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Free Speech in the Jurisprudence of the Romanian Constitutional Court: between Personal Dignity and Anti-Discrimination[1]

Introduction

The topic of free speech and its limitations has been the target of a wide debate both in academic circles as well as in the relevant jurisprudence. On the one hand, arguments for allowing a wide margin of free speech have been offered since the time of John Stuart Mill. These have presented the intrinsic as well as the instrumental merits of allowing speech, even in its libelous or hateful manifestations, to flourish in a "marketplace of ideas". On the other hand, an emphasis on the values of dignity and equality has emerged in the last half a century in Europe. This generated strong arguments in favor of banning certain kinds of speech, especially hate speech. It has permeated the elaboration of the European Convention on Human Rights, as well as the subsequent case law of the European Court of Human Rights (ECHR). Alternatively, the US Supreme Court has moved in the opposite direction: from accepting the criminalization of hate speech in 1952 in the case of *Beauharnais c. Illinois*, to a laissez-faire approach in 1991 *(R.A.V. c. City of St. Paul*).

The Romanian Constitutional Court (RCC) has pronounced itself in this debate siding with the dignity-based arguments, in the context of two types of regulations: the criminalization of libel and insult and the banning of racial hate speech and Holocaust denial. In both cases, the Court decided in favor of restricting speech and upheld both the criminalization of libel and the banning of racial hate speech and Holocaust denial. Romania has also adopted another legislative act banning discriminatory speech, which has not yet been challenged before the RCC. Meanwhile, the Government has adopted a "marketplace of ideas" approach, arguing for the decriminalization of libel. In its reasoning, the government maintained that debate is more important that any damage that offenses to dignity might do.

Firstly, the paper will analyze the meaning of the "marketplace" in relation to hate speech. Secondly, it will show that hate speech or group libel cannot be meaningfully read as part of a fair "marketplace". The paper will agree with the ECHR decisions but disagree with their reasoning. Also, the paper will criticize the Romanian Constitutional Court decision of 2007, which allowed for the criminalization of libel and insult. The paper will claim that speech regulation is acceptable in the case of hate speech but not appropriate in the case of libel and insult against individuals. Hate speech does not target a particular person, nor does it make a falsifiable statement. It is at the same time both false and impossible to argue against. On the

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other hand, individual libel can be fought by the aggrieved person and can be proven false. This, along with any pecuniary damage should prove sufficient satisfaction for the libeled.

In the first section, the paper will present the academic arguments for and against free speech. The second section will present an overview of five U.S. Supreme Court and several ECHR decisions on the issue. Finally, the third section will discuss and analyze the decisions of the Romanian Constitutional Court.

I. Literature review

Arguments about freedom of speech have been waged at two deeply interconnected levels. The first is the academic one, with professors (mostly philosophers and scholars of law) arguing about abstract situations. The arguments in this case are made without reference to specific traditions and constitutional or legal frameworks. These arguments are centered on basic values which the regulation of free speech is supposed to further or hinder. In the academic debates on free speech, two major trends can be discerned: an autonomy-based defense of free speech and an equality-centered request for tougher regulation.

The first argument in favor of a wide margin for free speech which this paper will consider is offered by philosopher Thomas Scanlon. He constructs an autonomy-based defense of free speech, re-interpreting the famous arguments offered in the XIXth century by John Stuart Mill in *On Liberty*. Scanlon argues that a state offends a citizen's autonomy if it restricts the viewpoints which it allows the citizen to be exposed to. Scanlon shows that a citizen might be harmed by coming to have wrong beliefs, but this harm is an acceptable risk in order to preserve autonomy. A truly autonomous being can reject false beliefs through his own rationality and does not need to be "cuddled" by the state, Scanlon claims[2].

Scanlon then inquires why speech is granted such a special protection. He claims that a state can only be legitimate if rational, autonomous citizens can accept that it has a right to issue them binding commands. Precisely because autonomy is crucial to the citizen, the state must allow citizens to make up their own minds about many issues of public concern. They must be exposed to as many arguments as possible and apply their own rationality. According to Scanlon, a state might demand that its citizens obey certain laws but cannot also force them to believe that those laws are the best without independent judgment[3].

The second major defender of a wide margin of free speech was Ronald Dworkin. His first argument, similar to Scanlon's, relies on the value of autonomy. Dworkin's autonomy-based defense centers on the concept of "moral agency". A citizen must be treated by the state, according to Dworkin, as a moral agent, who is able to form his own opinions and to express them in a public forum. Having free speech is thus a constitutive part of this moral agency of citizens which the state must respect. Dworkin makes the same argument as Scanlon: that if government is to exercise legitimate dominion over an individual, it must respect the characteristics of that individual's moral agency[4]. Furthermore, Dworkin also argues that there are instrumental reasons why freedom of speech must be protected: better things come

[2] *Th. Scanlon*, The Difficulty of Tolerance: Essays in Political Philosophy, Cambridge University Press, Cambridge, 2003, p. 14.

[3] Idem, p. 20.

