

Pioneering legal advances: the European Convention on Human Rights' latest efforts against online hate

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Abstract: This article examines the most recent criteria and determinations in the jurisprudence of the European Court of Human Rights (ECtHR) regarding the interpretation of the European Convention on Human Rights (ECHR) for the effective prevention and prosecution of online hate speech by national authorities. In a digital landscape marked by the rise of expressions that foster intolerance, the ECtHR has reinforced its position on the balance between freedom of expression (Article 10 ECHR) and the effective protection of the right to respect for private and family life (Article 8 ECHR). This analysis delves into several cases before the Court that establish precise standards on the prevention and sanction of online hate speech. Furthermore, it highlights a new line of jurisprudence under development concerning the complexities and difficulties related to online hate speech in implementing the ECtHR's resolutions. The article concludes by emphasizing the relevance of these interpretations for strengthening the fight against online hate speech, underlining the central role of the ECtHR as a guarantor of the principles of the ECHR in a constantly evolving digital environment.

Keywords: Hate speech online freedom of expression Internet

(A) ANALYSIS OF THE RESEARCH OBJECT

Online hate speech has become a socio-legal phenomenon that, on occasion, constitutes the starting point for the emergence and development of social conflicts, even posing a real risk to the protection of democratic systems and human rights.¹ This is because it generates an atmosphere of intolerance that can lead to serious human rights violations, especially against the most vulnerable and oppressed groups in society.

The United Nations has pointed out that incitement to violence against specific communities or individuals based on their identity can contribute to the facilitation or preparation for the commission of atrocity crimes and is simultaneously a warning sign and an indicator of the risk of such crimes being committed.²

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¹ European Economic and Social Committee Opinion JOIN(2023) 51 final, OJ 2024 C/2024/4669, 2.2. And Commission Joint Communication JOIN(2023) 51 final, OJ 2023, at.15

² United Nations, *Plan de Acción para Líderes y Actores Religiosos. Para la prevención de la incitación a la violencia que podría dar lugar a crímenes atroces* (United Nations Office on Genocide Prevention and the Responsibility to Protect, 2017).

It has been demonstrated that hate speech, even when propagated by the media, plays a fundamental role in the commission of genocides such as the Rwandan genocide, which resulted in over 800,000 deaths in less than five months.³

While one might think that online hate speech does not have the same force or direct effect in reality, it has also been a fundamental tool used to commit atrocities, taking advantage of the fact that platforms do not always have efficient content filtering or review systems. An example of this occurred in Kenya, where numerous expressions of hate were spread on social networks during an election, provoking harassment and social violence that resulted in over 1,000 deaths and 600,000 displaced persons.⁴

However, despite the above, it must be acknowledged that there is currently no definition of hate speech accepted by the entire international community. Nevertheless, the United Nations, in the Rabat Plan of Action, defines it as “any kind of communication, whether oral or written or also behavior that attacks or uses pejorative or discriminatory language referring to a person or group based on who they are, in other words, based on their religion, ethnicity, nationality, race, color, ancestry, gender, or other forms of identity”.⁵

At the European regional level, the territorial scope of this research, the Council of Europe defined hate speech in its Recommendation No. 20 of the Committee of Ministers on Hate Speech of 1997 as: “[...] all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism and other forms of hatred based on intolerance, including intolerance expressed in the form of aggressive negationism and ethnocentrism, discrimination and hostility against minorities, immigrants and persons born of immigration.”⁶

Therefore, given the absence of new international instruments that directly address the new socio-legal phenomena of the digital age, this research aims to determine whether, by resorting to the interpretation of the ECHR,⁷ at least at the regional level, international treatment of online hate speech can be achieved by each of the Council of Europe states, as the ECtHR jurisprudence seems to indicate, aimed at its prevention and prosecution, at least regionally.

The methodology used is based on the HUDOC database, where the research was focused on all ECtHR resolutions concerning Article 10 ECHR, which enshrines the right to the free exercise of freedom of expression, and on hate speech in the last ten years until December 3, 2024, focusing on those cases where online hate speech was the issue, regardless of whether or not there was a human rights violation.

³ M. Chiara Marullo, ‘El rol de la plataforma Facebook en la difusión de la campaña de odio contra la etnia musulmana rohingya en Myanmar’, in Z. Combalía, M. P. Diago, and A. González-Varas (eds), *Libertad de expresión y discurso de odio por motivos religiosos* (Licregdi, Zaragoza, 2019) 119, at 127.

⁴ I. Gagliardone et al., *Countering Online Hate Speech* (UNESCO SERIES ON INTERNET FREEDOM, France, 2015), at.34.

