



Anti-Roma speech before the European Court of Human Rights

by Luca Victorina

LL.M. LONG THESIS

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PROFESSOR: Peter Molnar Dr. habil.

Central European University

1051 Budapest, Nador utca 9.

Hungary

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Introduction

“... Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance...”¹

The scope of the thesis is to analyze the effectiveness of the rule of law applied in three cases decided by the European Court of Human Rights in regard to racial hate speech: *Jersild v. Denmark*, *Hagan versus Australia* and *Vejdeland versus Sweden* and *Aksu v. Turkey*. These cases have been selected based on the court’s estimation in regards to the offense of Roma sentiment for instance the case *Aksu v Turkey*, second case is related to incitement of racial hatred and third case is based on provoking public reaction. These cases set a standard of what hate speech constitute and weaver it interferes with individual rights.

The main research question of the thesis is how effective the European Court of Human Rights judgments in the cases mentioned above are protecting the applicant’s rights. The main question splits into two major sub questions. First, whether the court has identified what kind of forms of expressions is considered as offensive including racism. Second, how the court is assessing the prohibition of the incitements to racial hatred, versus the interference with freedom of speech.

In order to assess the above mentioned research questions, the analysis and comparison method will be used. Thus each case will be analyzed in the light of European Court of Human Rights Principles. To this extend the comparison between Canada and France hate

¹ CASE OF ERBAKAN V. TURKEY
(Application number 59405/00, Chamber Judgment of 06.07.2006) paragraph 56

speech regulations will allow the reader to evaluate the applicability and practice of such norms at the ground level. The legal framework used in the thesis is the European Court of Human Rights Jurisprudence, Canadian Charter and France Central Administrative Regulations. It will be evaluated the European Court of Human Rights Jurisprudence in regards to the hate speech practices. As well will be analyzed which elements of “hate speech” were taken into consideration by the court when assessing that there was not infringement of rights of freedom of expression, drawing a comparison between the Canadian Charter and France Central Administrative Regulations and Practices of hate speech. This will enable the reader to make a clear distinction between the regulation of hate speech and how it works, how to embrace policies with administrative norms and rules and to what extend the example of the best practices of Canada could be applicable in Europe, mostly in countries where a large number of minorities cohabits.

The Proposals of Implementation of Hate Speech regulations chapter will analyze the existing recommendations of Council of Europe’s Committee’s of Ministers, European Commission against Racism and Intolerance, Committee on the Elimination of Racial Discrimination, General Recommendation XV and Organization for Security and Cooperation in Europe combating hate speech. The existing proposals for combating hate speech will be analyzed in the light of its successful future application by taking the necessary steps of regulating hate speech in Europe Context, specifically targeting minorities for instance the Roma.

Chapter I - Theoretical Foundations

As mentioned in the thesis outline this chapter will analyze the Council of Europe Committees' of Ministers interpretation of hate speech as well in the light of European hate speech case law and contemporary scholars approach. Thus the main goal of the chapter will be based upon the analysis of the most cores of notion and its elements in the light of European Convention on Human Rights and contemporary scholars.

Thus the chapter will analyze the most cores of notion and its elements in the light of European Convention on Human Rights. As well this chapter will emphasize the elements of the expressions that do not constitute hate speech according to the recent judgment of the European Court of Human Rights. This chapter will classify the notion of the hate speech in the light of how it can be easily identified as hate speech and which parameters should be analyzed in order to distinguish different types of expressions, which may be of insulting nature but do not necessary fall within the notion of hate speech. The chapter will analyze the following notions: Council of Europe's Committee of Ministers Recommendation 97(20) on hate speech, European case-law, European Court of Human Rights Jurisprudence, as well will be presented several scholars definitions on hate speech in order to give a clear image of the concept from different perspectives. Further will be discussed which specific criteria falls under the concept of hate speech, weaver the freedom of expression can be considered conflicting right or not.

Before delving into the concept of hate speech is very important to analyze the freedom of expression right which is considering to be one of the most conflicting rights in regards to hate speech. Although the right to expression can be limited by the freedom of conscience or thought, the European Court of Human Rights has numerous times highlighted that is

important to balance the conflicting interest. At stake should be considered the both parties the right to communicate and the right to respect other parties rights.²

The conflict in itself lies between freedom of expression and the interdiction of all forms of discrimination. It is clearly that it is necessary to interdict the freedom of expression when it incites hatred.³ The issue at stake is, how to balance the conflict, what are the boundaries of the freedom of expression.

The Principles of freedom of expression and equality are foundational rights. According to Article XIX, “Pluralism and diversity are hallmarks of freedom of expression. Realization of the right to freedom of expression enables vibrant, multi-faceted public interest debate giving voice to different perspectives and viewpoints. Inequality results in the exclusion of certain voices, undermining this. The right of everyone to be heard, to speak and to participate in political, artistic and social life is, in turn, integral to the attainment and enjoyment of equality. When people are denied public participation and voice, their issues, experiences and concerns are rendered invisible, and they become more vulnerable to bigotry, prejudice and marginalization.”⁴

That is why the conflicting issue is at stake in regards to the equality and freedom of expression Article XIX, it is expressed that:

“Security measures, particularly in the areas of counterterrorism and immigration, have undermined individual rights, resulting in illegitimate restrictions on freedom of expression and the stigmatization of certain ethnic and religious groups. The Principles reject the view

² Aydin Tatlav v. Turkey No. 50692/99, para.26, 2 May 2006 available at: <http://echr.ketse.com/doc/50692.99-en-20060502/> last visited 12.12.2013

³ Manual of Hate speech p. 2

⁴ Article XIX, Global campaign for freedom of expression, London 2009, p. 3

that security requires human rights to be compromised. They assert instead that respect for human rights is central to attaining true security. “⁵

In this regards the Council of Europe’s Committee of Ministers Recommendation number 97(20) defines hate speech from a very clear perspective. It emphasizes the forms of expressions which follow under the concept of hate speech. As well this notion presents a very clear legal approach of the hate speech concept because it covers:” all forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance “⁶

Regarding to intolerance, the Council of Europe Committee of Ministers Recommendation describes the phenomenon of nationalism and ethnocentrism, as being the mere fact of discrimination, hostility against minorities and migrants. This notion reveals the concept of hate speech its content and the groups affected. It emphasizes two main purposes. The first purpose is to prevent, to combat and to stop all ideologies, policies and practices which constitutes an incitement to one of the actions enumerated bellow: racial hatred, violence and discrimination, any action or language which strengthen fear and tension towards an individual or between groups of individuals based on their belonging to ethnic origin or nationality, social backgrounds or religion. The second purpose of this notion is to ensure the democratic security, the cultural cohesion and pluralism. This is needed as the concept of the democracy in our days reveals the ruling of the majority over the minority within the society. This phenomenon is called “populism”⁷, and from the human rights perceptive has its own dangerous towards the minority. Therefore the purpose of the Council of Europe’s

⁵ Article XIX, Global campaign for freedom of expression, London 2009, p. 3

⁶ The Council of Europe’s Committee of Ministers Recommendation number 97(20) available at: [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1997\)020&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1997)020&expmem_EN.asp) last visited 14.01.2013

⁷ See Individual Human Rights, Professor Osyatinski

Committee of Ministers Recommendation is to combat the hate speech and second purpose is to ensure the democratic security.

