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FREEDOM OF SPEECH AS THE BASIS OF A DEMOCRATIC ORDER¹

Summary

The paper analyzes the concept and importance of freedom of speech, as one of the basic prerequisites for the existence of democracy and a democratic order. Freedom of speech is a universal human right that guarantees every individual the opportunity to express opinions, ideas and attitudes freely, without fear of sanctions, pressure or censorship. Freedom of thought is almost inextricably linked to freedom of speech. Together, these two fundamental freedoms, as John Stuart Mill claimed, mark the entire scope of human freedom. The authors will examine the connection between democracy and freedom of speech through research, first in a historical context, but also through an examination of existing forms of guarantee, of exercising and protecting freedom of speech in modern democratic societies. Of essential importance is also the analysis of the possibility of restricting freedom of speech, especially in the domain where there is tension between freedom of speech and its antipode, hate speech. Finally, it is worth looking at the challenges that arise as a real threat to the exercise and protection of freedom of speech in the so-called era of the Internet and social networks.

Keywords: human rights, freedom of speech, freedom of opinion, democracy, hate speech.

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1. INTRODUCTION

On the historical path of "conquering freedom", almost the greatest human accomplishment was to speak freely about freedom. The age of freedom does not begin with free-thinking individuals; it begins with the brave who freed the imprisoned thoughts about freedom. That is why today, in defense of freedom of speech, we act with the same fervor as when we defend the right to life. Because even the right to "biological" life loses its meaning without freedom of thought and speech, which are the essential foundation of *"the right to a civil and dignified life in a democratic society."*

Freedom of speech² or expression is an external manifestation of an individual's inviolable "inner space", that is, their personal thoughts, convictions and beliefs, and therefore it must be protected as part of a broader concept: the inviolability of human dignity and personal autonomy (Gunatilleke 2021, 93). The importance of freedom of speech is also recognized in its being a necessary condition for the realization not only of other human rights such as freedom of religion and freedom of association, but also of democracy itself, as a form of political order.

Meiklejohn emphasizes that freedom of speech is more than an individual human right, and that it does not stem from natural rights, but from the pure practical political need of a democratic society to be self-governing (Meiklejohn 1948, 26). While respecting the theoretical approach of the aforementioned author, we must nevertheless emphasize that from a theoretical and legal perspective, freedom of speech is today primarily a fundamental human right, whose source is the corpus of natural (moral) rights. Freedom of speech is, therefore, an element of the moral order. However, on the other hand, this does not mean that it is not also a necessary prerequisite for the existence and functioning of a democratic order, because without freedom of speech, democracy, just like thought, would be imprisoned.

Today, the guarantee and respect for freedom of speech is seen as a matter of the democratic maturity of a society. However, we cannot help but reflect on the emergence of regressive reflexes, which always surprise us when those views appear in public with which the majority do not agree. Given that freedom of speech also protects such "unpopular" statements, the legal system, no matter how democratically founded, will tremble due to the normative tension that arises in the relationship between the freedom of speech of one person and the rights and freedoms of another or other individuals. This is precisely why the issue of restricting freedom of speech is a very important segment in the domain of human rights.

² In everyday speech, freedom of speech and freedom of expression are often used as synonyms, although there are views that freedom of expression is a broader concept, and freedom of speech is its narrow segment.

Restrictions on freedom inevitably lead us to encroach on the sensitive domain of human dignity, and this issue must therefore be approached very cautiously. The sword of Damocles, which constantly hangs over our heads, symbolizes the danger that state authorities could abuse their powers to restrict freedom of speech in some situations. It is precisely in this narrow space between the necessity of protecting the interests of the state and the rights of others on the one hand, and freedom of speech on the other, that the key question of this paper arises: "To what extent and under what conditions is it possible to limit freedom of speech without violating its role of a *"guardian"* of democracy and the dignity of the individual?". This paper will attempt to shed light on this complex relationship, finding a balance between protecting freedom of speech and defining its limitations.

2. ON THE CONQUEST OF FREEDOM

Historically, it is very difficult to determine the origin of freedom of speech because, truth be told, free human expression began precisely at the moment when the fear of external coercion disappeared. The conquest of freedom is, therefore, nothing other than liberation from fear, for a man who is led by fear is not the master of his own mind. (Spinoza 1665, 21).

