain passive[38]. A positive duty arises under the Convention requiring domestic police and prosecutors to take all reasonable, active steps to unmask any underlying bias motive and establish whether hatred or prejudice fuelled the events[39].

This procedural requirement was developed across several judgments, showing a steady expansion of State accountability. For instance, in *R.B. v. Hungary* (2016), the Court established this procedural duty under art. 8 taken alone, finding that authorities failed to properly investigate racist verbal abuse targeting a Roma woman[40]. This standard was extended in *Alković v. Montenegro* (2017) regarding ethnic bias attacks against a family[41]. The doctrine was fully integrated into an intersectional framework in *Association ACCEPT and Others v. Romania* (2021) under art. 8 in conjunction with art, 14. In *Association ACCEPT*, the Court held that when an LGBTQ+ association's public event was disrupted by private individuals shouting homophobic slurs, the State's failure to investigate the anti-LGBTQ+ bias behind those slurs constituted a distinct violation of the Convention[42].

[34] European Court of Human Rights, *Sanchez*, cit., para. 162.
[35] European Court of Human Rights, Grand Chamber, Judgement of 15 March 2012, Application nos. 4149/04 and 41029/04, *Aksu v. Turkey*, para. 45.
[36] European Court of Human Rights, *Budinova and Chaprazov v. Bulgaria*, cit., paras. 91-96; European Court of Human Rights, Judgement of 16 February 2021, Application no. 10255/12, *Behar and Gutman v. Bulgaria*, paras. 102-106.
[37] European Court of Human Rights, *Beizaras and Levickas*, cit., para. 124.
[38] European Court of Human Rights, *Beizaras and Levickas*, cit., paras. 110-115 and 155.
[39] European Court of Human Rights, Judgement of 12 April 2016, Application no. 64602/12, *R.B. v. Hungary*, paras. 83-84.
[40] European Court of Human Rights, *R.B. v. Hungary*, cit., paras. 85-91.
[41] European Court of Human Rights, Judgement of 5 December 2017, Application no. 66256/14, *Alković v. Montenegro*, para. 66.
[42] European Court of Human Rights, *Association ACCEPT and Others*, cit., paras. 123-126.

Where risks of social tensions or prejudice are known, national authorities are under a positive obligation to provide proactive, adequate protection to safeguard an individual's dignity against hatred-motivated verbal attacks by private actors[43]. Law enforcement cannot treat hate speech as a minor, non-actionable offence. Consequently, they must actively investigate the discriminatory intent to ensure the protection of marginalised individuals is real and effective, rather than theoretical and illusory.

3.3. Comparative Analysis of State Discretion and Regional Variances

The application of the above-mentioned standards reveals significant differences regarding the margin of appreciation granted to Member States. When assessing interferences under Art. 10, para. 2, the Court varies the breadth of State discretion based on the nature of the speech in question[44].

In cases concerning political discourse or matters of intense public interest, the domestic margin of appreciation is typically narrow, as robust debate is considered an essential pillar of a pluralistic democracy. However, when expressions border on hate speech, xenophobia, or intolerance, the Court expands the State's margin of appreciation, acknowledging that local authorities are often better positioned to assess the specific social impact and potential volatility of such statements within their respective societies.

This regional variation becomes particularly apparent when comparing cases from different socio-political and historical contexts across Europe. The Court takes into account whether a State has a history of recent conflict, systemic ethnic tensions, or specific historical sensitivities that make certain forms of expression far more volatile than they might be in another member State.

This approach ensures that the Convention remains a living instrument capable of responding to the diverse legal traditions and social realities of its forty-six member States. Yet, this flexibility also creates challenges for legal certainty, as practitioners must look beyond abstract legal definitions and deeply analyse the localised context of every dispute. The Court's task requires balancing competing duties: it gives national authorities the tools to suppress genuine incitement to hatred and protect vulnerable minorities, while simultaneously ensuring that the label of "hate speech" is not misused by States to silence legitimate political opposition, unorthodox opinions, or challenging historical research.

