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### Is Freedom of Expression a Tool of Oppression and Harm? A Study on Hate Speech and its Harms in Case Law and Doctrine of the US and European Court of Human Rights

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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**IS FREEDOM OF EXPRESSION A TOOL OF  
OPPRESSION AND HARM?  
A STUDY ON HATE SPEECH AND ITS HARMS  
IN CASE LAW AND DOCTRINE OF THE US AND EUROPEAN  
COURT OF HUMAN RIGHTS**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

**By**

**Mohamed Hassan**

**May 2021**

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School of Global Affairs and Public Policy

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A Thesis Submitted by

*Mohamed Hassan Mohamed Abdel Moniem*

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May 2021

in partial fulfillment of the requirements for the  
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## DEDICATION

I dedicate this thesis to the people who suffer from racism and sexist speech. Hate speech traumatizes many lives and souls. This thesis tries to highlight this problem and hope my voice can make a difference in people's lives who are suffering from this speech.

## ACKNOWLEDGEMENTS

This thesis is the final step to acquire my LLM degree from the American University in Cairo. This is the last phase in a journey that started three years ago. Since I joined this program, I have learned many things about the law that changed my perspective on how it functions in our society. Thanks to the law department professors I have learned many things that have changed my understanding of the law and that have helped me develop my critical thinking in dealing with law and rules.

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Mohamed Hassan  
Supervised by Professor Jason Beckett

**ABSTRACT**

Many societies now face the problem of hate speech. It has reached the level of a global problem. Many groups use freedom of expression to oppress other groups through using hate speech. The problem of hate speech represents a complex topic because it is interwind with the right of freedom of expression. However, international human rights law tries to combat the hate speech law in some treaties, such as the ICCPR and CERD, by offering rules to guide states constitutional courts in adjudicating these cases by limiting some of their absolute discretionary power in deciding these cases. These efforts have not led to comprehensive rules against hate speech. Therefore, countries have adopted two approaches to organize the right of freedom of expression and their restriction of hate speech. The US approach grants the freedom of expression without any restriction on hate speech. Meanwhile, the ECHR has adopted an approach that restricts hate speech in many cases. The main effects of these contradictions are two models that offer different approaches to the hate speech problem. The study of freedom of expression rights and its restrictions in these two models is essential to know the justifications for hate speech protection and refuted by literature and court cases. This paper illustrates the main IHRL treaties that organize the freedom of expression rights and its restrictions to explain the hate speech problem's origin. The US doctrine is explained by illustrating cases and opinions which support this system. The critical race theory and feminist scholarship opinions which call for restricting hate speech are analyzed. They reject hate speech because it increases racism and discrimination in society and supports hate speech restriction. This paper also views the ECHR cases that adopt the same approach. This paper argues that hate speech should be restricted because it causes harm to individuals and society.

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## I. Introduction

Nowadays, in our world, many problems are shared among different countries. Due to the spread of the internet and modern technology, many problems are common in societies despite their differences. The spread of extreme and racist speech is now seen as a common problem that many countries try to find a solution for. Hate speech is a difficult problem because it intersects with the right of freedom of expression. Many international conventions illustrate that freedom of expression is a basic right that states must protect. These conventions grant this right to protect the people's right to speak and express their ideas. In spite of the importance of this right, these treaties do not grant this right without restriction. Many international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and Convention on the Elimination of All Forms of Racial Discrimination (CERD) offer some restrictions on speech. They use varied approaches to treating the problem of hate speech. This paper calls for unifying the global response to the hate speech problem. This is an institutional project in which I argue that the international human rights law (IHRL) should provide standards to guide states, and their domestic courts, especially the Constitutional courts, on how they should react to freedom of expression and imposes some restrictions on hate speech. This is a specific example of a more general problem that Constitutional courts face in any country. Constitutional courts try to balance the rights of some people and counter societal/minority interests. Therefore, IHRL provides global rules and approaches to limit the discretionary power of these courts on deciding such cases. However, many authors criticize the current IHRL framework as it lacks unified standard rules to guide states in fighting this problem.<sup>1</sup>

Two models treat the problem of hate speech. A state such as the US has adopted a doctrine of almost absolute protection for the freedom of expression, which has led to the protection of hate speech and incitement to discrimination based on racial and ethnic grounds.<sup>2</sup> Other regimes, such as the European Union regime, implements another view

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<sup>1</sup> MICHEAL ROSENFELD, *Hate Speech in Constitutional Jurisprudence A Comparative Analysis in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES*, at 248, (edited by Michael Herz and Peter Molnar, Cambridge University Press) (2012).

<sup>2</sup> *Id.*



that protects the freedom of expression and restricts hate and racial speech.<sup>3</sup> I explore these two regimes, mainly because they respond differently to hate speech. While the US doctrine protects hate speech, the European Court of Human Rights (ECHR) restricts this speech based on the harms it inflicts on society. I explain these two regimes' views by illustrating the relevant explanation and the theories that support both regimes. The different organizations of freedom of expression and hate speech raise essential questions: Should freedom of expression and its restrictions be applied differently? Or should the freedom of expression be granted without any restriction even though it inflicts harm?

These questions are critical because the various approaches to freedom of expression protection led to the spread of hate in these societies. I illustrate the problem of hate speech and the right to free speech in three legal frameworks: IHRL, US case law and doctrine, and ECHR cases. It is crucial to analyze hate speech in the IHRL framework because this system guides states, especially their Constitutional courts, with many substantive rules to be followed by constitutional judges in adjudicating freedom of expression cases and hate speech cases. These rules are only essential because they limit some of the courts' discretion in deciding such cases. It is important to explain that the IHRL treaties, such as the ICCPR and CERD, use different approaches toward the hate speech problem and offer rules to end this problem.<sup>4</sup> Therefore, I explain the IHRL framework, which organizes the freedom of expression right and its restriction, to see why this system functions this way. Also, it is useful to explain US doctrine and cases and the ECHR cases because the two systems are completely opposite, as explained. They both offer a different approach to freedom of expression rights as both systems treat hate speech differently. For these reasons, I explore these systems to understand why they function this way.

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<sup>3</sup> TOBY MENDEL, Does International Law Provide for Consistent Rules on Hate Speech? in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES, at 422, (edited by Michael Herz and Peter Molnar, Cambridge University Press) (2012).

<sup>4</sup> Natalie Alkiviadou, *The Legal Regulation of Hate Speech: The International and European Frameworks*, 55, 4, Croatian Political Science Review, at 216 (2018).

In this paper, I argue that hate speech should be restricted because it imposes harm on victims of this speech and makes them suffer. Freedom of expression is not an excuse to protect hate speech. This harm is unrepairable. This harm degrades victims and makes them feel unequal to other members of society. I propose that the harm inflicted on victims offers a solid justification for the restriction of hate speech. This illustration explains some critiques of freedom of expression in the literature using critical race and feminist theory. I use critical race theory and the feminist theory framework to explore the harm affecting hate speech victims. Also, ECHR cases are used as examples to see how this court has applied the restriction of hate speech to offer protection from hate speech.

In part II, the IHRL framework toward hate speech shows how this system offers rules to guide states on how they are supposed to treat the hate speech problem. However, this system is criticized by literature because it lacks a unified approach to the problem of hate speech. Part III explores how the US doctrine justifies the absolute protection of hate speech by discussing the literature and case law that supports this view. Part IV analyzes the opinions which call for the restriction of hate speech. I explain the European Court of Human Rights (ECHR) decisions against hate speech as this court adopts a well-developed doctrine against hate speech and offers an alternative approach to the hate speech problem. Part V concludes by suggesting that hate speech should be restricted, and states should be aware that hate speech represents a grave threat to society. Therefore, states should rethink their current approach to fighting hate speech.

## **II. Hate speech restriction in IHRL: vague rules and lack of comprehensive approach toward the hate speech problem**

The international human rights law (IHRL) is well-developed with substantive rules that seek to guarantee the right of the freedom of expression and, at the same time, has developed rules to restrict hate speech. These rules are general rules that seek to control the states' constitutional court discretionary power in treating such cases. Usually, in deciding cases related to freedom of expression and hate speech, constitutional courts balance the rights of the people to speak and the duty to protect people from the negative outcome of this speech. Therefore, IHRL proposes some rules to limit this power and offers unified rules to unify international practice. This is the official story. In reality, IHRL's current rules against hate speech do little to fight this problem. Although many IHRL rules are against incitement toward violence or racial acts, threatening society's peace or safety, these rules are ineffective against hate speech. The lack of consistent rules against hate speech is due to the absence of a clear vision in IHRL treaties toward fighting the hate speech problem. Also, there is no standard approach on the exact essence of the right of freedom of expression and the supposed restrictions on hate speech.

In this chapter, I argue that IHRL lacks consistent rules against hate speech and offers limited rules to fight this problem to guide the states' constitutional courts in adjudicating such cases of hate speech. To explain this argument, in the first section, I illustrate the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) preparation history to illustrate states' disagreements on the restrictions of hate speech which led to fragments in these texts. Also, this section focuses on the main critiques of the ICCPR approach toward the hate speech problem. In the second section, I explain the Convention on the Elimination of All Forms of Racial Discrimination (CERD) approach against hate speech. Although this treaty offers a rule that can be effective against racist speech to guide states' courts in cases of racism speech, it does not offer a comprehensive approach toward the hate speech problem. In the third section, I conclude that different approaches toward hate speech led to confusion on a precise definition of hate speech and the approach that states

should follow to treat it. For this reason, treaties do not fight the hate speech problem properly.

### **A. UDHR and ICCPR articles on the prohibition of hate speech: many debates and lack of unified view**

The UDHR and ICCPR comprise the main IHRL corpus. They both offer many rules and principles that states should follow in their relationship with their citizens. They illustrate the states' main rights and obligations toward individuals and are considered an important step towards organizing the main human rights that are agreed upon by states.<sup>5</sup> Although these legal texts are essential instruments for granting the freedom of expression and restricting hate speech, they both criticize for lacking a unified legal framework against hate speech.<sup>6</sup> The UDHR and ICCPR do not offer a straightforward way to fight the hate speech problem due to various reasons related to these texts' vagueness and the lack of a straightforward approach toward fighting the hate speech problem. To explain this, I introduce some of the historical debates between states in forming these treaties to understand the origin of such vagueness. Then I explain why ICCPR text does not offer a clear path against hate speech prohibition.

#### **1.UDHR preparation and the fatal mistake of ignoring restricting hate speech**

Article 19 of the UDHR adopts a clear rule to protect the freedom of expression right, but it lacks text to restrict hate speech. Article 19 declares:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice.<sup>7</sup>

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<sup>5</sup> TARLACH MCGONAGLE, *The development of freedom of expression and information within the UN: leaps and bounds or fits and starts?* in *THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES*, at 6 (edited by Tarlach McGonagle, Yvonne Cambridge University Press) (2015).

<sup>6</sup> *Supra* note 1, at. 216.

<sup>7</sup> Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(II), U.N. Doc. A/8 10, at 71 (1948).

This declaration leaves the restriction on hate speech to the general limitation, which is stated in article 7 and article 29/2.<sup>8</sup> Article 29/2 illustrates some of the general restrictions on the rights stated in this declaration:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>9</sup>

Article 7 adopts the equality principle before the law and equal protection by the law. Stephanie Fariior interprets the principle of equality as a principle for protection against hate speech.<sup>10</sup> Also, article 7 in the Declaration calls for the prohibition of incitement to discrimination. Article 29 explains that the limitation on rights is "due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." From this illustration, UDHR avoids adopting a text against hate speech or restriction on freedom of expression, which is a fatal mistake. To understand why there is no explicit prohibition on hate speech in the UDHR, we must look into the preparation of the UDHR. The preparation of the UDHR provides insight into the different views that states have adopted on the freedom of expression right and its restrictions. These debates explain that the lack of a unified version against hate speech is deeply rooted in the international system.

In the formation of the UDHR, there were two views toward hate speech; the first group of countries argued for the respect of freedom of expression and refused any text which would hinder this right. The other group called for adopting an explicit rule against racist and discriminatory speech. On the one hand, during the preparation of article 7, countries adopted different views on this article, organizing the equality principle between people. Countries disagreed about whether the equality principle and not discrimination must include protection from incitement to discrimination or not.<sup>11</sup> There

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<sup>8</sup> Stephanie Fariior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law concerning Hate Speech*, 14, 1 BERKELEY J. INT'L L. at 11 (1996).

<sup>9</sup> *Supra* note 7.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.* at 13.

was a debate between the USSR, China, and Australian representatives and US representatives about adopting a provision to prohibit discrimination based on race, religion, and nationality.<sup>12</sup> The USSR representative called for penalizing the act of discrimination and advocacy for such an act. He stated that their article should include “any advocacy of national, racial and religious hostility or of national exclusiveness or hatred and contempt, as well as any action establishing a privilege or a discrimination based on distinctions of race, nationality or religion, constitute a crime and shall be punishable under the law of the State.”<sup>13</sup> The US representative Eleanor Roosevelt claimed that “her Government would be opposed to the introduction of the Soviet Union proposal in the Declaration, She did not think that a law such as that proposed by the Soviet Union representative could be applied in practice, and cited the prohibition law in the United States as an example.”<sup>14</sup> However, countries adopted article 7 after voting between countries without requiring states to criminalize discrimination or incitement to such an act.

From this debate, we can understand an apparent disagreement on the incitement to discrimination prohibition as one of the commonly defined elements of hate speech. Furthermore, adopting a restriction on article 19 divided states, this article is about protecting the right of freedom of expression. States debated on adopting an explicit prohibition on speech that calls for fascism and racial superiority. The USSR and France representatives proposed to adopt the limitations on the freedom of expression.<sup>15</sup> These “clauses were rejected by the majority, which viewed the general limitations clause (Article 29) as sufficient.”<sup>16</sup> The US representative rejected these restriction clauses, and “when Article 19 was discussed in the U.N. General Assembly, the Soviets once again sought to reintroduce more detailed restrictive amendments, which were rejected without discussion at the request of Mrs. Roosevelt.”<sup>17</sup> We can see how the US has a persistent opinion that rejects the restrictions on freedom of expression. In the voting process, other

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<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Id.* at 15, 16.

