

DOG WHISTLES AND CAT SENSES – HIDDEN EXTREMISM AND THE FRAMEWORK OF LEGAL OVERSIGHT IN EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

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Abstract. *This paper examines the challenges posed by hidden extremist messages communicated through coded language, memes, irony, and discursively veiled expressions within the framework of the European Court of Human Rights' (ECtHR) case law. It develops a methodological framework for assessing such speech, drawing on discourse analysis, speech act theory, and the concept of "dog whistle" communication. Through an analysis of ECtHR and selected national decisions, the study highlights the tension between safeguarding freedom of expression under Article 10 of the European Convention on Human Rights and addressing disguised incitement to hatred or violence. It argues that courts must adapt their interpretative tools to account for the evolving forms of extremist rhetoric in digital environments, where messages often operate simultaneously on multiple semantic levels.*

Keywords: Hidden extremism; Dog whistle communication; ECtHR case law; Freedom of expression.

1. INTRODUCTION

The entry of social networks, image boards, forums and other forms of online communication into political discourse has led to the formation of online communities using their own language, memes, symbols, inside jokes, audiovisual forms, narratives, stories that serve to communicate and identify these communities, as well as to disseminate their ideas.

The use of such coded messages is common phenomenon for closed groups. As in the past, so today, specific languages are also used by different professional groups. Also, criminal groups use specific jargons (Koskensalo, 2015, p. 499), which do not allow law enforcement agencies to understand the plans and activities of the criminal group.

This type of coded communication is now widely used by radical and extremist groups (Koskensalo 2015, p. 501). In addition to preventing incrimination (Åkerlund (2022, p.1822), the use of coded messages also achieves three additional goals:

- as a means of both intra-group recognition and public self-identification for group members (signaling that the speaker is "in the club") (Weimann, 2020, p. 20);
- attracting new followers (cryptic speech requires a certain intellectual effort from the listener, which is rewarded with obtaining membership in the community);
- it is a means of circumventing platforms' algorithms that remove illegal content;

This explains why, in the present context, extremist messages are more likely to disguise their intent rather than openly call for violence. However, this shift does not necessarily indicate a moderation of political views; rather, it reflects a deliberate strategy to gain broader support while avoiding legal repercussions. The messages are carefully framed in coded and legally permissible expressions, often embedded in memes and other forms of public discourse, both oral and written. As a result, the speech exerts a strong influence on the targeted group, while the wider audience perceives it as neutral or harmless.

Thus, extremist messages function in parallel in two discourses, which creates their semantic duality – the hidden inter-extremist discourse. and the wider public discourse. The hidden meaning is a discursive

tool that can remain invisible to the courts and law enforcement agencies. The latter, as citizens, most often participate in public discourse, which determines their tendency to be neutral towards hidden extremist messages.

2. PURPOSE OF THE STUDY

This study aims to present a conceptual framework for the assessment by the Court of Human Rights, of hidden extremist messages when they are realized through coded, visual or discursively veiled speech (so-called dog whistle messages).

The proposed framework is based on the case law of the Court of Human Rights, which has a leading role in defining the boundaries of permissible speech in Europe (for the member states of the Council of Europe), as it forms the minimum standards binding on these states.

Given the dynamic development of channels of expression in recent years, there is a lack of case law of the Court of Human Rights on newer forms of veiled or coded extremist speech – such as internet memes, ironic slogans and other audiovisual forms. This necessitates the report to also analyse selected decisions of national courts in Europe that have decided cases related to digital hate speech.

3. NORMATIVE FRAMEWORK THE PROTECTION OF FREEDOM OF EXPRESSION IN THE ECHR

Article 10, paragraph 1 from The European Convention on Human Rights guarantees the law on free expression - freedom of opinion and freedom to receive and distribute information and ideas without interference by public authorities.

Outside the scope of Art. 10, paragraph 1 ECHR is speech inciting to violence, hate speech and racism, as well as Holocaust denial (Bychawska-Siniarska, 2017, p. 23-31). This is so insofar as Art. 17 ECHR prohibits abuse of rights by excluding from the protection of Art. 10 expressions that undermine the fundamental values of the Convention. The Court of Human Rights has applied this provision to deny protection to speech inciting to violence, hate speech, racism or Holocaust denial.