Further on, is important to make a clear connection between the Council of Europe's Committee of Ministers Recommendation and the European Court of Human Rights Jurisprudence. Both are based upon the same principles. For example the European Court of Human Rights states in *Gündüz v. Turkey*, paragraph 41 that hate speech does not follow under the protection of freedom of expression. In this case the court stated that: "there can be no doubt that concrete expressions constituting "hate speech", which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention." ⁸

This means that the hate speech concept is clearly defined according to the European Court of Human Rights case law, hate speech notion constitutes forms of expressions that "spread, incite, promote or justify hatred based on intolerance (including religious intolerance)." ⁹

Now comes up the question: If the Council of Europe's Committee of Ministers based on the Recommendation number 97(20) and the European Court of Human Rights Jurisprudence based upon the case law decisions come up with the same concept of what hate speech constitutes than based on what kind of criteria do they identify hate speech?

According to, Anne Weiber, Council of Europe and European Court of Human Rights Jurisprudence, identifies hate speech based upon the following criteria:

"- Firstly, incitement of racial hatred or in other words, hatred directed against persons or groups of persons on the grounds of belonging to a race;

⁸ Gündüz v. Turkey case , para. 41

⁹ Gündüz v. Turkey, op. cit, para. 40; Erbakan v. Turkey, op. cit.,para. 56.

- Secondly, incitement to hatred on religious grounds, to which may be equated incitement to hatred on the basis of a distinction between believers and non-believers;
- and lastly, to use the wording of the Recommendation on “hate speech” of the Committee of Ministers of the Council of Europe, incitement to other forms of hatred based on intolerance “expressed by aggressive nationalism and ethnocentrism””.¹⁰

Basically, the concept of hate speech is encroached within the expression of incitement to hatred; it can be incitement to hatred based on religion, incitement to hatred based on intolerance to nationality, ethnicity, anti-Semitism, xenophobia etc.

In order to have a better understanding of what hate speech constitutes further on is important to present several contemporary scholars who define hate speech notion from different perspectives.

According to Michel Rosenfeld hate speech is defined as followed: ”Hate speech- that is designed to promote hatred on the basis of race, religion, ethnicity, or national origin...”¹¹

In this notion the word “incitement” is replaced by the word “promote hatred”. Doctor Ralph Pettman considers that incitement to hatred include: “ written and printed propaganda, spoken words used in public meetings and other public places (which raises the question of defining what "public" means), radio and T.V. broadcasts (or bits thereof), filmed or staged material, gestures (such as forms of salute), pre-recorded telephone messages, the wearing or display of special clothing, signs (such as graffiti), flags, emblems, insignia, and any other such representations (and, where appropriate, the distribution or dissemination or same)', random violence up to and including riots, and membership of, or

¹⁰ Anne Weber, Manual on Hate Speech, Council of Europe, French Edition, 2009, this will help to reveal the European Convention of human rights vast scope of freedom of expression page 4

¹¹ Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence, A comparative Analysis, in the book of Michael Herz and Peter Molnar, the Content and Context of Hate Speech, Rethinking Regulation and Responses, Cambridge Univeristy Press, 2012, page 242

the provision of assistance to, racist organizations in particular and racist activities in general.”¹²

Seems that the difference between promote and incite is based upon the active or passive action to be taken place. As well the difference is based upon the time duration. Promotion of hate speech takes longer time, unlike incitement, which seems to be immediate or with the short term purpose of taking action as soon as possible.

Another criterion I would add it is that seems to be easier to promote than to incite. In order to incite the individuals has to be equipped with strong convictions and arguments, unlike promotion of stereotypes which are based upon generality of ideas. If I would have to balance them, in order to analyze the immediate harm that can produce, I would equalize them. I consider that the danger caused by the hatred, no matter the means, is it incitement to hatred or provocation to hatred, the cause has the same effect. The only difference is the time. The incitement to hatred usually has an immediate response or an immediate action, unlike the promotion which is based upon the long run time. By the immediate action I do mean the effect of the hate speech upon the individual, which can take the form of the offence, ridicule, slander and so on. Hate Speech is a very dangerous tool , it can reinforce stereotypes, or disseminate ideas of racial superiority.

Another scholar Bhikhu Pareh defines hate speech as the following: “Hate speech expresses, encourages, stirs up, or incites hatred against a group of individuals distinguished

¹² Ralph Pettman, Incitement to racial hatred: Issues and Analysis available at: http://www.multiculturalaustralia.edu.au/doc/pettman_1.pdf last visited 23.02.2013

by a particular feature or set of features such as race, ethnicity, gender, religion, nationality and sexual orientation. “¹³

This notion is extremely important to be considered because it encroaches the main essence of the hate speech conception. It is one of the clearer notions which combines not only the actions like expressing, encouraging, stirring up, or inciting, which are to be taken for the hate speech to take place, but as well the features of the victims of hate speech. He describes those features based upon identifiable criteria such as gender, sexual orientation, ethnicity, nationality. These features may characterize a person or a group of individuals.

Unlike this notion Kenan Malik, in his interview with Peter Molnar describes the definition of hate speech as being unclear of what really constitutes hate speech. He presents different approaches of hate speech. Kenan Malik claims that around the world in different countries hate speech is banned from a different perspective, for example he states that:” Britain bans abusive, insulting and threatening speech. Denmark and Canada ban speech that is insulting and degrading. India and Israel ban speech that hurts religious feelings and incites racial and religious hatred. In Holland it is a criminal offence deliberately to insult a particular group. Australia prohibits speech that offends insults, humiliates, or intimidates individuals or groups. Germany bans speech that violates the dignity of, or maliciously degrades or defames, a group.”¹⁴

Above are presented several notions that open a clear image of what hate speech constitutes. By analyzing them, the common verbs which characterize hate speech in all the countries mentioned above are the following: to insult, to hate, to harm, to offend, and to degrade.

