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# Hate speech by politicians in the case law of the European Court of Human Rights

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## 1. Introduction

When dealing with cases concerning hate speech by politicians, the European Court of Human Rights[1] faces an interesting dilemma. On the one hand, under Article 10 of the European Convention on Human Rights[2], political speech proffered by politicians in the exercise of their political functions is granted a high level of protection, due to its importance for the well-functioning of the democratic process. On the other, hate speech is a category of unprotected speech, which may be restricted by national authorities pursuant to Article 10(2) of the Convention in order to combat discrimination and intolerance. Some expressions of hate speech have even been denied the protection of Article 10, because they were considered an abuse of the right to freedom of expression pursuant to Article 17 of the Convention.

The Court is faced with this dilemma because hate speech can be proffered by any person, including politicians. Indeed, hate speech may be featured in a political campaign of a candidate running for office or be used by a politician to justify certain policy choices (Savage (2021); Piazza (2020)). Since political affairs generally receive intensive media coverage, hate speech by politicians may have an especially broad reach and consequences (Piazza (2020); Akca (2018)). According to the European Commission Against Racism and Intolerance[3], «as a result of the use of racist, antisemitic and xenophobic political discourse: [i]ll considered measures which impact disproportionately on particular groups or affect the latter's effective enjoyment of human rights are being adopted; [t]he long term cohesion of society is damaged; [r]acial discrimination gains ground; [and r]acist violence is encouraged» (European Commission against Racism and Intolerance (2005)). Considering this, how should the high-level protection of political speech proffered by politicians in the exercise of their political functions be conciliated with the unprotectedness of hate speech? In other words, what level of protection should be afforded to hate speech by politicians?

The present study examines the above dilemma and attempts to answer the following research question: *in cases concerning hate speech by politicians, how does the Court resolve the dilemma of, on the one hand, providing a high level of protection to political speech and, on the other hand, protecting persons/groups from discrimination and intolerance?*

1 Hereinafter referred to as: «the Court».

2 Hereinafter referred to as: «the Convention».

3 Hereinafter referred to as: «the ECRI».

This paper is structured as follows: In Section 2, we analyse the relevant treaty law, soft law and case law of the Council of Europe in order to present the dilemma faced by the Court in cases concerning hate speech by politicians. We demonstrate that, in the system of human rights protection of the Council of Europe, political speech is granted a high level of protection (Section 2.1.), while hate speech is not protected (Section 2.2.). We then address how hate speech proffered by politicians fits into this dilemma (Section 2.3.). In Section 3, we examine how the Court resolves the dilemma in its case law. Finally, in Section 4, we present our concluding remarks.

## 2. The dilemma: (highly protected) political speech vs (unprotected) hate speech

### 2.1. Political speech as highly protected speech

Freedom of expression, proclaimed in Article 10(1), «is considered to be one of the core rights of the Convention because it enables the public debate in matters of public interest, which is vital for the well-functioning of democracy» (Van Dijk (2018), p. 765; Weber (2009), p. 19; Bychawska-Siniarska (2017), pp. 11-13). Indeed, «[w]ithout the ability to receive the political views of others, the citizen is unable to come to an informed view as to the direction in which government should proceed. He or she would be simply incapable of casting an intelligent vote» (Saunders (2017), pp. 1-2).

Unsurprisingly, Article 10 has received much attention in the case law of the Court. Notably, in *Handyside v. the United Kingdom* the Court affirmed:

> «Freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to [Article 10(2)], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued» (Case of Handyside v. United Kingdom (1976), ¶. 49).

In *Hertel v. Switzerland*, the Court added that freedom of expression «is subject to exceptions, which […] must, however, be construed strictly, and the need for any restrictions must be established convincingly» (Case of Hertel v. Switzerland (1998), ¶ 46). Overall, the Court seeks to ensure that freedom of expression is not restricted in ways that are destructive to democracy.

Due to its particular importance for democracy, political speech receives an especially high level of protection when compared to other types of expression such as artistic or commercial speech (Sharland (2009), p. 63). The Court has recognised that «freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention» (Case of Lingens v. Austria (1986), ¶ 42). The high level protection of political speech means that «there is little scope under [Article 10(2)] for restrictions on political speech or on debate of questions of public interest» (Case of Wingrove v. United Kingdom (1996), ¶ 58). Indeed, «political debate on matters of general interest [is] an area in which […] restrictions on the freedom of expression should be interpreted narrowly» (Case of Lopes Gomes da Silva v. Portugal (2000), ¶ 33).

Inside the broad category of political speech, political speech proffered by politicians[4] in the exercise of their political functions receives a particularly high level of protection. The Court affirmed that «freedom of expression for Members of Parliament [is] political speech par excellence. States have very limited latitude in regulating the content of Parliamentary speech» (Case of Pastörs v. Germany (2019), ¶ 38). Moreover, «[w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament […] call for the closest scrutiny on the part of the Court» (Case of Castells v. Spain (1992), ¶ 42). Similar protection (or at least close scrutiny) is granted to political speech proffered by candidates to public office[5]: «[i]n the context of election debates […] the Court has attributed particular significance to the unhindered exercise of freedom of speech by candidates» (Case of Kudeshkina v. Russia (2009), ¶ 87).