<sup>14</sup> U.N. Commission on Human Rights, U.N. Document. E/CN.4/SR.34, 12/12/1947 at 10, available at: <http://undocs.org/E/CN.4/SR.34>. [accessed 26 February 2021].

<sup>15</sup> *Id.* at 20.

<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.* at 20.

countries' representatives approved the US proposal. From these debates, we can see that during the formulation of the main and the most prominent legal text that declared the rights and duties upon people, states could not agree on the prohibition of hate speech. This is a fatal mistake because it normalizes the existence of hate speech. Although the UHDR adopts a clear article against incitement for discrimination, it lacks restrictions on other types of hate speech and racist speech.

Therefore, I can deduce that various states did not accept the idea of restricting freedom of expression at that time, and only a few countries warned about the hate speech problem. Although subsequent international treaties restricted the freedom of expression, hate speech is accepted without a straightforward, comprehensive approach against this, as we shall see later.

## **2. ICCPR meaningless rules against hate speech**

The ICCPR is supposed to be an essential instrument for granting the freedom of expression and restricting hate speech; Many authors criticize ICCPR for offering a meaningless unclear legal framework against hate speech.<sup>18</sup> In this part, I explain that ICCPR does not offer a straightforward way to fight the hate speech problem due to these texts' vagueness and the lack of a straightforward approach toward fighting the hate speech problem. In explaining this argument, it is important to highlight some of the debates during ICCPR formation among states to highlight why states formed the ICCPR in this way. Then article 20/2 of ICCPR is analyzed to show that this article is meaningless in fighting hate speech.

The preparatory work of article 20 of the ICCPR reflects the disagreements and confusions among states on hate speech prohibition. In this part, I explain some of these debates to see why states articulated the ICCPR in this way. With respect to Article 20/2 of ICCPR's preparation process, there were many debates between states on the exact extent of the restrictions on the freedom of expression. Article 20/2 prohibits “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility

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<sup>18</sup> *Supra* note 1, at. 216.

or violence.”<sup>19</sup> The main disagreements between states were about the unclear definition of the terms of article 20/2, such as incitement to discrimination and hatred.<sup>20</sup> Also, other countries held that this article threatens the right to freedom of expression.

Regarding debates about article 20/2, the US posited that governments could interpret incitement to discrimination to restrict speech.<sup>21</sup> The US asserted it is enough to restrict speech that incites violence only.<sup>22</sup> Other countries, such as the USSR, rejected this view and argued that this article is important to restrict hate speech. The USSR suggested that article 20 does not provide any rights but an obligation on states to prohibit propaganda to war, advocating for racial or religious hatred incitement to discrimination or violence.<sup>23</sup> The US contested this article as it could encourage censorship.<sup>24</sup> Also, the US explained that article 19/3 was enough to restrict racist speech. Although this article was adopted, these debates show that many countries disagree with the US policy of rejecting to restrict hate speech. Furthermore, these historical debates represent two contradictory approaches toward the treatment of the hate speech problem. These contradictions hinder efforts to implement a unified policy against hate speech, and it led to vague legal texts that, in turn, led to fragmentation in the legal order against hate speech. However, others see this text as offering legal protection against hate speech, and this text representing most of the principles that states agreed on in treating the hate speech problem.<sup>25</sup> I disagree with this opinion because the ICCPR’s approach toward hate speech does not lead to fighting this problem. In the next part, I illustrate some of the legal fragments of this Convention to explain that article 20/2 is pointless against hate speech prohibition.

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<sup>19</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).

<sup>20</sup> MICHAEL O’FLAHERTY, International Covenant on Civil and Political Rights: interpreting freedom of expression and information standards for the present and the future, in THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES, at 62 (edited by Tarlach McGonagle, Yvonne Donders, Cambridge University Press) (2015).

<sup>21</sup> *Id.* at 63.

<sup>22</sup> *Supra* note 8, at 25.

<sup>23</sup> *Supra* note 20, at 63.

<sup>24</sup> *Id.* 63.

<sup>25</sup> Thomas J. Webb, *Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 Washburn L.J. at 450-451 (2011).



Relating to the ICCPR criticisms, the main critiques I focus on are related to Article 20/2 of ICCPR. This article is considered the main article that offers a restriction on speech and engages with the problem of hate speech directly, unlike article 19, which describes the right and proposes a certain restriction. Article 20 offers a different approach against extreme speech. Michel Rosenfeld argues that Article 20/2 lacks the definition of many terms such as advocacy for hatred, incitement to discrimination or hostility, and violence.<sup>26</sup> Also, the exact interpretation and the threshold for applying this article by states brought many legal concerns.

On the one hand, Jeroen Temperman criticizes Article 20 for using vague language to tackle the hate speech problem. This article does not require countries to prohibit hateful speech per se, but it prohibits the advocacy of national, racial speech, which constitutes incitement that leads to discrimination, hostility, or violence.<sup>27</sup> He rejects such a formula because the words of article 20/2, such as advocacy, incitement, and religious hatred, are vague.<sup>28</sup> The ICCPR lacks the exact definition of the advocacy for racial or national or religious hatred. The word advocacy is not clear because it does not determine what advocacy means. Is advocacy about the promotion of racial ideas only, or can it include the speech that supports such speech?<sup>29</sup>

There are some authors and NGOs who have tried to define advocacy. For example, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted a report to the General Assembly which defines advocacy of hate speech “as explicit, intentional, public and active support and promotion of hatred towards the target group.”<sup>30</sup> The problem with this definition is that it does not clearly define the meaning of active support and the threshold for the active support

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<sup>26</sup> *Supra* note 1, at 214- 215.

<sup>27</sup> JEROEN TEMPERMAN, *RELIGIOUS HATRED AND INTERNATIONAL LAW: THE PROHIBITION OF INCITEMENT TO VIOLENCE OR DISCRIMINATION*, at 181, Cambridge University Press (2016).

<sup>28</sup> *Id.*, at 168.

<sup>29</sup> *Supra* note 1, at 214.

<sup>30</sup> UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, para. 44(b), 6 September 2012, A/67/357, available at: <https://undocs.org/A/67/357> [accessed 5 March 2021].

requirements.<sup>31</sup> Also, Jeroen Temperman suggests that the advocacy for racial or national, or religious hatred must be delivered in a public forum and speaker must be intended to prompt a certain action such as violence, discrimination, or hatred.<sup>32</sup> The report of the Special Rapporteur accepted this definition requiring in the definition of advocacy to discrimination or hatred three elements: “explicit, intentional, public.”<sup>33</sup> Many authors reject this definition because this interpretation does not cover advocacy of racial or national hatred in the private sphere.<sup>34</sup> I think this could lead to a limited application for the law that organizes the advocacy to hatred or discrimination.

Furthermore, like the disagreements on the definition of advocacy, national, racial, and religious hatred also brought about the considerable controversy on the exact meaning of hatred. Temperman argues that this word needs to be defined in the light of the emotional effects it brings to victims.<sup>35</sup> It has been proposed by the report of the Special Rapporteur that hatred can be defined “as a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”<sup>36</sup> However, Temperman criticizes this interpretation because it links the speech with a certain kind of emotion.<sup>37</sup> This definition is not accurate because hate speech can be emotionless, and hate speech that does not affect feeling cannot be prohibited by states accordingly to this definition.<sup>38</sup> In addition, the word incitement to discrimination, hostility, or violence is not clear enough to show what constitutes incitement and the threshold for this act.<sup>39</sup> Also, it is unclear if the incitement to violence and discrimination requires certain results or whether it is enough that the act will likely cause discrimination or violence.<sup>40</sup>

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<sup>31</sup> *Supra* note 1, at 215.

<sup>32</sup> *Supra* note 27, at 169.

<sup>33</sup> *Supra* note 30, para. 44(b).

<sup>34</sup> *Supra* note 27, at 172.

<sup>35</sup> *Id.* at 173.

<sup>36</sup> *Supra* note 30, para. 44(a).

<sup>37</sup> *Supra* note 27, at 173.

<sup>38</sup> *Id.* at 172- 174.

<sup>39</sup> Rebecca Meyer, *Pursuing a Universal Threshold for Regulating Incitement to Discrimination, Hostility or Violence*, 44 *Brook. J. Int'l L.* at 310 (2018).

<sup>40</sup> *Supra* note 27, at 181.

There have been some attempts by IOS representatives and NGOs to define incitement. For instance, the Special Rapporteur report defines incitement as "statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups."<sup>41</sup> ARTICLE 19, an NGO concerned with human rights problems, defines the prohibition of incitement to hatred and discrimination by using many criteria to evaluate speech, such as the speaker's intent, the context, and the likelihood of violence. It defines protected group from this speech in a non-exhaustive list, including "race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status colour."<sup>42</sup> However, these definitions are intended for the broadening of the scope of article 20/2, which contradicts the states' intention.<sup>43</sup> Moreover, these definitions restrict the free speech right.<sup>44</sup> ARTICLE 19's definition contradicts the states' intention because states agree on prohibiting advocacy for extreme speech, which are national, racial, or religious hatred, only without adding other elements such as racial exclusiveness.<sup>45</sup> These criteria also have led to a divergent application for the restriction imposed in article 20/2 because some states may follow these criteria, and others may not follow this approach.<sup>46</sup> Furthermore, the UN special rapporteur approach leads to suffocating free speech and disconfirming ICCPR principles, which protects speech that does not cause harm.<sup>47</sup>

Regarding the exact requirement of incitement, many authors disagree on its relation to haters and its exact meaning. One opinion calls for a relationship between hatred that constitutes incitement; Ghana argues that the courts or prosecution must establish hatred before these authorities can treat this speech as incitement to

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<sup>41</sup> *Supra* note 30, para. 44(c).

<sup>42</sup> Article 19, *Prohibiting incitement to discrimination, hostility or violence*, at 7, December 2012, ISBN: 978-1-906586-38-6, available at: <https://www.refworld.org/docid/50bf56ee2.html> [accessed 01 March 2021].

<sup>43</sup> *Supra* note 39, at 337.

<sup>44</sup> *Supra* note 27, at 181.

<sup>45</sup> *Supra* note 39, at 338.

<sup>46</sup> *Id.* at 339.

<sup>47</sup> *Supra* note 27, at 183.

discrimination, hostility, or violence.<sup>48</sup> If the speech calls for national or racist hatred only without incitement to discrimination or violence, article 20/2 does not prohibit this speech in this case.<sup>49</sup> This article uses a different approach from article 19/3, as the latter restricts speech if it is only against the rights of others, national security, or public order. Article 19/3 restrictions to the speech are applied immediately if the speech violates these restrictions; Article 20/2 requires the incitement to discrimination to result from hatred.<sup>50</sup> Another opinion thinks that incitement is unclear in ICCPR and suggests deferring to national systems to define incitement. Toby Mendel posits that incitement must lead to certain result “and to define it narrowly as requiring a close nexus between the statements and the engendering of the proscribed result, which, pursuant to Article 20(2) of the ICCPR, is violence, discrimination, or hostility.”<sup>51</sup> He illustrates that the US adopts this definition “in *Brandenburg v. Ohio*, for example, the U.S. Supreme Court held that the First Amendment prohibits restrictions on advocacy of crime, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>52</sup> From these contradictions on the exact definitions of words of article 20/2 of ICCPR, it is clear that this article is useless against the hate speech problem. We can trace this problem to the preparation process as countries disagreed on many concepts that this article must cover. Therefore, I believe these contradictions led countries to refrain from meeting their international obligation in article 20 by refusing to adopt a clear law against hate speech. In the next part, I explain the CERD to illustrate its approach against hate speech to explain that CERD has offered prominent rules against racist speech contrary to ICCPR rules.

### **B. The CERD approach fighting racism: prominent rules but limited application**

The CERD Convention unifies international efforts to combat racism and offers a legal obligation upon countries to prohibit and criminalize such an act. In this Convention, Article 4 organizes the criminalization of racist speech or incitement for such an act. This

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<sup>48</sup> Nazila Ghanea, *Expression and Hate Speech in the ICCPR: Compatible or Clashing*, 5 *Religion & Hum. Rts.* at 188 (2010).

<sup>49</sup> *Id.* at 189.

<sup>50</sup> *Id.* at 190.

<sup>51</sup> *Supra* note 1, at 428.

<sup>52</sup> *Id.* at 428.

Convention illustrates the prohibition of racist speech in a much more detailed and comprehensive illustration.<sup>53</sup> Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) declares that:

[S]tates Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.<sup>54</sup>

This article requires states to adopt laws to prohibit and criminalize the “dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.”<sup>55</sup>

Article 4 obligates states to adopt a law against propaganda to discrimination and incitement to offense and adopts civil remedies for incitement to discrimination. Although the CERD convention adopts a narrow view toward restricting racist speech only, this treaty imposed an obligation to penalize racist speech. CERD obligates states to criminalize the dissemination of racist ideas and incitement for hatred and discrimination, which extends the mere obligation of ICCPR to prohibit acts of “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>56</sup> While the prominent views of this Convention to unify the international efforts against racism in general and to combat racist speech specifically, there are many uncertainties in the approach adopted by this Convention to fight hate speech. This vagueness is related to the exact definition of racist speech and the requirements of the intention as an element of the crime of incitement to discrimination. In this section, I explain that the CERD is a good step in fighting racist speech. However, some opinions suggest that this treaty is unclear. I explain some of the counter-arguments offered by CERD General recommendation and opinions in the literature on these considerations.

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<sup>53</sup> *Supra* note 8, at 48.

<sup>54</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965 S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212.

<sup>55</sup> *Id.*

<sup>56</sup> IVAN HARE, *Extreme Speech Under International and Regional Human Rights Standards*, in *EXTREME SPEECH AND DEMOCRACY*, at 72 (editors Ivan Hare, James Weinstein, Oxford University Press) (2009).

The main criticism against the CERD convention approach is that this Convention does not define racist speech or incitement to discrimination. This hinders the restriction of racist speech as states may refrain from implementing their obligation under this treaty because it is vague.<sup>57</sup> I disagree with this opinion because General Recommendation number 35 of 2013 offers a framework to define racist speech. Concerning the criticism of this Convention, Patrick Thornberry argues that racist speech as a term is not defined by CERD articles, which affects the treaty's primary purpose to restrict this speech. Patrick Thornberry contests article 4 of CERD because it tries to describe the racist speech most superficially, which led to a too general and incomplete text.<sup>58</sup> However, I think the general recommendation offers an interpretation of this article.