[4] *R. Dworkin*, Freedom's Law: The Moral Reading of the American Constitution, Oxford University Press, New York, 1996, p. 200.

out of a wide debate. For example, if government is criticized, some of its worse policies might be reversed[5]. Dworkin concludes this argument by agreeing with the decision (if not the justification) in the *R.A.V. c. City of St. Paul* case (which will be discussed below). He also claims that those, such as MacKinnon (see below) who believe that hate/violent/pornographic speech increases the likelihood of violent actions deny the moral responsibility of the perpetrators, and even offer them easy defenses[6].

Two more arguments in favor of free speech made by Dworkin should be discussed. The first is a development of the autonomy defense presented above, but with a focus on legitimacy. Dworkin argues that for a law to be legitimate, it must be widely debated. All of the arguments in favor or against a law must have been heard at the stage of its adoption if its enforcement is to be moral. Especially in the case of anti-discrimination legislation, the arguments of racists should be heard if such legislation is to be imposed. Moreover, it does not matter how these arguments are made, either through saying in a polite way that for example "Women should be relegated to the house" or "in the light of a burning cross"[7]. This way, according to Dworkin, the US is more legitimate in demanding workplace equality between men and women, since its deniers have a chance to speak. A final argument made by Dworkin, in a piece shortly before his death, concerns the proper relations between individuals and the state. According to Dworkin, while the state owes each individual proper respect and concern, no such duty is incumbent in horizontal relations among citizens. The state should protect these expressions in which citizens show their contempt for one another, even if it is barred from making these statements itself[8].

One of the earliest academic arguments in favor of limiting free speech in the case of women and pornography was made by legal scholar and activist Catharine MacKinnon. In her book, *Only Words* [9], MacKinnon argued on equality grounds for a limitation of pornography and sexist public speech. Her conceptualization of the issues set the stage for future generations of arguments.

MacKinnon wanted people to think of speech acts as more than a simple message of dislike (when burning a cross on the lawn of a black family), and to place this speech in context. Thus, racial insults bring with them an invocation of the entire history and atmosphere of discrimination, abuse, segregation and lynching of black people. MacKinnon treats sexual speech similarly. She understands pornography as akin to the law in the sense that both are "only words" but words backed by some kind of power. While law is backed by the power of the state, pornography is nothing less than the power which society grants men over women. It is the power of subjecting women to men's sexual desires and of not taking their refusals into account[10]. Further, MacKinnon argues that "unwelcome sex talk is an unwelcome sex act". She believes that there is not much difference between the creation of a hostile sexual environment for women at work and actual rape. A similar harm is done to the

[5] Idem, p. 204.
[6] Idem, p. 206.
[7] *R. Dworkin*, Foreword, in *I. Hare, J. Weinste*, in Extreme Speech and Democracy, Oxford University Press, Oxford, New York, 2009.
[8] R. Dworkin, Reply to Jeremy Waldron in *P. Molnár, M.E. Herz*, The Content and Context of Hate Speech: Rethinking Regulation and Responses, Cambridge University Press, Cambridge, 2012).
[9] *C.A. MacKinnon*, Only Words, Harvard University Press, Cambridge, Mass, 1993.
[10] Idem, p. 20-40.

recipients of this sex talk, because an unwanted environment is created, one in which women are seen as inferior sexual objects ("Once you are used for sex, you are sexualized. You lose your human status")[11]. Finally, MacKinnon analyzes constitutional jurisprudence in the US. She concludes that while the banning of some discriminatory speech has been upheld, the equality motivated rationale she argues for has not been employed in the judicial reasoning[12].

A later interpretation of MacKinnon is offered by Abigail Levin, who expands the equality based argument. She shows that in a situation of cultural oppression, the ideal of state neutrality, which liberals aim for, is wrong. Conversely, a neutral state does nothing else except to perpetuate the inequalities present in society. Levin believes the state should take an activist stance on discrimination and cultural oppression and ban those expressions which favor them[13].

As MacKinnon, Levin starts from the premise that speech should not be taken in isolation, but that sexist and hate speech create and reinforce a general climate of subordination and silencing. Taking this as a fact, she then analyzes several contemporary theories of rights, including Dworkin's. Levin believes that given the fact of cultural oppression, even those writers who support a wide margin for speech, such as Mill and Dworkin, would change their minds. This way, Levin aims to generate arguments for limiting free speech from inside the liberal tradition itself (later in her book she also offers arguments from outside liberal thought, such as critical race theorists)[14]. Levin utilizes J.S. Mill's two major works *On Liberty* and *The Subjection of Women* to show how the argument for free speech can be modified when the effects of sexist speech are taken into account. She believes sexist speech is a form of subjection and silencing, as well as a particularly egregious manifestation of inequality. Therefore, even on Mill's utilitarian grounds, speech which silences other speech should itself be silenced, in order to bring about the highest benefit for all[15].