The high-level protection of political speech proffered by politicians and candidates to public office is intimately tied to the functions they exercise in the democratic process. In other words, the exercise of their political functions

4 In the present study, the term *politician* refers to anyone elected to hold public office, including members of the legislative branch and members of the executive branch, whether at national, regional or municipal level.

5 In the present study, the term *candidate to public office* refers to anyone standing for election for public office, including candidates to the legislative branch and candidates to the executive branch, whether at national, regional or municipal level.

requires the general absence of obstacles to freedom of expression. In order to carry out their political functions, politicians must express political positions, as well as propose, support or oppose legislative proposals. Additionally, politicians part of the opposition serve an important role of holding the party in power accountable through criticism. Similarly, candidates to public office need to present their political programmes and debate other candidates to attempt to convince citizens that they are the most suitable candidate – this often involves criticising the opposing candidates.

A group of politicians worth mentioning in particular are members of parliament. Historically, the exercise of parliamentary functions is considered to require the absence of hinderances to freedom of expression, since parliamentarians represent the constituents, debate legislative proposals and scrutinise the work of the government. In order «to enable parliament to carry out its tasks without undue external interference» from the executive and the judiciary (Hardt (2015), p. 7), many jurisdictions grant parliamentary immunity, including most States party to the Convention (Case of A. v. United Kingdom (2002), ¶ 80) and the Council of Europe itself (Article 40 of the Statute of the Council of Europe). Parliamentary immunity is «a legal instrument, which temporarily or permanently inhibits legal action, measures of investigation, and/or measures of law enforcement in criminal and/or civil matters against members of parliament» (Hardt (2015), pp. 6-7).[6]

The Court has dealt with several cases involving parliamentary immunity. Most of these cases concerned complaints that parliamentary immunity had violated the applicant's right of access to court under Article 6(1) of the Convention.[7] Though not directly related to Article 10 or to hate speech, these cases are interesting for the present study because they exemplify how parliamentary immunity can completely shield statements made by members of parliament from legal action – thereby indirectly protecting the expression of members of parliament. In a case concerning the impossibility – due to absolute immunity – to bring charges of defamation against a member of parliament who had made damaging statements about the applicant in a parliamentary speech, the Court recognised that parliamentary immunity constitutes a restriction of the right of

6 According to Hardt, two forms of immunity can be distinguished: non-accountability (also referred to as freedom of speech in parliament) and inviolability. Non-accountability constitutes «an absolute immunity that shields members of parliament from all legal action relating to utterances in parliament or in the exercise of the parliamentary mandate, and to the parliamentary vote». Inviolability «protect[s] members of parliament from legal action […] for acts and utterances outside […] the exercise of the parliamentary mandate» (Hardt (2015), pp. 6-7).

7 Since it protects members of parliament from legal action, parliamentary immunity may prevent access to court. An offended party may be denied any legal means to settle the dispute on the grounds that the other party has parliamentary immunity.

access to a court, but declared such a restriction legitimate and proportionate (Case of A. v. United Kingdom (2002), ¶ 83). Therefore, the Court accepts rules of absolute immunity for statements made in parliamentary sessions (Case of A. v. United Kingdom (2002); Case of Zollmann v. United Kingdom (2003)). Interestingly, the Court also accepts rules of absolute immunity for statements made outside of parliamentary sessions, but only if the statements are «connected with the exercise of parliamentary functions in their strict sense» (Case of Cordova v. Italy (No. 1) (2003), ¶ 62). Otherwise, absolute immunity is deemed a disproportionate restriction of the right of access to a court (Case of Cordova v. Italy (No. 1) (2003), ¶ 63).[8]

Overall, political speech proffered in the exercise of their political functions by politicians (including members of parliament) and candidates to public office is granted a high level of protection by the Court. Restrictions to this type of speech may be used to silence political opponents and negatively affect the well-functioning of the democratic process. Thus, the Court carefully scrutinises restrictions to ensure they are not destructive to the democratic process.

### 2.2. Hate speech as unprotected speech

Though the right to freedom of expression is certainly vital for democracy, it is not absolute. Pursuant to Article 10(2) of the Convention:

> «[t]he exercise of [freedom of expression], 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 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».

Even types of speech which receive a high level of protection – such as political speech – may be subject to restrictions, as long as they are lawful, legitimate

8 The Court stressed that «[t]o hold otherwise would amount to restricting in a manner incompatible with Article 6 § 1 of the Convention the right of individuals to have access to a court whenever the allegedly defamatory statements have been made by a parliamentarian» (Case of Cordova v. Italy (No. 1) (2003), ¶ 63).

and necessary (Bychawska-Siniarska (2017), pp. 31-33). Indeed, the Court has acknowledged that «[t]he freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain "restrictions" or "penalties"» (Case of Castells v. Spain (1992), ¶ 46).

One type of restrictions that may be placed on freedom of expression are hate speech restrictions. Though there is no universally accepted definition of hate speech (Weber (2009), p. 3), in Recommendation No. R (97) 20, the Committee of Ministers defined it as «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» (Committee of Ministers (1997)). In its case law, the Court does not explicitly define hate speech (Weber (2009), p. 3). It has at times referred to the Committee of Ministers' definition (Case of Balsyte-Lideikiene v. Lithuania (2008), ¶ 44) or used the expression «all forms of expression which spread, incite, promote or justify hatred based on intolerance» (Case of Gunduz v. Turkey (2003), ¶ 40; Affaire Erbakan c. Turquie (2006), ¶ 56).