Concerning the definition of racist speech, Article 35 of the General recommendation calls for general requirements to identify racist speech. These requirements are about defining the very act of racist speech, the definition of incitement, and some of the proposed circumstances that infer a racist utterance. Generally speaking, racist speech means the rejection of “the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society.”<sup>59</sup> The racist speech addresses the following forms of conduct:

- (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;
- (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;
- (c) Threats or incitement to violence against persons or groups on the grounds in (b) above;
- (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;

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<sup>57</sup> PATRICK THORNBERRY, International Convention on the Elimination of All Forms of Racial Discrimination: the prohibition of ‘racist hate speech’, in THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES, at 120 (edited by Tarlach McGonagle, Yvonne Donders, Cambridge University Press) (2015).

<sup>58</sup> *Id.* at 123.

<sup>59</sup> UN Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35: Combating racist hate speech, paragraph 10, 26 September 2013, CERD/C/GC/35, available at: <https://www.refworld.org/docid/53f457db4.html> [accessed 03 March 2021].

(e) Participation in organizations and activities which promote and incite racial discrimination.<sup>60</sup>

These acts are adopted by General recommendation No. 35 from article 4 of CERD. This article covers many acts of racist speech and shows which groups are protected. This recommendation calls for prohibiting genocide denial and considers this utterance as a form of racist speech. It suggests “public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred.”<sup>61</sup> Although article 4 did not state the prohibition of genocide denials, this recommendation prohibits such an act as it infers from the CERD that this act is characterized by “incitement to racial violence or hatred.”

Relating to the definition of incitement, this recommendation defines incitement and explains its requirements. Incitement means “to influence others to engage in certain forms of conduct, including the commission of a crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words.”<sup>62</sup> The recommendation explains that the incitement to hatred, discrimination, or violence does not require any action as a result of this incitement. It illustrates that “incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in article 4.”<sup>63</sup> The speaker's intention in incitement to hatred, discrimination, or violence is required as a part of these acts. Therefore, this recommendation asserts that the incitement in CERD is clear, unlike ICCPR, which is vague.

The context of speech is also an important element to assess whether this speech is racist speech. This recommendation suggests that racist speech should be evaluated based on the following elements: “The content and form of speech. The economic, social and political climate. The position or status of the speaker. The reach of the speech. The objectives of the speech.”<sup>64</sup> These elements are important in examining racist speech in

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<sup>60</sup> *Id.* at para 13.

<sup>61</sup> *Id.* at para 14.

<sup>62</sup> *Id.* at para 16.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at para 15.

hard cases. Although this treaty does not define racist speech, the CERD General recommendation defines this kind of speech, which offers an approach to states to follow in legislating a law against racist speech. Furthermore, these recommendations offer a threshold and framework to organize the restriction of racist speech by guiding states to adopt those restrictions which do not contradict the freedom of expression. This framework does not impose new obligations not previously agreed upon by states. This recommendation is inspired by article 4. Article 4 is detailed with examples of racist speech, and it is clear in fight racist speech, so this recommendation broadens the application of this article to include other aspects of the problem of racist speech to offer concert protection. The protection from racist speech forms is the main purpose of article 4, and so states designed this article in the form. Therefore, the recommendation framework is workable in the spirit of and goal of article 4.

Related to the lack of intention as an element in incitement crime, the incitement to discrimination or the dissemination of ideas based on racial superiority or hatred in article 4 is claimed to lack *mens rea* as an element in the crime of incitement which is not accepted; this contradicts the states' criminal law.<sup>65</sup> Thornberry contends a CERD study argued that the definition of incitement in CERD article 4 criminalizes the mere act of incitement carried out regardless of the speaker's intention and the consequences of the act of incitement<sup>66</sup>. This study suggests the dropping of the criminal intention as an element of incitement:

The extreme speech prohibitions contained in Article 4 ICERD should be enforced regardless of the precise intentions of the person responsible for the alleged racist hate speech. For instance, in a 1985 report on Article 4 the Committee bluntly and adamantly states that 'the mere act of dissemination is penalized, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination, whether they be grave or insignificant.'<sup>67</sup>

Thornberry rejects this approach because criminal law requires in the crime of the incitement two conditions which are: the criminal mind - the *mens rea*- and the

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<sup>65</sup> *Supra* note 57, at 109.

<sup>66</sup> *Id.*

<sup>67</sup> *Supra* note 27, at 221.



relationship or causal link between the act of speech and the harm.<sup>68</sup> This study calls countries to drop these main requirements and to adopt a law that penalizes the mere act of incitement to racism without the intention to incite. As a result of these objections, this approach was changed by subsequent general recommendation 35. The interpretation of crimes illustrated in article 4 of CERD requires proving the speaker's intention to incitement to discrimination or disseminating ideas based on racial superiority. This approach was noted in General Recommendation 35, as explained by Temperman

In a paragraph specifically dedicated to the crime of ‘incitement’ the Committee postulates that State parties should recognize as ‘important elements’ of this offence ‘the intention of the speaker and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question.’<sup>69</sup>

It was an important step that the CERD General recommendations shifted its doctrine. This approach is flexible so that states could enforce the treaty and confirm their national laws’ requirements.

I think this approach of the CERD articles and the general recommendations offer a suitable framework that offers protection from racist speech and preserves the freedom of expression. Therefore, I conclude that this approach offers a concerted approach to fight racist speech, and I recommend countries follow it. However, the international efforts against hate speech do not lead to eliminating this problem. In the next part, I explain some of the reasons for the ongoing challenges in fighting hate speech.

### **C. IHRL and the lost opportunities to offer unified legal rules against hate speech**

From the above illustration, I can conclude that there is no unified approach in IHRL to tackle the hate speech problem. Therefore, many questions have been raised by literature about the effectiveness of IHRL rules toward hate speech. These opinions question the IHRL approach toward the hate speech problem. Many authors argue that these treaties do not offer a unified approach toward hate speech. The IHRL rules are ineffective in countering hate speech and are not clear enough to guide the states facing this problem. I

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<sup>68</sup> *Supra* note 57, at 110.

<sup>69</sup> *Supra* note 27, at 223.

argue that the IHRL treaties are designed in this manner and do not offer a unified approach to fight hate speech. IHRL treaties chose different paths in facing hate speech, and these treaties lack a comprehensive view to eliminating this problem. There are four main criticisms of the IHRL framework. First, these treaties lack the definition of hate speech. Second, these treaties have adopted different paths to face the hate speech problem. Third, they have implemented vague rules and concepts, which leads to confusion on the exact approach to be applied by states against hate speech. Finally, these treaties lack the enforcement mechanism to apply the rules against hate speech. This part highlights these criticisms to illustrate why the IHRL framework does not function against restricting hate speech.

With respect to the first drawback, there is no single definition for hate speech in international law. Likewise, the ICCPR and its general comments do not adopt a definition for hate speech, nor does the CERD convention define hate speech. However, general recommendation number 35 established a general definition of racist speech by stating that it includes racial attacks and any speech that attacks racial or ethnic groups.<sup>70</sup>

Concerning the second point, there is a clear difference between the CERD and ICCPR approaches to fighting the hate speech phenomenon. While the CERD requires countries to punish incitement for racist ideas, the ICCPR only requires countries to prohibit speech if it advocates for discrimination, violence, or hatred. The CERD proposes a lower threshold for criminalizing racist speech, but this Convention fights racist speech only and ignores other forms of hate speech such as religious hate speech.<sup>71</sup> However, the ICCPR takes a higher threshold that prohibits only without penalizing advocacy of racist speech or national or religious speech if it leads to hatred, discrimination, or violence. Still, it covers three types of hate speech racist speech, national, and religious speech.<sup>72</sup> Michel Rosenfeld criticizes the CERD because it is useful only to combat racist speech and not other hate speech forms.<sup>73</sup> The criminalization of racist speech in article 4 of CERD hinders the effort to restrict and

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<sup>70</sup> *Supra* note 1, at 216-217.

<sup>71</sup> *Supra* note 27, at 133.

<sup>72</sup> *Supra* note 1, at 216-217.

<sup>73</sup> *Id.*

eliminate racist speech because state parties reserve this article based on free speech protection.<sup>74</sup> The states members of this Convention are 182 states; Twenty states' members reserved or made declarations on article 4.<sup>75</sup> Therefore, Rosenfeld argues that the CERD is not effective in combatting racist speech because it obligates countries to criminalize racist speech, and countries reserve this obligation.<sup>76</sup> Therefore, CERD is not efficient in combating racist speech.<sup>77</sup> I suggest that the historical context in which racial speech has led to crimes and genocide in our world led states to adopt CERD with this view against racist speech restriction contrary to ICCPR's approach. This does not mean that other hate speech types are not important or do not lead to harm, but countries that have chosen racist speech only to be penalized in CERD because racist speech is associated with a horror narrative to our societies.

Third, some authors criticize the international framework in fighting hate speech because it calls to apply vague legal concepts to restrict hate speech. This opinion suggests that adopting the concept of harm resulting from hate speech as some countries call to restrict hate speech is not accepted. This is happening because, for instance, Article 20/2 requires countries to prohibit hatred which is extreme emotion, which incites hostility, and this article defines hostility here as harm. Therefore, this article prohibits emotions rather than an actual act, so countries refrain from adopting such a rule because it does not offer a solid rule prohibiting hate speech.<sup>78</sup>

Finally, the international system against hate speech is voluntary, and little incentive is available to make states willing to follow this system, so this has led to an ineffective application of the rules against hate speech as this system lacks an enforcement mechanism for IHRL treaties obligation. Furthermore, the reservation is

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<sup>74</sup> MORTEN KJERUM, Approaches to Reservations by the Committee on the Elimination of Racial Discrimination. In RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME, at 71 (edited by Ineta Ziemeie, Springer Science + Business Media Dordrecht) (2004).

<sup>75</sup> *Id.*

<sup>76</sup> *Supra* note 1 at 212.

<sup>77</sup> *Id.* at 212-213.

<sup>78</sup> Mona Elbahtimy, *The Right to be Free from the Harm of Hate Speech in International Human Rights Law*, at 7 CGHR Working Paper 7 ( University of Cambridge Centre of Governance and Human Rights) (2014).

available to many articles, making states avoid applying these treaties.<sup>79</sup> From this illustration, I argue that the prohibition of hate speech in IHRL is not comprehensive enough to eliminate this problem. Although the CERD convention offers prominent legal rules against racist speech, it does not cover other kinds of hate speech. Furthermore, gaps fill the ICCPR approach against hate speech that led states to refrain from restricting hate speech. Due to the lack of a unified approach against hate speech, states used their domestic philosophy to organize the freedom of expression and have refrained from restricting hate speech. This will become clearer in the next chapter, which focuses on the US' approach vis-à-vis the freedom of expression and hate speech.

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<sup>79</sup> *Supra* note 56, at 74-76.

### **III. Freedom of expression in the US: limited restrictions on speech and absolute protection for hate speech**

The US legal system offers great protection for the freedom of expression with limited restrictions on this right. The first amendment of the US constitution describes this right as such: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The US approach provides a good case study reflecting how this system grants freedom of expression with minimum restrictions. In this chapter, I argue that the USA model protects hate speech, and this system uses the freedom of expression as a justification to promote racist and xenophobic speech. The mainstream literature and the case law offer almost absolute protection of hate speech.

In the first section, I explain the general theories used to justify the freedom of expression to show how these theories are used to protect hate speech even though this speech is racist or xenophobic. In the second section, I analyze the main USA case law to explain that this system is not concerned with restricting hate speech even though it inflicts harm on other people. In the third section, I explain some of the opinions expressed in literature that offer great protection for hate speech. These opinions use liberal values to maintain racist speech. This chapter concludes with a discussion of how the protection of hate speech in the USA has led to the encouragement of racism, xenophobia, and sexism in society. Moreover, as a result, members of US society suffer unprecedented harm.

#### **A. General theories of freedom of expression: protection for speech which leads to racism and discrimination**

In this part, I explain the three theories of freedom of expression: the marketplace of ideas, political speech theory, liberty theory, or as sometimes described as the non-instrumental values are as self-fulfillment, self-expression, and individual autonomy to understand. These theories have shaped the current US philosophy on freedom of expression. And in spite of these theories' prominent ideas about the protection of free speech, these theories are used to justify racist and discriminatory speech in American

society. These theories disagree on the theoretical bases for protecting speech but share a common view for protecting hate speech. In this part, I explain the dominant ideas of these theories and the main arguments for protecting hate speech, and some of these theories' criticisms.

### **1.The marketplace of ideas theory and normalizing radical ideas**

The marketplace of ideas theory is an important theory developed by John Stuart Mill to protect speech freedom. Mill's theory explains that the main reason to protect the freedom of expression is to reach the truth.<sup>80</sup> Through public debates between society's members and exchanging opinions and ideas, society will reach the truth. According to this theory, the truth or the right solution for any problem is objective, and these solutions will prevail because people are rational enough to reach them.<sup>81</sup> People use their logic and rational thinking to reach the truth. However, this view seems optimistic. This theory calls for the protection of radical and racist ideas to reach this truth. In this part, I present this theory's main ideas and explain the criticism of this theory to show how this theory uses fallacies to protect hate speech.

This theory offers an essential theoretical framework for protecting the freedom of expression and granting free speech without restriction. The most important aspect of this theory is the protection of hate speech in society, as this speech helps to reach the truth. This theory is calling for protecting opinions in public debates even though these opinions contain extreme views. According to this theory, a radical opinion may contain a degree of correctness, so it deserves to be protected as it is the potential for reaching the truth.<sup>82</sup> Therefore, this theory grants radical views protection to be heard by the society until it decides to reject this speech. Without allowing extreme opinions to be heard and assessed by society, society may never reach truth or solutions to its problems because the exchange of views, including unproven opinions, is accepted as it may lead to the truth.<sup>83</sup> Although this theory's main ideas seem progressive because it protects the essential right of speaking, many authors criticize this theory. I cannot entirely agree with

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<sup>80</sup> JOHN STUART MILL, ON LIBERTY, The Floating Press, at 49-50, 2006. (1909)

<sup>81</sup> *Id.* at 36-37.