¹³ Bhikhu Parekh, Is there a case for Banning Hate speech ? in the book of Michael Herz and Peter Molnar, the Content and Context of Hate Speech, Rethinking Regulation and Responses, Cambridge University Press, 2012, page 40

¹⁴ Interview with Kenan Malik by Peter Molnar in the book of Michael Herz and Peter Molnar, the Content and Context of Hate Speech, Rethinking Regulation and Responses, Cambridge University Press, 2012, page 81

Hate speech is mostly defined by harm. Peter Molnar makes a very clear statement related to the harm: “ The harm that expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized in pamphlets, billboards, talk, radio and block. “¹⁵

Therefore the notion of hate speech can be easily defined as the main core of its concept encompasses: hatred. In my opinion hate speech concept lies within not only all forms of expressions but within all forms of actions, which are able to harm, to put an individual in a danger situation, to make the individual feel inferior, ridicule, offended or disturbed by somebody’s actions or expressions towards him/her or a particular group of individuals. I do agree that States should adopt legislation which prohibits racial or religion hatred. In order to understand what hatred or incitement means, it is important to concrete define the notion of these terms. Hatred means intense feelings of enmity towards an individual or a group of individuals. Incitement refers to statements which create an imminent risk, hostility or violence against an individual or a group of individuals.¹⁶

There are two kinds of tests applicable, the three part test and the six-part threshold test. The European Court of Human Rights usually use the three part test which is the legality, proportionality and necessity.¹⁷ For the application of article 20 of International Covenant on Civil and Political Rights in order to assess the severity of the hatred there is a six-part threshold test. The six-part threshold test was proposed for considering the criminal

¹⁵ Peter Molnar , Responding to Hate Speech with Art, Education, and the Imminent Danger Test, in the Michael Herz and Peter Molnar, the Content and Context of Hate Speech, Rethinking Regulation and Responses, Cambridge University Press, 2012, page 185

¹⁶ Article XIX, Global campaign for freedom of expression, London 2009, p. 10 available at: <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> last visited on 12.12.2013

¹⁷ Rabat Action Plan p. 5 available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf last visited on 12.12.2013

offences. This test includes the: context, the speaker, the intent, the content and form, the extent of the speech act, likelihood, including imminence.¹⁸

Further on I would like to analyze the six-part test. The context is the evaluation of the statements whether it incites discrimination, hostility or violence whether it has a direct intent or causation. In regards to the **context** is very important the speech act and the time when was disseminated. The status of **the speaker** in the society its position in the context to whom the speech is directed. **The intent** according to the article 20 International Covenant on Civil and Political rights, there are two types of the intent, negligence or recklessness. It is important to be considered for the incitement or advocacy not for the mere distribution of materials.

The content and the form: The content of the speech includes the degree to which the speech was direct or provocative. It also includes the form or the style or the nature of the arguments.

The extent of the speech act: Extent includes: speech act, public nature, magnitude and size of its audience, weather the speech is public what means of dissemination are used.

Likelihood, including imminence: Incitement means being as an inchoate crime. In this context the incitement speech should not necessary be committed. In order for the speech to be considered, it has to be determined whether there is a reasonable probability that the speech would incite the actual action.¹⁹

¹⁸ Rabat Action p.6 available at:

http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf last visited on 12.12.2013

¹⁹ Rabat Action Plan p.6 available at:

http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf last visited on 12.12.2013

Next chapter analyzing the practice of the hate speech cases will be evaluated some of the criteria set out in the six part test.

Chapter II Practice of Hate Speech cases

This chapter will be based on the analyses of the European Court of Human Rights Jurisprudence. This includes the analysis of three cases of the European Court of Human Rights based on six part test parameters. These cases are: *Jersild v. Denmark*, *Aksu v. Turkey*, *Hagan versus Australia* and *Vejdeland versus Sweden*.

Aksu v. Turkey is one of the recent judgments held on 15th of March 2012, which reflects the offense sentiment. The court held that the publication which included remarks of Roma were not offensive to Roma. By assessing this case, the analysis will be based upon the assessment of the court. This analysis will reflect what constitutes offensive remarks and why the court refused to consider the publication remarks as offensive.

2.1. Jersild v. Denmark

The applicant was a journalist. He conducted a radio interview with a group of young people, called the Greenjackets. During the interview the applicant asked about their views of racism, which the interviewees made many derogatory statements about black people. Following broadcast the applicant was charged and convicted of offence of aiding and abetting the dissemination of racist statements.²⁰

²⁰ Jersild versus Denmark , 23.09. 1994 ECtHR available at:
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57891#{\"itemid\":\[\"001-57891\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57891#{\) last visited 27.10.2013

This case is an example of how journalists do have the responsibility and obligation to deny the dissemination of racist remarks. They are the once who should be in control of the information they spread. Further on the court considered the following:

2.1.2. The Elements the Court considered

Jersild v. Denmark is the case where the court drew a clear distinction between “Greenjackets” who openly made racist remarks and the applicant who had the intension to expose and analyze the remarks. The court draws attention at the status of the applicant and its role in society. Especially the court makes a distinction between the “Greenjackets” and the journalist’s comments. The Court held in *Jersild v Denmark* that: “a significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news program.” [Paragraph 31]

As to consider the 'duties and responsibilities' of a journalist and the “potential impact of the medium” concerned was an important factor; at the same time, it is not for the Court nor for national courts to substitute their own views for those of the press as to what techniques of reporting should be adopted by journalists [Paragraph 31]

The remarks made by the court in this case falls under the racial category being considered offensive and disturbing to public. The Applicant himself had taken the initiative of preparing the impugned feature and knew in advance that racist statements were likely to be made during interviews. More than that, the applicant had encouraged such remarks to be made. He had edited the item in such a way as to include the offensive assertions. Therefore without his involvement the racist remarks would not have been disseminated or even punished. [Paragraph 32]

On the other hand at the TV presenter's introduction were invited viewer to see the programme in context of Danish debate on racism. Here was indicating that it was intended to address aspects of problem by identifying individuals, their background and mentality; it sought to "expose, analyse and explain" this group (paragraph 33). As well the item broadcast was serious Danish news programme and intended for well-informed audience. In this way the extremist views were counterbalanced. But the fact that the film "surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets" [Paragraph 35].