3.4. Emerging Challenges in the Digital Sphere: Platforms, Algorithms and Automation

The migration of public discourse to digital platforms has profoundly altered the context of hate speech litigation before the European Court of Human Rights. While the foundational principles of art. 10 and art. 8 remain constant, their application to online spaces introduces new technical and conceptual complexities that traditional doctrine was not fully equipped to handle. The speed, reach, and permanence of digital communications mean that a derogatory comment or a coordinated harassment campaign

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[43] European Court of Human Rights, *Association ACCEPT and Others*, cit., paras. 105-113.

[44] European Court of Human Rights, *Perinçek v. Switzerland*, cit., paras. 196-198 (clarifying that the scope of the State's margin of appreciation under art. 10, para. 2 is directly contingent upon the nature of the speech in question; while a narrow margin of discretion is permitted where political discourse or matters of intense public interest are at stake, the domestic authorities are afforded a significantly broader margin of appreciation when regulating or penalizing speech that lacks such public value, particularly expressions that morph into personal defamation, xenophobia, or the incitement of intolerance).

can achieve almost instant global dissemination, increasing the psychological harm suffered by the targets and accelerating the potential for physical violence.

A primary area of legal evolution concerns the attribution of liability for online content. Historically, as seen in *Delfi AS v. Estonia* (2015), the Court focused on the responsibilities of large commercial news portals that maintained user comment sections, ruling that such platforms could be held liable for clearly unlawful or hateful comments left by anonymous readers if they failed to implement rapid notice-and-take-down mechanisms[45]. However, the subsequent shift toward massive social media networks has forced the Court to redefine these boundaries. The recent Grand Chamber ruling in *Sanchez v. France* (2023) marks a significant development, effectively extending a form of shared editorial responsibility to individual operators of public social media pages[46]. By holding that a political figure can be held criminally liable for failing to promptly remove xenophobic comments posted by third parties on his public wall, the Court signalled that the digital sphere requires heightened civic diligence[47].

This expanded liability introduces profound, predominantly prospective challenges for algorithmic content moderation and automated governance. As platforms increasingly rely on artificial intelligence and automated filters to comply with stringent domestic laws designed to curb online hate speech, the risk of over-blocking and unintended censorship rises significantly. Automated systems frequently struggle to interpret satire, historical context, or political irony, leading to the erroneous suppression of lawful speech.

Consequently, while the Court has yet to rule directly on the human rights implications of AI-driven moderation, its future jurisprudence will almost certainly be forced to address the procedural fairness of algorithmic moderation. Future cases will likely need to explore whether state-enforced platform automated filtering systems violate the requirement of predictability under art. 10, para. 2, or give rise to systemic due process concerns under art. 6 of the Convention.

3.5. Intersectionality and the Protection of Intersecting Identities

An emerging trend in the evolving jurisprudence of the ECtHR is the gradual recognition of intersecting vulnerabilities within the framework of art. 8 and 14. Historically, the Court approached discrimination claims by looking at individual grounds of discrimination separately, examining whether an applicant was targeted solely on the basis of race, religion, sexual orientation, or gender. However, modern sociological and legal realities demonstrate that individuals frequently experience complex, compounded forms of hostility that arise from the intersection of multiple protected characteristics. A prominent example is the specific abuse directed at Romani women, who may face overlapping racial prejudice and gender-based discrimination[48].

The Court's recent case-law, visible in judgments like *Association ACCEPT and Others v. Romania* (2021) and *Budinova and Chaprazov v. Bulgaria* (2021), reflects an increasing willingness to acknowledge this compounding effect when evaluating whether the threshold of seriousness under art. 8 has been crossed[49].

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[45] European Court of Human Rights, Judgement of 16 June 2015, Application no. 64569/09, *Delfi AS v. Estonia*, paras. 110-131.
[46] European Court of Human Rights, *Sanchez*, cit.
[47] European Court of Human Rights, *Sanchez*, cit., paras. 177-210.
[48] European Court of Human Rights, *Budinova and Chaprazov*, cit.
[49] European Court of Human Rights, *Budinova and Chaprazov*, cit.; European Court of Human Rights, *Association ACCEPT and Others*, cit.

In these rulings, the Court's reasoning aligns closely with the core principles of intersectionality, noting that severe verbal attacks do not merely target an isolated personal characteristic. Rather, they strike at the entire social identity and human dignity of the individual, leaving them uniquely isolated and exposed to systemic harm. This intersectional-oriented perspective potentially places a heavier burden on the procedural obligations of member States. Under the established duty to unmask bias motives, domestic authorities are increasingly expected to look beyond a single aspect of an attack[50]. If a victim is targeted due to a combination of their ethnicity and their sexual orientation, the domestic criminal investigation must actively probe both discriminatory motives.

