



SPEAKING TRUTH TO POWER:
AN ANTIDOTE TO HATE SPEECH

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Introduction

Freedom of expression is essential for any democratic society to grow stronger, especially in times of crisis. “Free speech and expression are the lifeblood of democracy, facilitating open debate, the proper consideration of diverse interests and perspectives, and the negotiation and compromise necessary for consensual policy decisions. Efforts to suppress nonviolent expression, far from ensuring peace and stability, can allow unseen problems to fester and erupt in far more dangerous forms.”¹ Human rights provisions hold governments accountable, and it seems that they are a nuisance to the illiberal democracies that are on the rise.

Societies in the Western Balkans, especially in Montenegro, have been trapped in the old regime’s institutional and bureaucratic legacy, which has often resulted in infringements of citizens’ rights and private business interests. The Former Yugoslavia was a socialist state created after World War II, led by the first communist leader Josip Broz Tito, who managed to successfully suppress tensions between the Serbs, Bosnian Muslims, Croats, Albanians, Slovenes, and other national and ethnic groups. After Tito’s death, other politicians wanted to take his place, but this ended in a brutal war which broke apart the peoples of a formerly united Yugoslav nation. The most significant sources of intolerance existed on the grounds of nationality, ethnicity and religion. Ethnic cleansing in the form of deportation, massive killings or displacement were the primary motives in establishing a geographical area that is homogenous and ethnically clean. Such a mental matrix caused the rise of nationalist movements throughout the history of Yugoslavia, and it still seems to be present because of the unsolved crimes that are still pending prosecution.

The past two years have been crucial in the political and judicial atmosphere in Montenegro. For many years Montenegro has been struggling with divisions based on political opinions and nationality. One of the critical and most vital characteristics of a democratic society is the traditional separation of powers between the state’s legislative, executive and judicial branches, which has become questionable in Montenegro. Over the past two years many scandals have come to light and judicial institutions have been undermined. Civil society started exerting pressure which has led to low levels of trust in political institutions.

The end of 2019 was marked with massive demonstrations organized by the Serbian Orthodox Church and its followers because of the Law on Religious Freedoms. The Law targeted mainly the Serbian Orthodox Church, where the Church was required to prove its ownership of the real estate or property acquired before 1918. Corruption became more evident in the society, infrastructure and various projects in our country, with concerned citizens working tirelessly to defend Montenegro’s natural resources from devastation. Finally, the lockdown year behind us helped us reflect on how easily our rights can be taken away. Our autonomy of decision-making over our health and bodies has been put to a test. Authoritarian and hybrid regimes have shown us that constitutional checks and balances are being neglected. Fundamental rights as protected by international treaties are being curtailed by laws that amend not only the rights and procedures but also the mere legal logic

¹ <https://freedomhouse.org/issues/freedom-expression>;

of equality, access to justice, and democratic institutional setting. The Covid-19 crisis has provided plenty of proof that such regimes would deny us our fundamental rights under the pretence of protecting our health. This is especially true for members of marginalized groups, persons with disabilities, migrants, and refugees.

The year 2020 in Montenegro was marked by tensions between citizens based on divided political opinions, national identity, and church influence. Due to the spread of coronavirus in Montenegro, combined with an already politically heated atmosphere, we witnessed increased intolerance among people. A lot of international legislation defines and guarantees freedom of expression. But the problem occurs when we find it difficult to decide where the boundaries are and what could be referred to as hate speech. Many people were arrested because of their social media posts about governing the country in a crisis, or upcoming elections in August 2020, or the general political situation in Montenegro. Around the world, many people have committed crimes based on hate speech, and thus, jeopardized human rights, as well.

Hate speech background

Hate speech is defined as any kind of communication that consists of hateful and discriminatory language. These words can refer to a person based on their colour, religion, beliefs, nationality, sexual orientation, etc.

International law provides in its legislation the concept of incitement to discrimination, hostility, and violence. “Incitement is a very dangerous form of speech because it explicitly and deliberately aims at triggering discrimination, hostility, and violence, which may also lead to or include terrorism or atrocity crimes. Hate speech that does not reach the threshold of incitement is not something that international law requires states to prohibit. It is important to underline that even when not prohibited, hate speech may be harmful.”²

Taking into account the fact that freedom of speech emerged as a democratic principle above governmental restrictions indicates the importance and power of this particular right as the backbone of a democratic society ever since ancient Greece. The right to freedom of speech has been guaranteed in its various forms through numerous historical legal documents.

