Protecting Minorities from Group Defamation: the Perspective of the European Court of Human Rights

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Title: La protezione delle minoranze dalla diffamazione di gruppo: la prospettiva della Corte di Strasburgo

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1. – In 1732 an attorney called Fazakerly reported an information for libel against the author of a pamphlet which had circulated in London. The paper told the story of how the Jews had killed a woman and her newly born baby and maintained that they were no stranger to committing such cruelties. The attorney, who was a Jew, complained that the pamphlet had defamatory content and deserved punishment. The English Court found that the paper had infringed public order as many attacks against the Jews were reported after its publication. Interestingly enough, though, it struggled in recognising Mr Fazakerly as a victim of libel, as the accusations set out in the paper were 'so general that no particular Persons could pretend to be injured by it' (*R. v. Osborne*, W. Kel. 230, 25 Eng.Rep. 584 (1732); the case is recalled by J. Waldron, *The Harm in Hate Speech*, Cambridge, MA, 2012, 204).

The question whether group defamation should trigger some sort of legal protection in favour of individual members of the targeted group is still ongoing in today's judicial arena. On 16 February 2021, the European Court of Human Rights ('the Strasbourg Court' or 'the Court') delivered two judgments on the issue in the cases *Budinova and Chaprazov v Bulgaria* and *Behar and Gutman v Bulgaria* (Applications No. 12567/13 and No. 29335/13, Merits and Just Satisfaction, 16 February 2021), pushing forward the frontiers of its case law on group defamation from the angle of the State's international obligations under Article 8 of the European Convention on Human Rights ('the Convention'). The Court elaborated for the first time a consistent test for the assessment of the applicability of Article 8 of the Convention to ethnicity-related insults and negative stereotypes and

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provided further clarification as to the scope of the positive obligation stemming from that provision.

The present article examines the abovementioned judgments, and it is structured as follows. Paragraph 2 offers some preliminary remarks on the nature of hate speech and terminology. Paragraph 3 provides a brief overview of the relevant case law of the Strasbourg Court. In this regard, the analysis will focus on the main structural and functional differences that the judicial review assumes when the Court is called upon to adjudicate a case of group defamation, depending on whether the application was lodged by the author or by a member of the targeted group. A point will be made that, regardless of the strand of case law applicable to a specific case, the protection afforded to the competing interests should remain consistent. Paragraph 4 analyses the recent case law developments and highlights the novelty they bring to the jurisprudence of the Court. Paragraph 5 focuses on the impact that those judgments might have at national and international level and offers some brief concluding remarks.

2. – Hate speech provides a paramount example of the fact that human rights constitute a unitary system, where reciprocal relationships among competing rights contribute to determine their respective contents and limitations (the point in made in relation to fundamental rights enshrined in a Constitution by P. Häberle, *Le libertà fondamentali nello Stato costituzionale*, Rome, 1993, 62; the same however applies to a comprehensive system of protection of human rights such as the Convention). In fact, hate speech judicial review – and the same applies to hate speech regulation – entails a balancing exercise between the freedom of expression of those who speak up their minds by putting forward disparaging utterances against others, and the right to reputation and social identity of those being talked about. In this regard, the article will specifically focus on a certain type of statements and targets, namely race and ethnicity-related insults and negative stereotypes disseminated against vulnerable minorities.

It is worth noting that, behind the need to solve the conflict between individual rights, opposing public interests are also brought to clash. Limitations to freedom of expression touch upon the so-called 'marketplace of ideas' and may result detrimental to society as a whole, especially when they restrict the ability of journalists and politicians to expose their views on important matters of general interest. At the same time, violent and systematic attacks on the reputation and social identity of ethnic minorities are also harmful to society, as they put in peril the public good of inclusiveness or, as Waldron put it, 'the assurance of a general commitment to the fundamentals of justice and dignity that a well-ordered society is supposed to furnish' (J. Waldron, *The Harm in Hate Speech*, cited above, 69; similarly, P.Y. Kuhn, *Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights*, in *Human*

Rights Law Review, 2019, 19, 128). Therefore, the balancing exercise referred to above must necessarily take into account both the social and individual dimensions of the two rights at stake (on the double nature of human rights, as institutions devoted to the protection of individual liberties that pursue also social functions see P. Häberle, *Le libertà fondamentali nello Stato costituzionale*, cited above, 42 ff).

Before moving to analysing the case law of the Court, it is worth noting that 'hate speech' is a term of art which emphasises the freedom of expression pole, whereas the notion 'group defamation' describes the phenomenon from the targeted group perspective. It has been observed in literature that the success of the first expression is not entirely neutral as to the understanding of the reciprocal weight that the interests at stake should be granted (J. Waldron, *The Harm in Hate Speech*, cited above, 41). With a view to maintaining a balanced position between the two, the paper will use both terminologies interchangeably.