<sup>82</sup> *Id.* at 88-92.

<sup>83</sup> *Id.* at 91-92.

this theoretical framework for two main reasons. It assumes that truth is reachable through discussions only, and it offers hate speech an opportunity to flourish in society. In this part, I explain these criticisms to prove my argument that this theory is not helping free speech but rather normalizing radical speech.

There are many criticisms of this theory. These counter opinions disagree with the theoretical framework as granting people the right to speak without any restrictions may not lead to truth. Regarding the uncertainties of reaching the truth by exchanging opinions among people, C. Edwin Baker disagrees with the market theory and claims that the objectivity of truth is uncertain. He illustrates the "rejection of objective truth can also be seen in the modern scholar's unwillingness to believe in Platonic forms or intelligible essences. Instead, knowledge is dependent on the way people's interests, needs, and experiences lead them to slice and categorize an expanding mass of sense data."<sup>84</sup> Therefore, claiming that there is one truth that people can reach is not granted. Also, the marketplace does not provide proof that this theory will lead to the truth. The author argues against the idea that only through discussion can people reach the best solution.<sup>85</sup> He explains that our perception of truth is not limited to discussion and debates, but other means can affect our perception of truth like our experience and social experience.

C. Edwin Baker argues that social experience is varied among people, so they have a different perspective toward the truth. He proposes that discussions alone will not lead to truth or changing people's perspectives on the truth. Furthermore, the author criticizes rational thinking as a means of leading people to the truth. He explains that rational thinking is not depending on progressive debates.

Instead, understandings will depend on the form and quantity of inputs, on the mechanisms by which people process these inputs, and on people's interests and experiences. Without the assurance of rationality as the

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<sup>84</sup> C. EDWIN BAKER - HUMAN LIBERTY AND FREEDOM OF SPEECH, at 13, Oxford University Press (1989).

<sup>85</sup> *Id.* at 25.

dominant means by which people evaluate competing viewpoints, robust debate cannot, in itself, be expected to lead to the best perspectives.<sup>86</sup>

Baker defines rational thinking as a way people reach a logical answer to a problem, and this way is affected by many factors, such as their social position, the quality of the data they precise, the surrounded propaganda.<sup>87</sup> All of these factors affect people's rationality.<sup>88</sup>

Another opinion is against hate speech protection under this theory framework because it leads to harm. Alexander Brown argues that the suppression of speech containing facts but causing harm is an acceptable price worth paying to avoid anticipated harm.<sup>89</sup> Protecting minority groups from discrimination and violence are important than allowing racist speakers to speak even if this speech reflects reality or states a fact.<sup>90</sup> He explains that hate speech affects people's minds who listen to this speech, which affects their personality and emotion and leads to the spread of haters in society. Instead of reaching knowledge, this will lead to the spread of racism and discrimination in society.<sup>91</sup> Therefore, these opinions contradict this theory because of the holes in its framework.

In conclusion, this theory protects the freedom of speech as a way to the truth. This theory says that people assess their problems through discussions and exchanging ideas, and the most influential idea will prevail in the end. However, another view criticizes this theory because it offers a limited approach to protecting freedom of speech. The critics of this theory think we cannot reach the truth through discussion only. Our society is complicated, so debating or exchanging opinions only will not solve our problems. Also, allowing hate speech in public debates thinking it is essential for these debates is incorrect. Hate speech never helps our society; on the contrary, it spread haters among our society. Therefore, this theory helps to normalize radical speech by claiming that this speech leads to truth, which is not correct.

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<sup>86</sup> *Id.* at 16.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 26.

<sup>89</sup> ALEXANDER BROWN, HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION, at 108, Routledge, (2015).

<sup>90</sup> *Id.* at 117.

<sup>91</sup> *Id.* at 120.



## 2. Political Speech Theory: when democracy legitimizes discrimination

The political speech theory is the second theory used to justify free speech to protect democracy and justify hate speech. Although this theory's progressive ideas seem to protect democracy and free speech, many authors use this theory as an important shield against the restriction of hate speech. I argue that many opinions use the political speech theory to justify freedom of expression, but this legitimizes discriminatory speech in society. To support this argument, I illustrate the main ideas of this theory. Then, I explain the justifications for allowing hate speech and some criticisms of these opinions.

Unlike the marketplace of ideas theory, which protects speech for reaching the truth, political speech theory protects political speech only. Alexander Meiklejohn introduced this theory as C. Edwin Baker explains Meiklejohn's argument as a theory that rejects any law restricting extreme speech to protect the political decision. Through debates and discussions on public issues, people can reach the best voting decision.<sup>92</sup> This theory proposes that debates must be protected so that democracy can work. The protection of free speech is essential so that the people can equally participate in the public forum. This theory is concerned with protecting the political debates of individuals.<sup>93</sup> Alexander Brown illustrates another aspect of Meiklejohn's theory by explaining that this theory calls for the democratic self-government of the society. This means people take a self-decision in the elections, and these single votes are gathered by authorities using the democratic process to present their own opinions, which produces the collective decision. This system depends on free speech, and it must be protected for each individual to acquire information and communicate with other people to present their views.<sup>94</sup> Protecting speech linked to the political sphere will benefit people in making voting decisions.<sup>95</sup> Wojciech Sadurski accepts Meiklejohn's arguments and explains the importance of free speech to democracy:

Democracy requires that citizens be free to receive all information which may affect their choices in the process of collective decision-making and,

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<sup>92</sup> *Supra* note 84, at 28-29.

<sup>93</sup> *Id.* at 29.

<sup>94</sup> *Supra* note 89, at 188.

<sup>95</sup> WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS, at 20, Kluwer Academic Publishers (1999).

in particular, in the voting process. After all, the legitimacy of a democratic state is based on the free decisions taken by its citizens regarding all collective action. Consequently, all speech that is related to this collective self-determination by free people must enjoy absolute (or near-absolute) protection.<sup>96</sup>

Democracy requires the government to protect free speech to ensure the legitimacy of the government. This protection is offered to people when they are using their right to criticize the government, and this protection is offered as a protection of the will of the people from the government. This protection is a safeguard against the majoritarian opinion. As a result, of these ideas, this theory, as James Weinstein explains, calls for the protection of hate speech. It explains that this protection is necessary to ensure that all speakers presented their points without censorship of their speech, even though their speech is not welcome by the majority.<sup>97</sup> Hate speech can provide people with information on public issues related to political decisions. Denying this speech, the right to be presented to society can block people from accessing information and led the government to control the political sphere. For these reasons, democratic values are incomparable with a law against hate speech because it hinders some people's right to manifest their ideas and acquire information.

Many authors disagree with this theory's propositions because it is limited to political speech only and contradicts the democratic right of people to enact laws to restrict harmful speech. This theory prioritizes political speech protection from censorship; this could neglect the importance of the other forms of expression even though they are significant in our lives.<sup>98</sup> Furthermore, a law against hate speech is confirmed with the democratic process because "hate speech that causes or is likely to cause a breach of the peace, can be justified on the democratic basis of ensuring that all citizens enjoy real opportunities for contributing to the formation of public opinion."<sup>99</sup> Furthermore, blocking hate speech will not hinder people from accessing public debates.

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<sup>96</sup> *Id.* at 21.

<sup>97</sup> JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND RADICAL ATTACKS ON FREE SPEECH DOCTRINE, at 12, Westview Press (1999).

<sup>98</sup> *Supra* note 95, at 23.

<sup>99</sup> *Supra* note 89, at 214.

Therefore, a law against hate speech is entirely acceptable in a democratic society.<sup>100</sup> Thus, we can see that this theoretical framework is full of contradictions and fallacies. It offers limited justification for the freedom of expression right as it protects political speech only and protects hate speech.

### **3. Liberty theory: when values are manipulated to maintain racism and discrimination**

The third theory is the liberty theory, which has been developed by many authors based on several justifications. This theory is essential now, and many American authors hold this theory to justify freedom of speech. This theory protects the freedom of speech as a value protected by liberal philosophy. This theory protects the individual rights to express themselves and their views to reach self-realization of their existence.<sup>101</sup> This theory protects the freedom of expression for various reasons. These reasons representing many liberal values and norms, such as individual autonomy, reaching the truth, and participating in the democratic process, are among the various reasons to protect free speech. This theory plays a major role in protecting free speech ideas and prohibiting censorship and speech restrictions. However, contrary to its principles, this theory is used to protect discriminatory and racist speech. To understand how this theory has led to this result, I illustrate this theoretical framework's main ideas; then, I explain the arguments for protecting hate speech under this theory contrary to promises it offers.

This liberty theory uses prominent values to protect speech, contrary to the other two theories. Protecting the individuals' right to express their personality and democracy are among the reasons for protecting free speech. C. Edwin Baker explains Thomas Emerson's argument as it calls for protecting the speech for three values: individual self-fulfillment, reaching the truth, and participating in the decision-making that includes political and cultural making.<sup>102</sup> These values are important for defending individual voices against majoritarian voices. These values offer people the right to introduce their

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<sup>100</sup> *Id.* at 214.

<sup>101</sup> *Supra* note 84, at 16.

<sup>102</sup> *Id.* at 47.

claims and opinions. This protection is granted by the democratic practice in any society that protects individuals against the majority's oppression.<sup>103</sup>

Thomas Scanlon describes self-autonomy as an important value for protecting freedom of speech. He explains that self-autonomy protection is offered not for protecting the speaker but for the listeners' autonomy. This theory offers this protection as individuals are rational humans and deserve the right to choose what to hear. He illustrates this idea:

An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.<sup>104</sup>

The government is not authorized to restrict speech; in this case, it undermines individuals' right to choose what to listen to.<sup>105</sup> Regarding the protection of democracy, Ronald Dworkin argues that democratic values protect an individual's right to speak, and any democratic government must respect this right. Democracy obligates governments to provide the right for freedom of speech and equally provide it to all society members.<sup>106</sup> He illustrates that a violation of this obligation could happen in case the "government violates the basic command of equal treatment when "it disqualifies some people from [expressing their views] on the ground that their convictions make them Unworthy."<sup>107</sup> This theory offers a justification for freedom of speech based on many well-developed values among different societies. This theory tries to protect the freedom of speech based on these values so that restriction on speech will violate these values. However, this theory offers protection for hate speech, and these values are interpreted and used by different groups to maintain racism and discrimination.

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<sup>103</sup> *Id.* at 51.

<sup>104</sup> Thomas Scanlon, *A Theory of Freedom of Expression*, 1, 2, *Philosophy & Public Affairs*, at. 216, (Winter 1972).

<sup>105</sup> *Id.* at 216.

<sup>106</sup> *Supra* note 97, at 15.

<sup>107</sup> *Id.* at 16.

On the other hand, the Liberty theory uses people's autonomy and self-fulfillment to justify the existence of hate speech. This theory protects radical ideas and opinions because people use this speech as a medium to deliver their views. C. Edwin Baker explains that sometimes people use hate speech as an element for reaching others.<sup>108</sup> It is accepted under this idea to use racist words or examples to illustrate a certain opinion. Restrictions upon such speech are not accepted unless it is causing physical harm to other people or restricting their liberty.<sup>109</sup> If this speech does not coerce people to make decisions or choose their lifestyle, this speech cannot be banned. Baker defines Coercive speech as interference with other choices and limited capacity to change a normal order.<sup>110</sup> Therefore, people being offended by hate speech because it is against their beliefs is not an acceptable reason for restricting hate speech.<sup>111</sup>

However, Alexander Brown refutes this opinion and explains that hate speech is coercive and must be banned. He claims that using hate speech leads to coercion by spreading hostility and intolerance among people. In this case, speech leads to undue influence on the people as it deduces people to reflect the speaker's will rather than their own will.<sup>112</sup> This happens through a circulation of false rumors, which increases the feeling of mistrust and hater to other groups. He considers this act to be coercive on the people's will. To support this argument, for example,

suppose a speaker spreads false rumors about a practice of murdering Christian children among a Jewish community in an attempt to promote feelings of mistrust and hostility between Jews and gentiles and to bring an end to the official policy of tolerance toward Jews. The speaker uses falsehoods to manipulate the audience's mental processes and circulates a stolen coroners' report about the death of a child without obtaining the consent of the parents concerned. Surely this is no more than the

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<sup>108</sup> *Supra* note 84, at 55.

<sup>109</sup> *Id.* at 56.

<sup>110</sup> *Id.* at 58.

<sup>111</sup> *Id.* at 60.

<sup>112</sup> *Supra* note 89, at 60.

speaker's intended method of involvement in the act of seditious libel and is coercive.<sup>113</sup>

Therefore, hate speech is not compatible with the autonomy of people principle.<sup>114</sup> To conclude, this theory is used by many to justify hate speech in contradiction with the main theoretical approach of protecting the people's autonomy. We cannot expect to have autonomy or self-fulfillment when others are tortured and abused by hate speech. Therefore, I think for the very reason that this theory protects free speech, it must restrict hate speech.

In conclusion, we have seen three theories, the marketplace of ideas, the political speech theory, and the liberty theory, and all of which agreed that the freedom of speech is an important right that any society must respect. These theories offer the framework in which the freedom of speech was developed, and many authors have used many of the arguments presented by these theories to call for the protection of the freedom of speech even if this speech uses hate or racist speech. As they are important to free speech, these theories are dangerous because hate speech developed under these theories. In the next part, I present the application of these theories in the judicial system of the US to explain how these theories influence the current doctrine protecting hate speech in US case law.

## **B. US cases approach to protecting free speech: a progressive start has become a drawback**

The American approach toward freedom of speech is highly protective of this right and prioritizes other norms and rights. There are three restrictions on the freedom of speech developed by the US courts: obscenity, defamation, and speech that lead to clear and present danger.<sup>115</sup> I argue in this part that the American case law offers absolute protection of free speech and hate speech with minimum exceptions. To illustrate this argument, I begin by providing a brief history of US case law concerning the freedom of expression and explain the main views of this doctrine. Then I clarify the shift in this view towards protecting hate speech and explain some court justifications for this

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<sup>113</sup> *Id.* at 62.