In addition, Article 10, paragraph 2, provides for the possibility for Council of Europe member states to restrict the right to protected speech if the following conditions are met:

- a. the restriction is provided for by law.
- b. the restriction must have a legitimate aim, it shall be provided “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (Art.10, par.2).
- c. interference is necessary in a democratic society, that is.
 - to be proportionate i.e. proportionate to the objective pursued.
 - to respond to a pressing social need i.e. there must be a social need to impose the restriction.

The ECHR admits on the national authority's freedom on judgment (so-called margin of appreciation) at imposing restrictions on the law based on Article 10, paragraph 2 of the Convention. This means that the countries have the competence to evaluate the specifics on the given case according to the existing social, historical and political context. This assessment is not entirely within the discretion of the State, since it is for the Court to assess whether it is complied with the standard "necessary in the democratically society".

In contrast to the European legal framework, in the United States the First Amendment to the Constitution guarantees almost full protection of speech unless it meets the strictly defined test of "incitement to immediate unlawful action" (US Supreme Court, *Brandenburg v. Ohio* (1969)). Any other expression, including that which in Europe would be qualified as hateful or inflammatory, is considered protected by the First Amendment in the United States (US Supreme Court, *Chaplinsky v. New Hampshire* (1942), *Virginia v. Black* (2003), *RAV v. City of St. Paul* (1992)).

4. THEORETICAL FRAMEWORK FOR SPEECH CONTENT ASSESSMENT

4.1. Speech Act Theory

The ECtHR's case law on the assessment of freedom of expression (Article 10, paragraph 1 of the ECHR), the limits that states may place on this freedom (Article 10, paragraph 2) and the application of Article 17 is influenced by the speech act theory and by various approaches to discourse analysis. (including critical discourse analysis (Åkerlund 2022), semiotic analysis (Pratiwi, D. P. E., Sulatra, I. K., & Dewangga, I. G. A. (2023)).

These analytical frameworks help to the evaluation not only of the explicit content of the expression but also its implied meanings, context, and potential impact. Speech act theory and methods of discourse analysis reveal the hidden extremist messages that are most popularly known today as 'dog whistles' a notion popularized by the American legal scholar Ian Haney López (López, 2014).

Speech act theories (speech as action) originated in the 1950s and explain speech not only as a statement or description, but also as an action (Austin, 1962). John Austin calls act-sentences "performative expressions" and identifies the characteristics for an expression to have performative meaning (Austin, 1962, p.15). A performative expression is valid (i.e., represents a relevant action) depending on:

- a. whether the author is legitimate to utter it and they did follow the normative procedure (if any). For example, the same expression uttered by three different people - a politician, an actor or a person who ridicules the expression, may or may not have a performative effect. While the speech of the ridiculer has a parodic or ironic character, that of a politician - under valid conditions - can be perceived as a form of incitement. The speech of the actor should in principle have an interpretative character, but under certain conditions it can also be performative.
- b. whether the expression is said sincerely (what is the speaker's intention) – that is, is there a match between the person's will and their statement. Such a match will not be present if, for example, what was said was said in joke, was given as a (teaching) example, or was uttered within the framework of an actor's interpretation of a work.
- c. the existing context – including the set of external factors that give meaning to what is said, since speech does not exist on its own, it is a response or provocateur to certain conditions.
- d. from the audience - to whom the speech is addressed.
- e. and if relevance requires – in the presence of additional statements and assumptions.

All of these premises, with some extrapolation, are methodologically applicable to the assessment of extremist speech.

John Searle introduced the concept of an "illocutive act" (Searle, 1969,13) – a speech act through which the speaker achieves social impact, expressing an intention in a specific communicative context. In discursive theory, this act does not exist in isolation, but fits into a broader system of meanings, where meaning is formed by the interaction between the speaker, the audience, the context and established social roles. It is this discursive engagement that gives legal significance to speech and allows the court or security authorities to assess not only what is said, but also its mobilizing, radicalizing or coded function.

This perspective is complemented by Michel Foucault's concept of discourse (Foucault, 1972, Foucault, 1981), according to which statements do not exist in a vacuum but are part of broader systems of knowledge and power that determine who can speak, what can be said and in what context. Therefore, extremist rhetoric should be considered not only at the level of the immediate interaction between speaker and listener, but also as an element of already established discursive formations. Within these formations, extremists resort to coded expressions, memes and "dog whistle" rhetoric, which allow them to disguise their messages, which receive a seeming legitimacy insofar as they appear to be expressed within the boundaries of legitimate public discourse.