In the United States of America, in the First Amendment of the Bill of Rights, freedom of expression is recognized as an introductory level of expression of opinion, idea or information without fear of government.

² United Nations Strategy and Plan of Action on Hate Speech, 2019, p.2. Available at: <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>

International legislation

In Europe, the Universal Declaration of Human Rights and the European Convention on Human Rights and Freedoms represent international treaties that many countries have accepted and implemented in their legislation. These documents are binding for citizens and institutions alike, and in the national legal hierarchy they rank higher than federal laws.

Currently, the Covid-19 pandemic has tied up the whole world. We are witnesses that many governments have adopted emergency measures, which, unfortunately, violate civil rights in many countries. In Montenegro, we have faced violation of privacy rights, particularly when it comes to the most vulnerable and marginalized members of society. The result of such behaviour is a decline in rights, justice and democracy. According to articles collected from Montenegrin newspaper websites and social media, it can be inferred that many hateful comments are based on different political opinions, nationalities and religions. According to the European Commission 2020 report on Montenegro, the country made no progress on freedom of expression, only on media legislation. However, this progress “has been overshadowed by arrests and proceedings against editors of online portals and citizens for the content they posted or shared online in the course of 2020; also, important old cases of attacks remain unresolved.”³

Case law

By adopting the Universal Declaration of Human Rights (UDHR) in 1948 member states of the United Nations recognized that all human beings are born free and equal in dignity and rights, without distinction of any kind, such as race, ethnic origin, colour, religion, gender identity, sexual orientation or any other status.⁴ Although the document fails to impose any specific legal obligations on states, it has become highly persuasive and provided a basis for more specific, binding and justiciable international norms.

The first global human rights treaty specifically addressing the most heinous forms of bias is the Convention on the Prevention and Punishment of the Crime of Genocide which was adopted unanimously by the United Nations General Assembly in 1948. According to Article III(c) of this Convention, direct and public incitement to commit genocide shall be punishable as a crime under international law and the contracting parties undertake to prevent and punish such crimes. Genocide is defined narrowly: it requires the intention to destroy, in whole or in part, a national, ethnic, racial, or religious group (Article II). Therefore, “incitement to genocide” could only be established in the most straightforward case of the Rwandan genocide, where radio broadcasts incited civilian population to violence against a minority ethnic group.

The International Convention on the Elimination of all Forms of Racial Discrimination from 1955, Articles 4 and 6, prohibits discriminatory speech and action on a significantly broader scale. It obliges states parties to criminalize certain forms of hate speech and the commission of or incitement to acts of violence against any race, group of persons of another colour, or ethnic group; furthermore, states must create the legal and institutional basis to provide adequate protection and remedies against any acts of racial discrimination and must provide for reparation or satisfaction for any damage suffered as a result of such discrimination.⁵ The International Covenant on Civil and Political Rights (ICCPR) of 1966 (entered into force in 1976), Article 20 in particular, as interpreted together with Article 19, is the most relevant international provision relating to hate speech. The list of protected characteristics is short and closed (national, racial or religious hatred). It requires advocacy, that is to say, intentional and public promotion of hatred; the advocated hatred is supposed to constitute incitement to discrimination, hostility or violence, i.e. illegal material actions.⁷

According to the European Convention on Human Rights (hereinafter: the Convention), freedom of expression is defined as a right guaranteed to everyone, and that includes freedom to “hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁸ Article 10 protects not only the right to freedom of expression but also the right to hold opinions. Under international law, for example, as reflected in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the right to hold opinions is absolute.