The court evaluated the case taking into consideration that the statements for which Greenjackets were convicted were more than insulting and not protected by Article 10. Even though the applicant encouraged statements, feature could not justify his conviction.[paragraph 35] One of the most important things the court considered was that the violation, conviction was disproportionate to protect rights of others [paragraph 37]. I do completely agree with this judgment in my view, the news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role as public watchdog. The punishment of the hate speech, this is going slow and has a lot of debates. Michel Rosenfeld illustrates that hate speech is designed to promote hatred on different basis; it can be race, religion, ethnicity or national origin.²¹ Therefore the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would prevent and minimize the spread of racist remarks, and it would contribute to the interest of the society, thus minimizing the stereotyping phenomenon. To have a more clear view of the importance of the prohibition of hate speech, Hagan versus Australia case is further on evaluated. This is one of the cases in

²¹ Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A comparative analysis,

which the prohibition of hate speech is clear expressed. Hagan versus Australia, case in particular illustrates the positive sides of prohibition of hate speech. In this case the word “nigger” was recognized as being offensive as stated that: “term can at the present time be considered offensive and insulting”.²² Professor William A. Schabas has argued that hate speech has its big impact over the promotion of genocide.²³ That is why after the Second World War the international community has started to take measures of combating the hate speech. In this regards the nations became parties to the International Convention on the Elimination of All Forms of Racial Discrimination.²⁴

Further on to analyze the Vejdeland versus Sweden.

2.1.3. Vejdeland versus Sweden

The applicants were convicted for distributing in an upper secondary school approximately 100 leaflets considered by the courts to be offensive to homosexuals. The leaflets were distributed by an organization called National Youth, by leaving them in or on the pupils’ lockers. The statements in the leaflets were, in particular, allegations that homosexuality was a “deviant sexual proclivity”, had “a morally destructive effect on the substance of society”²⁵ and was responsible for the development of HIV and AIDS. Applicants claimed that they had not intended to express contempt for homosexuals as a group and stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education in Swedish schools. [54 paragraph]

2.1.4. The Elements the Court Considered

²² Hagan versus Australia available at: <http://www1.umn.edu/humanrts/country/decisions/26-2002.html> paragraph 7.3 last visited 23.10.2013

²³ William A. Schabas, Hate Speech in Rwanda: The Road to Genocide, 46 McGill L.J. 141, 144 (200)

²⁴ Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, available at: www.ohchr.org/english/countries/ratification/2.htm last visited 23.10.2013

²⁵ Vejdeland and others versus Sweden paragraph 54, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046#{"itemid":\["001-109046"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046#{) last visited 09.01.2014

The Court considered that the statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful acts. The Court stressed that discrimination based on sexual orientation was as serious as discrimination based on “race, origin or color”. [Paragraph 55] Very important remark is that the court recognized that hatred does not necessary call for violence, For instance, the court states that: “ inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favor combating racist speech in the face of freedom of expression exercised in an irresponsible manner ...” [Paragraph 55]²⁶

The Court concluded that there had been no violation of Article 10, as the interference with the applicants’ exercise of their right to freedom of expression “had reasonably been regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others”. [Paragraph 59]

The Court stated that the statements in the leaflets amounted to “serious and prejudicial allegations”, even though they did not directly recommend individuals to commit hateful acts: “inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favor combating racist speech in the face of freedom of expression exercised in an irresponsible manner...In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or color” [paragraph 55]

²⁶ Vejdeland and others versus Sweden 9th February 2012 available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046#{\"itemid\":\[\"001-109046\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046#{\) last visited 7th January 2014

This case is very important as to the understanding of manifestation of hate speech. Hate speech is not only an act which causes imminent danger for a group but has the effects of slandering or ridicule a person or a group of people. This is a landmark case in regards to establishing the European Court of Human Rights Jurisprudence on manifestation of hate speech. In contrast to this case is the case of Aksu versus Turkey. Here the court did not recognize the claim of the applicant since it did not induce the prima facie evidence.

2.1.5. Aksu versus Turkey

As mentioned in the introduction of the chapter, the following case reflects Court's view on publications which according to the Court assessment were not recognized as raising anti-Roma sentiment nor was regarded as offensive to Roma. Mr. Aksu being of Turkish national and belonging to Roma ethnicity, complained regarding two publications in which Roma were characterized living as: ““thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers” and were polygamist and aggressive”

²⁷ Based on his Roma identity Mr. Aksu found offensive the content of the three government funded publications. In this regard Mr. Aksu invoked article 14, the anti-discrimination provision in conjunction with article 8, the right to private life.

The Grand Chamber did not examine the case under article 14 based on the following considerations: “ the case does not consider difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing prima facie evidence that

²⁷ Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 14, last visited on 28.03.2013

they impugned publications had a discriminatory intent or effect. The case is therefore not comparable to other applications previously lodged by members of the Roma community”²⁸

The Court induced the *prima facie* evidence concluding that the applicant was not subject to different treatment as it is ought to be in case of discrimination matter. In relation to the *prima facie* evidence, Alexandra Timmer states the following: “...in my view, the applicant *did* adduce *prima facie* evidence that these publications had the effect of harming his Roma’s ethnic identity and reputation.”²⁹

I totally agree with Alexandra Timmer, the matter of dignity was involved not only for the applicant but for each Roma individual. The Court simply failed to take into consideration the offence that was produces. Each Roma individual hearing about this publication and the metaphorical ways of expression harms his or her dignity, rising up backwards hatred towards non-Roma. In this way it is affecting his/her self- worth, self-confidence, and in general his or her private life.

In regarding to article 8, the right to private life the Grand Chamber stated the following: “any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group”³⁰

²⁸ Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 45, last visited on 28.03.2013

²⁹ Alexandra Timmer, ECtHR Observer, available at: <http://strasbourgobservers.com/2012/03/20/stereotypes-of-roma-aksu-v-turkey-in-the-grand-chamber/> last visited 28.03.2013

³⁰ Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 58, last visited on 28.03.2013

In regards to this ruling to what extend can be evaluated to which level can stereotyping get to? As the Grand chamber stated that negative stereotype, when reaches a certain level³¹ must be considered that the sense of self identity was affected. In this context might it be considered that the publication did not harm Roma identity? It is wrong and very wrong. Even if the author did intent to just describe the historic views of the Roma image, than historically talking there is no history that can expose offense against a group of minority.