As is clear from the Committee of Ministers' definition, hate speech may take different forms, including incitement to hatred on racial, origin or religious grounds (Weber (2009), p. 4). Interestingly, the definition proposed by the Committee of Ministers does not mention homophobic speech. Nonetheless, incitement to hatred on the grounds of sexual orientation can be considered a form of hate speech, since the Court has stressed that «discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"» (Case of Vejdeland and Others v. Sweden (2012), ¶ 55). Additionally, other grounds may be considered. Indeed, the ECRI includes in the definition of hate speech incitement to hatred on the grounds of age, disability, gender identity «and other personal characteristics or status» (European Commission against Racism and Intolerance (2015)).[9]

Interestingly, the Court seems to implicitly adopt a broad definition of hate speech, since it has held 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 favour combating racist speech in the face of

9 In the preamble, the ECRI defines hate speech «as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of «race», colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status» (European Commission against Racism and Intolerance (2015)).

freedom of expression exercised in an irresponsible manner» (Case of Vejdeland and Others v. Sweden (2012), ¶ 55).

When freedom of expression is used to spread hate speech, there is a «conflict between freedom of expression and the interdiction of all forms of discrimination» (Weber (2009), p. 2). While the Convention offers a broad protection of freedom of expression, at the same time various treaty and soft law instruments of the Council of Europe prohibit all forms of discrimination (Weber (2009), pp. 7-8, 9-13).[10] Such a prohibition can be found in Article 14 of the Convention, in Article E of the Revised European Social Charter, and more broadly in Article 1 of Protocol No 12 to the Convention. Additionally, the Framework Convention for the Protection of National Minorities prohibits «discrimination based on belonging to a national minority» (Article 4(1)) and obliges Parties to «undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity» (Article 6(2)). Parties to the Additional Protocol to the Convention on Cybercrime are obliged to criminalise the following cyber acts: the dissemination of racist and xenophobic material (Article 3(1)), racist and xenophobic motivated threats (Article 4) and insults (Article 5), as well as the denial, gross minimisation, approval or justification of genocide or crimes against humanity (Article 6).

Concerning soft law, Recommendation No. R (97) 20 of the Committee of Ministers addresses «the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression so as to avoid the risk of undermining democracy on the grounds of defending it» (Committee of Ministers (1997), § Preamble). With this objective in mind, the Recommendation urges the governments of member States to «maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others» (Committee of Ministers (1997), § Principle 2).

The Parliamentary Assembly and the ECRI have also addressed hate speech. In Resolution 1510(2006), the Parliamentary Assembly «emphasise[d] that hate

10 Though the European Court of Human Rights only assesses compliance with the European Convention on Human Rights, this paper briefly discusses other treaties of the Council of Europe that have provisions on discrimination and hate speech. The reason for this is that parties to the European Convention on Human Rights may also be parties to these treaties and thus be obliged by the provisions in question. We believe it is important to take these treaties into consideration when discussing hate speech restrictions, especially considering that a State may be obliged – by a treaty of the Council of Europe – to criminalise certain forms of hate speech.

speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the [Convention]» (Parliamentary Assembly (2006), ¶ 12). In Recommendation 1805(2007), the Parliamentary Assembly endorsed the ECRI General Policy Recommendation No. 7 (Parliamentary Assembly (2007), ¶ 12), which had called for the criminalisation of racist expressions, including incitement to hatred «on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin» (European Commission against Racism and Intolerance (2017), ¶ 18). Also relevant is the ECRI General Policy Recommendation No. 15, in which the ECRI recommends that member States «take appropriate and effective action against the use, in a public context, of hate speech […] through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected» (European Commission against Racism and Intolerance (2015), ¶ 10). Nonetheless, the ECRI urges members States to «ensure that prosecutions for [hate speech] offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs» (European Commission against Racism and Intolerance (2015), ¶ 10).

All these calls for measures against hate speech have certainly been heard. As the Venice Commission noted, «[p]ractically all Council of Europe member States (with the exception of Andorra and San Marino) provide for an offence of incitement to hatred», although laws differ significantly from jurisdiction to jurisdiction (European Commission for Democracy through Law (2008), ¶¶ 33-40).

The Court has also addressed hate speech restrictions in its case law. It «is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations» (Case of Jersild v. Denmark (1994), ¶ 30). For this reason, the Court «emphasise[d] that 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 (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued» (Case of Gunduz v. Turkey (2003), ¶ 40). Thus, the Court explicitly recognised that freedom of expression may be used to incite hatred, which may justify the imposition of a restriction to the right to freedom of expression under Article 10(2) (Bychawska-Siniarska (2017), pp. 25-27).