3. – The case law of the Strasbourg Court on group defamation reflects the opposing rights dialectics described above. Most commonly, the Court is called upon to decide on applications brought by hate speakers who complain that the State has disproportionately interfered with their freedom of expression. In this paradigm, 'the protection of the reputation or rights of others' constitutes a legitimate aim for the State to interfere with the right guaranteed by Article 10 of the Convention and the Court carries out the balancing exercise under the second paragraph of that Article (*Jersild v Denmark*, Application No. 15890/89, Merits and Just Satisfaction, 23 September 1994, § 31; Grand Chamber judgment in *Perinçek v Switzerland*, Application No. 27510/08, Merits and Just Satisfaction, 15 October 2015, § 228; more recently, *Atamanchuk v Russia*, Application No. 4493/11, Merits and Just Satisfaction, 11 February 2020, § 70).

A mirror-like reasoning takes place when an application is filed with the Court by individual members of the targeted group complaining about a violation of their right to respect for private life. The Court balances the applicant's right to reputation and social identity against the public interest in protecting freedom of expression. Here again the Court considers the 'rights of others' as a legitimate aim to interfere with the right guaranteed by Article 8 of the Convention under the limitation clause set forth in its second paragraph (Grand Chamber judgment in *Aksu v Turkey*, Applications Nos. 4149/04 and 41029/04, Merits and Just Satisfaction, 15 March 2012, §§ 62-63). Although it is possible that an applicant complains about defamation directly carried out (or otherwise facilitated) by public authorities, it is much more frequent for the Court to examine the measures undertook by the State to secure respect for private life in the sphere of the relations of individuals between themselves as part of their positive obligations under the same provision (*Aksu v Turkey*, cited above, § 61; *R.B.*

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v Hungary, Application No. 64602/12, Merits and Just Satisfaction, 12 April 2016, § 81; *Király and Dömötör v Hungary*, Application No. 10851/13, Merits and Just Satisfaction, 17 January 2017, § 60; *Lewit v Austria*, Application No. 4782/18, Merits and Just Satisfaction, 10 October 2019, § 46).

There is also a third way for the Court to address a hate speech case and it entails skipping the balancing test altogether. Article 17 precludes to rely on the rights enshrined in the Convention to conduct activities intended to destroy these rights. In cases concerning Article 10 of the Convention, the Court resorted to it when the right to freedom of expression was invoked for purposes clearly contrary to the Convention's underling values of tolerance, social peace and non-discrimination, mainly in the material context of Holocaust denial and anti-Semitism (*Witzsch v Germany*, Application No. 7485/03, Admissibility, 13 December 2005; *Ivanov v Russia*, Application No. 35222/04, Admissibility, 20 February 2007; *Hizb Ut-Tahrir and Others v Germany*, Application No. 31098/08, Admissibility, 12 June 2012). By applying Article 17 the Court removes the contested statements from the protection of Article 10 of the Convention, which leads it to declare the application incompatible *ratione materiae*. The inadmissibility of the complaint implies that no further investigation is needed on the merits and, therefore, no balancing test takes place.

Leaving aside Article 17 of the Convention, which the Court has clarified being applicable only on an exceptional basis and in extreme cases (*Perinçek v Switzerland*, cited above, § 114), the analysis will focus on the common features of the balancing test carried out under Article 8 and Article 10 of the Convention.

The first point to raise is that in both scenarios the balancing test takes into account the same material elements (A. Nieuwenhuis, *A positive obligation under the ECHR to ban hate speech?*, in *Public Law*, 2019, 327). In principle, expression on matters of public interest is entitled to strong protection under Article 10 of the Convention, whereas expression that promotes or justifies violence, hatred, xenophobia or another form of intolerance cannot normally claim protection. According to the Court, incitement to hatred does not necessarily require a call to violence or unlawful acts. Attacks carried out against others by means of insulting, ridiculing or defaming specific groups of the population are sufficient for the authorities – and in some cases impose on them a positive obligation under Article 8 of the Convention – to give priority to combating racist speech over irresponsible freedom of expression which undermines the dignity and even the safety of the targeted group. The Court recognises that speech that incites hatred based on religious, ethnic or cultural prejudices is a danger to social peace and political stability in democratic states and shall be limited even in the contexts where freedom of speech is most intensively protected, namely the political debate and in the media (eee, for example, *Féret v Belgium*, Application No. 15615/07, Merits, 16 July 2009, §§ 73-75, and

Grand Chamber judgment in *Cumpănă and Mazăre v Romania*, Application No. 33348/96, Merits and Just Satisfaction, 17 December 2004, § 115).