2.1.6. The Elements the Court considered

Regarding the insulting effect of the publications towards Roma, the Grand chambers stated that: “it would have been preferable to label such expressions as “pejorative” or “insulting”, rather than merely stating that they were metaphorical. Such a precaution would also be in line with ECRI’s General Policy Recommendation No. 10, which stipulates that States should promote critical thinking among pupils and equip them with the necessary skills to become aware of and react to stereotypes or intolerant elements contained in the material they use”³²

Related to the judgment of the case, the grand chamber for the first time explicitly stated the obligation of the state to protect the individual against the negative stereotyping. The Court emphasized in paragraph 58 that: ““an individual’s ethnic identity must be regarded as another such element of a person’s physical and social identity that is embraced by the notion of ‘private life’” and that “any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen

³¹ Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 58, last visited on 28.03.2013

³² Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 85, last visited on 25.10.2013

as affecting the private life of members of the group.””³³

However the court concluded that the book in itself is based upon history and socio-economic studies with the purpose to conduct a comparison for the academic study.³⁴ As well as the author of the book reiterated what was written in the history without expressing negative remarks or his own comments about Roma more than that the comments being considered of metaphorical nature.³⁵

In this regards professor Dirk Voorhoof in his article stated that: “...the Court was not persuaded that the author of the book had insulted the applicant's integrity or that the domestic authorities had failed to protect the applicant's rights.”³⁶

Alexandra’s Timmer overall impression about the case is that:” ... the judges pre-agreed on the outcome – no violation of the Convention – and then tried to find the easiest way of reaching that outcome. Regrettably, the result is that the Court declines to make a proper discrimination-analysis and opts to cast the case as one concerning positive obligations. Still, this Grand Chamber judgment accomplishes something of crucial importance: it recognizes negative stereotyping as a human rights issue.”³⁷

The main issues in this case were that the court did not recognize that the applicant’s dignity and integrity was harmed. In my opinion the Court had failed to protect the applicant’s dignity. The history arguments are based on the past. The past created this hostile present

³³ Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 58,59, see also: <http://echrblog.blogspot.hu/2012/03/aksu-grand-chamber-judgment-short-guest.html> last visited on 25.11.2013

³⁴ Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 69, last visited on 25.10.2013

³⁵ Aksu versus Turkey , available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577> paragraph 70, last visited on 25.10.2013

³⁶ Dirk Voorhoof, professor at Ghent Belgium University and Copenhagen University in Denmark, Iris Database on legal information available at: <http://merlin.obs.coe.int/iris/2010/10/article1.en.html> last visited 28.10.2013

³⁷ Alexandra Timmer, ECtHR Observer, available at: <http://strasbourgobservers.com/2012/03/20/stereotypes-of-roma-aksu-v-turkey-in-the-grand-chamber/> last visited 28.03.2013

environment full of hostile attitudes and stereotypes for Roma people. It is wrong that the Court failed to recognize that the metaphorical words in this case incite and promote hate towards Roma. By accepting the history, the court simply enforces the metaphorical ways of stigmatization for Roma. I consider that this type of publications contribute to increase the discriminatory and stereotyping attitudes towards Roma people. Further on will analyze whether an existing enforcement mechanism which regulates successfully racial hatred and hate speech should be in place or not.

2.1.7. Banning Hate Speech or Not

Article 4 of the ICERD, ICCPR, and International Customary Law prohibits all forms of the hate speech propaganda. More than that clearly is prohibited the hate speech on bases of race or ethnic origin, as well the disseminating ideas of hate speech. More than that ICCPR requires the state parties to criminalize the hate speech. In this context the Hagan versus Australia, is the best example of prohibition of the hate speech. The Committee in Hagan held that due to the contemporary circumstances of the society hate speech is prohibited.³⁸

In this context ICCPR makes a difference between the hate speech that does incite and the one which does not. If looking further on the UN failed to give a clear definition of incitement that is why is difficult to distinguish between the types of the hate speech the severity. On the other hand there is no hate speech without incitement may it be direct or indirect. In certain instances because of the controversial utterances is difficult to prove the hate speech intent. For instance based on the ICCPR article 19(3) states that:” The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and

³⁸ Hagan versus Australia available at: <http://www1.umn.edu/humanrts/country/decisions/26-2002.html> paragraph 7.3 last visited 23.10.2013

responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.”³⁹

This article does not necessary require the criminal prohibition, the State is left with the decision of which type of sanctions to enforce. This cannot be said for the CERD. CERD is the only one using strong wording in requiring the criminal prohibition of hate speech.

Article 4 (a) of CERD states that: “Shall declare an offence punishable by law 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 color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;”⁴⁰

This is not said for the European Convention of Human Rights since the prohibition of the hate speech is not explicitly expressed. Despite this European Court of Human Rights in its judgments makes clear that hate speech is not compatible with fundamental rights and freedoms. Despite this there is a wide margin of appreciation and in certain circumstances almost is impossible to prove that there is a hate speech crime or offence, what to do in regards of these types of cases. The European Court of Human Rights article 10 is (2) is stating that:” The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national

³⁹ International Convention on Civil and Political Rights Art. 19 available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> last visited 12.12.2013

⁴⁰ CERD article 4 available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> last visited on 12.12.2013.

security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”⁴¹.

This paragraph states multiple reasons for which the right to freedom of speech should be prohibited or should contain punitive measures prescribed by law. The European Convention of Human Rights clearly expresses in article 17 that: “ Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”⁴² This means that that the right to freedom of speech comes with responsibilities and duties. If the speech is harming other individuals, than article 17 is expressing the prohibition of the abuse of other rights.

⁴¹European Convention article 10(2) available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf last visited 12.12.2013

⁴² European Convention article 17 available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf last visited 12.12.2013

Chapter III of the Thesis

Practice of regulations of hate speech

The third chapter, *Practice of regulations of hate speech*, analysis the essential elements which Court takes into consideration in order to tackle the hate speech issue. As well this chapter will analyze which elements of “hate speech” were taken into consideration by the court when assessing that there was not infringement of rights of freedom of expression. This chapter will bring Canada as an example of the best practice of regulations of hate speech. The comparisons will be done based on analysis of regulations between Canada regulations versus France regulations. Canada is regarded as the best example that protects and prevents minorities from being subject to the direct harm of hate speech, by criminalizing hate speech. In the same manner but from another perspective France bans hate speech through administrative regulations completed by penal legislation. In France hate speech falls within several penal categories such as: “provocation or incitement to commit certain crimes or offenses, provocation of hatred, violence, discrimination, ethnic groups, abuse directed towards a person on the basis of ethnic group, defamation of person or group on the basis of adherence to a certain ethnic group”⁴³ this chapter will analyze those categories which emphasize the direct provocation to hatred towards ethnic groups as well will emphasize the approach of danger test, applicable in Hungary described by Peter Molnar.

⁴³ Pascal Mbongo, Hate Speech, Extreme Speech and Collective Defamation in French Law, in *Extreme Speech and Democracy*, May 2009

Further on I would like to present the comparison between Canada and France regulations on hate speech, to analyze and evaluate the criteria of defining hate speech and its enforcement mechanism from the legislative approach of the two different countries. I would like to state a motto made by Will Smith: “Throughout life people will make you mad, disrespect you and treat you bad. Let God deal with the things they do, because hate in your heart will consume you too.”⁴⁴ Will Smith

People are inclined to hate and disrespect. Still, the question remains, ‘what could be the cause of this line of action? Some people find comfort and satisfaction in believing that they are superior. They feel convinced to harm, disrespect and hate without any scope of reasoning. In spite of nationality, ethnicity, gender, belief, or opinion, the human mind operates on the basis of choice. It is necessary to establish an enforced mechanism that attempts to control or suppress, put a limit to the harm the individuals might cause and sanction those who directly or indirectly, intentionally or unintentionally spread hatred towards others.