The power over the mind and words comes with the fall of tyranny. Only when the "despotic monologue" ceased were people able to freely express their thoughts and beliefs. Although periods of freedom were generally short-lived, it was during these periods that rhetoric – the art of public speaking – was conceived. Thus, Aristotle, in his *Rhetoric*, testifies that Corax of Syracuse was one of the first rhetoricians to successfully collect and systematize many of the techniques of this discipline (Aristotel 1926, book 1.). After the fall of tyranny, citizens were able to address the authorities themselves and represent their interests, but it was still essential to learn the skills of oratory, to which Corax made an immeasurable contribution.

The period of ancient Greek democracy gave rise to two important concepts that help us better understand the historical genesis of freedom of speech and its connection to democracy. The first concept is called *parresia* (Greek: *παρρησία*), and it means honest, free, or open speech. *Parresia* represents free expression without fear of consequences, and therefore it was one of the essential elements for the functioning of Athenian democracy. The second concept is called *isegoria* (Greek: *ισηγορία*), and it represented the equal right of citizens to speak before the assembly or court. These two concepts somewhat justify Michael John's position that freedom of speech arises as a consequence of the practical political need of a democratic society, but we should not forget that it is only elevated to the pedestal of democratic values as an individual human right.

The Middle Ages will be remembered as a period in which freedom of speech was in the hands of clerical centers of power. Therefore, one could only speak about topics that

did not constitute heresy for the church or treason for the government. Heresy, as a reminder, was punishable by death. In ancient times, Socrates paid the price for freedom of speech by drinking hemlock poison, while in the Middle Ages, for advocating the theory of the heliocentric model of the universe, the Inquisition would try Copernicus and Galileo for heresy, and G. Bruno would be sentenced to death in 1600. Censorship by the Roman Catholic Church became more pronounced during the Reformation. Books that were then considered heretical and unsuitable for the faith and morality of society were placed on the list of prohibited books and writings. The so-called *Insex expurgatorius*³ became the main means of censorship of new, but unacceptable to the church, scientific and philosophical ideas. The invention of the printing press would reduce the real scope of censorship in church circles, but the moral authority of the church would continue to be a decisive factor in the realm of restrictions on freedom of speech. For this reason, Erasmus of Rotterdam would present his criticism of social and church structures by inverting appearances, hiding truth and wisdom in the guise of madness (*Praise of Folly*).

The modern social and ideological transformation began with the rise of the Enlightenment, as well as the development of new philosophical understandings of freedom. The works of philosophers such as John Locke and J. J. Rousseau led to the idea that each individual in society is responsible for his or her own freedom, as well as for the freedom of the entire social community. That is why, first in 1775, the American Revolution, and shortly thereafter in 1789, the French Revolution, symbolized the beginning of the true struggle for freedom. The world level of development of the state and law undoubtedly owes much to the two great revolutions that marked the birth of the new, modern state. They were actually struck by foundations and established basic principles on which today's state-legal orders function. (Simić, Đorđević, Matić, 2015, 46)

Thus, in the course of human development, a time has come when it is no longer considered necessary for rulers to have unlimited power, which is in itself contrary to the common good. It seemed to the people that it would be much better if the various powers of the state were entrusted to plenipotentiaries or deputies of the whole nation, who could be replaced. The people thought that this was the only way to ensure that the state power could never be used to their detriment (Stuart Mill 1859, 6).

However, the conquest of freedom and the rise of democracy did not mean the end of the struggle of the defenders of freedom against force. Force has always been and will be a tool in the hands of power, while according to John Stuart Mill, the most significant feature of history is precisely the struggle of "*freedom against force*." Hence it is clear that freedom must constantly be defended against force, because a government that fears criticism of free thought will not hesitate to suppress free thought by force. The guardians of

³ Index librorum prohibitorum, 1559. Houghton Library, Harvard University, 1980, https://books.google.rs/books/about/Index_librorum_prohibitorum_1559.html?id=27M8nwEACAAJ&redir_esc=y

freedom must therefore once again curb government and its power in order to defend the won freedom to speak and think.

Thomas Jefferson, the author of the American Declaration of Independence, would therefore, in a letter to his friend, John Tilghman, highlight perhaps one of the most important messages of support for freedom of speech and the press: *"If it were up to me to decide whether we would have a Government without newspapers, or newspapers without a Government, I would not hesitate for a moment to choose the latter."* And Thomas Erskine, Attorney General of the Prince of Wales, rising to defend Tom Paine, will make one of the truest statements about freedom of speech: *"Let men freely communicate and express their thoughts, and their anger will scatter like fire, which only spreads over the surface; their argument will seem like gunpowder scattered, it ignites, but the explosion is neither loud nor dangerous. If you hold them under pressure, it is then an underground fire that burns invisibly, until it erupts, like an earthquake or a volcano."* (Keane 1991, 1-5).