Finally, Levin engages in an analysis of the way the free speech doctrine has been employed in Canada and the US. Levin criticizes the US Supreme Court for its reasoning in *R.A.V. vs. City of St. Paul* and its belief that rights, including free speech rights are constitutive of a democratic culture. Rather, Levin argues that rights should be seen as instrumental for protecting other, more central democratic values. Levin then contrasts the US approach with the one adopted by the Supreme Court of Canada in two cases, *Keegstra* and *Zundel*. The latter court decided that what the Canadian Charter of Fundamental Rights protects are not inviolable rights but also lawful limitations of those rights. The Canadian Court further argued that the right of free speech is not absolute, but can be balanced against other rights[16]. After this analysis, Levin concludes that the Supreme Court of Canada has adopted an approach consistent with the idea of an activist state, which aims to end social inequalities. On the other hand, the US Supreme Court remains wedded to neutrality.

Another famous advocate of regulations on speech is legal philosopher Jeremy Waldron, who espouses a dignity based argument. Rather than conceptualizing hate speech as a breach

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[11] Idem, p. 55, p. 67.

[12] Idem, p. 71-80.

[13] *A. Levin*, The Cost of Free Speech: Pornography, Hate Speech, and Their Challenge to Liberalism, Houndmills, Palgrave Macmillan, 2010, chapter I.

[14] Ibidem.

[15] Idem, chapter II.

[16] Idem, p. 179.

of the social value of equality, Waldron believes each society has an interest in creating a hospitable environment for everybody. Thus, having respect for each citizen's dignity is a public good. Waldron's approach thus differs from those outlined above because he believes hate speech hurts not only those it is addressed to, but a general societal interest. According to Waldron, hate speech hurts the dignity of those who are targeted by it, but the preservation of this dignity (understood as equal social status) is a duty of the society[17].

Waldron also presents a history of free speech regulation in the U.S., starting with the original Sedition Act of 1798 and up to recent developments. Waldron argues that free speech has been developed as a doctrine to protect the individual from the state. This emerged after abuses committed by the U.S. government during wartime or times of threat to national security. (shortly after the War of Independence, during World War I, during the Cold War). However, the same doctrine of free speech has been employed to defend the racist and sexist speech of individuals against other individuals. As examples, Waldron quotes the usual cases of R.A.V. vs. City of St. Paul and National Socialist Party vs. Skokie. There, acts such as burning crosses on the lawn of a black family or marching in Nazi uniform through a neighborhood full of Holocaust survivors were performed. Waldron believes that while speech against political actions by the state must be protected, it should not drag hate speech along with it into the realm of protected speech[18].

Waldron also argues against Dworkin's legitimacy argument. He believes that legitimacy is a matter of degree. Thus, even if racists are not heard at the stage of adopting a law, the basic legitimacy of that law, let alone that of the whole system of a particular liberal democracy, is not hurt. Additionally, Waldron brings the "cessation of debate" argument. He believes that at this point in time the debate on whether all people are equal has been solved. Thus, all contributions by racist hate speech are not a proper participation in a debate, as Dworkin would see it. Alternatively, the hate speech manifestations discussed have no other reason than to offend, insult and intimidate. Finally, Waldron also rejects an argument that those who perpetrate acts of hate speech are nothing else but a minority who deserves protection. Alternatively, he claims that it is those at whom hate speech is addressed (blacks, gays) that are the proper minority in need of protection from some parts of the majority[19].

Two other challenges against the autonomy defense of free speech have been brought in the literature. Susan Brison analyzes the concept of autonomy and argues that under almost any understanding of the term it fails to offer an argument for tolerating hate speech. She discusses six possible readings of the term autonomy. The first is a Millian concept of negative liberty, whereby autonomy is a right of the speaker to do what he wished. Secondly, the Dworkinian idea that individuals should be morally independent is rejected, given the negative effects hate speech has on the moral independence of the victims. Thirdly, Scanlon's idea discussed above (that the individual must form his own beliefs) as well as his later claim that autonomy is a good to be promoted (a form of positive liberty) are attacked. Brison shows that, when the focus is on the autonomy of the listener, absurd results emerge. Finally, she

[17] *J. Waldron*, The Harm in Hate Speech, Harvard University Press, Cambridge, 2012, chapter I.

[18] Idem, chapter II.

[19] Idem, chapter VII; *J. Waldron*, Hate Speech and Political Legitimacy, in *P. Molnár, M.E. Herz*, The Content and Context of Hate Speech: Rethinking Regulation and Responses, Cambridge University Press, Cambridge, 2012).

claims that free speech could be defended as an exercise of autonomy only if it could be shown that being exposed to more speech actually increases social welfare[20].

One article which applies results from empirical research to the problem of free speech argues for limitations. Andres Moles maintains that tests have shown that social stereotyping affects our unconscious and undermines our autonomous decisions. For example, people who were subliminally made to view faces of Asians or Blacks began to behave according to the stereotype associated with those categories. For example, those who viewed Asian faces performed better in mathematics. This, according to the author, offers a strong reason for banning hate speech, due to its contribution to stereotyping[21].