3.1. Application of Hate speech regulations, comparison of Canada regulations versus France

Further I will analyze the existing enforcement mechanism which regulates successfully racial hatred and hate speech. Canada and France regulations are one of the best examples which ban hate speech.

The application of the different means of regulations of hate speech draws a comparison of tests applied in these two countries. Canada is one of the best examples that protects and

⁴⁴Famous quotes available at: <http://www.brainyquote.com/quotes/keywords/hate.html> last visited 24.12.2012

prevents minorities from being subject to the direct harm of hate speech, by criminalizing hate speech. In the same manner but from another perspective France bans hate speech through administrative regulations completed by penal legislation. The aim of the analysis is to evaluate which system of banning hate speech would be more effective in a democratic society. That is why further will analyze Canada and France hate speech regulation mechanism. This chapter will describe, will analyze and finally will evaluate the hate ban speech enforcement mechanism of these two countries.

First, describing Canada's legislation it can be simply seen that according to section one of Canadian Charter is clearly expressed that: "... the rights and freedoms set out in it [are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁴⁵ In this context the Canadian jurisprudence, example the case *R v. Oakes*, the Court set up two types of tests, regarding the limitation of rights; first one is concerning the ends and the second, the means. Due to these tests the rights and freedoms stipulated in the Canadian Charter may be subject to reasonable limits. The Court set out the several criteria by which the tests are applicable. The first criteria is based upon the legislative objective, this explains that in order to justify any limitation of rights first there is the need of the legislation to be pressing and substantial. Secondly the proportionality is applicable only if the legislation is proportionate to the purpose or objective achieved, which includes the rational connection. The Court explains that here comes the reasonable ground between the legislation and its objectives. Here follows the minimal impairment, which sets boundaries to the legislation. The court clearly holds that these boundaries cannot limit the right more than necessary for achieving its objective and

⁴⁵ Canada Constitution Act 1982 available at: <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> [are] added last visited 24.12.2012

proportional effects. The court balances between the costs of the limitation versus the benefits of the achieving purpose.⁴⁶ About balancing, Summer L.W. in connection to the proportionality test, he analyzes it from the perspective of balancing hate speech benefits towards the expected costs, for example he states that:” It must be shown that criminalizing hate speech will succeed in reducing its circulation, with corresponding gains in self-esteem and other important social goods for the members of target minorities.”⁴⁷ The balancing approach of the Canadian Courts estimate the benefits of the target group, here the test applied in the Oakes is so much supported by John Stuart, who highlights the harm based approach test.

John Stuart introduces the harm test, whose burden of proof is upon the state that has to demonstrate that hate speech threatens to impose harm. The harm threatened has to be serious, as the author states that: “it must by no means be supposed, because [of] probability of damage to the interests of others, can alone justify the interference of society...”⁴⁸ that is why L.W.Summer and J.S.Mill, and the Canadian Supreme Court agree that the legislation must pass the cost-benefit balance test. According to the Court Jurisprudence and the above mentioned authors the cost-benefit test is applicable based on three criteria: the first one is regarding the expectations of the restriction, the circumvented power of the restriction by internet or other means may weaken its effectiveness. Second criteria taken into consideration are based upon the effectiveness of preventing the social harm, for example the censorship abridges personal liberty. In this context, the balance should be the last resort

⁴⁶ Oakes Case available at: <http://www.canlii.org/en/ca/scc/doc/1986/1986canlii46/1986canlii46.pdf> page 105, 106

⁴⁷ L.W.Summer, Incitement and the Regulation of Hate Speech in Canada: A Philosophical Analysis in Ivan Hare, James Weinstein, Extreme Hate Speech and Democracy, Oxford 2009, Chapter 11, page, 206

⁴⁸ J.S.Mill, Essays on Politics and Society Ed. J.M. Robson (Toronto: University of Toronto Press, 1977, page 292

of the state to prevent harm. A third criterion is based upon the estimation of restriction benefits versus the costs, for example the censorship might compromise the public debate or by being administered by the officials it can lead to social harm⁴⁹. There is clear that the Canadian system is based upon the Court's regulations and tests which are applicable. These tests are based upon criteria which balance the social harm versus individual liberty. In fact any case brought to the Court will be interpreted in the light of the above mention criteria's. Unlike the Canadian approach which is based upon Court Jurisdiction and Regulations, the French regulations of hate speech are based upon the administrative regulation, which is implemented through the penal jurisdiction. In France the racial hate speech or hate speech is regulated upon the explicit norms set out in the Law. For example the Law on the Freedom of Press of 29th July 1881, Article 29 states that:

” Any allegation or imputation of a fact that undermines the honor or reputation of the person or body to which the fact is imputed is a libel. Publication directly or through reproduction of this allegation or imputation is punishable, even if it is done as doubtful or if it is a person or body not specifically named, but whose identification is made possible by the terms speeches, shouting, threats, written or printed placards or posters. Any offensive expression, term of contempt or invective which does not contain an allegation of fact is an insult.”⁵⁰

France prohibits hate speech through its penal code and through the press laws public and private communications which provoke to commit or incite crimes, provoke to hate, provoke

⁴⁹ Ivan Hare, James Weinstein, *Extreme Hate Speech and Democracy*, Oxford 2009, Chapter 11 by L.W. Summer, *Incitement and the Regulation of Hate Speech in Canada: A Philosophical Analysis*, page, 207

⁵⁰ Law on the Freedom of Press of 29th July 1881, Article 29 available at:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=vig> translated

version from French to English last visited 24.12.2012

to violence on the basis of adherence or non-adherence to a particular group, ethnic or religious, or based on gender, sexual orientation, disability and so on. Due to the fact that France bans hate speech through ordinary laws it also bans hate speech through administrative acts, such as broadcast and television act of 1986. There is a special Conseil supérieur de l'audiovisuel, which prescribes sanctions for illicit programs, materials, incitement to violence, xenophobic speech, and incitement to use of trafficking or drugs.⁵¹ In France the law plays an authoritative role and control in radio, television broadcasts, which might have a negative impact on media.