As mentioned supra, when freedom of expression is used to incite hatred, there is a «conflict between freedom of expression and the interdiction of all forms of discrimination» (Weber (2009), p. 2). In the system of European supervision,

it is primarily for national authorities to achieve a fair balance between the conflicting rights and interests at stake (Weber (2009), p. 2). National authorities must assess each hateful expression and choose either to protect the targeted person/group from discrimination (by restricting speech) or to protect the freedom of expression of the person inciting to hatred (by not restricting speech).[11] In achieving a fair balance, hate speech may be restricted under Article 10(2) if the interference is «prescribed by law», genuinely[12] pursues one or more legitimate aims stated in Article 10(2) and is «necessary in a democratic society» in order to achieve such aim(s) (Case of Castells v. Spain (1992), ¶ 34; Bychawska-Siniarskan (2017), pp. 31-33). This last criterium means that an interference must be «proportionate to the legitimate aim pursued» taking into consideration the existence of a «pressing social need» (Case of Stoll v. Switzerland (2007), ¶ 101), as well as the nature and severity of the sanctions imposed (Case of Stoll v. Switzerland (2007), ¶ 153). National authorities enjoy a (varying) margin of appreciation in their analysis of the necessity of restrictions, which means that authorities may adopt different solutions – as long as they remain within the allowed margin (Weber (2009), pp. 31-32). The use of this margin is subject to the supervision of the Court, which ensures that any restrictions imposed comply with the conditions of legality, legitimacy and necessity (Weber (2009), pp. 31-32).

Besides analysing whether hate speech restrictions comply with Article 10, the Court has also considered that some expressions of hate speech constitute an abuse of the right to freedom of expression under Article 17, thereby excluding such speech from the protection afforded by Article 10 (Weber (2009), p. 23). Indeed, the Court has affirmed that «il ne fait aucun doute que tout propos dirigé contre les valeurs qui sous-tendent la Convention se verrait soustrait par l'article 17 à la protection de l'article 10» (Affaire Seurot c. France (2004)). Following this line of reasoning, the Court has considered that holocaust negationism (Case of Lehideux and Isorni v. France (1998), ¶¶ 47, 53; Affaire Garaudy c. France (2003)) and manifestly racist statements (Case of Jersild v. Denmark (1994), ¶ 35; Case of Norwood v. United Kingdom (2004); Case of Pavel Ivanov v. Russia (2007)) are contrary to the values of the Convention and are thus excluded from the protection of Article 10 by Article 17 (Weber (2009), pp. 24-27; Bychawska-Siniarska (2017), pp. 27-30).

11 This is of course an oversimplification: if national authorities choose to restrict freedom of expression, they must then choose the concrete means of restriction which differ widely in severity (e.g., imprisonment, fine, order to pay damages, confiscation of publication, etc.).

12 See Article 18 of the Convention.

### 2.3. Hate speech by politicians

Having examined the high-level protection of political speech and the unprotectedness of hate speech, it is necessary to address how hate speech proffered by politicians fits into this dichotomy.

Due to high media coverage, hate speech proffered by politicians may have an especially broad reach and consequences (Piazza (2020); Akca (2018)). This potential for harm has not been ignored by the Council of Europe. The Committee of Ministers has emphasised that «freedom of political debate does not include freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, antisemitism and all forms of intolerance» (Committee of Ministers of the Council of Europe (2004)). Moreover, the Committee has stressed that: «[t]he governments of the member States, public authorities and public institutions at the national, regional and local levels, as well as officials, have a special responsibility to refrain from [hate speech] statements, in particular to the media […] Such statements should be prohibited and publicly disavowed whenever they occur» (Committee of Ministers (1997), § Principle 1). The ECRI has also «condemn[ed] the use of racist, antisemitic and xenophobic elements in political discourse» and recommended the «[e]ffective implementation of criminal law provisions against racist offences […] and racial discrimination, which are applicable to all individuals» (European Commission against Racism and Intolerance (2005)).

Concern regarding hate speech proffered by politicians has also been expressed by the Court: *Soulignant que la lutte contre toute forme d'intolérance fait partie intégrante de la protection des droits de l'homme, il est d'une importance cruciale que les hommes politiques, dans leurs discours publics, évitent de diffuser des propos susceptibles de nourrir l'intolérance* (Affaire Erbakan c. Turquie (2006), ¶ 64).

The question then is: if hate speech by politicians is to be condemned, how can that be conciliated with the high-level protection granted to political speech proffered by politicians in the exercise of their political functions? In other words: what level of protection should be afforded to hate speech by politicians? The next section addresses how the Court navigates this dilemma.

## 3. The Court's solution to the dilemma

Regarding cases of hate speech by politicians, the Court has said of the conciliation of the high-level protection of political speech with the unprotectedness of hate speech:

> «While interferences with the right to freedom of expression call for the closest scrutiny when they concern statements made by elected representatives in Parliament, utterances in such scenarios deserve little, if any, protection if their content is at odds with the democratic values of the Convention system. The exercise of freedom of expression, even in Parliament, carries with it "duties and responsibilities" referred to in Article 10 § 2 of the Convention […]. Parliamentary immunity offers, in this context, enhanced, but not unlimited, protection to speech in Parliament» (Case of Pastörs v. Germany (2019), ¶ 47).

Thus, the Court accepts that hate speech restrictions may be placed on politicians (even if they are members of parliament protected by parliamentary immunity). More than that, the Court firmly condemns that politicians proffer hate speech: «*La qualité de parlementaire du requérant ne saurait être considérée comme une circonstance atténuant sa responsabilité. A cet égard, la Cour rappelle qu'il est d'une importance cruciale que les hommes politiques, dans leurs discours publics, évitent de diffuser des propos susceptibles de nourrir l'intolérance*» (Affaire Féret c. Belgique (2009), ¶ 75).