⁵ United Nations, *La Estrategia y Plan de Acción de las Naciones Unidas para la lucha contra el discurso de odio* (United Nations Office on Genocide Prevention and the Responsibility to Protect, 2019).

⁶ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech” (adopted 30 October 1997).

⁷ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953).

(B) THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RECENT ADVANCES ON ONLINE HATE SPEECH

Firstly, it must be stated that the ECtHR's interpretation of the research object is based on the protection of two rights enshrined in the ECHR.

Thus, when faced with a case of online hate speech, the ECtHR is obliged to verify whether national authorities have achieved a fair balance between the two rights enshrined in the ECHR that are involved: the right to exercise freedom of expression (Article 10) and the right to respect for private and family life (Article 8).⁸

This is because these are not absolute rights, so under certain circumstances and requirements, both can be limited by national authorities, see in this sense the provisions of the second paragraph of both.⁹

The verification of this fair balance is the basis on which the ECtHR develops criteria to be considered by national authorities to determine what measures should be applied to guarantee (or violate) the effective protection of both rights enshrined in the ECHR, as well as under what circumstances one right may require greater protection than the other.

The ECtHR has repeatedly stated that these criteria are not exhaustive,¹⁰ which is evident in recent jurisprudence on the prevention and prosecution of online hate speech. Through this, it is verified that the ECtHR is developing specific treatment for each of the elements that are emerging and being incorporated into this phenomenon, giving rise to detailed jurisprudence on online hate speech.

Therefore, the ECtHR has focused, through its jurisprudence, on determining the particularities and specifications required for the treatment of online hate speech, such as the analysis of the language and stylistic resources of a social network (Application *Savva Terentyev v. Russia*),¹¹ the amplifying effect of the network (Applic. *Cicad v. Switzerland*),¹² the feeling of anonymity (Applic. *Verlagsgesellschaft mbH v. Austria*),¹³ among others.

In this sense, we will focus on analyzing the most recent advances of the ECtHR in the interpretation of the ECHR to guarantee the effective protection of both rights in the face of online hate speech, specifically regarding measures to block access to websites and the responsibility of users for the dissemination and attitude towards it.

(1) Blocking measures

With regard to measures to block access to websites by national authorities, the ECtHR has been involved for years in determining when they are justified under the ECHR. These require a thorough analysis, as they are designed to influence the accessibility of

⁸ *Medzlis Islamske Zajednice Brcko and others v. Bosnia and Herzegovina*, ECtHR (2017), No.17224/11, 77.

⁹ J.A. Carrillo Salcedo, *El Convenio Europeo de Derechos Humanos* (Tecnos, España, 2004), at 30-32.

¹⁰ *Medzlis Islamske Zajednice Brcko and others v. Bosnia and Herzegovina*, ECtHR (2017), No.17224/11, 88.

¹¹ *Savva Terentyev v. Russia*, ECtHR 2018, No.10692/09.

¹² *Cicad v. Switzerland*, ECtHR 2016, No.17676/09.

¹³ *Standard Verlagsgesellschaft mbH v. Austria*, ECtHR 2021, No.39378/15.

the internet for users and, consequently, compromise the State's responsibility for the possible violation of the right to the free exercise of their freedom of expression.¹⁴

In the *Applic. Taganrog Lro and others v. Russia*, of June 22, 2022, the ECtHR stated that the declaration of the international website of Jehovah's Witnesses as extremist could not be made in a general manner, so that blocking measures should only be directed at extremist content and not the entire website. This prevented users of the website from accessing, receiving, and disseminating information, even affecting their right to freedom of religion, as it was verified that the website contained content on various topics.¹⁵ In fact, this situation was aggravated by the fact that it was a website that disseminated religious content adapted for people with specific needs.¹⁶

Therefore, it should be noted that it is established jurisprudence of the ECtHR that the decision to declare an entire website "extremist" for the purpose of total blocking constitutes an extreme measure that deliberately ignores the distinction between licit and illicit information that a website may contain, constituting in itself a violation of the ECHR.¹⁷

This does not mean that the ECtHR has stated that a total blocking measure of a certain website can never be applied, but that there should be a separate and distinct justification for this, with respect to the underlying justification directed solely to the blocking of illicit content, and with reference to the criteria established in accordance with Article 10 ECHR, otherwise this would constitute an arbitrary interference by national authorities on the users and owners of the website.¹⁸

This is significant because the ECtHR establishes that to carry out the total blocking of a website, it is not enough to determine the necessity of it on each of the illicit contents contained therein, but to carry out a thorough analysis and justification of the reasons why it must be blocked completely. This represents a real step forward in that the ECtHR determines the possibility of carrying out a total blocking of a website, which until then had been considered in a very succinct manner.