2. Dog Whistle and The Discourse

The dog whistle is used by the owner and is only heard by the dog, as its sound is in the high frequency range, inaudible to human hearing. This way, the message is clear to the addressee but remains hidden from the audience.

The dog whistle can be understood as a speech act that activates pre-shared meanings within a specific audience, while remaining unrecognizable to the general public. The concept of the dog whistle is a manifestation of Michel Foucault's idea of discourse as a mechanism for maintaining power through control over meaning and access to it. For example, the slogan “Let’s defend the family” operates on two levels. To the general public, it sounds like an acceptable message about traditional values. However, within the framework of far-right discourse, the same phrase has a hidden meaning – opposition to the LGBTQ+ community and migrants, presented as a “threat” to society. It is this ambiguity and selective intelligibility that illustrates Foucault’s understanding that discourse controls access to knowledge: some hear a simple appeal, while others hear a coded extremist message.

Messages of this type contain a conscious and purposeful ambiguity of speech. For example, it is possible for an actor’s speech to simultaneously inhabit two realities – performative and non-performative. A monologue inviting war can be perceived both as a performance and as a call (if the prerequisites for a valid performative are present – the actor has a public position, utters the monologue out of conviction, and the context includes deteriorated international relations, the audience is made up of nationalistic people and, accordingly, can be provoked to action).

This duality of the speech act, visible to some, invisible to others, is aptly described by China Miéville in her novel *The City and the City*. It tells the story of two cities – Beshel and Ul Kama – that share the same space, but the inhabitants are trained not to see the other city, even when they pass by people and buildings from it. This metaphor of the social division is useful for understanding the “dog whistle” effect.

John Searle justifies this possibility (Searle, 1969, p.26), pointing out that this is precisely the main characteristic of hidden speech – its simultaneous belonging to performative (mobilizing) and constative (descriptive) discourse. Like the cities of Bechel and Ul Kama in Miéville’s novel, the message is visible to some and invisible to others, heard by some and unheard by others – perceived as normal political rhetoric by some, but as a call to violence by others. This ambiguity significantly complicates the courts and institutions, as it calls into question whether the expression is part of legitimate political debate or constitutes a disguised hate speech or incitement to violence.

These concepts of speech justify the need for a discursive analysis of speech that reveals the actual meaning, intention and potential effect. The task of the court is to recognize “dog whistle” communication as a discursive element that – under certain circumstances – contributes to the escalation of hatred and hostility.

The court's assessment of discursive determinacy is very important because, although extremist speech is primarily subject to moderation by algorithms (which at this point lack discursive sensitivity, leading to the removal of legitimate content (overblocking) and unreasonably narrowing the right to expression), it is the court, not the algorithm, that shall be legitimately obligated to outline the boundaries of a human right.

The incorrect definition of discourse leads to the danger that messages that do not carry illegality could be incorrectly qualified as such and thus the exercise of a fundamental human right, such as freedom of expression, will be restricted.

All this necessitates clarifying the problem of discourse within the framework of extremist messages. The ECtHR has serious practice in this direction, it takes into account discourse, but on the other hand, it was formed mainly before the emergence of communications through social networks and image boards. Considering that social networks and image boards are the main channels for the dissemination of extremist views, it is necessary to apply the existing principles to this type of communication, considering the specifics of the latter.

The present study is limited mainly to manifestations of right-wing extremism, as right-wing extremists use similar political and linguistic tools in propagating their ideas. Although the study focuses on covert extremist messages (typical of the far-right, who wish to present their ideology as mainstream

and their lifestyle as cool) (Ebner, 2020, p. 153), it examines the judicial practice of overt extremist messages, insofar as the latter represent the typical case of judicial assessment of extremist speech, but the developed practice is partly directly, partly correspondingly applicable to covert extremist messages.

5. CASE LAW FRAMEWORK

The ECtHR has long recognised that speech operates within a particular discursive environment, which is relevant to the assessment of a particular expression. Therefore, in analysing messages with the potential to incite hatred, it is essential to consider who is speaking, to whom, in what context and what effect their speech may have.