The last argument to be discussed here is the classification proposed by Caleb Yong. He argues that hate speech can be divided into four major categories: targeted vilification, diffuse vilification, advocacy for exclusionary or elimination policies and adverse assertions of facts and values. By analyzing the different arguments for regulation of speech, Yong argues that the first category is not covered by the free speech principle because it involves very little speech. On the other hand, the second and third forms of expression represent speech, but a very pernicious one. Diffuse vilification, like burning a cross on a black family's lawn is meant to insult or intimidate, while the consistent and organized advocacy for exclusionary policies potentially leads to the implementation of those policies. According to the authors, the diffuse vilification and advocacy for exclusionary policies represent speech which can be regulated. Conversely, Yong classifies group libel as adverse assertions of facts and values and argues that this is protected speech[22].

II. Jurisprudence

The second type of arguments to be covered in this review comes from concrete court cases. Unlike participants in academic debates, courts need to take into account binding legal documents, as well as interpretative traditions. Further, the social context in which a particular court operates is also taken into account when rendering a decision. Thus, as the academic literature analyzing legal decisions in free speech cases has observed, there is a major distinction between US constitutional jurisprudence and European jurisprudence (ECHR and national jurisprudence inspired by it). The first offers a large margin of protection for hate speech while the latter accepts the criminalization of offensive and abusive language.

Before discussing actual cases decided before the Supreme Court of the United States (SCOTUS) and the European Court of Human Rights (ECHR), a brief introduction is necessary. The main argument of this section is that there is a major difference between the regulation of hate speech in the United States and under the European Convention on Human Rights, the relevant fundamental document of the Council of Europe. In the US, the main legal rule governing speech is the First Amendment to the US Constitution. Moreover, in interpreting this amendment, the Supreme Court has formulated the rule of avoiding content-based regulation. This interpretation of the First Amendment argues that political speech can only be banned for the way, time and place it is delivered, but not for its content. Even

[20] *S.J. Brison*, The Autonomy Defense of Free Speech, Ethics 108, no. 2 (1998), p. 312-339.

[21] *A. Moles*, Autonomy, Free Speech and Automatic Behaviour, in Res Publica 13, no. 1/2007, p. 53-75, doi:10.1007/s11158-006-9015-6.

[22] *C. Yong*, Does Freedom of Speech Include Hate Speech?, in Res Publica 17, no. 4/2011, p. 385-403.

extremely offensive speech, such as a march in Nazi uniform through a village populated by Holocaust survivors, is a form of protected speech, according to SCOTUS. According to SCOTUS, the banning of speech is acceptable only when it presents a "clear and present danger" to safety and the rule of law. In other words, only direct incitement to breaking the law (not even advocacy for such an action) can be banned [23].

On the other hand, the European Convention on Human Rights in its interpretation by the Court accepts the banning of hate speech. Article 10 of the European Convention on Human Rights states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. […]
>
> 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 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[24].

Permeated by a dignitarian thinking, the Convention limits free expression on a rather large number of grounds such as national security, public safety, health and the "rights and reputation of others". When interpreting the Convention, the ECHR has been unable to formulate a test to distinguish between what is and what isn't hate speech. Thus, as the literature has pointed out, the ECHR has failed to show a good reason for banning some forms of speech and not others.

Several analyses performed on Court decisions in the US and the UK (which also operates under the rules established by the European Convention on Human Rights) have observed the noticeable differences in evaluation[25]. According to one opinion, the ECtHR offered a very limited protection for hate speech and has accepted a definition of it based on a Council of Europe Committee of Ministers Recommendation. This recommendation stated that hate speech is "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance"[26]. However, the ECtHR has not "been constrained" by any reading and has not given "precise definitions" of

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[23] *M. Rosenfeld*, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, in *P. Molnár, M.E. Herz*, The Content and Context of Hate Speech: Rethinking Regulation and Responses, Cambridge University Press, 2012).

[24] Council of Europe, European Convention on Human Rights, accessed May 16, 2013, (*http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf*).

[25] *M. Oetheimer*, Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law, in Cardozo Journal of International & Comparative Law 17, no. 3/2009, p. 427-443; *I. Hare, J. Weinstein*, Extreme Speech and Democracy, New York, Oxford University Press, 2009; *Rosenfeld*, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis.

[26] *M. Oetheimer*, Protecting Freedom of Expression, p. 428.

the terms comprised in both the Convention and the Recommendation quoted above[27]. A less charitable reading of the Court's actions is offered by Ivan Hare. He believes that the absence of a clear criterion of differentiation between speech that can and speech that cannot be banned only shows that the Court can decide arbitrarily, based on its appreciation of the motives of the speaker[28].