First of all, the positive obligations under Article 10 of the Convention envisage that every state should find mechanisms to protect journalists and authors so that a favourable environment would be established. This article is not limited only to political rights but has a broad scope of protection such as artistic expression such as painting (*Case of Müller and others v. Switzerland*)⁹, or rules governing clothing (*Stevens v. the United Kingdom*).¹⁰

There are contradictions in particular cases where one argues to support the principle of free speech, but in a traditional manner, thus actually allowing people to express hate. For example, the Muslim Council of Britain argues that “a free discourse...on the merits of Islam and Muslims...is, of course, necessary in an open society, but to urge others to hate, and thereby oppress, an entire faith community must be unacceptable at all times and all places. And the UK’s Institute of Race Relations, in seeking to outlaw hateful content from the popular media, argues that “the ‘press freedom’ that was fought for in previous centuries...is not the freedom of large corporations to be involved in the industrialized production of racism for profit”.¹¹

In the case *Féret v. Belgium*, Mr. Feret’s parliamentary immunity was waived at the request of the Public Prosecutor as he was the author of offending leaflets. The Court decided that there had been no violation of the particular article in question, emphasizing that it is of great importance that politicians during campaigns be allowed to express themselves in order to reach a wider audience.¹²

⁵ <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>;

⁶ The International Convention on the Elimination of all Forms of Racial Discrimination, 1954

⁷ International Covenant on Civil and Political Rights (ICCPR), 1966

⁸ https://www.echr.coe.int/documents/convention_eng.pdf

⁹ ECtHR, Case of Müller and others v. Switzerland, No. 10737/84, 1988

¹⁰ ECtHR, Stevens v. the United Kingdom, Commission decision, No. 11674/85, 1985; }

¹¹ Arun Kundhani, “Freedom to hate?”, Institute of Race Relations, 20 May 2003 <<http://www.irr.org.uk/2003/may/ak000012.html>>, reproduced from *Campaign Against Racism and Fascism*.

¹² ECtHR, *Féret v. Belgium*, no. 15615/07, 2009

³ European Commission report on Montenegro 2020, page 7, https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/montenegro_report_2020.pdf

⁴ Universal Declaration of Human Rights, 1948, Articles 1 and 2

The Court believes that offensive speech can initiate violence, primarily online, where harm posed by the content and communication in reference to journalists' articles on the Internet can undoubtedly present a risk for exercising human rights in its trustworthy essential manner (*Delfi AS v. Estonia and Savva Terentyev v. Russia*).¹³

National legislation

National legislation in Montenegro is crucial for the protection of freedom of expression. The Constitution is the highest law which contains the general framework of this principle, provided by article 47. In particular, this provision establishes that “(e) everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner.” In line with international standards, this means a) that freedom of expression is recognized and protected vis-à-vis any individual in the territory of Montenegro and thus does not apply to nationals or journalists only, and b) that freedom of expression is exercised through any expressive means, beyond written or audio-visual content (i.e., music, dancing, painting, artistic performances, etc.). The same article also stipulates that such right “may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro.”¹⁴ Possible limits to the right to freedom of expression are thus mentioned with reference to some broad concepts. Such a generalized provision should be further developed and elaborated so the rule of law is exercised in full scope. Freedom of expression is not considered an absolute right which means that a person can be limited in the exercising of this particular freedom. This is the case when we talk about hate speech which becomes a violation if it incites discrimination, hostility or violence. In the Constitution of Montenegro, we can find this restriction under article 16.

The problem that may be caused by such a generalized provision is that the limits of this right must be more clearly established by law and cannot be used in any context to prevent any reference to this individual freedom from being used to express hatred.

The law that now needs to be taken into consideration is known as the Media Law. This is a particularly relevant law. It establishes some general criteria and fundamental parameters for developing a regime for exercising the right to freedom of expression and its limits in Montenegro. Chapter III of this law covers media distribution and sets out many provisions that impact the exercising of freedom of expression in Montenegro.

Extremely relevant provisions in this area are found in Montenegrin criminal legislation as well. Many articles are related to this area. For example, provisions that determine the possible liability of publishers, printing companies, and producers in some instances seem nevertheless excessive, as well as envisaged remedies and sanctions if one fails to respect this freedom and its limits; it also establishes a general provision criminalizing the disclosure of information falling into the category of trade secrets, and contains a series of criminal requirements regarding defamation.

¹³ ECtHR, *Delfi AS v. Estonia*, 64569/09, 2013 and ECtHR, *Savva Terentyev v. Russia*, 10692/09)

¹⁴ Constitution Law Montenegro, <http://www.ustavnisud.me/dokumenti/CONSTITUTION%20OF%20MONTENEGRO.pdf>

Recommendations for combating hate speech in Montenegro

In order to fight hate speech in Montenegro, the government should work at every level to raise awareness of the importance of the freedom of expression and mutual respect regardless of religion, ethnicity, nationality, race, sexuality, etc. One of the central problems of the society is the upbringing provided by the parents, where many of them teach their children to divide their friends according to these characteristics. We should teach our children at home, and even more so at school, that we cannot judge people on such an insufficient basis.