According to the Court's case-law, restrictions on freedom of speech are permissible if there are compelling reasons (*Féret v. Belgium*, 2009, § 63) and with proportionate measures (*Féret v. Belgium*, 2009, § 64) – that is, this restriction cannot be applied to every speech, even if it contains a radical or provocative meaning.

5.1. The personality (image) of the speaker

In assessing the illegality of an expression, the personality of the speaker is relevant to the court's judgment. In social sciences, personality image can be viewed as a social construct that is formed by the way others perceive an individual. The image of the individual is built because of the impressions of others about her/his acts.

What the speaker says is not perceived in isolation, but in the context of what she/he has said or done before and what her/his intention is. The meaning of his expression is derived from the constructed discursive profile of that person. For example, when the statement is made by a public figure – a politician (*Necmettin Erbakan*, former Prime Minister of Turkey, *Erbakan v Turkey*, 2006, §76, 80), leader of a far-right party (*Feret vs Belgium*, 2009), comedian (*Dieudonné M'Bala M'Bala*, famous French comedian, *M'Bala M'Bala vs France*, 2015), prominent footballer (*Josip Simunić*, Croatian national team player, *Simunic vs Croatia*, 2018, § 45) the court accepts that their social status and public image influence the perception of the message by the audience. This also leads to a change in the legal assessment of the expression and in these specific cases the court accepts that the sanctions imposed by the national jurisdictions on these individuals do not contradict Article 10 of the ECHR.

The public role alone is not sufficient to accept that an expression is unlawful. This is stated in the decision in the case *Perinçek v. Switzerland* (2015), which found that the denial of the 1916 Armenian genocide by the leader of the Turkish Workers' Party, *Doğu Perinçek*, did not automatically constitute incitement to hatred, absent additional indicators such as a call for violence or a real public risk that the provocative statement would lead to an escalation of public tension.

The public perception of a person as radical may in certain cases even lead to an adverse legal assessment of their statements. In §51 of the judgment in the case of *Gündüz v. Turkey* (2003), the ECtHR noted that the applicant's statements must be viewed in the light of his public role and prominence as the leader of a religious group whose radical ideology is well known. Because of this, his speech had a more limited impact, as the audience perceived his words in the context of his already known radical views, which reduced the risk of his speech being perceived as incitement.

5.2. Sincerity (the author's intention)

All the world's a stage, and all the men and women merely players. Yuval Harari points out that the main difference between humans and other animals is that we believe in fictional stories (Harari, 2015, p. 27-28). Fictional stories have a huge impact on shaping our society, norms, experience and worldview. Within this, aesthetically we often enjoy violence, victory over the opponent and humor. A large part of show business, culture and sports are built on these preferences of ours.

The law does not prohibit such content – their meaning is interpreted in an aesthetic or fictional context, which usually excludes a performative (i.e., effective) function of speech. The sincerity, or more

precisely the intention of the speaker, is also important. A typical example is acting – within a fictional context, the insincerity of the actor is assumed – she/he will not be tried for incitement to violence or hatred if he plays the role of a war provocateur.

Here the question arises: to what extent does the actor express herself/himself and to what extent does she/he play the role? There are different types of acting and different relationships between the actor and the character. At what point does the actor cease to be an interpreter and become an author? This can be said with even greater force for the author of a novel – are the thoughts and characters an extension of the author's personality, or has the author consciously severed her/his connection with them?

No less important are the issues related to jokes and anecdotes. Despite some objections to inappropriate humor, it is not prohibited. In the case of *Simić v. Bosnia and Herzegovina* (2020), Bosnian lawyer Marko Simić was convicted of contempt of court for telling the famous joke in which the professor asked the student to list the names of the victims of the Hiroshima atomic bomb. The ECtHR found that in this case there was a violation of Simić's right under Art. 10 of the Convention – i.e. it accepted that this joke was permitted speech that did not constitute an insult in the context of the protected freedom of expression.

However, similar protection was denied to comedian Dieudonné M'bala M'bala vs France (*Dieudonné M'bala M'bala vs France*, 2015), for a humorous sketch in which an actor wearing striped pajamas and a yellow Star of David with the inscription "Jew" presented an "Oscar" to the famous Holocaust denier in France, Robert Faurisson. In this case, the ECtHR found that the action exceeded the limits of humor and fell within the scope of Art. 17 of the ECHR (abuse of rights), and therefore was not subject to protection.