Unlike the French whose system is based upon administrative and penal laws which ban the hate speech content, the Canadian system of banning hate speech is based upon the Basic Law, which is the Canadian Charter and Courts jurisprudence. As well to mention that the Independent Institutions like the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure, the law is clearly expressing in part I article 5 that: "The Commission may provide for any matter of practice and procedure not provided for in these Rules by analogy to these Rules or by reference to the Federal Courts Rules and the rules of other tribunals to which the subject matter of the proceeding most closely relates."⁵² This means that besides the Basic Law norms and Federal Courts decisions, the Canadian Institutions have their own internal rules, which go beyond the Basic Law or Court decision, in case the norms do not cover the issue in question than the Institution can rely on her own gained practice. The opposite is happening in France, the broadcast and

⁵¹ Medial Legislation in France http://www.elections-lebanon.org/elections/docs_6_G_4_4a_14.aspx last visited 24.12.2012

⁵⁸ Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure available at:

⁵² The Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-277/page-1.html#h-6> last visited 24.12.2012

television are under an authoritative control. This happens due to the regulatory norms of the French Codes. Example, professor Pascal Mbongo analyses the administrative control over the content of cinematic works, which is stipulated in the Cinematic Industry Code of France. He describes the impossibility to overcome the Codes and Norms written down, for example the Code of Cinema in France is clearly stipulating that a movie cannot be shown until does not get the authorization of the Minister of Culture, following a certain procedure, example consultation with the French Commission de Classification de Film. The most important is that the Minister takes into consideration the commission decision, as well decides about authorizing the film or banning it completely. These two decisions are taken by the Minister only after analyzing a set of criteria which will either allow or ban the screening. These criteria are based upon the interdiction to undermine somebody's human dignity, interdiction that incites hatred or violence, pornographic scenes and in general banning the context which are not compatible with fundamental values. More than that the professor states that: "This control is a result of the combination of administrative and Penal regulations" ⁵³

Evaluating the two systems regulatory norms, I tend to conclude that France has a more powerful tendency to control and impose its regulations over the broadcasting and media Institutions. On the one hand this authoritative control, implemented through administrative and penal law bans ambiguous speech, explicitly racist speech, incitement to racial hatred, xenophobic hatred, anti-Semitic speech, values that undermines someone's

⁵³ Ivan Hare, James Weinstein, *Extreme Hate Speech and Democracy*, Oxford 2009, Chapter 12 by Pascal Mbongo, *Hate Speech, Extreme Speech, and Collective Defamation in French Law*, page, 224, 222

dignity. This approach is the perfect reflection of an enforced mechanism able to limit the mankind harm towards others.

On the other hand, this authoritative control comes up as an apology for preventing crimes whereas in reality it undermines the independence of Broadcasting Television and media Institutions. According to the database on legal information to the audiovisual sector in France, the report on the Cinema is clearly expressing the worries raised upon the conditions for screening films. The issues raised upon the conduct code between operators and distributors; conflicts between municipality cinemas and private once⁵⁴. All these examples reflect the negative aspect of having such an authoritative control and regulations.

The opposite to France, Canada's system of regulation is focused on long term effects rather than immediate mechanism of enforcement. Michel Rosenfeld analyses Canadian approach to hate speech based on "serious threats to social cohesion rather than merely on immediate threats to violence...."⁵⁵

Social cohesion has a long term run approach that is why Canada is focused on the cultural diversity and promotes the ethnic mosaic as the Canadian Supreme Court affirms that dissemination of hate propaganda is more dangerous than the suppression of it⁵⁶. Secondly, Michel Rosenfeld analyses the Canadian approach as to hate speech as relying on democracy, pursuit of truth and autonomy.⁵⁷ In this respect evaluating, the Canadian system of banning hate speech, the test applicable are too general to compass a solid enforcement. Secondly, the Canadian Court Judgments and Decisions are open to vast interpretations,

⁵⁴ Amelie Blocman, Report on the Cinema and the Law on Competition, France 2008 available at: <http://merlin.obs.coe.int/iris/2008/5/article15.en.html> last visited on 29.12.2012

⁵⁵ Michael Herz and Peter Molnar, The content and context of Hate Speech, Cambridge 2012, Chapter 13, Michel Rosenfeld Hate Speech in Constitutional Jurisprudence, A comparative analysis, page 261

⁵⁶ Keegstra case available at: http://www.hrcr.org/safrica/limitations/r_keegstra.html section 319 (2) last visited 29.12.2012

⁵⁷ Ibid., Michel Rosenfeld Hate Speech in Constitutional Jurisprudence, A comparative analysis, page 261

which may lead confusion to the establishment of hate speech in itself. In a democratic society, democracy is the reflection of the rule of majority over minorities, if there is not a clear law than the Courts' interpretation might lead to different debate and room for different interpretations. Autonomy reflects the integrity of a person, dignity based approach, again is based upon the interpretation of the Canadian Basic Law.

As a lawyer, balancing these two systems, on one hand there is France, which has an authoritative control with a very solid mechanism of enforcement, on the other hand, Canada, which relies on Courts Jurisprudence, using the coercive enforcement as the last resort of the state. In my opinion none of these systems are proper for a democratic society. I cannot accept to involve penal law into banning the hate speech, unless it causes imminent danger towards an individual or a group of individuals. Regarding to hate speech which does not follow within the imminent danger test, but shocks, disturbs and offends, I would rather combine the general approach of Canada, which relies on Basic Law backed up by the enforcement of Civil Code Mechanism.

Chapter IV of the Thesis

Conclusion and Recommendations

The Fourth chapter, Conclusion and Recommendations analyzes the existing recommendations of Council of Europe's Committees of Ministers, European Commission against Racism and Intolerance, Committee on the Elimination of Racial Discrimination, General Recommendation XV and Organization for Security and Cooperation in Europe combating hate speech. The existing proposals for combating hate speech will be analyzed

in the light of its successful future application by taking the necessary steps of regulating hate speech in Europe Context, specifically targeting minorities. The conclusion draws inferences based on the assessment of racial hate speech cases and based on the systematic escalation of anti-Roma hate speech.

The Council of Europe's Committees of Ministers recommends that: "Recommends that the governments of member states:

1. Take appropriate steps to combat hate speech on the basis of the principles laid down in this recommendation;
2. ensure that such steps form part of a comprehensive approach to the phenomenon, which also targets its social, economic, political, cultural and other root causes;
3. where they have not done so, sign, ratify and effectively implement in national law the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in accordance with Resolution (68) 30 of the Committee of Ministers on Measures to be taken against incitement to racial, national and religious hatred;
4. Review their domestic legislation and practice in order to ensure that they comply with the principles set out in the appendix to this recommendation."⁵⁸

Another Recommendation adopted in August 2013 by the United Nations Committee on the Elimination of Racial Discrimination (CERD) entitled 35th General Recommendation (GR), "pleads for other measures than criminalizing the hate speech, for instance civil and administrative measures. (Para. 8) It recognized the different approaches of the hate speech

⁵⁸ Council of Europe's Committee's of Ministers Recommendation 97(20) available at: [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1997\)020&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1997)020&expmem_EN.asp) last visited: 12.12.2013

notion and its different impacts. It recommends different remedies and responses. It emphasizes to be examined the contextual factor, the content, the status of the speaker and the reach objectives (para.15) Besides adhering more to the civil and administrative regulations it stressed the need to combat hate speech through teaching, education, culture and information. 9para 8, 9 general Recommendation number 35),”⁵⁹

In contrast to these light recommendations, I recommend the European Commission against Racism and Intolerance recommendation which clearly and directly expresses the method of banning hate speech.