Since hate speech by politicians is strongly condemned, does this mean that the Court resolves cases of hate speech by politicians in the same manner it resolves cases of hate speech by other persons? In other words, is it irrelevant for the Court that the statements were proffered by a politician? We will see below that the answer is negative. However, it is true that, whether addressing cases of hate speech restrictions applied to politicians or to other persons, the Court applies the same two approaches (Weber (2009), p. 19). A first approach considers that hate speech restrictions are restrictions of the right of freedom of expression under Article 10 (Weber (2009), pp. 30-31). When following this approach, the Court analyses whether such restrictions complied with the conditions of legality, legitimacy, and necessity (Weber (2009), pp. 30-31). The second approach consists in the exclusion of hate speech from the protection of the Convention (Weber (2009), pp. 22-27). This approach is based on Article 17, which prohibits the abuse of rights (Weber (2009), pp. 22-27). Hate speech may be considered an abuse of the right to freedom of expression if it negates the fundamental values of the Convention – in this case, it will be denied protection under the Convention (Weber (2009), pp. 22-27).

### 3.1. The first approach: Article 10

Regarding the first approach (sole application of Article 10), notable cases are *Féret v. Belgium* and *Le Pen v. France*. In *Féret v. Belgium*, the applicant (chairman of the Belgian political party Front National and member of the House of Representatives) was responsible for the distribution of Front National campaign leaflets and posters featuring hateful statements against immigrants (Affaire Féret c. Belgique (2009), ¶¶ 5-18). As a result, he was sentenced to 250 hours of community service, a 10-month suspended prison sentence and a 10-year measure of ineligibility (Affaire Féret c. Belgique (2009), ¶¶ 25-41). Though the applicant alleged that Belgium had breached his right to freedom of expression (Affaire Féret c. Belgique (2009), ¶ 48), the Court did not find a violation of Article 10 (Affaire Féret c. Belgique (2009), ¶ 82). The Court considered that the interference had been prescribed by law, pursued the legitimate aims of preventing disorder and protecting the rights of others, and was necessary in a democratic society (Affaire Féret c. Belgique (2009), ¶¶ 58, 59, 81). With regard to the last requirement, the Court noted that the leaflets mocked immigrants and presented them as criminals keen to exploit the benefits of living in Belgium, thus inciting to hatred against such persons (Affaire Féret c. Belgique (2009), ¶ 69). The Court also emphasised that the leaflets were distributed in an electoral context, which can amplify the impact of racist and xenophobic discourse (Affaire Féret c. Belgique (2009), ¶ 76). For these reasons (and the fact that the restrictions applied were community service and ineligibility and not imprisonment) (Affaire Féret c. Belgique (2009), ¶ 80), the Court ruled that it was necessary to protect the rights of the immigrant community and restrict freedom of expression (Affaire Féret c. Belgique (2009), ¶ 81).

In in *Le Pen v. France*, the applicant (president of the French Front National) alleged that France had breached his right to freedom of expression when it fined him for inciting hatred against Muslims in a newspaper interview (Affaire Le Pen c. France (2010), § Griefs). The Court ruled that the interference was prescribed by law, pursued the legitimate aim of protection the reputation and rights of others, and was necessary in a democratic society (Affaire Le Pen c. France (2010), § En Droit). With regard to the last requirement, the Court considered that the statements were susceptible of inciting hatred against Muslims, which justified the restriction of freedom of expression (Affaire Le Pen c. France (2010), § En Droit). The fact that the applicant was subject to a fine and not imprisonment also contributed to the Court's conclusion that the restriction was proportionate (Affaire Le Pen c. France (2010), § En Droit).

Interestingly, the analysis carried out by the Court is similar in both cases. However, in *Féret v. Belgium,* the Court found no violation of Article 10 (Affaire

Féret c. Belgique (2009), ¶ 82). Differently, in *Le Pen v. France* the application was considered manifestly ill-founded and thus inadmissible (Affaire Le Pen c. France (2010), § En Droit). Indeed, when dealing with cases concerning hate speech restrictions applied to politicians, the Court declares some Article 10 complaints inadmissible (manifestly ill-founded) (Affaire Le Pen c. France (2010); Case of Pastörs v. Germany (2019)), and others admissible but ultimately finds no violation of Article 10 (Affaire Féret c. Belgique (2009); Affaire Willem c. France (2009)). The criteria for determining complaints admissible or inadmissible is not entirely clear.

*Féret v. Belgium* and *Le Pen v. France* exemplify that the Court's application of Article 10 to cases where hate speech restrictions were enforced on politicians is similar to its application of Article 10 to cases where those restrictions were enforced on other persons. Indeed, whenever it applies Article 10, the Court essentially analyses whether the restriction was prescribed by law, pursued one or more legitimate aims stated in Article 10(2) and is necessary in a democratic society in order to achieve such aim(s). However, it cannot be said that, in cases of hate speech by politicians, it is irrelevant for the Court that the statements were proffered by a politician who exercises political functions of extreme importance to democracy. «*[C]ompte tenu de l'intérêt de la société démocratique à assurer et à maintenir le libre jeu du débat politique*» (Affaire Erbakan c. Turquie (2006), ¶ 70), the Court is particularly rigorous in scrutinising the necessity of hate speech restrictions applied to politicians. Since there is a risk that these restrictions may be used improperly – e.g., to silence political opponents –, the Court is careful to analyse whether the restrictions do not undermine the democratic process.