Failure to do so constitutes a procedural violation of art. 14 taken in conjunction with art. 8, as it leaves an essential element of the discriminatory intent unexamined. This development encourages national legal systems across Europe to modernise their hate crime frameworks.

3.6. Remedial Mechanisms and the Principle of Proportionality in Sanctions

The final component of the Court's analytical model involves evaluating the proportionality of the remedies and sanctions imposed by domestic authorities. Even when a State has successfully demonstrated that an expression constitutes genuine hate speech and that an interference was necessary to fulfil a pressing social need, the choice of sanction remains subject to strict European supervision. The Court has repeatedly emphasised that the nature and severity of the penalties imposed are critical factors to be considered when assessing the proportionality of an interference under art. 10, para. 2[51].

The imposition of criminal sanctions, particularly custodial sentences, is viewed by the Court with strict scrutiny. The Court's settled position dictates that while criminal law may be employed to combat extreme forms of hate speech, such as direct incitement to violence or genocidal acts, the recourse to criminal proceedings must remain an exceptional measure of last resort. For less egregious forms of intolerance or offensive discourse, the Court strongly encourages the utilisation of civil remedies, administrative fines, or professional disciplinary measures, as these are less likely to produce a "chilling effect" on public debate. A disproportionate penalty can transform a legitimate State action into a violation of art. 10 simply because the severity of the punishment outweighs the actual harm caused by the expression[52].

Conversely, under Scenario 2 (claims brought by the targets of hate speech), the proportionality principle requires that the domestic legal remedy be genuinely effective and capable of providing adequate redress. If a State responds to severe, bias-motivated harassment with minor administrative fines that carry no deterrent value, it may fail to satisfy its positive obligations under art. 8[53]. The remedy must be sufficient to restore the human dignity of the victim and signal a clear societal rejection of discriminatory animosity.

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[50] European Union Agency for Fundamental Rights (FRA), *Unmasking Bias Motives in Crimes: Selected Cases of the European Court of Human Rights*, Publications Office of the European Union, Luxembourg, 2018, pp. 2-10; European Court of Human Rights, *Beizaras and Levickas v. Lithuania*, cit., paras. 151-155; see also, for the explicit requirement to account for multi-axis vulnerability during domestic investigations, European Court of Human Rights, Judgement of 24 July 2012, Application no. 47159/08, *B.S. v. Spain*, paras. 62-64.

[51] European Court of Human Rights, *Erbakan*, cit., para. 56.

[52] European Court of Human Rights, *Atamanchuk*, cit., paras. 58-74.

[53] European Court of Human Rights, *Beizaras and Levickas*, cit., paras. 128-130.

4. Conclusion

The jurisprudence of the European Court of Human Rights regarding hate speech and discriminatory expression represents one of the actively debated fields of contemporary European human rights law. As this paper has demonstrated, the systemic architecture of the Convention does not permit a singular approach to these issues. Instead, the Court must balance competing rights, utilising the abuse of rights doctrine under art. 17 alongside the context-dependent balancing test of art. 10, para. 2. This procedural dichotomy underscores the Court's ongoing effort to protect the open, robust debate required by a democratic society while simultaneously preventing the abuse of those very liberties to destroy human dignity and pluralism.

The evolution of Strasbourg case-law highlights a gradual shift from a purely state-centric, negative-liberty paradigm toward an increasingly victim-sensitive approach that reflects intersectional dynamics. When handling cases brought by the authors of controversial expression, the Court continues to afford national authorities a relatively broad margin of appreciation under art. 10, para. 2, particularly when the speech targets vulnerable groups or risks inciting localised public disorder. As confirmed by the Grand Chamber in *Sanchez v. France* (2023), this protective stance toward the public square now extends deep into the digital sphere, creating shared responsibilities for online platform operators and public figures who fail to monitor known xenophobic discourse within their digital domains.