The issue of sincerity and humor is of great importance in the context of extremist speech, given that far-right communication and propaganda include humor, irony, and ambiguity as their main weapons. Jokes often serve as a defense mechanism, a "loophole" through which authors can invoke a frivolous tone when held accountable. This requires a more careful judicial assessment of the context, the audience, and the possible perlocutionary effect – regardless of the outward comedic or ironic style of the speech.

The issue of intent is particularly well developed in American jurisprudence, as it is key in distinguishing protected from unprotected speech. For example, American law distinguishes the burning of a cross without the intention to intimidate someone from the burning of a cross that threatens (*Virginia v. Black*, 538 US 343 (2003)). The law in the member states of the Council of Europe would not be so sensitive to a specific symbolic act in this case – it would be protected mainly if it is given as an example or is part of a work of art.

5.3. The audience

Next, according to the method of discourse analysis, the meaning of a message is influenced by the audience to which the message is addressed. The meaning of the message can be clarified by how the relevant social group perceives and interprets it (*M'bala M'bala vs France*, 2015, § 35, *Šimunić vs Croatia*, 2018 § 45).

In dog whistle speech, the message, although formally a single speech act, is deliberately structured in such a way as to produce different semantic effects in different audiences. Such a two-level perception of speech was examined in the case of *Šimunić v. Croatia*, in which the Court analyzed the double discourse embedded in the slogan used – officially presented as historical or patriotic, but with a clearly recognizable meaning in an extreme nationalist context.

The Court accepts that the phrase "For Home" which Croatian national football player Josip Simunić uttered three times to the crowd in 2013 after a football match that qualified Croatia for the World Cup, was also used as an official greeting during the Ushashi regime (1941-45) in the Independent State of Croatia. (*Šimunić v. Croatia*, 2018 § 44). Thus, although at first glance the expression may seem permissible, its discursive attachment to a specific ideology, as well as the effect on the audience – Croatian football fans, make it incompatible with the standards of Article 10 ECHR.

It should be borne in mind that a significant proportion of the expressions not protected under Article 10 of the ECHR are used in the context of intra-organisational communication between already radicalised individuals. This type of speech usually remains hidden from the public and is therefore rarely subject to

judicial review. It would be wrong to consider that the impact of intra-organisational speech is limited, insofar as it is at this stage that newly recruited or hesitant individuals come into contact with extremist content — as part of the process of selection, socialization, and ideological indoctrination.

5. 4. The context

The meaning of an expression is also shaped by the social and communicative context in which it is uttered – what, when, where, to whom and how (Lingens vs. Austria, 2008 § 40, Leroy vs. France, 2008, § 32, Sürek vs. Turkey (No. 3), 2009, § 40).

Communication on image boards like 4chan, section /pol/ is the most diverse in context - it includes personal, everyday, political, ethnic, historical, ironic sexual and other topics.

This does not mean that an extremist message cannot appear within a seemingly innocuous context. For example, the statement "Today, 44 veterans in America commit suicide every day out of despair. Imagine what would be achieved if half of them, instead of committing suicide, killed our enemies " (quote from a post by 4chan) would be perceived in Europe in any context as hate speech or even incitement to violence.

In contrast, ambivalent expressions, symbols, and slogans such as Z, 14/88, white advocacy, race realism like most internet memes, get their meaning largely from the context. The same expression can be perceived as irony, a political message, or hidden extremist incitement.

A statement denying the 1916 Armenian genocide, if it does not contain incitement to violence and is made in a context free from immediate ethnic tension, is admissible (the decision was not unanimous) (Perinchek v Switzerland, § 158). The Court recognises the importance of the issue for the Armenian community and that the statements affect their dignity (Article 8 of the Convention), but considers the following: the applicant's words do not contain incitement to hatred or violence, they were made in a context free from immediate ethnic tension.

In the case Sürek v. Turkey (No. 1), § 62, the Court stressed the importance of the context in which the impugned letters were published in the newspaper. Expressions such as "fascist Turkish army", "murder gang" and "hire assassins of imperialism" were assessed as stigmatising and inciting revenge, fuelling hatred and posing a risk in the context of a protracted conflict with a high level of violence in south-eastern Turkey. In that context, the Court found the interference with freedom of expression to be justified, as it amounted to hate speech and glorification of violence. The Court considered that the speech was directed at a real action, it has the purpose of activating (it is performative), its restriction by the state is permissible within the meaning of Art. 10, par. 2.