Firstly, only compelling reasons – such as the fact that the speech incites violence, hatred or discrimination – can justify restrictions of political speech proffered by politicians in the exercise of their political functions. Thus, political speech being restricted must strictly amount to incitement to violence, hatred or discrimination (Affaire Faruk Temel c. Turquie (2011), ¶¶ 58-64). Otherwise, political speech proffered by politicians in the exercise of their political functions cannot be restricted – doing so is a breach of Article 10 (Affaire Faruk Temel c. Turquie (2011), ¶¶ 58-64). The difficulty here is that what constitutes sufficiently compelling reasons and incitement to violence, hatred or discrimination is not absent from disagreement, even between the judges of the Court. This is exemplified by the dissenting opinion in *Willem c. France*: Judge Jungwiert disagreed that there were compelling reasons to fine a mayor – who had called for a boycott of Israeli products – on the grounds that he was inciting to discrimination (Affaire Willem c. France (2009), § Opinion dissidente du Juge Jungwiert). According to Judge Jungwiert, calling for boycotts as a form of protest should

be tolerated in a democratic society (Affaire Willem c. France (2009), § Opinion dissidente du Juge Jungwiert).

Secondly, restrictions of political speech proffered by politicians are only necessary in a democratic society if such speech poses a current risk or an imminent danger (Affaire Erbakan c. Turquie (2006), ¶¶ 68-71). Otherwise (e.g., if the restriction is applied by the government years after the speech was proffered), the restriction violates Article 10 (Affaire Erbakan c. Turquie (2006), ¶¶ 68-71).

Finally, hate speech restrictions applied to politicians must not be severe so as to have a chilling effect (Affaire Erbakan c. Turquie (2006), ¶ 69). Due to the importance of freedom of political debate in a democratic society, only particularly compelling reasons can justify severe interferences with political speech (such as the imprisonment of politicians or the interdiction of the exercise of their civil and political rights) (Affaire Erbakan c. Turquie (2006), ¶ 69). The Court does accept that prison sentences may be applied to hate speech by politicians (Case of Otegi Mondragon v. Spain (2011), ¶ 59). However, it seems to prefer that, when national authorities restrict hate speech by politicians, prison sentences are avoided in favour of less severe measures (Affaire Féret c. Belgique (2009), ¶ 80; Affaire Le Pen c. France (2010)). The point is the imposed sanction must be proportionate.

### 3.2. The second approach: Article 17

Moving on to the second approach (recourse to Article 17), it is important to note that Article 17 is applied by the Court in some cases directly and in others indirectly (Weber (2009), p. 27). Though rare (Weber (2009), p. 27), direct recourse to Article 17 consists in declaring a complaint «incompatible ratione materiae with the provisions of the Convention in view of Article 17» (Case of Pastörs v. Germany (2019), ¶ 36). Indirect recourse to Article 17 consists in «relying on Article 17 as an aid in the interpretation of Article 10 § 2 […] and using it to reinforce [the] conclusion on the necessity of the interference» (Case of Pastörs v. Germany (2019), ¶ 36). In other words, when Article 17 is indirectly applied, the Court «finds Article 10 applicable, invoking Article 17 at a later stage when it examines the necessity of the alleged interference» (Case of Pastörs v. Germany (2019), ¶ 37). Whether the Court applies Article 17 directly or indirectly «is a decision taken on a case-by-case basis and will depend on all the circumstances of each individual case» (Case of Pastörs v. Germany (2019), ¶ 37).

An interesting case where Article 17 was applied is *Pastörs v. Germany* (Case of Pastörs v. Germany (2019)). The applicant (member of the German regional

Parliament) made statements denying the Holocaust during a parliamentary session (Case of Pastörs v. Germany (2019), ¶ 5). Consequently, his parliamentary immunity was revoked and he was criminally convicted (Case of Pastörs v. Germany (2019), ¶¶ 6-27). He lodged an application with the Court alleging that Germany had breached his right to freedom of expression.[13] One of the arguments invoked by the applicant was precisely that a high level of protection should be granted to the statements in question since they were proffered in a parliamentary session by a parliamentarian (Case of Pastörs v. Germany (2019), ¶¶ 33, 35). Addressing this argument, the Court recognised that: «States have very limited latitude in regulating the content of Parliamentary speech. However, some regulation may be considered necessary in order to prevent forms of expression such as direct or indirect calls for violence» (Case of Pastörs v. Germany (2019), ¶ 38).