The European Commission against Racism and Intolerance (ECRI) states that: “Under **hate speech**, ECRI will look into measures taken to deal with forms of **expression that should be criminalized** and, in general, intolerant and inflammatory discourse targeting groups of concern to ECRI (vulnerable groups).”⁶⁰

I do agree with the strong punitive measure of hate speech expressions because of the impact it has over the individuals. For instance, the forms of hate speech is spreading throughout Europe by taking different aspects from offensive expressions to incitement to violence, anti-Roma evictions, school segregation, and most recently the anti-Roma attacks⁶¹. Looking at the experienced background of Roma, the existence of Roma persecution, the

⁵⁹ (CERD) adopted its 35th General Recommendation, comments available at: <http://merlin.obs.coe.int/iris/2013/10/article7.en.html> last visited on 12.12.2013

⁶⁰ European Commission against Racism and Intolerance <https://wcd.coe.int/ViewDoc.jsp?id=1988291&Site=COE> last visited: 12.12.2013

⁶¹ European Roma Rights Center, Henry Scicluna, Anti-Roma Speech in Europe’s Public Space-the Mechanism of Hate speech on 21 November 2007, available at: <http://www.errc.org/article/anti-romani-speech-in-europes-public-space--the-mechanism-of-hate-speech/2912> last visited 03.10.2012

racism faced during Nazi and social exclusion,⁶² the life of Roma is marked by the presence of anti-Roma attitude throughout time. The anti-Roma attitude is reflected through expressions which promote hatred. The core notion of hate speech consists of expression that incites hatred⁶³. Thus in my opinion the European states must assess the need of banning racial hate speech towards groups of marginalized people.

Peter Molnar considers that in the context of hate speech is of major importance to regard the context of the social environment in which occurs and the danger that might cause. Expressing the view on the limitations on freedom of expression, Peter Molnar regards the “imminent danger” test, as it creates a clear and present danger of violence⁶⁴. He points out that: “the harm of the expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized...”⁶⁵

As mentioned before in third chapter, in certain circumstances people are inclined to hate and disrespect, this is the nature of things, and the only thing what keeps us awake is the freedom to choose. However some people find comfort and satisfaction to believe that they are superior. They feel entitled to harm and disrespect and spread hatred no matter on what grounds: nationality, ethnicity, gender, belief, or even in absence of any cause. That is why we need an enforced mechanism suppresses direct or indirect motives of hate speech irrespective of its content. The states should put a limit to the hate speech harm it might cause and sanction those who directly or indirectly, intentionally or intentionally spread hatred towards others. In response to this the Committee on the Elimination of Racial

⁶² Jean-Pierre Liegeois and Nicolae Gheorghe, Roma/Gypsies: A European Minority, Minority Rights Group International Report, available at: <http://www.minorityrights.org/1010/reports/romagypsies-a-european-minority.html,1995> last visited 03.10.2012

⁶³ European Roma Rights Center, Helen Darbishire, Hate Speech: new European perspective, 7th December 1999 <http://www.errc.org/article/hate-speech-new-european-perspective/1129> last visited on 03.10.2012

⁶⁴ Michael Harz and Peter Molnar, The Content and Context of Hate Speech, Rethinking Regulation and Responses, Cambridge University Press, 2012 page. 184

⁶⁵ Michael Harz and Peter Molnar, The Content and Context of Hate Speech, Rethinking Regulation and Responses, Cambridge University Press, 2012 page. 183

Discrimination, recommends that the states parties to adopt concrete measures in order to prevent or ban the incitement to hatred, in particular to promote the principle of non-discrimination⁶⁶

In this context professor Farrior considers that if a state is failing to restrict hate speech it means it fails actually to fulfill its “obligation to give effect to the right to equality and non-discrimination”⁶⁷. As a lawyer I do see the potential dangers of letting hate speech not be punishable. This might lead to genocide or to the 3rd Massive War. States should take measures and provide necessary remedies. A good example can serve the Canadian approach analyzed in chapter three. This approach demonstrates judicial and legislative remedies against the hate speech. Canadian commitment empowers the prohibition of hate speech letting other states to take examples.

Evaluating the European Court of Human Rights jurisprudence, although the European Convention within the article 10 guarantees the freedom of expression, there are other treaties which should be mentioned as the European Social Charter, the Framework Convention for the protection of minorities. These instruments do contain measures that prohibit discrimination on grounds.

According to the Committee on the Elimination of Racial Discrimination, General Recommendation XXX, adopted 1st of October 2004, General Recommendation on Discrimination Against Non-Citizens it recommends the following: “Basing its action on the provisions of the Convention, in particular article 5, which requires States parties to prohibit and eliminate discrimination based on race, color, descent, and national or ethnic origin in

⁶⁶ the Committee on the Elimination of Racial Discrimination, General Recommendation XXX, adopted on 1st of October 2004, General Recommendation on Discrimination Against Non-Citizens

⁶⁷ Farrior, Professor at Law at Pennsylvania State University, Dickinson School of Law, Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich.L.Rev.1989, page 97

the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms..”⁶⁸

The states are obliged to take effective measures and adopt effective domestic laws that would prohibit discrimination and punish hate speech. Unfortunately very few members states from the Council of Europe Committee have undertaken such steps. Many of the states do encourage a cultural diversity and cooperation among ethnic, cultural, linguistic or religion identities but do not involve into deeper implementation of hate speech practices. I do think that educative measures are important but not adequate for those who already suffered of hate speech. First, because it does not offer remedies and second because hate speech is not punished. I think that the educative measures have a long term run result, which does not guarantee the present change of minds. I do urge the states to take adequate measures to combat racial attitudes, incitement to racial hatred, to counter tendencies which stigmatize, stereotype or profile.

⁶⁸ The Committee on the Elimination of Racial Discrimination, General Recommendation XXX, adopted 1st of October 2004 available at: <http://www.unhchr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d?OpenDocument> last visited on 14.20.2013

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