3. FREEDOM OF SPEECH AND ITS LIMITATIONS

Freedom of speech is an individual human right that guarantees every individual the opportunity to freely express their thoughts, views and beliefs, without fear of sanctions, censorship or persecution. This right includes not only the freedom to express and disseminate one's own opinion, but also the freedom to receive, that is, listen to and consider the opinions, views and beliefs of others.

Many authors state that freedom of speech is actually "double-conceived" (both as a right and as a freedom). As a right, it refers to the ability of each individual to exchange information, opinions, ideas, beliefs and convictions as they wish, and with whomever they wish. As a freedom, it refers to the obligation to refrain from imposing limits on the various forms and contents of expression, and most often on the principle of prohibiting state authorities from setting limits by law (*or in some other way*) to which freedom of expression could go (Vučić, 2022,17).

By enabling every individual to freely express their views and beliefs, as well as to become acquainted with the views and opinions of others, pluralism of ideas is established and a critical attitude towards society, politics and authorities is encouraged. Freedom of expression also ensures the protection of the views of minority social groups and affirms social dialogue as a way of overcoming conflicts in the community. It is clear that without the guarantee and protection of freedom of speech, there is no active participation of citizens in decision-making, and thus no democratic order. Precisely for this reason, this freedom is protected by many international legal instruments, both as a fundamental human right and as a democratic value.

The First Amendment to the US Constitution of 1791, freedom of speech was conceived as an absolute human right that almost does not know the possibility of establishing restrictions. Congress shall make no law abridging the freedom of speech, or of

the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances⁴. Only speech which is harmful, such as libel and sedition, is punishable. Speech which incites violence is thus outside the protection of the right to freedom of expression, especially in situations where there is a real danger of conflict escalation (Paunović, Krivokapić, Krstić, 2018, 203).

Internationally, the first document in which freedom of speech finds its footing is the Universal Declaration of Human Rights adopted in 1948 at the United Nations General Assembly in Paris. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression; this includes the right not to be harassed because of their opinions, and the right to seek, receive and impart information and ideas through any media and regardless of frontiers⁵. The text of the Universal Declaration does not recognize any provisions on limitations on the right to freedom of speech, and the first normative formulation of this type is found only in the text of the International Covenant on Civil and Political Rights.

The provision of Article 19, paragraph 3, of the ICCPR⁶ stipulates that freedom of speech may be subject to certain restrictions which must be expressly provided for by law. The reasons for which restrictions on freedom may be imposed are also listed, namely: respect for the rights or reputation of other individuals or the protection of national security, public order, health and morals. Leaving the possibility of restricting freedom of speech in certain situations is a suitable solution that is intended to protect both the interests of the state and the interests of other members of the community. However, when determining the form and model for imposing restrictions, one should be very careful, because on the other hand, one must not open up space for the abuse of this right by the state.

In this context, the most precise solutions are contained in the text of the European Convention on Human Rights. The provision of Article 10 of the ECHR states that the exercise of these freedoms carries with it duties and responsibilities, and freedom of speech may be subject to formalities, conditions, restrictions and penalties. In order for an exception to the rule to apply, three cumulative conditions must be met. The first implies that any restriction must be provided for solely and exclusively by law. The second condition concerns the aim of the restriction, which must relate to the protection of one of several prescribed interests and values. The ECHR⁷ includes among the interests and values mentioned: national security, territorial integrity, public safety, prevention of disorder or

⁴ Constitution of the United States, First Amendment: <https://constitution.congress.gov/constitution/amendment-1/>

⁵ United Nations. 1948. Universal Declaration of Human Rights. [online] Paris: United Nations General Assembly. "Article 19"

⁶ United Nations. 1966. International Covenant on Civil and Political Rights. [online] New York: United Nations General Assembly. "Article 19"

⁷ Council of Europe. 1950. European Convention on Human Rights. [online] Rome: Council of Europe.

crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, as well as preserving the authority and impartiality of the judiciary. The third condition implies that the established restriction must be necessary in a democratic society, that is, the measure restricting speech must be realistically justified and the least harmful. Bearing in mind that life will impose many situations The European Court has taken the view that in every borderline case, the freedom of the individual must prevail over the state's appeal to an overriding interest (cited by Simović, Stanković and Petrov, 2018, 182. according to: Macovei, 32).