(2) Responsibilities

Another issue analyzed in various cases by the ECtHR is the determination of responsibility for online hate speech, from its creation to its dissemination.

In this sense, we must highlight, due to its current relevance and importance, the *Applic. Mukhin v. Russia*, of December 14, 2021, through which the ECtHR stated that journalists, editors-in-chief, publishers, and media owners may have duties and responsibilities regarding the hate and violence expressed in their media, even if they are not personally associated with such statements if they assist the authors in their dissemination.¹⁹

¹⁴ *Ahmet Yildirim v. Turkey*, ECtHR 2012, No.3111/10, 48-54.

¹⁵ *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 224.

¹⁶ *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 225.

¹⁷ *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 230-231.

¹⁸ *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 231.

¹⁹ *Mukhin v. Russia*, ECtHR 2021, No.3642/10, 124.

This represents an advance in the determination of the responsibility of the subjects involved in the dissemination and manifestation of hateful expressions in different media, since until now, the element of intentionality had been a subjective and defining element for the ECtHR to respond for the consequences of hate speech.²⁰ This shows that the ECtHR is in an evolutionary process of its jurisprudence regarding the treatment of online hate speech.

An example of the ECtHR's jurisprudential evolution in this matter is the treatment of the individual responsibility of the user for online hate speech when this user is a political figure, highlighting in this regard the recent *Applic. Sanchez v. France*, of May 15, 2023, whose case revolves around the responsibility of the claimant, specifically a council member, with respect to online hate speech expressed in one of his publications by other users through comments on the same.

Firstly, it is particularly important to note, regardless of the claimant's status as a public representative and the relationship of this to his responsibility, that the ECtHR considered and analyzed the Terms of Service of the network where the hateful expressions were made, in order to determine the degree of responsibility of the originating user.²¹ This is revealing in that, for the first time, the ECtHR not only takes into account the national and international regulations applicable to the case for its pronouncement, but also incorporates the Terms of Service of a social network to analyze the diligence of the user in it.

This case stands out because with it, the ECtHR takes a very important step in the prosecution and prevention of online hate speech, as it has become fundamental to understanding the responsibility that politicians may have in the dissemination and constitution of hate speech on social networks. In the *Applic. Delfi AS v. Estonia*, of June 16, 2015, the ECtHR indicated that the responsibilities and obligations of large internet portals managed professionally and exploited for commercial purposes, excluding from its examination internet forums where comments from third parties may be disseminated. However, from this judgment, the ECtHR expresses that social network for political purposes, where even the account holder is not a simple individual, but a political representative who uses their networks for such purposes, cannot have the same consideration, and therefore the same responsibilities, as the social network of any individual.²²

Although the case under analysis is the responsibility of the politician in relation to hateful comments made in his publication against social minorities, the ECtHR notes that there is no consensus in the Council of Europe, for the moment, to attribute responsibility for acts committed by third parties, although these may arise depending on the moderation or purification techniques applied by the "producer" users of content who use their social networks for non-commercial purposes.²³ Even so, it analyzes this term in depth through the analysis of national regulations, which is very interesting for the treatment of online hate speech by the Court.

²⁰ *Sürek v. Turkey (No.1)*, ECtHR 1999, No.26682/95, 62.

²¹ *Sanchez v. France*, ECtHR 2023, No.45581/15, 81.

²² *Sanchez v. France*, ECtHR 2023, No.45581/15, 179-180. And *Delfi AS v. Estonia*, ECtHR 2015, No.64569/09, 115-116.

²³ *Sanchez v. France*, ECtHR 2023, No.45581/15, 182.

The ECtHR observes that, although the holder of a Facebook account used for non-commercial purposes does not have absolute control over the administration of comments or automatic filtering, it was required in the case of a very popular account of a producer user to have a diligent attitude and a series of considerable resources available.²⁴

Thus, the ECtHR points out that producer users cannot be exempted from all responsibility, as this could facilitate or encourage hate speech, so that professional entities that create social networks and make them available to other users have certain obligations, there must be a distribution of responsibilities among the actors involved, allowing, if necessary, the degree of responsibility and the way it is attributed to be adjusted according to the objective situation of each one.²⁵

In this sense, the ECtHR determines that the duties and obligations of a politician according to the above are accentuated, as he holds a certain degree of notoriety and representativeness, having a greater capacity to influence users.²⁶