<sup>114</sup> *Id.* at 62.

<sup>115</sup> Roger Kiska, *Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence*, 25 REGENT U. L. REV. at 139 (2012).

approach. I achieve this by describing the American landmark cases for protecting hate speech.

The American Court's history toward the freedom of expression and hate speech has many phases and approaches, which has led to almost complete protection of hate speech. The literature divides the USA free speech case history into three phases. The first phase protected free speech from governmental restrictions. The Second protected the minority right to speak from majoritarian oppression. The third, the right to speak and the protection of this right with a minimum restriction.<sup>116</sup> This part illustrates how the shift from the second era to the third era has occurred.

In the first era, American courts adopted a conservative approach toward freedom of speech. In this era, the USA case law gave little attention to speech protection and prioritized speech restriction in many cases. Jeremy Waldron explains the first application of the first amendment as an administrative rule that regulates speech.<sup>117</sup> Courts used the first amendment to protect the publication of the press and opinions, but it offered no further protection if speech opposed the government or the president. This protection for the government was granted by courts' verdicts to protect it from opposition speech, to ensure its legitimacy was maintained because political speech may undermine governmental authority.<sup>118</sup> Therefore, the USA judges offered no special protection for political speech that attacked the government or raised unacceptable political messages against the government.<sup>119</sup>

The second era, which protected the people's right to speak and oppose the majoritarian government, was shaped in the mid-19th century. In the case of *Stromberg v California (1931)*, judges offered protection for political speech that included the raising of a red flag as a sign of opposition against the government.<sup>120</sup> The court, in this case, struck down a law that forbade the display of a red flag as an example of opposition to the government.<sup>121</sup> This change came after many dissenting judges reject this doctrine. In the case of *Abrams v the United States (1919)*, Justice Oliver Wendell Holmes offered an

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<sup>116</sup> *Supra* note 1, at 248-249.

<sup>117</sup> JEREMY WALDRON - THE HARM IN HATE SPEECH, at 22 Harvard University Press (2012).

<sup>118</sup> *Id.* at 23.

<sup>119</sup> *Id.* at 24-25.

<sup>120</sup> *Stromberg v California* at, 283 US 359 (1931).

<sup>121</sup> *Id.*

important dissenting opinion that rejected the conviction of an activist through the use of the espionage act.<sup>122</sup> This case involved a man who distributed a leaflet criticizing the president for sending the army to the USSR to fight communism during World War I. Justice Holmes thought that this man's act expressed a political opinion and did not present any immediate danger. He called for the acceptance of this speech and offered it protection in the free trade of ideas. In this case, he called for the noticeable idea of protecting speech unless it led to clear and present danger.<sup>123</sup> He explained in this famous verdict:

It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.<sup>124</sup>

It is important to highlight that courts did not grant the protection of speech without any restriction in this era, but the court restricted hate and racist speech as a grantee that a balanced application of the free speech right and at the same time to protect the society from a speech that could cause harm to other members.

Unlike the first era, this doctrine shifted in the second era to restrict hate speech. In the case of *Beauharnais v Illinois (1952)*, the court refused to grant protection for racist speech.<sup>125</sup> This case concerned the conviction of a group leader for distributing a leaflet that contained racist speech. The government arrested the man and charged him with a law that criminalizes the publication of materials that contain racist utterances. The court, in this case, held that it offered no protection for libelous utterances.<sup>126</sup> However, this prominent start in the American case law doctrine that protected from hate speech later

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<sup>122</sup> *Supra note*, 117 at 23.

<sup>123</sup> *Id.* at 25.

<sup>124</sup> *Abrams v. United States*, at 250 U. S. 628 (1919).

<sup>125</sup> *Beauharnais v. Illinois*, at 343 U.S. 250 (1952).

<sup>126</sup> *Id.*



shifted to an approach that guaranteed that racism and discrimination would flourish in society.

In the third era, in the 1960s, US case law which protected from hate speech was transformed into the almost complete protection for hate speech. In *Brandenburg v Ohio* (1962), in which group members of the Ku Klux Klan held a demonstration recorded for television, the group's members used racist speech against Jews and black people and called on the government to get them out of the country without a direct incitement to violence.<sup>127</sup> The Supreme Court decided that the act of the KKK is hate speech against blacks and Jews, but it is not an incitement to violence. The court clarified that the first amendment uncovers advocacy for violence. In this case, the KKK was not seen by the court to have incited violence, and so their activity was protected.<sup>128</sup> The court held in its reasons to acquitted the defended that:

Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid 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.<sup>129</sup>

However, according to this test, general hate speech is not banned if it does not lead to a lawless act of violence.<sup>130</sup> The US courts followed this approach in 1977 in the case of *Smith v Collin*. In this case a neo-Nazi group wanted to organize a demonstration with swastikas, the Nazi symbol, and with demonstrators wearing the Nazi SS uniform, the unit in the Nazi army used to target Jews during WWII, in Skokie, a city in Illinois. Jews inhabited this city, and some of them were survivors of the Holocaust. Skokie's city council issued a law to criminalize "promote and incites hatred against persons because of their race, national origin, or religion."<sup>131</sup> The demonstration organizers filed a case

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<sup>127</sup> *Supra* note 1, at 254.

<sup>128</sup> *Id.* at 254.

<sup>129</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>130</sup> *Supra* note 97, at 12. See also *Supra* note 95, at 54.

<sup>131</sup> *Smith V. Collin*, 439 U.S. 916 (1978).

and argued that this act was not an incitement to violence as established by the court's rhetoric to restrict speech. The constitutional court supported this opinion. It decided that a march with a Nazi symbol in a neighborhood with Jews is not an incitement to violence and allowed for this demonstration.<sup>132</sup>

The same approach of protection of hate speech was repeated in the well-known 1992 case of *RAV v City of St Paul*, a juvenile and member of the KKK group, burned a cross in a black man's backyard house.<sup>133</sup> The court decided the boy's conviction based on a law criminalizing a cross burning is unconstitutional. The court contended that this law targets a certain ideology and certain activity, and the constitution does not accept this as a rule to restrict speech.<sup>134</sup> It expressed its refusal for the law in question by illustrating:

The ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of "race, color, creed, religion or gender." At the same time, it permits displays containing abusive invective if they are not addressed to those topics.<sup>135</sup>

The court held that protecting the group members affected by hate speech is an important governmental interest. However, the court explained that "St. Paul's desire to communicate to minority groups that it does not condone the "group hatred" of bias-motivated speech does not justify selectively silencing speech on the basis of its content".<sup>136</sup> So, the court declared that the law in question is unconstitutional.

To understand the reasons for the previous decision, James Weinstein explains that the American courts differentiate between content-based regulation and content-neutral regulation.<sup>137</sup> Content-based regulation is regulating a certain kind of speech or activity or a certain message.<sup>138</sup> For example, the prohibition of using offensive symbols or words is considered to be a content-based regulation that must be invalidated. The

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<sup>132</sup> *Id.*

<sup>133</sup> *Supra* note 95, at 58-62.

<sup>134</sup> *Id.*

<sup>135</sup> *R. A. V. v. St. Paul*, 505 U.S. 377 at 391-393. (1992).

<sup>136</sup> *Id.*

<sup>137</sup> *Supra* note 97, at 84.

<sup>138</sup> *Id.* at 84.

content-based regulation, in many cases, is considered to be unconstitutional.<sup>139</sup> The content-neutral regulation is the regulation of speech regardless of the message of the speech or time or the place of this message.<sup>140</sup> Therefore, we can conclude that there is no specific restriction policy against hate speech.

Hate speech is protected under this doctrine if it satisfied two conditions: it manifests a certain opinion. And it is not intended to harm. Furthermore, courts maintained this approach in subsequent case law, but hate speech is restricted if it causes the people to feel insecure or threatened. In the case of *Virginia v Black (2003)*, which is about burning a cross in the backyard of an Afro-American by a KKK group member, the Court declared that burning a cross in and of itself is not an intimation to violence as the KKK group are known to use such an act in their speech. However, in this case, the Court held that burning the cross, in this case, is a form of treating people in a way that makes them feel insecure. For this reason, the Court accepted that a law that restricts such an act is accepted based on the evidence of intimidation that people feel from this speech.<sup>141</sup>

Restricting hate speech in the previous case could be taken to represent a shift in the US doctrine toward hate speech; however, it is not true. This doctrine did not shift to restrict hate speech because this case considered the act of burning a cross nondiscriminatory; rather, the effects of this act on people may justify restriction if they feel threatened. The shift in this doctrine which is seen in the case *Virginia v Black* was reversed by courts in the 2011 case of *Snyder v Phelps*. In this case, the court affirmed the doctrine of rejecting the use of emotional harm as a basis for restricting hate speech. This case is about a group of people motivated by a local church leader who used hate speech at the funeral of an army soldier who died in Iraq. They accused the deceased of homosexuality. They condemned the memory of the deceased and caused emotional distress, according to the deceased father. Snyder, the deceased father, filled a case against this group of protesters. The Court rejected the case and held that the father's grievance and emotional distress failed to merit damages. The Court considered this speech as a speech protected by the constitution. The Court considered this speech as

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<sup>139</sup> *Id.*

<sup>140</sup> *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>141</sup> *Supra* note 89, at 72,73.

protected speech under the US constitution, especially since this speech was about a topic of public concern as it manifested the rejection of homosexuality in the US army.<sup>142</sup>

Charles Lawrence II explains the court doctrine described as unconscious racism that the courts unaware of its existence. The author explains that racism is deeply rooted in society, and discrimination is unconscious among people. Governments and people are unaware that their actions lead to racist utterance or act. He illustrates that courts assess racism based on clear cases of intended motivation for racism without analyzing the issue from the cultural perspective. Therefore, this led the Court to refuse many racism cases because it identifies racism as a clear act. He explains, "the Court creates an imaginary world where discrimination does not exist unless it was consciously intended. And by acting as if this imaginary world was real and insisting that we participate in this fantasy, the Court and the law it promulgates subtly shape our perceptions of society."<sup>143</sup> So, he wants to

trigger judicial recognition of race-based behavior. It posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning. It suggests that the "cultural meaning" of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly.<sup>144</sup>

Therefore, he explains that the US system tries to expose racism in laws and cases by identifying it through the existence of clear intent to racism; however, it ignores that racism is rooted in the society, and many laws can lead to racism if it was interpreted based on the cultural context of the US society. So, we can infer from this theory that the cases in which hate speech was protected can be explained as a continuation of this approach. Courts think that a law that restricts certain racist speech, such as burning a cross, violates the freedom of speech right, but the Court ignores the fact that this act is racist. The Court used the clear and present danger to restrict speech and refused any alternative approach, which explains burning a cross act as a racist act as interpreted by

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<sup>142</sup> Snyder v. Phelps, 562 U.S. 443 (2011).

<sup>143</sup> Charles R. Lawrence II., *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. REV. at 325, (1987).

<sup>144</sup> *Id.* at 324.

society's culture. The Court lives in its fallacies about the society that is not affected by racism and ignoring that racism has unconsciously existed.

In conclusion, the American case law doctrine has gone through many significant phases, which has led to the current doctrine of protection of hate speech. Although this system seems to be against hate speech, these courts shifted its doctrine into granting free speech protection even though the speech may be racist or discriminatory against minority groups. This shift in American case law doctrine did not happen separately in isolation from societal changes in the society and literature that reflected growing tolerance for racism and discrimination in society. These cases represent how American society is willing to accept racism and defend people's right to undermine other society members. In the next part, I introduce some of the literature which supports this doctrine to see how this literature has presented its case to defend racism and discrimination utterance.

### **C. American literature tolerating hate speech: some reasons and justifications**

There are many arguments and justifications for protecting hate speech in American literature, representing the mainstream. These opinions and justifications have not come to existence without a prior convention of the superiority of a certain race or gender in society over others. Therefore, they offer many reasons for justifying hate speech as this speech represents their viewpoints of how the society should submit to specific speech and a narrative that everyone should believe. The white male race's superiority and the discrimination against other genders and races are the main features of this doctrine. However, they represent the opinion that they respect the right of freedom of expression to hide their true intentions. In this part, I argue that the current American doctrine protects hate speech by claiming that this doctrine represents the societal choice toward protecting free speech to hide their true intentions of protecting racism. To illustrate this argument, I explain some of the arguments which support this view. Some opinions explain that the norms adopted in society accept and justify hate speech. Other opinions call for protecting hate speech as an important way to preserve the legitimacy of law in society and ensure that individuals' viewpoints are presented equally in society.

Some of the opinions call for the protection of hate speech because there is no controlling norm in the society which decides which speech should be allowed or restricted. Robert Post says that the definition of hate speech is complex.<sup>145</sup> He argues using harm to define hate speech is not accepted.<sup>146</sup> Using insults or offenses and treating them as hate speech will lead to uncertainty. He proposes that our social norms can differentiate between outrageous speech and decent speech. These norms control the identity of the people and shape their response.<sup>147</sup> Post says the community's norms known to people are used in society to define extreme speech or everyday speech.<sup>148</sup> He suggests that norms are intersubjective, which means "norms are not merely subjective; they are instead 'intersubjective' because they refer to attitudes and standards that persons have a right to expect from others."<sup>149</sup> It developed through social interaction and shared experience, which developed between the members of society. It is like a common language. He explains that the law offers an authoritative interpretation of these norms. From this idea, the author concludes that the hate speech law enforces the norm developed in society.<sup>150</sup> This norm is about protecting democratic legitimacy and the government's prohibition from intervention in the public debates, so this explains why the US doctrine prohibits hate speech law to protect these values. He illustrates the approach of the Supreme court, which adopted this idea.

The Supreme Court has been reluctant to allow the state to enforce community norms in public discourse. In effect the First Amendment pressures the state to be neutral with respect to the many competing communities that seek to control the law by enforcing their own particular ways of distinguishing decency from indecency.<sup>151</sup>

So, the government must remain neutral to these norms in public debate.<sup>152</sup> Post argues that if the law prohibits hate speech based on preventing harm, it will be unconstitutional

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<sup>145</sup> ROBERT POST, *Hate Speech*, EXTREME SPEECH AND DEMOCRACY, at 128, (edited by Ivan Hare, James Weinstein, Oxford University Press) (2009).