Conversely, the growing body of case-law under art. 8 and 14, initiated by the targets of hate speech, establishes a clear system of positive State obligations. The Court's strict enforcement of a "threshold of seriousness" ensures that while ordinary political offence remains protected under art. 10, expressions that strike at core identity markers, such as race, ethnicity, religion, and sexual orientation, will trigger the protective mechanisms of art 8. Once this threshold is crossed, the State cannot remain a passive observer. The procedural duty to "unmask bias motives", developed through *R.B. v. Hungary* (2016) and further aligned with intersectional considerations in *Association ACCEPT and Others v. Romania* (2021), imposes a binding, procedural obligation on domestic law enforcement and prosecutors to actively investigate the discriminatory intent behind verbal and psychological attacks.

Ultimately, the Court's consolidated approach enforces a two-sided standard of proportionality. On one hand, it restrains punitive overreach by domestic authorities against authors, emphasising that criminal sanctions must remain an exceptional measure of last resort to prevent a chilling effect on legitimate speech. On the other hand, it demands that States deploy sufficiently rigorous, deterrent civil or administrative mechanisms to ensure that the protections promised to marginalised targets are practically effective rather than theoretical and illusory.

As emerging technologies, automated algorithmic content moderation, and compounding socio-political tensions continue to reshape the European communicative space, the doctrinal criteria established by the Court will remain essential tools. They ensure that the European Convention on Human Rights functions as a living instrument, capable of preserving an open society that is robust enough to tolerate dissent, yet protects against the spread of hatred and discrimination.

Finally, it can be concluded that the systemic reality of Strasbourg jurisprudence confirms a clear structural evolution. It seems that in discrimination cases brought by hate speech targets whom their States have failed, the Court's consistency has historically been somewhat less evident when compared to the well-established, predictable frameworks that revolve around freedom of expression and have been initiated by alleged hate speakers. However, after years of emphasis on this first perspective (Scenario 1), a significant development is underway. The ECtHR is now actively working to develop the second perspective (Scenario 2), moving beyond passive boundaries to construct a more victim-centred framework.

By refining the procedural duty to unmask bias motives and embracing an intersectional understanding of identity under art. 8 and 14, the Court is reconciling the application of the two tracks. Ultimately, while traces of doctrinal fragmentation remain as these standards are localised across member States, the current path signals a decisive and positive commitment to ensuring that the European human rights framework protects not only the liberty of the speaker but, with equal force, the dignity and safety of the target.

ABSTRACT

Although freedom of expression enjoys wide protection as a fundamental right under the ECHR, not all forms of expression are protected. Consequently, various limitations may be applied when expression falls into the category of hate speech or includes an incitement to discrimination against particular groups or individuals. This paper reviews the case-law of the ECtHR in cases involving hate speech and discrimination, examining the consistency of the Court's approach. Specifically, it analyses the dual perspective within Strasbourg doctrine: the restrictions imposed on the senders of hate speech under arts. 10 and 17, and the positive state obligations to protect victims under arts. 8 and 14. Ultimately, the paper highlights the structural evolution toward a more comprehensive, victim-centred framework.

KEYWORDS

Discrimination, European Court of Human Rights, Freedom of Expression, Hate Speech, Positive Obligations.

HATE SPEECH E DISCRIMINAZIONE NELLA PRASSI DELLA CORTE EUROPEA DEI DIRITTI DELL'UOMO

ABSTRACT

*Sebbene la libertà di espressione goda di ampia protezione quale diritto fondamentale ai sensi della CEDU, non tutte le forme di espressione risultano protette. Ne consegue che possono essere applicate talune limitazioni laddove l'espressione rientri nella categoria del discorso d'odio o includa un incitamento alla discriminazione contro gruppi o individui particolari. Il presente contributo, dunque, prende in considerazione la giurisprudenza della Corte EDU nei casi che riguardano l'*hate speech e *discriminazione, esaminando la coerenza dell'approccio della Corte. In particolare, analizza la doppia prospettiva all'interno della dottrina di Strasburgo: le restrizioni imposte ai mittenti di discorsi d'odio, ai sensi degli artt. 10 e 17, e gli obblighi positivi dello Stato di proteggere le vittime, ai sensi degli artt. 8 e 14. In definitiva, l'articolo evidenzia l'evoluzione strutturale verso un quadro più completo e centrato sulla vittima.*

KEYWORDS

Corte europea dei diritti dell'uomo, Discriminazione, Hate Speech, Libertà d'espressione, Obbligazioni positive.