Therefore, and in relation to the individual responsibility of the user who created the publication where the hateful comments were made, the ECtHR points out that although this user did not have automatic filtering tools or other mechanisms that must be established by the social network itself, he allowed public access to the wall of his Facebook account. This allows us to understand that he authorized comments to be published on it, and that taking into account the political and social circumstances in which said publication was framed, serious consequences were expected, a risk that, as a politician, he should have foreseen, which was accentuated as he was an expert in online communication strategy.²⁷

Furthermore, the ECtHR recalls that hate speech is not always manifested by the individual through precise and clear expressions, but sometimes takes other forms such as implicit statements that, even if expressed cautiously or hypothetically, are equally hateful.²⁸ And with this, the Court points out that the impact of hateful and racist speech becomes more harmful in an electoral context where there are tensions in the population.²⁹ In this sense, it recalls that political speeches linked to immigration should not advocate for racial discrimination or humiliating and degrading attitudes, as this can trigger a complex social climate and undermine confidence in democratic institutions.³⁰

On the other hand, with reference to the principle of proportionality that this Court has echoed so much, the ECtHR recalls that not all politicians have the same responsibility with respect to their words, but an analysis should be carried out on the degree of responsibility that can be attributed to them, since the notoriety and representativeness of all politicians are not the same. With this, it expresses that a local politician has fewer duties, and therefore a smaller burden, than a national figure,

²⁴ *Sanchez v. France*, ECtHR 2023, No.45581/15, 185.

²⁵ *Ídem*.

²⁶ *Sanchez v. France*, ECtHR 2023, No.45581/15, 187.

²⁷ *Sanchez v. France*, ECtHR 2023, No.45581/15, 191-193.

²⁸ *Smajić v. Bosnia and Herzegovina*, ECtHR 2018, No.48657/16. And *Sanchez v. France*, ECtHR 2023, No.45581/15, 157.

²⁹ *Sanchez v. France*, ECtHR 2023, No.45581/15, 178.

³⁰ *Ídem*.

since these must be graduated according to the weight and scope attributable to their words and the resources, they have at their disposal to prevent the constitution and dissemination of hate speech to intervene effectively on social media platforms.³¹

In this context, the ECtHR also establishes, as one of the elements to be considered for the prosecution of online hate speech, the attitude of the producer user towards the publication of hateful comments in his main publication, since he was also allowing the creation of a kind of permanent dialogue that represented a coherent set and not mere monologues, but these responded to and complemented each other.³²

In fact, the individual warned the other users about the hateful nature that the comments made could have, without deleting them or showing his rejection of them, alluding to the terms of service of the network, without having stopped to determine if those that remained on his wall contained the content that these comments had, even pointing out that the claimant was aware of the legal consequences that were falling on some of the users who had made said comments.³³

Furthermore, the ECtHR expresses that it is relevant to analyze that the claimant had declared before the national authorities that the comments on his publication were too numerous and that he could not read them regularly, which was contradicted by the Government itself and not denied by the claimant later. For this reason, the ECtHR expresses that the state of responsibility due to the difficulties caused by potentially excessive traffic on a politician's account and the resources necessary to guarantee its effective control, is not an issue addressed in the case it is hearing.³⁴

And this shows that this case represents a great challenge for the ECtHR with regard to the prevention and prosecution of online hate speech, as it would be interesting to see how the Court analyzes the responsibility of a producer user and his due diligence in the presence of a large number of comments and interactions on a main publication.

However, in the face of the lack of consensus in the Council of Europe on the responsibilities that producer users may have, a new, more exhaustive jurisprudential and conceptual treatment in the matter seems to be emerging in the face of the growth of online hate speech by political representatives on the continent.

(C) THE INFLUENCE OF THE INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS CONCLUSION

It should be noted that the above analysis has revealing connotations for the normative development of the prevention and prosecution of online hate speech by Council of Europe States.

The impact of the Convention is equivalent, in a generic sense, to the capacity of the ECtHR's jurisprudence to transform and harmonize national rules on fundamental

³¹ *Sanchez v. France*, ECtHR 2023, No.45581/15, 201. And *Mesić v. Croatia*, ECtHR 2022, No.19362/18, 104.

³² *Sanchez v. France*, ECtHR 2023, No.45581/15, 201. And *Mesić v. Croatia*, ECtHR 2022, No.19362/18, 104.

³³ *Sanchez v. France*, ECtHR 2023, No.45581/15, 196.