<sup>146</sup> *Id.* at 128.

<sup>147</sup> *Id.* at 129.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 128-131.

<sup>151</sup> *Id.* at 133.

<sup>152</sup> *Id.*

because there is no exact measure to this harm.<sup>153</sup> This opinion claims that our society is so diverse that one group's single norm must not control the whole society. However, this opinion disregards the fact that a norm against hate speech is a universal standard now. International human rights law, as shown in the CERD framework, adopts a norm against hate speech. This norm is essential to protect individuals or groups from this speech, and many countries internationally accept it. The protection from hate speech is not limited to certain groups, but it is a universal right granted to people regardless of their nationality or race, and countries are obligated to follow this rule.

Other authors build their arguments for protecting speech and refusing to restrict hate speech based on the protection of the law's legitimacy and the protection of democracy in society. Ronald Dworkin contends that the restriction of hate speech will affect the legitimacy of law as it restricts the opinions of people who may disagree with anti-racist laws.<sup>154</sup> He explains that the restriction of hate speech would affect the legitimacy of law by illustrating:

It would leave room only for the pointless grant of protection for ideas or tastes or prejudices that those in power approve, or in any case do not fear. We might have the power to silence those we despise, but it would be at the cost of political legitimacy, which is more important than they are.<sup>155</sup>

Dworkin explains anti-hate speech laws are against the legitimacy of the law. People may choose to enact these laws, but it will be against the principle of legitimacy.<sup>156</sup> The legitimacy of law can be reached after all the points of view and opinions give the chance to address society. He explains that restricting hate speech is against democracy because it grants the people the right to present their opinions and restricts people from speaking violates this principle.<sup>157</sup> Therefore, even people who choose to enact a law against hate speech affect the legitimacy of law and democracy because it restricts certain opinions.

Furthermore, some authors build their arguments on the protection of hate speech for the benefit of society. For instance, C Edwin Baker argues that hate speech helps

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<sup>153</sup> *Id.* at 131-133.

<sup>154</sup> RONALD DWORKIN, Foreword, in *EXTREME SPEECH AND DEMOCRACY*, at v-ix, (edited by Ivan Hare, James Weinstein, Oxford University Press) (2009).

<sup>155</sup> *Id.* at ix

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at v-ix

society expose racism and enhances minority groups' situation.<sup>158</sup> The author explains the importance of granting hate speech the opportunity to speak as it exposes this speech to the society by illustrating that "allowing and then combating hate speech discursively is the only real way to keep alive the understanding of the evil of racial hatred."<sup>159</sup> So, society takes action against this speech. Also, the suppression of hate speech will lead the radical groups to resort to extreme measures and violent acts against the minority groups. Furthermore, the suppression of hate speech by law can have negative consequences against the groups intended to protect because this law could suppress minority groups.<sup>160</sup> Wojciech Sadurski explains that silencing radical groups will not protect minority groups or enhance their right to speak. He insists that the suppression of hate speech will not protect the minority group's dignity. He explains that one way to protect minorities is to use affirmative action by reducing the racist groups' right to speak and give the minority groups an equal amount of space to speak.<sup>161</sup> To conclude, this opinion claims that radical speech helps minority groups by giving them the chance to present their case to society and protect them from violence if radical groups. This opinion uses unaccepted arguments to present their case. They illustrate that hate speech is benefiting minority groups rather than radical groups. This opinion differs from other opinions as it builds its argument on defending minority groups rather than the idea of free speech or protecting racist speech, which seems to be a solid argument.

In conclusion, the arguments supporting hate speech in literature and case law falsely use society's norms that reject hate speech restriction and democracy to justify hate speech. These arguments are false because either society's norms or the democracy of any rational society could accept hate speech. It is not accepted to justify hate speech and allow an attack on other races and groups without any reason. Furthermore, restricting speech, which leads to clear and present danger, is not a solution to this problem. Hate speech is like an enemy that can lead to significant pain to individuals that cannot be repaired or forgotten. If wars inflict pains and wounds which cause everlasting

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<sup>158</sup> C. EDWIN BAKER, *Hate Speech in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES*, at 67 (Edited by Michael Herz and Peter Molnar, Cambridge University Press) (2012).

<sup>159</sup> *Id.* at 77.

<sup>160</sup> *Id.* at 78.

<sup>161</sup> *Supra* note 95, at 101.



pain, hate speech can impose the same effects on victims. However, the victims of hate speech live in a worse situation than the victims of war. We can know who led to this pain in war, and it can be held accountable for their actions, but in hate speech cases, this literature and case law neglect this accountability and offer xenophobic protection. So, these opinions negatively affect the situation of the victims and normalize racism in society. Therefore, I highly reject these views, and in the next part chapter, I present the main theories and other opinions which reject this doctrine and call for the restriction of hate speech.

#### **IV. The restriction of hate speech: in theory and in practice as seen in ECHR**

Many opinions now call for restricting hate speech. These opinions refute the mainstream arguments which protect free speech without any restriction. These opinions offer a theoretical approach to justify the restriction of hate speech for many reasons, such as the harms inflicted on the victims and to protect society from the negative consequences of this speech. In this chapter, I argue that hate speech must be restricted because it inflicts unimaginable harm on victims of this speech, and freedom of expression is not an excuse to permit hate speech. In the first two sections, I introduce some critiques of freedom of expression in literature, such as the critical race theory and the feminism theory and their justification for the restriction of hate speech. Then, I illustrate some counterarguments that the literature offers against the mainstream opinions that accept hate speech. In the third section, I shift focus to illustrating how the restriction of hate speech is not merely theoretical, and international courts such as the European court of human rights (ECHR) have adopted an approach to restricting hate speech. I argue that the ECHR approach offers a framework that justifies the restriction of hate speech without violating the freedom of expression. I focus on the case-law of ECHR, which has dealt with hate speech and its justification and some of the critiques. To conclude, I propose that the doctrine of absolute protection for freedom of expression is unworkable and leads to oppression and harm, and a restriction on hate speech is needed.

##### **A. The critical race theory justification for restricting hate speech**

Critical race theory is a fundamental theory in the literature that calls for the restriction of hate speech. In the mid-1970, this theory was developed in the US by groups of writers who argued that the conditions in communities of the color situation have not improved. They explain that the civil rights movement reforms in the 1960s have been largely ineffectual as a society sunk in racism. This theory grew in the 1990s, and many authors joined. This theory has some basic assumptions. Racism is deeply rooted in American institutions and society, leading to its normalization. Therefore, this theory refuses the spreading of racism in society.<sup>162</sup> In this part, I clarify the meaning of hate speech

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<sup>162</sup> RICHARD DELGADO AND JEAN STEFANCIC, CRITICAL RACE THEORY: THE CUTTING EDGE, at xv- xix, (edited by Richard Delgado and Jean Stefancic. - Temple University Press, 2nd ed) (1999).

according to this theory and the arguments that restrict hate speech. Then, I illustrate some of the counterarguments to the mainstream doctrine offered by this theory. I conclude that this theory's justifications offer a substantial ground to restrict racist utterance.

### **1.Hate speech definition**

Defining hate speech is a crucial element in understanding this theory. Many authors define hate speech as attacking certain groups or particular genders or sexes. One author explains that this speech targets certain features or qualities of a specific group. For instance, hate speech calls for the deportation, exclusion, and segregation of other groups from society.<sup>163</sup> Racist groups see minority groups or colored groups as an enemy within a society that does not deserve equal rights equivalent to other society's members.<sup>164</sup> In the same vein, Mari J Matsuda tries to construct a doctrine that stretches the first amendment doctrine exceptions to include hate speech.<sup>165</sup> She illustrates three elements of racist speech: "The message is of racial inferiority. The message is directed against a historically oppressed group. The message is persecutory, hateful, and degrading."<sup>166</sup> In this way, this theory offers some general guidelines for constructing the meaning of hate speech and explains that this speech targets certain groups.

### **2.Opinions against hate speech**

Regarding the arguments against hate speech, many authors explain that hate speech inflicts harm on individuals and groups. Hate speech stigmatizes victims with a negative image, leading to degradation and inequality, leading to violence and even extermination. Jeremy Waldron explains how hate speech imposes a certain image that becomes a part of our perception of certain groups. The dangers of hate speech against groups create a factual claim against a certain group, creating a false impression. For example, to claim

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<sup>163</sup> BHIKHU PAREKH, Is There a Case for Banning Hate Speech? in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES, at 37-39 (edited by Michael E Herz and Péter Molnár, Cambridge University Press) (2012).

<sup>164</sup> *Id.* at 39-41.

<sup>165</sup> MARI J MATSUDA, Public Response to Racist Speech: Considering the Victim's Story in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, at 36, (edited by Mari J. Matsuda, Routledge) (1993).

<sup>166</sup> *Id.* at 36.

that black men are drug dealers and hustlers or claim that Muslims are terrorists are among the examples that racists groups use to target these other groups. This speech stigmatizes groups using certain negative images, so black or Muslim individuals suffer as a result.<sup>167</sup> This happens because, for instance, racist groups use slogans that call for deportation or exclusion of a certain group from the society, such as "Muslims out or no Blacks allowed."<sup>168</sup> These ideas slowly become a normalized speech and ultimately "become a permanent feature of the landscape" requiring members of minority groups "to live and work and raise their families in a community whose public aspect was disfigured."<sup>169</sup> Thus, hate speech affects minority groups' dignity and denies them the opportunity to live in a peaceful society. Dignity in this context refers to the personal status of the member of society in which he/she is treated by the society accordingly.<sup>170</sup> Dignity in this context means "basic social standing, the basis of their recognition as social equals and as bearers of human rights and constitutional entitlements."<sup>171</sup> Therefore, this stigmatization creates a feeling of abnormality and unworthiness in society's eyes, affecting the minority groups' dignity and leading society to treat them as second-degree people who are not the bearer of rights equivalent to the other members in the society.<sup>172</sup> In essence, hate speech leads to the degrading of an individual's dignity.

Degradation of individuals' dignity is not the only effect of hate speech, but this speech also hinders victims from communicating with other society members properly. The messages of hate speech undermine the minority groups in the society, which led victims to feel that "others perceive them as falling short of societal standards, ones that even the individual may have internalized."<sup>173</sup> So, victims suffer from depression and mental illness. This stigmatization hinders the minority group members from engaging with other groups in society. This happens because this speech undermines minority group members leading to their voices and ideas often being seen as unimportant.

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<sup>167</sup> *Supra* note 117, at 57-60.

<sup>168</sup> *Id.* at 59.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> RICHARD DELGADO, JEAN STEFANCIC, MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY, at 8, New York University Press, (2018).

<sup>173</sup> *Id.*

Therefore, these group members refrain from speaking and engaging in public debates.<sup>174</sup> Furthermore, the racists and discriminatory members of society underestimate the views of minority groups. Caroline West explains:

when members of a group generally held in low regard express an unorthodox or unpopular view, that opinion is considerably less likely to be attended to or considered—at least, absent a conspicuous counter-veiling reason for thinking that the speaker in question has some special domain-specific expertise regarding the particular subject matter.<sup>175</sup>

For this reason, racist groups argue that people of color are nonintelligent beings which affects their chance to be heard; on the contrary, other members of the majority in the society are granted, according to this opinion, the chance to speak and have their ideas and thoughts listened to.<sup>176</sup> Racist ideas influence society's members, so they discriminate in their preference for listening to certain speakers and undermining speakers of color. Thus, the sense of stigmatization is one form of harm that profoundly touches the victims of hate speech. They feel in this speech that they are no longer welcome members of the society, but rather like second-degree persons who are not equal to other society members.

The harm caused by hate speech can lead to violence and sometimes catastrophe. The spread of hate speech has a long-lasting effect on the stability of society. This speech increases the haters and racism in the society, making society more vulnerable to racist violence, and a climate of hate could lead to physical and emotional damages on victims of this speech. This happens because the spread of hate speech in society normalizes listening to hateful ideas, which increases the sense of inferiority of minority groups; this gives the radicals the chance to commit violence against these groups.<sup>177</sup> In this case, the society may accept these incidents of violence or find an excuse to accept them because "freedom to espouse racist propaganda may contribute to extreme political action which

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<sup>174</sup> CAROLINE WEST, *Words That Silence? Freedom of Expression and Racist Hate Speech*, in *SPEECH AND HARM CONTROVERSIES OVER FREE SPEECH*, at 232-235 (edited by Ishani Maitra and Mary Kate McGowan, Oxford University Press) (2012).

<sup>175</sup> *Id.* at 244.

<sup>176</sup> *Id.* at 245.

<sup>177</sup> David Kretzmer, *Freedom of Speech and Racism*, 8 *CARDOZO L. REV.* at 463, (1987).

is acceptable only because such attitudes and beliefs are prevalent."<sup>178</sup> This is not a hypothesis. History is full of concrete examples in which the spread of racism and discrimination in society led to unimaginable violence and genocide. For example, during the 1920s and 1930s in Germany, the Weimar Republic protected the freedom of expression and offered special protection for hate speech. Hitler took advantage of this right and spread his racist and discriminatory ideas in Germany, which normalized the hate propaganda that saw other minority groups as second-degree individuals who were not equal to the Aryan race. After Hitler took power, his regime continued to embrace racism and discrimination in society by issuing many discriminatory and racist decisions targeting minority groups.<sup>179</sup> Society accepted these decisions or did not challenge them because the society adhered to this speech and was willing to accept the racial superiority of the Aryan race over other minority groups, which justified these racist actions until it led to the Holocaust.<sup>180</sup> This example shows that allowing hate speech in society could lead to grave harm that any society or even individual humans would not accept under normal circumstances. However, when hate speech becomes widespread in society, it induces its members and to willingly accept these atrocities. Therefore, restricting hate speech is a significant step that any society must take to save its members' lives and to maintain stability.