Secondly, non-governmental organizations are a crucial part of a democratic society and they need to take more initiative and have a bigger role in finding the proper manner to educate citizens and promote EU values through lectures, courses, media promotion, and any other useful method.

Local and state institutions should safeguard equality for all citizens when it comes to education and health care. For example, if a Roma parent is not investing in their child's education, the Social Welfare Centre will consider that a part of Roma culture and lifestyle, so no legal procedure for protecting the child, in line with the Family Law provisions, will be initiated.

This situation causes disappointment in people because our legal system is still trapped in bureaucracy and corruption. Law enforcement should be strengthened by criminal provisions such as in the case of *Savva Terentyev v. Russia*. Mr. Savva Terentyev posted a comment on a blog about a press release reporting on a politically-motivated police search of a newspaper's premises. In his statement, he referred to the police as “cops,” “pigs,” and “hoodlums.” The comment also alluded to the burning of police officers “like at Auschwitz.” Mr. Savva Terentyev received a one-year suspended sentence for publicly inciting hatred and enmity and humiliating the dignity of a group of persons on the grounds of their membership of a “social group”. In doing so, the Russian courts included police officers as a specially protected group under their hate speech laws. The press release also stated that the police did not clearly explain the legal basis for the search. One police officer threw out a journalist's belongings to access the latter's computer during the inspection of the premises. Mr Terentyev submitted a complaint to the European Court of Human Rights and argued that his conviction amounted to an unforeseeable application of Article 282 of the Russian Criminal Code, which aimed to protect against racial, national, linguistic, or religious hatred and did not extend to “social groups” such as the police. The Court applied the three-part test in assessing the legitimacy of the interference: it had to be prescribed by law, it had to have a legitimate aim and it should have been necessary in a democratic society. In the concluding paragraphs of the judgment, the Court stressed that it was “vitally important that criminal law provisions directed against expressions that stir up, promote or justify violence, hatred or intolerance clearly and precisely define the scope of relevant offenses, and that those provisions be strictly construed to avoid a situation where the state's discretion to prosecute for such offenses becomes too broad and potentially subject to abuse through selective enforcement.”¹⁵

¹⁵ ECtHR *Savva Terentyev v. Russia*, 10692/09, 2018

One of the perfect examples of a big corporation is that of Facebook, which has established a \$130 million trust fund that will support its Oversight Board's operation, which is independent of Facebook. The Board's mandate is to review content that could be inconsistent with Facebook's policies and values, all the while respecting the freedom of expression within the framework of international law and human rights.¹⁶

Authorities must build a more robust and healthier society where state institutions will respect civil rights and liberties. In this community, hate crimes must be prosecuted according to international and national legislation.

Conclusion

In its document *EU Human Rights Guidelines on Freedom of Expression Online and Offline* the European Union has stated the following: "(...) *Hate speech legislation should not be abused by governments to discourage citizens from engaging in legitimate democratic debate on matters of general interest.*"¹⁷

The accomplishments in the protection of freedom of expression from the late 2000s have largely been lost in the late 2010s — the rise of digital authoritarianism following the development of communications technology has resulted in insufficient protection of freedom of expression. When a hybrid regime is still alive, the government will be involved in any online surveillance to protect and keep their position as long as possible. Internet accessibility makes the collection and gathering of information by corporations and governments much faster and easier. We could say that this is a situation of a double-edged sword where freedom of expression could be easily restricted by limiting access to information on a full scale. Freedom of expression is indeed one of the pillars that helps in the development of democracy and society in a country. As ECtHR stated in the case *Handyside v. the United Kingdom*, freedom of expression is not only respecting the rule of law but: "its exercise is essential for social progress and the intellectual and moral development of individuals."¹⁸

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¹⁷ <https://ec.europa.eu/digital-single-market/en/news/eu-human-rights-guidelines-freedom-expression-online-and-offline>, page 16;

¹⁸ ECtHR, *Handyside v. UK*, 5493/72, 1976