Five cases have established the main outlines of the American free speech doctrine in modern times. The first, *Beauharnais c. Illinois* was decided in 1952 and permitted a ban on hate speech. While *Beauharnais* was never explicitly overturned, its spirit was overruled by subsequent jurisprudence. The four other cases to be discussed are *New York Times Co. c. Sullivan*, *Brandenburg c. Ohio*, *National Socialist Party of America c. Village of Skokie* and the culmination of the elaboration of the American understanding of Free Speech, *R.A.V. c. City of St. Paul.*

In *Beauharnais*, the case centered around the conviction of a white supremacist who published and distributed leaflets defaming African Americans and requesting the city of Chicago to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro". The pamphlet then claimed that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will"[29]. The lower Courts and the Illinois Supreme Court upheld the conviction and argued that the Illinois law banning the depiction of a group as depraved, unchaste, criminal or lacking virtue was constitutional. In its decision on the case, SCOTUS accepted two main arguments for banning hate speech. The argument upheld by the Court is centered on public peace: if hate speech is allowed, communal peace is threatened. The Court also agreed that group libel is similar to individual libel:

> But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group unless we can say that this is a willful and purposeless restriction unrelated to the peace and wellbeing of the State.[30]

Secondly, the Court accepted that group stereotyping has an important impact on the wellbeing of the individuals in the group:

> It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.[31]

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[27] *M. Oetheimer*, Protecting Freedom of Expression.
[28] *I. Hare, J. Weinstein*, Extreme Speech and Democracy, p. 77.
[29] *Beauharnais c. Illinois* (United States Supreme Court 1952).
[30] Idem.
[31] Idem.

The case which has been seen as indirectly overturning *Beauharnais* is *New York Times Co. v. Sullivan.* There, SCOTUS established that (at least individual) libel needs to be committed with intent to cause harm. In other words, journalists or others who print or distribute mistaken information need to have intended to harm the reputation of the person or persons they are making their claims against. The case once again took place in the context of the struggle for racial equality in the US. The *New York Times*, a newspaper favoring the civil rights movement of the 1960s, documented the sometimes illegal actions of some of those involved in suppressing the civil rights movement. When some of the statements of the *New York Times* proved false, an Alabama state official sued the newspaper for libel. SCOTUS overturned the award of damages and argued that libelous statements need to be made with "actual malice"[32]. In this particular case, SCOTUS preferred to adopt the "marketplace of ideas" approach and to argue that the need for vigorous public debate can outweigh the fact that some statements are wrong in their particulars:

> Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials … The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice." [33]

Another crucial distinction drawn by the Supreme Court was established in *Brandenburg c. Ohio* (1969). The case concerned a leader of the Ku Klux Klan convicted for advocating violence against the government. Clarence Brandenburg invited a TV crew to a KKK rally and claimed that the government oppressed the white race and that a march on Washington by the KKK might be the only solution. Both lower Courts and the Ohio state court upheld the conviction under an older law meant to suppress communists advocating the violent overthrow of government. SCOTUS reversed the conviction and drew a distinction between advocacy of violence and incitement to violence. While the first form of speech (advocacy) is protected by the First Amendment, incitement ("fighting words") can be prohibited[34]. The Court held that:

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[35]

Using the same "fighting words" doctrine, the Illinois Supreme Court in 1978 concluded that wearing a swastika on a march does not represent incitement to violence. The case was discussed as an aftermath of the *National Socialist Party of America c. Village of Skokie*[36], when the Supreme Court held that banning a march by the National Socialist Party of

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[32] *New York Times Co. c. Sullivan* (United States Supreme Court 1964).
[33] Idem.
[34] *Brandenburg c. Ohio* (United States Supreme Court 1969).
[35] Ibid.
[36] *National Socialist Party of America c. Village of Skokie* (United States Supreme Court 1977).

America through a village populated by Holocaust survivors would violate the NPSA members' freedom of assembly.

The argument that viewpoint discrimination is unacceptable has been offered by the Supreme Court in the landmark case of *R.A.V c. City of St. Paul*[37]. In this case, a group of teenagers burned a roughly made cross on the lawn of a black family. They were convicted under a Minnesota law which banned the display of symbols meant to arouse "anger, alarm or resentment" on the basis of "race, color, creed, religion and gender". The USSC overturned the conviction and declared the statute unconstitutional under the First Amendment.

Firstly, the Court condemned viewpoint discrimination as unconstitutional and working against the "marketplace of ideas". Speech can be banned for other reasons, but not for the views it expresses:

> The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be "underinclusiv[e]", a First Amendment "absolutism" whereby "within a particular 'proscribable' category of expression, ... a government must either proscribe all speech or no speech at all[38].

The Court argued that even if the Minnesota law is to be construed narrowly, as involving only incitement to lawlessness ("fighting words"), it is still unconstitutional. The USSC held that a state either bans all "fighting words" or none at all, as it cannot choose to forbid only incitement based on racial or religious invectives. One argument invoked by the court is that the law does not offer a level playing field between racists and anti-racists for example:

> But "fighting words" that do not themselves invoke race, color, creed, religion, or gender aspersions upon a person's mother, for example-would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules[39].

Further, in what seems to be a radical reversal of the reasoning in *Beauharnais*, the Court stated that hate speech might harm minorities, but that it should be discouraged in less intrusive ways than prohibition:

> Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content based statute, requires that that weapon be employed only where it is "necessary to serve the asserted [compelling] interest[40].

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[37] *R.A.V. c. St. Paul* (United States Supreme Court 1991).
[38] Idem.
[39] Idem.
[40] Idem.