Other authors reject this mainstream doctrine protecting hate speech and offer counterarguments against hate speech protection. Mari J Matsuda is one such author who illustrates how racism has become common practice and attitude in the US. She explains that inferiority is deeply developed in society and "planted in our minds as an idea that may hold some truth."<sup>181</sup> In the US, the mainstream white race doctrine implies that other minority groups are uncivilized and not equal to other members of the society. They do this, offering many justifications for the normalization of hate speech. Matsuda rejects the white race doctrine and asserts that equality between people helps protect minority groups from the negative outcome of hate speech. She insists that the restriction of hate speech is essential to maintain equality, as reflected in this passage:

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<sup>178</sup> *Id.* at 464.

<sup>179</sup> *Id.* at 464-465.

<sup>180</sup> *Id.* at 464.

<sup>181</sup> *Supra* note 165, at 25.

The application of absolutist free speech principles to hate speech, then, is a choice to burden one group with a disproportionate share of the costs of speech promotion. Tolerance of hate speech thus creates superregressivity—those least able to pay are the only ones taxed for this tolerance. The principle of equality is violated by such allocation. The more progressive principle of rectification or reparation—the obligation to repair effects of historical wrongs—is even more grossly violated.<sup>182</sup>

She is against opinions that reject government intervention to regulate hate or racist speech. Matsuda explains that although government intervention may affect the imaginary marketplace of ideas, it is important to restrict racism. Protecting this marketplace of ideas and accepting racist speech leads to harm to minority groups and individuals, so regulating this market through restricting hate speech is prioritized over the freedom of speech.<sup>183</sup>

A different point of view proposes that anti-hate speech does not affect the legitimacy of law. This opinion is responding to Ronald Dworkin's argument that explains that the hate speech law is illegitimate. According to the constitution, anti-hate speech law does not affect the legitimacy of law because it is enacted accordingly to its rules. For example, many countries have adopted anti-hate speech laws, and no one can contest these laws' legitimacy.<sup>184</sup> Also, a law against hate speech will not affect the situation of minority groups in society.<sup>185</sup> Claiming that this law may target minority groups and hinder them from expressing their ideas and beliefs is not correct.<sup>186</sup> Hate speech law can be used against minority groups in totalitarian or authoritarian states only, but in democratic states that adopt the rule of law and human rights, a law against hate speech is rarely used to attack the groups it is supposed to protect.<sup>187</sup> This is confirmed in 1992 Striking a Balance Hate Speech, Freedom of Expression and Non-discrimination study:

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<sup>182</sup> *Id.* at 48.

<sup>183</sup> *Id.* at 50.

<sup>184</sup> JEREMY WALDRON, Hate Speech and Political Legitimacy in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES*, at 33-37, (Edited by Michael Herz and Peter Molnar, Cambridge University Press) (2012).

<sup>185</sup> *Supra* note 172, at 62.

<sup>186</sup> *Id.* at 63.

<sup>187</sup> *Id.* at 64.

[I]n repressive societies, such as South Africa and the former Soviet Union, laws against hate speech have indeed been deployed to stifle dissenters and members of minority groups. Yet this has not happened in more progressive countries. The likelihood that officials in the United States would turn hate- speech laws into weapons against minorities thus seems remote.<sup>188</sup>

These opinions share the same idea that mainstream doctrine promotes fallacies to protect hate speech. These mainstream doctrine arguments lead to the spread of hate and racism in society. Protecting free speech, which includes racist ideas, in this case, is not accepted by some authors who respond to these arguments by offering arguments that support the restriction of hate speech. To conclude, the critical race theory framework against hate speech protects society from violence and harms inflicted on victims. I think It is no longer accepted in society that free speech is granted protection without any restriction. In the next part, I explain the feminist perspective toward hate speech restriction to explore other reasons for restricting hate speech.

### **B. The feminist approach against hate speech: a way to protect women from discrimination**

Feminist writers criticize hate speech because it calls for inequality against women and stigmatizes women as sex givers as pornography shows. Pornography has rooted this view in society. Feminist writers explain that freedom of expression is offered by masculinity to protect only white men and normalize hate speech against women. Also, the freedom of expression is granted to pornography, although it humiliates women and promotes a particular image of sex performers. To understand the feminist critiques, I briefly explain this theory's assumptions regarding freedom of expression and hate speech. Then, I illustrate the harms of discriminatory speech on women.

On the one hand, feminist writers reject the absolute protection of freedom of expression without restrictions because it oppresses women by using hate speech. They explain that mainstream doctrine grants freedom of speech according to the white male view in society. Susan H. Williams, for example, explains that authors build feminist

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<sup>188</sup> *Id.* at 64. See also this study in Sandra Coliver, Striking a balance Hate Speech, Freedom of Expression and Non-discrimination, at 134-140 and at 208-220, Editor Human Rights Centre, University of Essex (1992). This is a study on the impact of hate speech law in many countries.



theory on certain assumptions. First, women are systematically oppressed in society by men and denied equality in society. Second, society is constructed by masculinity to adopt a certain reality about women and male privilege, undermining women's rights and equality. She rejects the marketplace of ideas theory because it "sees truth as objective, rationalist, universal, and representational works systematically to support gender hierarchy."<sup>189</sup> This theory offers a justification for freedom of expression from the white male view, ignoring the other views. Williams argues that our knowledge is socially constructed and that the truth's objectivity and rationality are not correct because gender hierarchy influences the construction of society. Our perception of the truth depends on our knowledge shaped by our culture. Our culture supports moral and political patriarchy. She explains why feminist theory rejects the marketplace of ideas:

[F]eminist critique does not merely argue that value judgments and social goals are generally implicit in epistemological choices; it demonstrates how a particular set of values and goals—those of gender distinction and domination—are implicit in a particular epistemology. In short, the Cartesian model of truth is not just epistemologically flawed, it is also morally objectionable.<sup>190</sup>

This opinion explains that people build the justification for freedom of expression on certain assumptions about society and how it is shaped. From this view, the marketplace of ideas theory offers a theoretical framework to justify discriminatory speech and speech, which calls for inequality. Therefore, discriminatory speech is developed and accepted by the general members of society.

Based on the previous explanation of the origins of discrimination against women, Mary Anne Franks argues that this doctrine protects white men's speech even if this speech is against minority groups or women.<sup>191</sup> This author criticizes the mainstream doctrine, which protects the freedom of speech even though it uses abusive expression against women. This doctrine allows the restriction of speech in case of defamation or threat to violence, and no one argues that it affects freedom of speech. However, if

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<sup>189</sup> Susan H. Williams, *Feminist Theory and Freedom of Speech*, *Free Speech Theory*, at 1002, 84, 3, Indiana Law Journal (2009).

<sup>190</sup> *Id.* at 1004.

<sup>191</sup> MARY ANNE FRANKS, *Beyond 'Free Speech for the White Man Research Handbook in FEMINIST JURISPRUDENCE LEGAL THEORY RESEARCH ENCYCLOPEDIA SERIES*, at 367 (edited by Cynthia Bowman & Robin West, eds., Elgar's) (2019).

speech is against women, it is rarely rejected. This happens because the white male is dominant in the society and thinks that hate speech is normal in society if it is not against this race, but if hate speech against women, it is accepted.<sup>192</sup>

In addition to these views, another author argues that media platforms use the freedom of expression to worsen women's image and stigmatizes them in a manner that humiliates them. Kimberlè Williams Crenshaw describes three intersectionality frameworks that affect the women of color's situation and explains how racist speech contributes to this cycle.<sup>193</sup> She illustrates that the racist speech represents women of color in mainstream media via a particularly stereotyped image. She illustrates that women of color are in a triangle that contains the structural intersectionality or dimension, the political dimension, and the representational intersectionality. She explains that structural intersectionality means society's members design the reasons for oppression to keep women of color in this vicious cycle of oppression from different economic and social factors. These factors range from "burdens of illiteracy, responsibility for child care, poverty, lack of job skills, and pervasive discrimination weigh down many battered women of color who are trying to escape the cycle of abuse."<sup>194</sup> Political intersectionality is how politics and gender interact to affect women's position in society.

The third element, representational intersectionality, is about women's image and how it is articulated in society "to create unique and specific narratives deemed appropriate for women of color."<sup>195</sup> These elements are gathered together to increase the oppression of women of color and undermine their image in front of society, increasing violence as a reaction to this speech.<sup>196</sup> She explains the existence of hate speech which stereotypes women of color, and the elements of intersectionality, which "not only represent the devaluation of women of color. They may also reproduce it by providing viewers with both conscious and unconscious cues for interpreting the experiences of

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<sup>192</sup> *Id.*

<sup>193</sup> KIMBERLÈ WILLIAMS CRENSHAW, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT*, at 113-119, (edited by Mari J. Matsuda, Routledge) (1993).

<sup>194</sup> *Id.* at 115.

<sup>195</sup> *Id.* at 116.

<sup>196</sup> *Id.*

others."<sup>197</sup> Therefore, hate speech against women increases inequality and leads women to suffer in an unjust society.

On the other hand, other feminist writers illustrate that freedom of expression is used in pornography to humiliate women's image in society, so this speech uses freedom of speech to impose pains on women. Catharine A. MacKinnon argues that the constitutional protection of pornography makes men see women as sex objects. Men are raised in their environment to see women in porn, so this image creates a sense of domination over women. She explains that through pornography, women are humiliated, while men enjoy these scenes. This is like a rapist who enjoys the raping of women. Porn allows and normalizes the idea of seeing women in a position that humiliates them.<sup>198</sup> She calls for the restriction of porn because it inflicts harm on women.<sup>199</sup> Pornography harms women because it creates a fallacy that the only purpose for women is to satisfy men's sexual desires. Therefore, this view calls for the restriction of porn because it causes harm and severe damage to women's image in society.<sup>200</sup>

In conclusion, feminist writers see that many people commonly use freedom of expression to protect hate speech, targeting women. Hate speech targets women by degrading them, and so this affects their dignity. The feminist writers' views toward hate speech are the same as the critical race theory. Both theories see hate speech as a way to normalize the inequality and inferiority of certain groups and genders and inflict harm on the victims. So, these theories strongly call for the restriction of hate speech.

To conclude these debates, the arguments for restricting hate speech are well-balanced arguments that refute the mainstream's scholarship and offer acceptable justification for eliminating hate speech. The above-illustration shows that hate speech leads to many devastating effects on minority groups and women. The harms of hate speech exploit the victims' lives. It affects their souls, social image, and right to live in an equal society like other society members. Therefore, the harms of racist speech are an important justification to eliminate hate speech. In the next part, I explore the European Court of Human rights (ECHR) cases to see a judicial system in which hate speech was

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<sup>197</sup> *Id.* at 124.

<sup>198</sup> CATHARINE A. MACKINNON, *ONLY WORDS*, Harvard University Press, at 21, (1996).

<sup>199</sup> *Id.* at 25.

<sup>200</sup> *Id.* at 96.

restricted and refused. It is important to illustrate this system to see that hate speech restriction is not theoretical, and courts can apply.

### **C. The ECHR cases against hate speech: a balanced approach against a complex problem**

The ECHR regime protects the freedom of expression unless speech calls for hatred or discrimination. In hate speech cases, the court restricts this speech as the court adopts an intolerant policy against racist and discriminatory speech. Although the court has not adopted a clear definition of hate speech, it deals with hate speech based on a case-by-case approach and restricts hate speech based on this analysis. It focuses on the speech context and its severity and consequence on society.<sup>201</sup> In this part, I argue that ECHR's treatment of hate speech is a highly recommended approach to be followed by countries because it has adopted an intolerant approach against hate speech. The court brilliantly uses a pragmatic approach which is a case-by-case analysis, to assess the content and context of the speech and restricts speech if it inflicts harm or leads to haters and discrimination. This section demonstrates the ECHR doctrine in deciding cases related to alleged abuses of freedom of expression. Then I illustrate some of the court cases in which it restricts hate speech and its rationale. I explain some of the counterarguments of the court's approach. To conclude, the ECHR model is a suitable model for fighting hate speech while recognizing some of its criticism.

In the cases related to the freedom of expression abuses, the ECHR evaluates speech based on its conformity with article 10 of the European Convention on Human Rights (The European Convention).<sup>202</sup> Article 10/1 of The European Convention protects the freedom of expression. There are three restrictions on exercising the freedom of expression right reflected in Article 10/2, which states that:

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 for a democratic society, in the interests of national security, territorial

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<sup>201</sup> KOEN LEMMENS, Hate Speech in the case law of the European Court of Human Rights - Good Intentions make Bad Law, In FREEDOM OF SPEECH UNDER ATTACK, at 142, (edited by, Afshin Ellian, Geliijn Molier, Eleven International Publishing) (2015).

<sup>202</sup> *Id.*

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.<sup>203</sup>

Furthermore, the court allows a margin of appreciation to states to restrict expression according to their legal system. This exception grant states the right to assess cases according to their national laws and restrict speech if it contradicts their society or culture.<sup>204</sup> The margin of appreciation is granted by ECHR only if the states present interests and clarify the dangers that led them to restrict speech.<sup>205</sup> The court resorts to already decided cases to qualify the speech. If the case law does not help, it analyzes the context and its effect on society.<sup>206</sup> The court declares the inadmissibility of cases that includes Holocaust denial and anti-Semitic speech. In these cases, the court refuses to examine the content of this speech. The court uses article 17 of the European Convention to reach this result.<sup>207</sup> In assessing speech, according to article 10 of the European Convention, there are three approaches the court follows to examine hate speech based on this article. First, it looks at the content of the speech. Second, it examines whether the speech tends towards hate or racism. Third, the infers from this tendency whether the speech indicates racial discrimination or hate.<sup>208</sup>

To understand how the court applies these approaches, I explain some of the court cases in which it has restricted hate speech based on article 10. The court mainly uses this article to restrict speech that calls for hatred and discrimination against other social groups. Then I explain some cases in which ECHR uses Article 17 of the European Convention to restrict speech, such as Holocaust denial and anti-Semitic speech and some of the court's justifications and some of its criticisms.

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<sup>203</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 1 March 2021].

<sup>204</sup> *Supra* note 201, at 142.

<sup>205</sup> ERIC BARENDT, FREEDOM OF SPEECH, at 182, Oxford University Press (2007).

<sup>206</sup> *Id.* at 143.

<sup>207</sup> Article 17 of ECHR “Nothing in this 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.”

<sup>208</sup> Stefan Sottiaux, *Bad Tendencies in the ECtHR's Hate Speech Jurisprudence*, 7 EuConst at 53 (2011).