In *Feret v Belgium* (paragraph 76) the Court emphasised the importance of the environment and context in which the speech was disseminated – an election campaign aimed at the entire population. While political parties enjoy broad freedom of expression in elections, in such a context racist and xenophobic rhetoric has a particularly strong and harmful effect, as it reinforces slogans at the expense of reasonable debate and undermines public order.

In the case of *Norwood vs. United Kingdom* (2004) Roger Norwood, a member of the British National Party, put up a large poster in the window of his home with the words "Islam out of Britain – Protect the British People", accompanied by an image of the Twin Towers in flames after the September 11 attacks. The court concluded that the context – in the days immediately following September 11, 2001 – was decisive in concluding that this was not a political debate but incitement to hatred, excluded from the protection of Article 10.

In its decision in the case of *Leroy v. France*, 2008 cartoonist Denis Leroy was convicted of publishing a cartoon praising the September 11, 2001 attacks, just two days after they occurred. The ECtHR held that the context of high tension and emotion immediately following the attacks justified the State's intervention and that the conviction did not violate Article 10 of the ECHR, as the restriction was "necessary in a democratic society".

Importantly, in relation to internet communication, as stated in §51 of *Gündüz v. Turkey*, the ECtHR emphasized that the applicant's statement was made in the context of a television programme where there was an open debate with opposing views. This context of pluralistic dialogue and counter-positions is

important as it limits the possibility of the speech being perceived as inflammatory – it is part of a clash of ideas, not a one-sided suggestion. Applied to internet communication, this reduces the state's ability to restrict opinions, even extremist ones, that are expressed within the framework of a discussion.

5.5. The effect (the potentially harmful consequences)

The effect that the message produces is also relevant (see *Sürek v. Turkey* (No. 3) § 40).

The potentially harmful consequences could be different. They could be in the potential to lead to violence – in incitement to violence. In hate speech, the potentially harmful consequences are of two types – the individual harm to a member of society belonging to a discriminated group and the creation, maintenance or escalation of a climate of hatred towards a particular group.

In *Gündüz v. Turkey*, par. 51, The court held that an opinion challenging democracy and advocating the introduction of Sharia law is protected by Article 10 of the ECHR, as it does not contain a direct call for the forcible establishment of Sharia law, despite the fact that it concerns provocative and radical statements.

However, the interpretation of the effect that a statement may have allows the court to rely on a fact that is more often presumed than actual.

The review of the selected case law shows that the court is sensitive to the issue of the discursive specificity of speech, which gives it a wide scope for assessment that is not based solely on the isolated interpretation of the individual expression.

6. THE MEMES

The issue with memes is more complicated, since their meaning cannot always be determined. It is often determined by a certain discursive history, which cannot always be traced precisely. Often it is a question of repeatedly reformulated symbols, which are incomprehensible to an outside observer, but for the "initiated" carry a strong political or ideological message.

Memes are carriers of information and ideas. Memes can express simple ideas, they are propaganda, communication, entertainment and therefore image tool (we are not that scary). It is this playful and ironic packaging that makes memes more ambivalent and more difficult to legally qualify than written or spoken speech.

Criminalizing the posting of memes would put extremists in the position of "victims of censorship," which could become part of their radical propaganda.

Discursive logic leads to the danger of a very broad possibility of interpretation, without the court's assessment of the presence of a perlocutionary (influential) effect of speech being subject to real control.

This issue is also reflected in one of the first cases in Europe in which a court verdict was issued for publishing a meme – the case of a Belgian citizen convicted of uploading an image with content inciting hostility towards a certain ethno-religious group (*Rechtbank van eerste aanleg Antwerpen*). In this case, it is about unequivocal incitement to hatred, not veiled or ambiguous incitement. However, the court justified its decision (and rejected the defendant's objection to the use of sarcasm) with the reactions of the targeted audience to her post on social network.

This decision is important both from the perspective of being one of the first to incriminate memes, and in recognizing the discursive approach to assessing hate speech.