³⁴ *Sanchez v. France*, ECtHR 2023, No.45581/15, 200.

rights and related legal regulations.³⁵ This is because the ECtHR's jurisprudence plays a leading role as it is endowed with authority and the capacity to impose its interpretative decisions, with the Committee of Ministers responsible for supervising the execution of judgments, as well as the Secretary General and the Parliamentary Assembly.³⁶ However, this does not mean that the execution of ECtHR judgments is without reservations and complex procedures.

The force of ECtHR judgments in national legal systems has been demonstrated even in its own jurisprudence, highlighting the current *Applic. Nepomnyashchiy c. Russia*, of May 30, 2023, where the ECtHR established that line of jurisprudence that achieves true effective protection of human rights enshrined in the ECHR against online hate speech.

In this case, which concerned a case of online hate speech, the ECtHR has stated that it is important for the State to positively incorporate the protection that the national legal system must provide against any existing discrimination, not leaving this protection in an indeterminate legal concept.³⁷ This is of particular interest in relation to the aforementioned ECtHR jurisprudence, its effects, and its execution.

To this, the ECtHR adds that it is not enough to positively incorporate the protection of the rights of vulnerable groups, but the State must guarantee that the legal mechanisms for the protection of socially stigmatized persons are effective and efficient, so that the State must even ensure that the normative regulation for the protection of these groups is subsequently put into practice.³⁸

In fact, numerous national legislative reforms have been driven by ECtHR judgments, as this is imposed by the international obligation to respect and guarantee conventional rights, which confirms the link between the national legislator and the fundamental rights of the ECHR.³⁹

In this way, the relevance of the ECtHR's jurisprudence is observed, not only for the action and/or activity of national authorities, but also for the development of rules that guarantee the protection of human rights enshrined in the ECHR, which shows transcendental effects on national legal systems.

In this sense, we can conclude that the ECHR is a truly useful tool for the prevention and prosecution of new socio-legal phenomena capable of violating the rights enshrined in it.

³⁵ J. García Roca and H. Nogueira Alcalá, 'El impacto de las sentencias europeas e interamericanas: valor precedente e interpretación vinculante', in J. García Roca and E. Carmona Cuenca (eds), *¿Hacia una globalización de los derechos? El impacto de las sentencias del Tribunal Europeo y de la Corte Interamericana* (Thomson Reuters Aranzadi, Madrid, 2017) 71, at 74.

³⁶ R. Niño Estébanez, *Fuerza obligatoria y ejecución de las sentencias del Tribunal Europeo de Derechos Humanos en España: el procedimiento de revisión* (Tirant lo Blanch, Valencia, 2019), at 53 and 56-57.

³⁷ *Nepomnyashchiy and others c. Rusia*, ECtHR 2023, Nos. 39954/09 and 3465/17, 78.

³⁸ *Nepomnyashchiy and others c. Rusia*, ECtHR 2023, Nos. 39954/09 and 3465/17, 78-79.

³⁹ J. García Roca and H. Nogueira Alcalá, 'El impacto de las sentencias europeas e interamericanas: valor precedente e interpretación vinculante', in J. García Roca and E. Carmona Cuenca (eds), *¿Hacia una globalización de los derechos? El impacto de las sentencias del Tribunal Europeo y de la Corte Interamericana* (Thomson Reuters Aranzadi, Madrid, 2017) 71, at 83.

Through its interpretation, the ECtHR manages to establish truly pioneering guidelines and criteria for the protection of human rights in the digital age. And not only with respect to the particularities to be taken into account for the treatment of online hate speech by national authorities, but also, recently, on the analysis of the personalized responsibility of each of the users involved in the constitution and dissemination of the same, as well as the way in which national authorities must adopt measures to block websites, as an option to curb it without violating the human rights of users not involved in the hate speech that occurred.

This is revealing in that the ECtHR, analyzing cases of online hate speech, is progressively concerned, as it deals with cases in a more detailed manner, that States and national authorities provide a guaranteeing and effective response to new socio-legal phenomena capable of violating human rights, such as online hate speech.

Thus, the ECtHR shows that, despite the emergence of challenges capable of violating human rights enshrined in the ECHR, States continue to be obliged to guarantee the protection of the rights contemplated in this international instrument, which is applicable to them, acquiring a timeless character and proclaiming it capable of adapting to the new legal challenges of the 21st century.

Therefore, the foregoing deserves special attention, taking into account the effects that the ECtHR's jurisprudence acquires for national authorities and the normative reforms of the States Parties through the various enforcement mechanisms of the Council of Europe, for the prevention and prosecution of online hate speech at the regional level.