While several cases have been argued before the ECtHR on the basis of Article 10 of the European Convention, only a few can be considered to involve hate speech. However, others tested the limits of the European Convention regarding other types of speech such as obscenity, advocacy for revolution or publication of factually inaccurate information. Unlike hate speech, libel or political advocacy were offered a wider protection by the Court.

The clearest cases of hate speech brought before the ECtHR were *Jersild c. Denmark, Feret c. Belgium*, *Leroy c. France* and *Norwood c. UK*. In *Jersild,* the applicant was a journalist who had produced and broadcast a program in which the opinions of some racist young men were presented. These opinions included the beliefs that black immigrants are not human beings. Jersild was fined by the Danish state, together with the young men he researched. While it was held that Jersild's conviction violated his right of free expression, the Court also had to render a decision on the hate speech itself. The Court held that hate speech is not protected by Article 10 because it violates the rights of others:

> The Government's argument, as the Court understands it, is that, whilst Article 10 (art. 10) of the Convention is applicable, the Court, in applying paragraph 2 (art. 10-2), should consider that the relevant provisions of the Penal Code are to be interpreted and applied in an extensive manner, in accordance with the rationale of the UN Convention (see paragraph 21 above). In other words, Article 10 (art. 10) should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention.
>
> Finally it is uncontested that the interference pursued a legitimate aim, namely the "protection" of the reputation or rights of others[41].

A direct application of the Court's hate speech doctrine came with the cases of *Feret v. Belgium* (2009) and *Vejdeland and Others c. Sweden* (2012), and the admissibility decision in *Norwood c. United Kingdom* (2004)[42]. All these cases involved the distribution of leaflets which amounted to group libel. The first case concerned material aimed against Muslim immigrants in Belgium distributed by a candidate to Parliamentary elections. He claimed that people should "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home"[43]. In the second case, the applicants distributed leaflets in a Swedish school whereby they claimed that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was "responsible for the development of HIV and AIDS"[44]. In both cases, the ECHR dismissed the petition of the applicants and upheld the claim that hate speech violates the "rights and reputation of others".[45]

In *Norwood*, the Court held the applicant's petition inadmissible. In this particular case, an individual posted a sign representing the Twin Towers in flames and saying "Islam out of Britain". He was convicted in the UK Courts and the ECtHR refused to listen to his challenge.

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[41] *Jersild c. Denmark* (European Court of Human Rights, 1994).

[42] European Court of Human Rights, "Factsheet-Hate Speech," March 2013 (*http://www.echr.coe.int/nr/rdonlyres/d5d909de-cdab-4392-a8a0-867a77699169/0/fiches_discours_de_haine_en.pdf*).

[43] Idem.

[44] V*ejdeland and Others c. Sweden* (European Court of Human Rights, 2012).

[45] Idem; *Feret c. Belgium* (European Court of Human Rights, 2009).

In justifying its decisions, the Court referred to article 17 of the Convention, which is aimed at preventing the abuse of the rights guaranteed by the Convention:

> Nothing in [the] 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 rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." (Council of Europe, European Convention on Human Rights.)

The Court's opinion held that:

> Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14[46].

As can be observed from all of these decisions, the ECHR does not hold the same concept as SCOTUS of forbidding viewpoint discrimination in speech. Rather, the somewhat vague concept of "rights of others" is used to uphold banning offensive speech. Yet, the Court is unable to say when a certain form of speech violates the rights of others or aims at the destruction of rights and freedoms and when it does not.

Other cases decided by the ECHR did not concern hate speech narrowly conceived as group libel. The Court had to render judgment on other aspects of speech such as libel and insult (*Sunday Times c. UK*, *Oberschlick c. Austria*), obscenity (*Handyside c. UK*, *Muller v Austria*), advocacy for the violent overthrow of the state (*Faruk Temel c. Turkey*, *Hizb Ut-Tahrir and Others c. Germany*), Holocaust denial (*Garaudy v. France*), or the registration of presumed totalitarian parties [*Refah Partisi c. Turkey, Partidul Comunistilor (Nepeceristi) c. Romania*]. Differently from cases of hate speech, the Court generally held for the applicants and against the state, offering wider margins of free speech in the case of potentially libelous publications or advocacy for violent overthrow. However, in the two cases of obscenity, the Court found some restrictions on obscene publications with the aim of maintain public morals as acceptable. Moreover, as in the hate speech cases, the ECHR considered Holocaust denial as not being covered as protected speech by Article 10. In *Garaudy*, the Court assimilated Holocaust denial with hate speech and advocacy for totalitarianism:

> Disputing the existence of crimes against humanity was, therefore, one of the most severe forms of racial defamation and of incitement to hatred of Jews. The denial or rewriting of this type of historical fact undermined the values on which the fight against racism and anti-Semitism was based and constituted a serious threat to public order.[47]

[46] *Norwood c. the United Kingdom* (European Court of Human Rights 2004).
[47] *Garaudy c. France* (European Court of Human Rights, 2003).