Since the factuality and unpredictability of real life cannot always be brought under the umbrella of a legal norm, The ECtHR has often had the opportunity to formulate new positions, standards and interpretations in its judgments in the field of application of Article 10 of the ECHR. One of the most significant judgments in the rich case-law of the ECtHR is *the Handyside v. UK* judgment. For the first time, the European Court had the opportunity to indicate the scope of protection of freedom of speech, stating that this protection does not apply only to those statements with which the majority in society agrees, but also refers to the expression of ideas that may be shocking or disturbing to the majority of members of the community.

Some of the most interesting judgments of the ECHR concern the issue of the protection of freedom of expression in those situations where that freedom is restricted in order to protect morals in society. The Court has already noted in this context that it would not be possible to establish a common understanding of morality among “European countries” and that states therefore have a very wide margin of appreciation when determining what is “necessary” to protect morality. However, it should be noted that the powers of states in this area must not be abused, which is why measures have been taken to restrict freedom of speech, subject to the control of the ECHR.

Of course, expression that by its very nature causes such public outrage that it violates the moral understanding of a society is subject to restrictions, as the case of *Muller and Others v. Switzerland* shows. In the aforementioned case, the Swiss court seized three works of art, but also imposed a fine on both the author and the organizers of the disputed exhibition, since the exhibited artistic images depicted scenes such as sodomy, bestiality, masturbation and homosexuality. The ECtHR stated in this case that the specific measures taken by the state could not be considered a violation of Article 10 of the ECHR. The decisive fact was that the exhibited images were offensive in relation to the sexual decency of ordinary sensibilities, and that they emphasized sexuality in some of its crudest forms (more in: Simović, Stanković and Petrov, 2018, 183).

One of the greatest challenges for the ECHR in the future will certainly be the domain of freedom of speech, but also protection against hate speech on social networks. The development of the Internet and social networks is directing a significant part of social communication into the digital space. The digital world is becoming the future of fast and free communication between people, as well as a paradise for those individuals who insult

and belittle others under false names. Protection against hate speech on social networks is difficult to achieve, while, on the other hand, increasingly frequent examples of incitement to violence, racial, religious and other hatred and intolerance.

One of the characteristic cases in this regard is *Sanchez v. France* from 2021. In the aforementioned case, a French court convicted politician Julian Sanchez because he failed to promptly remove third-party comments from his Facebook profile, who incited hatred and intolerance towards members of the Muslim religion. The ECHR, acting on the representation of J. Sánchez, concluded that in this case there had been no violation of freedom of expression under Article 10 of the Convention, because a politician as a public figure has a significantly greater responsibility to monitor the content on his or her profiles, and thus prevent the spread of hate speech.

The above example, as well as numerous other examples such as the case of *Delfi AS v. Estonia* from 2015, indicate that the standards of the ECtHR for assessing a violation of Article 10 of the ECHR are becoming increasingly strict and thorough. On the other hand, this could be expected, given that the tension between freedom of expression and hate speech is starting to grow with the development of social networks. Hate speech is becoming increasingly prevalent in political contexts, making it difficult to distinguish between politically unpopular but inoffensive content and content that is offensive and harmful and should therefore be restricted.

4. HATE SPEECH

Starting from the understanding that freedom of speech should be protected within the concept of the inviolability of human dignity and personal autonomy, the question arose whether expression that is aimed at violating human dignity and personal autonomy could also enjoy protection. The answer is, of course, negative.

Hate speech is a kind of antithesis to freedom of speech and undermines the assumption of free expression as an absolute value. It is defined in legal literature as speech that aims to humiliate, intimidate, and incite violence and activities full of prejudice against a specific group, based on faith, ethnic origin, national origin, religion, sexual orientation, or disability. (Paunović, Krivokapić, Krstić, 2018, 202).