Remarkably, the Court considered that «the applicant's statements showed his disdain towards the victims of the Holocaust» in such a manner that could justify applying Article 17 directly, but ultimately decided to apply Article 17 only indirectly due to the fact that «the statement was made by a Member of Parliament during a Parliamentary session, such that it could warrant an elevated level of protection and any interference with it would warrant the closest scrutiny on the part of the Court» (Case of Pastörs v. Germany (2019), ¶ 39). The Court went on to consider that the applicant's criminal conviction consisted in an interference prescribed by law and pursuing the legitimate aim of protecting the reputation and rights of others (Case of Pastörs v. Germany (2019), ¶¶ 40-41). The Court then analysed whether the interference was necessary in a democratic society through a reading of Article 10(2) in light of Article 17 (Case of Pastörs v. Germany (2019), ¶¶ 46-48). The Court considered that «the applicant sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention», since he had «planned his speech in advance, deliberately choosing his words […] and resorting to obfuscation to get his message across: a qualified Holocaust denial showing disdain towards the victims of the Holocaust and running counter to established historical facts» (Case of Pastörs v. Germany (2019), ¶ 46). For this reason, the Court concluded that the interference was proportionate, especially considering the historical context of Germany (Case of Pastörs v. Germany (2019), ¶ 48). The complaint was deemed manifestly ill-founded and thus inadmissible (Case of Pastörs v. Germany (2019), ¶ 49).

13 The applicant also alleged that Germany had breached his right to an impartial trial under Article 6. However, that part of the judgement is not relevant for the present study.

### 3.3. Critical assessment

Faced with a case concerning hate speech, what criteria guides the court in its decision to apply the first or the second approach? According to the Court, «Article 17 is only applicable on an exceptional basis and in extreme cases and should […] only be resorted to if it is immediately clear that the impugned statements sought to deflect [Article 10] from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention» (Case of Pastörs v. Germany (2019), ¶ 37). Thus, recourse to Article 10 is the default approach taken by the Court, while Article 17 is only applied when freedom of expression has been abused to undermine the values of the Convention.

Unfortunately, the criteria used to determine which concrete expressions of hate speech are contrary to the values of the Convention – and which are not – is far from crystal clear (Alkiviadou (2018), p. 225). The judges themselves do not always agree if Article 17 should be applied in a case (Affaire Erbakan c. Turquie (2006), § Opinion partiellement dissidente de Mme la juge Steiner).[14] Since applying Article 17 results in the categorical denial of Convention protection, the conditions for applying such an extreme consequence should be clearer.

Additionally, the added value of the Court's recourse to Article 17 – instead of analysing all hate speech cases in accordance with the first approach (sole application of Article 10) – has been questioned by some scholars, according to whom recourse to Article 17 is unnecessary for safeguarding democracy and even detrimental to human rights protection, since it categorically excludes the protection of Article 10, thereby eliminating «substantial (procedural) guarantees for applicants seeking to safeguard their right to freedom of expression […] at the Strasbourg level, leaving a too broad discretionary margin for member States, and removing the applicants' particular protection against disproportionate interferences» (Cannie (2011), p. 82).

If restrictions of political speech call for enhanced scrutiny by the Court due to their potential destructiveness for democracy, this scrutiny is arguably better achieved by analysing hate speech restrictions applied to politicians under the first approach (sole application of Article 10) as this allows for a thorough examination of the legality, legitimacy and necessity of restrictions. As the Court recognised in *Pastörs v. Germany*, direct recourse to Article 17 allows for no scrutiny at all and thus is not an appropriate approach to cases where hate speech restrictions are applied to politicians (Case of Pastörs v. Germany (2019), ¶ 39).

14 Although the majority opinion was that the speech beneficiated from Article 10 protection, Judge Steiner disagreed and defended that Article 17 should be applied (Affaire Erbakan c. Turquie (2006), § Opinion partiellement dissidente de Mme la juge Steiner).

When applying Article 17 indirectly, the Court does analyse the legality, legitimacy and necessity of restrictions like it does when following the first approach. The difference is that, when applying Article 17 indirectly, the Court analyses the necessity of the restriction by reading Article 10(2) in light of Article 17. The advantages of using Article 17 as an interpretation aid have not been established convincingly by the Court. Indeed, when reading Article 10(2) in light of Article 17, the Court tends to not conduct a thorough examination of the necessity of the restriction in view of the particularities of the case, instead justifying its decision through general considerations and overly relying on the findings of national courts (Cannie (2011), pp. 67-68). Thus, sole application of Article 10 is arguably a preferable approach, since through it the Court administers the closest scrutiny of restrictions.

## 4. Conclusion

When the Court deals with hate speech by politicians, the «conflict between freedom of expression and the interdiction of all forms of discrimination» (Weber (2009), p. 2) is resolved either by denying hate speech the protection of Article 10 through recourse to Article 17, or by striking a fair balance of the rights and interests involved, which may culminate in the imposition of a restriction of freedom of expression pursuant to Article 10(2). The Court opts for one or the other approach, considering the circumstances of the case.

The Court conciliates the high-level protection of political speech with the unprotectedness of hate speech by: (1) accepting that it may be necessary to apply hate speech restrictions to politicians in order to combat discrimination and intolerance, but (2) carefully scrutinising the necessity of such restrictions to ensure that the democratic process is not undermined. However, careful scrutiny is arguably better achieved through the sole application of Article 10 rather than directly applying Article 17, since the latter categorically excludes the protection of Article 10 instead of analysing the legality, legitimacy and necessity of the restriction. When the Court indirectly applies Article 17, restrictions are loosely scrutinised – but far from the strict scrutiny administered by the sole application of Article 10.