III. Criminalization of libel in Romania: the dignity approach

The Constitutional Court of Romania had the opportunity to consider the right to freedom of expression in the context of two issues: the criminalization of libel and insult, and racial hate speech and Holocaust denial (Government Emergency Ordinance 31/2002). In both cases, the Romanian Constitutional Court (RCC) interpreted the laws in favor of restricting speech and upheld both the criminalization of libel and the banning of racial hate speech and Holocaust denial. Romania has adopted another legislative act criminalizing discriminatory speech (Government Ordinance 137/200) but this has not been challenged yet before the RCC on grounds of its effects on speech.

In 2006, the government of Romania decided to eliminate insult and libel from the list of crimes included in the Criminal Code, and to modify the definition of other crimes related to freedom of speech. In its arguments, the Government argued that the right to freedom of expression had been regulated far too strictly and that a looser approach was required. For example, in the case of advocacy for totalitarianism, the government instituted a "real threat" test. At the same time, the Government argued that criminalization of insult and libel would create an attitude of "self-censorship" and would inhibit free discussion. Even if someone's dignity is hurt, it was argued that this is a matter between private individuals[48]. In other words, the Government adopted a "marketplace of ideas" approach to libel, showing how the risks of offenses to dignity can be trumped by the general interest in having a wide debate.

The Romanian Constitutional Court, through Decision 62/2007 invalidated the de-criminalization of libel and insult and argued from both a "dignity approach" and a "rights of others" approach. In adopting the dignity-based approach, the Romanian Constitutional Court aligns itself with the Court in Germany, which also sees human dignity as a supreme value which has to be balanced against other rights[49]. In its decision, the Court referred to several aspects of the Romanian Constitution, as well as Article 10 of the European Convention on Human Rights.

Firstly, the Court quoted articles 1 paragraph (3) and 30 paragraph (6) of the Romanian Constitution. The first states:

> Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed[50].

Article 30 paragraph (6) comes as a qualification to article 30 paragraph (1) which establishes freedom of speech. It states that:

> Freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one's own image[51].

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[48] Government of Romania, "Exposition of Reasons-Law 278/2006", 2006 (*http://www.cdep.ro/proiecte/2006/000/20/4/em24.pdf*).

[49] *Rosenfeld*, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis.

[50] Constitution of Romania, 1991 (*http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=1#t1c0s0a1*).

[51] Idem.

The Court claimed that the Romanian Constitution establishes human dignity among the supreme values which the state must defend and limits free speech by it. In its most concise formulation, the Court stated that:

> The limits of the freedom of expression, as stipulated in article 30 paragraph (6) of the Romanian Constitution are completely in consonance with the notion of liberty. Philosophical-juridical conceptions which lie at the bases of democratic societies admit that the liberty of a person ends where the liberty of another person begins[52].

In this particular case, the freedom of speech ends, in the opinion of the Court, where the dignity of others begins. Further, in support of its judgment, the Court quoted Article 10 of the European Convention of Human Rights and emphasized the limitation of free speech by the "rights and reputation of others"[53]. It is not exactly clear if the Court argued in this case that dignity is a right or that it is reputation which the state must defend. The Court concluded: "Criminalizing libel and insult is not incompatible with freedom of speech"[54].

The 2007 decision is the only substantive decision rendered by the Constitutional Court on the issue. However, the legal status of insult and libel was decided through a longer process. After the Parliament omitted to pass an act to re-criminalize insult and libel, the Romanian High Court of Cassation and Justice (Supreme Court) intervened. It concluded that in the absence of such a law, libel and insult remain outside the sphere of the Criminal Code[55]. However, in the latest development, the Constitutional Court quashed this decision and its supportive legislative basis (Article 414^5 of the Criminal Procedure Code), therefore effectively re-criminalizing insult and libel[56]. However, the case was not decided on the merits of freedom of expression, but on those of the effects and entry into force of judicial decisions.

As in other cases, the RCC did not define human dignity nor spelled out its content. It did not discuss what harms a libelous statement can have on a person's dignity or if there is a threshold to this. It only argued that civil damages for libel and insult are not enough of a protection because "dishonor is irreparable and human dignity cannot be evaluated in money"[57].

The "rights of others" approach has also been taken by the RCC in a series of decisions concerning racial and xenophobic hate speech. These decisions were rendered in cases where an article (317) of the Criminal Code banning racial hate speech and parts of Government Emergency Ordinance 31/2002 were challenged. The trend-setters in this field have been Decisions 480/2004 and 67/2005[58]. Other decisions[59] have upheld the same reasoning, sometimes with the same wording.

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[52] Decision 62/2007 (Constitutional Court of Romania 2007).

[53] Idem.

[54] Idem.

[55] Decision no. 8/2010 (Romanian High Court of Cassation and Justice-All Sections 2010).

[56] Constitutional Court of Romania, Press Comunique, April 29, 2013 (*http://www.ccr.ro/noutati/COMUNICAT-DE-PRES-45*).

[57] Decision 62/2007 (Constitutional Court of Romania 2007).

[58] Decision 67/2005 (Constitutional Court of Romania 2005); Decision 480/2004 (Constitutional Court of Romania 2004).