The expression of views and ideas that incite intolerance and hatred towards certain individuals or groups in society not only does not fall under the protection of freedom of expression, but also represents a specific discriminatory offense. The fact that the boundary of freedom of speech is violated by hate speech is also confirmed by the ECHR in several of its judgments. In the case of *Affaire Erbakan v. Turkey*, the Court stressed that tolerance and respect for the dignity of all human beings are the foundation of a democratic and pluralistic society. It follows that in democratic societies the issue of sanctioning, and even preventively preventing, various forms of expression that spread, incite, promote and justify intolerance and hatred based on intolerance can be considered necessary.

The frequency of hate speech, especially in political discourse, came to the fore after the migrant crisis in Europe in mid-2015. At that time, anti-migrant attitudes of political actors began to penetrate social reality, often bordering on hate speech or directly entering its field. As the migrant crisis provoked strong reactions from the entire “European” society, it was difficult and sensitive to find adequate solutions that could prevent or sanction hate speech against migrants. It should be recalled here that the ECtHR had previously, in the 2009 case of *Féret v. Belgium*, emphasized that anti-migrant rhetoric, especially when it calls for the deportation of entire population groups, is an example of hate speech not protected by Article 10 of the Convention, even when it comes from politicians in the context of an election campaign. Free political speech is essential for the realization of democracy, but when it grossly infringes on the dignity of others, its connection with democracy is severed.

We conclude that the case of sanctioning hate speech is not a mere restriction of freedom, but rather its protection from abuse. We are also referred to this obligation by the provision of Article 17 of the ECHR, which stipulates the obligation to prevent the exercise of the rights under the Convention to the detriment of the rights and interests of others. Therefore, the subtle boundary between freedom of speech and hate speech is perhaps perhaps one of the key issues of contemporary legal theory and practice. It is necessary for the legal order to determine this boundary much more precisely in the future, perhaps by formulating special regulations on the prevention of hate speech. In this regard, a significant contribution will be provided by the practice of the ECHR, from which we currently take over the largest number of standards for maintaining the balance between freedom and responsibility.

5. CONCLUSION

Freedom of speech (expression) is certainly one of the most significant achievements of all legal thought, but also the most complex issue in the field of human and minority rights and freedoms. Its essence is reflected not only in the freedom of an individual to express his ideas, attitudes, opinions and beliefs, but also in the right of other individuals in society to hear different views. This certainly includes those views that are unpopular or provocative, but not those that violate public order and morality, security, the rights and interests of other citizens.

The democratic capacity of a community is embodied in its ability to protect freedom of expression, even when that expression may be socially debatable. This also requires constantly maintaining a balance between the protection of individual freedoms and the general interest. The area of freedom of speech is only at first glance borderless. The line beyond which legal protection ceases must be redrawn, taking into account not only the circumstances of specific disputes, but also the many novelties that penetrate the social environment every day. Only in this way is it possible to find solutions in cases of conflicts

that increasingly arise between the rights and interests of different members of the community.

The free exchange of ideas, the public confrontation of different views and the active participation of citizens in social life are essential prerequisites for the existence and functioning of a democratic society. Without the possibility of an individual's voice being heard, even when in the minority, there is neither true public debate nor the legitimacy of democratic institutions. The true democratic maturity of a society is therefore reflected in the fact that, by guaranteeing freedom of speech, it will demonstrate a willingness not only to tolerate criticism, but also a willingness to accept it as a necessary corrective.

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СЛОБОДА ГОВОРА КАО ОСНОВ ДЕМОКРАТСКОГ ПОРЕТКА

Апстракт

У раду се анализира појам и значај слободе говора, као један од основних предуслова постојања демократије и демократског поретка. Слобода говора представља универзално људско право којим се сваком појединцу гарантује могућност да слободно изражава мишљења, идеје и ставове, без страха од наступања санкције, притиска или цензуре. У готово неодвојивој вези са слободом говора налази се слобода мисли. Заједно, ове две темељне слободе, како је то тврдио и Џон Стјуарт Мил, обележавају читав делокруг човечанске слободе. Аутори ће кроз истраживање испитивати повезаност демократије и слободе говора, најпре у историјском контексту, али и кроз проматрање постојећих облика гаранције, остваривања и заштите слободе говора у савременим демократским друштвима. Од суштинског значаја је и анализа могућности ограничења слободе говора, нарочито у домену где постоји тензија између слободе говора и њеног антипода, говора мржње. Напоследку се ваља осврнути и на изазове који се јављају као реална претња за остваривање и заштиту слободе говора у тзв. ери интернета и друштвених мрежа.

Кључне речи: људска права, слобода говора, слобода мишљења, демократија, говор мржње.

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