6.1 Limitations in the legal recognition of hidden extremist messages

The above leads to the conclusion that the Court of Human Rights has built an appropriate methodological framework for assessing extremist speech. This does not mean that there are no legal and institutional obstacles. They are largely inherent in judicial bodies and are not specific to the Court of Human Rights alone. They can be defined as follows:

1. Difficulty in recognition by the court

Courts are not always sensitive to coded extremist messages. The principle of the court's internal conviction to some extent forces the court to judge its interpretation of the message as valid. As a result, the effect of the message on its actual addressees is neglected. Thus, some messages are perceived as acceptable opinions, although they have an inciting effect for certain groups.

2. Preference for “cleaner” and easily provable cases

The prosecutor's office, human rights organizations and other entities authorized to initiate proceedings often avoid borderline cases in which there is no direct violence or insult.

This is due primarily to the difficulties in proving and substantiating the procedural position in such a process. Proving a covert case of extremist propaganda requires serious linguistic knowledge, knowledge of the environment – the target of the message and is much more laborious, and the outcome of the case is unclear. Substantiating a procedural position for which there is no analogous previous case law creates uncertainty for the potential initiating party about the outcome of the process.

Similarly, in most European judicial systems there are mechanisms for evaluating the work of judges and prosecutors, on which their professional growth depends. In them, the number/percentage of overturned decisions by the higher instance, or lost cases, is a valid criterion for evaluating the work of the judge. The possibility that a decision may negatively affect the professional development of the judge also hinders the bolder entry of law into more ambiguous territories of speech.

In addition to the above, if the claim is rejected, there will be a negative public response to institutions, and extremists become the victims, the unjustly repressed, and the human rights institution or organization - a dark-hearted persecutor of freedom of speech. Putting themselves in the position of victims is often part of the extremists' strategy.

3. Unwillingness to narrow the boundaries of freedom of expression Freedom of expression is protected by Article 10 of the ECHR, with its limitations provided for in Art. 10, paragraph 2 A decision that expands the unlawful use of speech is perceived negatively, especially when it concerns a controversial case.

4. The significant differences between the USA and Europe, especially with regard to hate speech. As we have pointed out, in the USA the First Amendment guarantees almost unlimited freedom of speech. In the case law of the ECtHR, freedom of expression under Article 10 ECHR is subject to restrictions when speech threatens the rights of others or the democratic order (see Article 10, §2 and Article 17 of the Convention). This makes it possible to sanction expressions with a latent extremist charge, including when they are dressed in language that at first glance seems legally permissible.

European audiences are increasingly influenced by extremist messages published by American citizens on platforms such as 4chan, Reddit, Gab, X (Twitter), etc., which operate under US jurisdiction and therefore do not remove content that would be banned in Europe. This cross-border difference in standards creates real difficulties in intercepting online hate speech, especially in cases of coded, memetic or ironically presented hostility (including “dog whistle” rhetoric).

5. Shifting responsibility to the algorithms in the platforms. Due to the huge volume of expressions on the Internet, there is a widespread opinion that the court does not have the opportunity to deal with the Internet, and content moderation is the job of social networks. As I indicated above, automatic content removal is the second-best solution in this case, because it cannot perform a legitimate assessment of the content of a message and, accordingly, may be activated when it is not necessary, but not activated when it is necessary.

However, platforms as a mechanism for self-regulation also have some positive sides: they can react quickly and at scale, limiting the spread of harmful content even before the courts intervene; they have the flexibility to implement various measures such as marking or limiting visibility, which allows for preventive intervention without a complete ban; and they often involve representatives of academia, human rights organizations and journalist associations in the development of rules, which gives greater legitimacy to the process.

6. CONCLUSION

The ECtHR has developed a suitable methodological toolkit for assessing whether an expression falls within the permissible interference of the state or not. This works relatively well in clear cases where someone openly calls for violence. or instills hatred.

However, the use of code words, memes, images or jokes that say different things to different audiences often go unnoticed because they do not sound aggressive to someone outside the group. Here, courts need to be more careful and expand the way they assess speech. The available methodological toolkit (assessing: author, intention, audience, context and effect of the speech) could be used admirably to carry out such an assessment.

However, there is also the practical problem that in the age of the Internet, almost every online statement is practically public. This is extremely burdensome for the court. No less important is the fact that the court and the prosecutor's office do not always have an incentive to deal with such complex and unclear cases. Thus, many messages go "under the radar" - precisely those that are best hidden and most difficult to prove.

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