[59] Decision 293/2006 (Constitutional Court of Romania 2006); Decision 37/2009 (Constitutional Court of Romania 2009); Decision 228/2012 (Constitutional Court of Romania 2012).

In Decision 480/2004, the RCC argued that article 317 of the Criminal Code is constitutional. The article stated that „Nationalist and chauvinistic propaganda, inciting racial or national hatred [....] is punishable by imprisonment between 6 months and 5 years". In Decision 67/2005, the Court upheld article 4 of Ordinance 31/2002, which banned „Spreading, selling, making fascist and xenophobic symbols" or using them in public. In 2006, through Decision 293, the RCC also upheld article 5 of the same statute. Article 5 forbids „promoting the cult of persons rendered guilty for crimes against peace and humanity or promoting fascist, racist or xenophobic attitutes through propaganda carried out by any means"[60].

In all of these decisions, the Court argued:

> The Court cannot accept the argument according to which the challenged regulation [the ban on racial hate speech] restricts fundamental rights and liberties of the citizens, such as the right of assembly, the righ to information, the right to free conscience and to free speech, because the exercise of these rights does not imply racial or national intolerance, which represents the denial of the rights and liberties of others based on their racial or national belonging[61].

IV. Dignity and the marketplace

As stated by Rosenfeld[62], courts and academics are trapped in a conundrum on the matter of speech. Either one argues for a wide right of free speech that then protects hate speech, or one offers a principled defense of a trumping value, such as human dignity. However, this opens the door for banning speech in situations not intended by the regulation, and for arbitrary judicial decisions. Rosenfeld ironically quotes the fact that the first person to be convicted under a law meant to improve race relations by banning racial insults in the UK was a black man shouting racial abuse at a white policeman.

Furthermore, the supporter of speech regulation must offer criteria to discriminate between offensive speech and speech meant to shock but not to invoke demeaning associations. For example, a man holding out a sign stating "Scientology is not a religion"[63] should not be prosecuted, but one requesting tough measures against "Gypsy crime" should. Rosenfeld proposes that such a test must take into account history and context, as well as "customs, common linguistic practices and the relative power or powerlessness of speakers and their targets in the society involved"[64].

Thus, it can be argued that the near-impossibility to clarify and spell out concepts such as dignity or the "rights and reputation of others" should disqualify them as principles for speech regulation. Rather, the "marketplace" principle should be employed. It is easier to understand and easier to apply. Ideas and points of view should be expressed freely, the same way that products compete for customers in a market. Further, this approach can permit almost unlimited political speech, including advocacy for violent overthrow of the current regime, as long as this does not slide into immediate incitement. Moreover, the "marketplace" principle

[60] Emergency Ordinance 31/2002.
[61] Decision 480/2004 (Constitutional Court of Romania 2004).
[62] *Rosenfeld*, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis.
[63] *Hare, Weinstein*, Extreme Speech and Democracy.
[64] *Rosenfeld*, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, p. 288.

can accommodate vigorous (even sometimes factually inaccurate) criticism of officials and especially of state policies.

Yet, even the most ardent defenders of a free market in economic policies admit that there are certain moments when the market fails to fulfill its aim. The case of public goods is the best example. The same way, in the "marketplace of ideas" hate speech represents a case of market failure. Firstly, hate speech cannot be combated by more speech. If one is libeled individually, one can request that the libeler prove the truth of his claims. A proper "marketplace" transaction takes place, where in a court of law, the truth is sought. However, hate speech is not like individual libel. It does not aim to make a factual claim to be believed by all. Thus, in the "marketplace of ideas", hate speech is not like a product; it is more akin to false advertisement. The same arguments which permit the state to force producers to reveal what is contained in a product can lead to the prohibition of hate speech.

Conclusion

This paper argues that the dignity aproach (rights and reputation of others) is not an adequate framework to be used by the Romanian Constitutional Court for limiting freedom of speech, because it is insufficiently clarified. Thus, insult and libel should not be reincluded in the Romanian Criminal Code. However, better protections should exist against hate, sexist or discriminatory speech, as there are legitimate grounds for limiting the freedom of speech. The paper has put forward a defense of free speech which includes a justification for the regulation of hate speech. It has argued that the dignity approach fails on principle to offer a way to distinguish between speech that should be banned and merely disturbing and unpleasant speech. The approach is vague and can have counterproductive results such as the criminalization of individual libel or the conviction of oppressed minorities uttering criticism against their oppression. Further, it grants strong powers to courts which decide according to their sympathy for the speaker's motives.

Alternatively, the paper defends a proper interpretation of the "marketplace of ideas" approach. It argues that in the same way the government regulates fake advertising, it can regulate hate speech. Conversely, according to this approach, potentially false statements, as well as advocacy of violent overthrow are viewpoints which can be rationally combatted by counter-speech. An individual can demand satisfaction in a civil court and request a libeler to prove the truth of his statements. A government can counter advocacy for revolution. But a libeled group cannot do such a thing when hate speech is not meant to convince anyone of anything, but only to offend, degrade and insult.