## 1.ECHR case law under Article 10 of the European Convention and its criticisms

In cases related to the application of article 10 of the European Convention, the court restricted hate speech that called for haters against minority groups. In the case of *Feret v Belgium*, a Belgian politician delivered a racist speech against the Muslim minorities in his country and accused them of terrorism. He also claimed that asylum seekers and refugees are radicals and encourage violence and terrorism. Belgium filed a case against this politician by charging him with violating a law that criminalizes racist speech. The national court found him guilty and penalized him. The defendant then filed a case with the ECHR and argued that he did not incite violence, but rather he expressed a political view. The ECHR upheld his conviction. The court analyzed the case from the lens of article 10 and found that there was no violation from Belgium. The court explained that incitement does not relate to violence:

[I]ncitement to hatred did not necessarily require the calling of a specific act of violence or another criminal act. Attacks on persons committed through insults, ridicule or defamation aimed at specific population groups or incitement to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people's dignity, or even their safety.<sup>209</sup>

The court illustrated that this speech affects the society's unity and living peacefully, and this speech affects the democratic institution which is required to protect these values.<sup>210</sup>

Recently, the rejection of hate speech against homosexuality was followed by the court in *Vejenland v Sweden*. The defendants, who are student members in a group called Vejenland, distributed a leaflet containing homophobic speech. The national authorities brought a case against them for agitating against a national or ethnic group. The defendants filed a case in the ECHR and argued that they discussed homosexuality and its effects on society without intending to humiliate its members. They claimed that they were bringing this issue to the public for debate only. The court found no violation of article 10 because this speech because was offensive against others. The court

<sup>209</sup> *Féret c. Belgique*, Requête no 15615/07, Council of Europe: European Court of Human Rights, 16 July 2009, available at: <https://futurefreespeech.com/feret-v-belgium/>. [accessed 16 March 2021].

<sup>210</sup> *Id.* at para 64.

illustrated that inciting to hatred "does not necessarily entail a call for an act of violence or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner."<sup>211</sup> Therefore, the court upheld the conviction.

In spite of ECHR's active approach against hate speech, many writers reject the ECHR court's approach to applying article 10 of the European Convention and restricting speech related to public concerns and political speech. They argue that public debates and political speech must be granted in society a high level of protection because a society must ensure that there is space for people to speak and exchange their opinions. People feel that the government respects "pluralism, tolerance and broadmindedness" among society members.<sup>212</sup> The ECHR explains that the right of freedom of expression under the Convention extends to the expression of speech " which are shocking, offensive and disturbing."<sup>213</sup> In this line, Stefan Sottiaux argues that the court restricts speech related to public debates that threaten freedom of expression. He opposes the court approach *Feret v Belgium* because, in this case, the speech acts that were involved were never intended to incite haters or discrimination. Sottiaux explains that the language used by the speaker in this case never "aimed not so much at inciting the members of the general public to act in a racist or discriminatory manner, but at criticizing the sitting government's immigration policies as part of an electoral strategy."<sup>214</sup> Therefore, in this case, the court's decisions were disagreed by Sottiaux because the court inferred haters and discrimination from a political speech merely discussing a public issue without intending to harm anyone.

## **2.ECHR case under Article 17 of the European Convention and its opposition**

In cases that involve speech, denying the Holocaust, or promoting neo-Nazi ideology, Article 17 is often used to refute these cases.<sup>215</sup> Article 17 states that:

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<sup>211</sup> *Vejdeland and Others v. Sweden*, no. 1813/0, Council of Europe: European Court of Human Rights, September 5, 2012.

<sup>212</sup> Aoife O'Reilly, *In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights*, 19 TRINITY C.L. REV, at 240 (2016).

<sup>213</sup> *Id.*

<sup>214</sup> *Supra* note 208, at 54.

<sup>215</sup> Antoine Buyse, *Dangerous expressions: The ECHR, violence and free speech*, 63,2 The International and Comparative Law Quarterly, at 494 (APRIL 2014).

Nothing in this 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.

For instance, in the 2003 case of *Garaudy v France*, an author published a book that denies the Holocaust. He was convicted based on a law that criminalizes denial of crimes against humanity and the publication of defamatory statements. The defendant filed a case in the ECHR. The court considered this expression "denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth."<sup>216</sup> Instead, it holds a certain view and ideology of Nazi, which calls for haters as it claims that the victims have falsified the Holocaust. The court explains that "denying crimes against humanity is, therefore, one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order."<sup>217</sup> So, the court considered that this expression incites individuals to violence and supports racism, so the court refused to examine the case in light of article 10 of the European Convention and declared the case inadmissible in light of article 17.

The court confirmed this refusal of hate speech in the case that involved hate speech against the Muslim minority. In the 2010 case of *Le Pen v France*, the defendant, who is president of the French "National Front" party, in an interview with the *Le Monde* newspaper, used racist speech against migrants and Muslims and rejected Muslims' existence in France. A French court convicted this party member for incitement of hate speech. He, in turn, filed a case in front of the ECHR. The court illustrated the use of this hate message which threatens the dignity and the security of a Muslim minority. Also, this speech, according to the court, could affect the stability of French society. It explained

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<sup>216</sup> *Garaudy v France*, no. 64496/17, Council of Europe: European Court of Human Rights, 7 July 2003, at 23 available at: <http://www.proyectos.cchs.csic.es/transitionaljustice/sites/default/files/maps/info/case-law/GARAUDY%20v.%20FRANCE.pdf>. [accessed 17 March 2021].

<sup>217</sup> *Id.* at 23.



that “the Court found that the interference with the applicant’s enjoyment of his right to freedom of expression had been “necessary in a democratic society.”<sup>218</sup> The court accordingly rejected his complaint.<sup>219</sup>

Furthermore, the court used article 17 to dismiss cases in which the plaintiffs use hate speech against minority groups. In the 2004 case of *Norwood v. the United Kingdom*, the British party member of British National Party, a right-wing party, set up a billboard in the window of this flat with the word "Islam out of Britain- protect the British people,"<sup>220</sup> this person was convicted by the use of anti-discrimination laws in the UK. He filed a case in front of the ECHR. The court said his conviction, according to British law, was appropriate. The court considered this speech as "incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination."<sup>221</sup> Thus, it was not covered by treaty protection because it abuses others' rights, according to art 17. This case shows how the court engages clearly with the hate speech problem. This case illustrates that the court rejects hate speech that targets a certain group based on religion. For this reason, the court rejected the defendant's case according to article 17.

Many authors reject the use of article 17 of the European Convention in cases related to freedom of expression because it threatens this right. Lemmens explains that article 17 was adopted in the European Convention to protect from the abusing of rights. He criticizes the ECHR because it uses this article to block certain types of speech, i.e., speech denying the Holocaust and anti-Semitic speech, without analyzing the merits of the case according to article 10 of the European Convention.<sup>222</sup> Article 17 is dangerous on freedom of expression because it allows the states to restrict speech based on the type only without justifying its interference in restricting speech. In line with this view, David Keane argues that article 10/1 protects hate speech, and article 10/2 offers restrictions to

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<sup>218</sup> *Le Pen v. France*, no 18788/09 20, Council of Europe: European Court of Human Rights, April 2010 available at: [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22003-3117124-3455760%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22003-3117124-3455760%22]). [accessed 17 March 2021].

<sup>219</sup> *Supra* note 208, at 44.

<sup>220</sup> *Id.* at 464.

<sup>221</sup> *Norwood v the United Kingdom*, no. 23131/03, Council of Europe: European Court of Human Rights, 16 November 2004.

<sup>222</sup> *Supra* note 201, at 145.

speech.<sup>223</sup> Article 10/2 justifies the restriction of the speech on three conditions: prescribed by law, necessary in a democratic society, and for 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.”<sup>224</sup> Therefore, ECHR must restrict speech according to this formula. However, ECHR applies to article 17 in denying Holocaust speech and anti-Semitic speech and requires countries to prove only that this speech falls under these categories without analyzing the speech context or content according to the article 10 formula.<sup>225</sup> He disagrees with the ECHR approach in these cases because it leads to:

loss of any degree of proportionality; interference is justified because of content, not because of any balancing act with a conflicting right, such as equality. The State would not be required to show that there was a pressing need for an interference – it would be required to prove only the content of the speech in question and not the effect of that speech.<sup>226</sup>

Aoife O'Reilly sees the use of article 17 in restricting speech as a threat to political speech. He contends that the dismissal of the *Norwood v England* case by the ECHR destroyed the freedom of expression right as the court blocked political speech that may be unsavory but did not deserve to be restricted by the court under article 17. He asserts that

displaying a poster that represented the party's concern that Britain was under threat from Islam. This was, by its very nature, political speech. In addition, whether the existence of a poster in the window of a flat in a village in Shropshire can reasonably be construed as an attempt to destroy the rights and freedoms in the Convention is surely dubious.<sup>227</sup>

Thus, this opinion insists that this speech should have been analyzed under article 10 of the European Convention rather than analyzed under article 17.

In addition to the opposition for the court's approach in deciding case according to articles 10 and 17, other opinions claim that the ECHR uses a vague approach toward the

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<sup>223</sup> David Keane, *Attacking Hate Speech under article 17 of the European Convention on Human Rights*, 25/4 *Netherlands Quarterly of Human Rights*, at 656 (2007).

<sup>224</sup> *Supra* note 203, at Article 10.

<sup>225</sup> *Supra* note 223, at 656.

<sup>226</sup> *Id*

<sup>227</sup> *Supra* note 212, at 243.

definition of hate speech, which has led to ambiguous application in cases. One author posits that the lack of clarity of the definition of hate speech is noticeable in the cases decided by the ECHR. The court deliberately avoids defining hate speech.<sup>228</sup> This has led to uncertainty regarding the exact approach that the court follows to treat hate speech cases.<sup>229</sup> For instance, in *Perincek v. Switzerland*, the court refused to restrict clear hate speech denied the Armenian Genocide. In this case, a Turkish citizen denied this Genocide at a conference in Switzerland. Switzerland filed a case and convicted him for advocating racist nationalist speech. The plaintiff, the Turkish citizen, filed a case in the ECHR, where the court found that the Swiss government violated article 10 because this expression related to public interests entitled to protection, and a mere denial of a historical incident does not constitute hate speech. It requires in the act of denying genocide, "to incited to hatred towards a specific group, it could lead to a climate of hostility and violence, and was thus properly criminalized. Conduct that was disrespectful or degrading for a group of people could properly be outlawed."<sup>230</sup> The court acquitted the defendant. From this case, it is clear that the court contradicts its prior case law, which considered the Genocide denial as a mere act of hate speech that should be restricted. Therefore, this could lead us to infer that the court applies an inconsistent definition to hate speech.

From these discussions, the court's approach towards hate speech fluctuates between prohibiting hate speech cases or accepting these cases and analyzing their content from a Convention perspective. The court clearly refuses anti-Semitic speech cases and declares them inadmissible, but in other forms of hate speech cases, the court analyzes this speech. The court approach in the cases that do not involve anti-Semitic speech focus on the context of the speech and its effect on society and victims. I believe that this approach can empower the victims of hate speech by protecting them from racist

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<sup>228</sup> TARLACH MCGONAGLE, A Survey and Critical Analysis of Council of Europe Strategies for Countering "Hate Speech" in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES, at 463 (Edited by Michael Herz and Peter Molnar, Cambridge University Press) (2012).

<sup>229</sup> *Id.* at 422. see also Vesna Alaburic, *Legal Concept of Hate Speech and Jurisprudence of the European Court of Human Rights*, 55, 4 *Croatian Political Science Review*, at 248 and 250. (2018).

<sup>230</sup> *Perincek v. Switzerland*, no. 27510/08, Council of Europe: European Court of Human Rights, 15 October 2015. at para 97.

and discriminatory speech. Although the court does not provide a straightforward test for hate speech, the main approach adopted in these cases leads to prominent effects. The case-by-case analysis is the most acceptable way to examine the hate speech problem. The court's approach to dealing with this kind of problem is pragmatic as it does not examine the actual act but rather examines the context and the effects of the hate speech. The court's approach, which adopts article 17 of the European Convention, is also an acceptable adjudication model. This model rejects to examine cases if these cases lead to the destruction of the rights and freedoms in the Convention.

I also reject the opinion which suggests that if a speech is related to public issues or political speech, it should be protected even though this speech calls for haters and discrimination. A speech which calls for haters and discrimination leads to harms on victims of this speech and increase the climate of hate in the society as discussed in section one and two of this chapter. To conclude, I believe the ECHR's approach is a balanced model in fighting hate speech, and countries, especially those which currently tolerate hate speech, could benefit from the ECHR's experience to restrict hate speech.

## V. Conclusion

The problem of hate speech is a contemporary problem facing societies for many decades because it is associated with freedom of expression rights. Therefore, this paper calls for adopting a unified approach against hate speech. IHRL plays an important role in guiding states and their Constitutional courts, especially on the exact approach that should be followed to deal with hate speech. The problem of hate speech is a specific problem of a more general problem that the Constitutional courts face. These courts try to balance between individuals' rights against society or minority interests. Therefore, IHRL should provide a unified code to delimit judicial discretion. We can see that the lack of common international practice has led to different approaches applied by states to organize freedom of expression and its restrictions. In the US, freedom of expression is used in this society to justify hate speech, and this society gives little attention to the minorities affected by this speech. Although hate speech leads to harms to the victims, the US offers greater protection for this speech. Other opinions, such as critical race theory and feminist theory, try to restrict hate speech by focusing on how hate speech harms the victims. The ECHR supports this approach and restricts hate speech in many cases, which, in my opinion, is a good model of adjudication that states can follow if they want to restrict hate speech.

I believe that the restriction of hate speech is necessary for any society to protect the victims from the harm it inflicts on them. Also, the restriction of hate speech leads minority groups to feel secure and tolerated by society if they see that society is against this kind of speech. I think our world now needs to take actual steps to fight racism and discrimination, which has spread in recent years. It is no longer acceptable to protect hate speech under any justification, and states that tolerate hate speech should rethink their approach to restricting hate speech. The restriction of hate speech is important to protect individuals and societies from the harms of hate speech.