All in all, hate speech restrictions applied to politicians are (to varying degrees) carefully scrutinised by the Court, although arguably this scrutiny would be better achieved by retiring Article 17.

## Bibliography

Alkiviadou, Natalie, 2018. «The Legal Regulation of Hate Speech: The International and European Frameworks», *Politička Misao*, vol. 55, number 4, pp. 203-29.

Bychawska-Siniarska, Dominika, 2017, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners*, Council of Europe.

Cannie, Hannes, and Voorhoof, Dirk, 2011, «The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?», *Netherlands Quarterly of Human Rights*, vol. 29, number 1, pp. 54-83.

Committee of Ministers of the Council of Europe, 1997, *Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech". Adopted by the Committee of Ministers on 30 October 1997 at the 607th Meeting of the Ministers' Deputies*.

Committee of Ministers of the Council of Europe, 2004, *Declaration on Freedom of Political Debate in the Media. Adopted by the Committee of Ministers on 12 February 2004 at the 872nd Meeting of the Ministers' Deputies*.

Akca, Davut, 2018, *Does Erdogan's Hate Speech Fuel Hate Crimes in Turkey?*, *Globe Post Turkey*, in http://turkey.theglobepost.com/does-erdogans-hate--speech-fuel-hate-crimes-in-turkey/.

European Commission against Racism and Intolerance, 2005, *ECRI Declaration on the Use of Racist, Antisemitic and Xenophobic Elements in Political Discourse*.

European Commission against Racism and Intolerance, 2015, *ECRI General Policy Recommendation No. 15 on Combating Hate Speech*. CRI(2016)15.

European Commission against Racism and Intolerance, 2017, *ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination. Adopted on 13 December 2002 and Amended on 7 December 2017*. CRI(2003)8 REV.

European Commission for Democracy through Law, 2008, «Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred», Study no. 406 / 2006.

Hardt, Sascha, 2015. «Parliamentary Immunity in a European Context», In-Depth Analysis for the JURI Committee. European Union Publications Office.

Piazza, James, 2020, «Why Words Matter: Political Violence Increases When Politicians Use Inflammatory Language», *Scroll.In*, in https://scroll.in /article/974436/why-words-matter-political-violence-increases-when-politicians-use-inflammatory-language.

Parliamentary Assembly, 2006, *Resolution 1510 (2006). Freedom of Expression and Respect for Religious Beliefs Parliamentary*.

Parliamentary Assembly, 2007, *Recommendation 1805 (2007). Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of Their Religion.*

Savage, Rachel, 2021, «More European Politicians Found Using Homophobic Hate Speech», *Reuters*, in https://www.reuters.com/article/us-europe-lgbt--homophobia-idUSKBN2AG0LU.

Saunders, Kevin, 2017, *Free Expression and Democracy*, Cambridge University Press.

Van Dijk, P., *et alii,* 2018, «Chapter 14. Freedom of Expression» in *Theory and Practice of the European Convention on Human Rights*, 5th Edition, pp. 765-813, Intersentia.

Weber, Anne, 2009, *Manual on Hate Speech,* Council of Europe.

**Case law**

Affaire Erbakan c. Turquie, 2006. Cour Européenne des Droits de L'Homme.

Affaire Faruk Temel c. Turquie, 2011. Cour Européenne des Droits de L'Homme.

Affaire Féret c. Belgique, 2009. Cour Européenne des Droits de L'Homme.

Affaire Garaudy c. France, 2003. Cour Européenne des Droits de L'Homme.

Affaire Le Pen c. France, 2010. Cour Européenne des Droits de L'Homme.

Affaire Seurot c. France, 2004. Cour Européenne des Droits de L'Homme.

Affaire Willem c. France, 2009. Cour Européenne des Droits de L'Homme.

Case of A. v. United Kingdom, 2002. European Court of Human Rights.

Case of Balsyte-Lideikiene v. Lithuania, 2008. European Court of Human Rights.

Case of Castells v. Spain, 1992. European Court of Human Rights.

Case of Cordova v. Italy (No. 1), 2003. European Court of Human Rights.

Case of Gunduz v. Turkey, 2003. European Court of Human Rights.

Case of Handyside v. United Kingdom, 1976. European Court of Human Rights.

Case of Hertel v. Switzerland. 1998, European Court of Human Rights.

Case of Jersild v. Denmark, 1994. European Court of Human Rights.

Case of Kudeshkina v. Russia. 2009, European Court of Human Rights.

Case of Lehideux and Isorni v. France, 1998. European Court of Human Rights.

Case of Lingens v. Austria, 1986. European Court of Human Rights.

Case of Lopes Gomes da Silva v. Portugal, 2000. European Court of Human Rights.

Case of Norwood v. United Kingdom, 2004. European Court of Human Rights.

Case of Otegi Mondragon v. Spain, 2011. European Court of Human Rights.

Case of Pastörs v. Germany, 2019. European Court of Human Rights.
Case of Pavel Ivanov v. Russia, 2007. European Court of Human Rights.
Case of Stoll v. Switzerland, 2007. European Court of Human Rights.
Case of Vejdeland and Others v. Sweden, 2012. European Court of Human Rights.
Case of Wingrove v. United Kingdom, 1996. European Court of Human Rights.
Case of Zollmann v. United Kingdom, 2003. European Court of Human Rights.

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