In carrying out this assessment the Court mainly refers to objective factors such as the content of the impugned statements and the context in which they were made (*Soulas and Others v France*, Application No. 15948/03, Merits, 10 July 2008, § 33; *Féret v Belgium*, cited above, § 66; *Le Pen v France*, Application No 18788/09, Admissibility, 20 April 2010), but it also attaches weight to some subjective elements, like the speaker's intention and the 'gratuitous' nature of the offence (*Giniewski v France*, Application No. 64016/00, Merits, 31 January 2006, § 50; *Aksu v Turkey*, cited above, §§ 62-63). Some legal scholars stressed the tendence of the Court to rely on an *ad hoc* approach and complained about the absence of a consistent test (P.Y. Kuhn, *Reforming the Approach to Racial and Religious Hate Speech*, cited above, 126).

The second common feature to the two strands of case law is that the balancing test is carried out through the lenses of national judgments. Subsidiarity plays an important role in this context and mainly operates through process-based review and margin of appreciation (on the subsidiarity rationale behind procedural review see E. Brems, *The "Logics" of Procedural-Type Review by the European Court of Human Rights*, in J. Gerards and E. Brems (eds), *Procedural Review in European Fundamental Rights Cases*, Cambridge, 2017, 22 ff.; for an analysis of the link between procedural review and margin of appreciation see A. Nussberger, *Procedural review by the ECHR: View from the Court*, *ibid*., 173-174). The review of the Court is process-based as it is not independent from the findings of domestic courts. Indeed, 'the Court's primary methodological focus' lies in 'an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles and the States' obligations to secure Convention rights to peoples within their jurisdictions'(R. Spano, *The Future of the European Court of Human Rights. Subsidiarity, Process-Based Review and the Rule of Law*, in *Human Rights Law Review*, 2018, 18, 480-481). If the national courts carry out the balancing exercise in conformity with the criteria laid down in its case law, the Court will need strong reasons to depart from their findings. The domestic judges' ruling will be considered as to fall within the margin of appreciation of the State. On the contrary, were the Court to find that the importance or scope of one of the rights at stake was not duly considered in the domestic judges' balancing exercise, it would step in and ultimately review substantive findings at national level with regard to the application of Convention principles (A. Nieuwenhuis, *A positive obligation under the ECHR to ban hate speech?*, cited above, 336).

It derives from the above that despite the structural and functional differences of judicial review under Article 10 and Article 8 of the Convention, the Strasbourg Court carries out the balancing test by means

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of the same material elements and methodological approach. This is certainly desirable as the protection afforded to the competing interests has to remain consistent regardless of whom among those involved takes the case to Strasbourg. A consequence of this consistency claim is that developments achieved in one strand of the case law will inevitably reflect on the other, and vice versa.

This is particularly true since the case law on group defamation under Article 8 of the Convention is more recent than the one on freedom of expression and, on many aspects, it is still under development. The Court has only recently set out the relevant factors by which to assess whether negative public statements about a social group affect the 'private life' of an individual member of that group to the point of triggering the application of Article 8 in relation to them, departing from its previous case law which had declared inadmissible analogous complaints (*Pirali v Greece*, Application No. 28542/05, Admissibility, 15 November 2007; *L.Z. v Slovakia*, Application No. 27753/06, Admissibility, 27 September 2011, § 69). Similarly, the scope of the obligations stemming from the need to protect individual members of ethnic minorities from insults and negative stereotypes is still developing and until now there have been only few cases in which the Court has actually found a violation of Article 8 of the Convention (T. Makkonen, *Equal in Law, Unequal in Fact. Racial and Ethnic Discrimination and the Legal Response Thereto in Europe*, Leiden – Boston, 2012, 188; A. Nieuwenhuis, *A positive obligation under the ECHR to ban hate speech?*, cited above, 342). The following paragraphs will analyse the latest developments in the case law under Article 8 of the Convention and will discuss the impact they are likely to have on the Court's assessment of hate speech in general and on the adjudication of similar cases before the national courts of the States parties to the Convention.

4. – On 16 February 2021 the Court delivered two judgments in the abovementioned cases *Budinova* and *Behar*. The applicants, Bulgarian nationals respectively of Roma and Jewish ethnic origin, sued a well-known journalist and politician before the national courts for several anti-Roma and anti-Semitic utterances he had made in public, but the national courts dismissed their request for a court order compelling him to apologise publicly and to refrain from making such statements in the future. They filed applications with the Strasbourg Court arguing that those statements personally affected them as members of the targeted minorities and that, by dismissing their claim, the national courts had violated their rights under Articles 8 and 14 of the Convention.

The judgments bring significant developments in the case law on two different levels. They elaborate for the first time a consistent test for the application of Article 8 of the Convention to group defamation and they further clarify the scope of the State's positive obligation to respond

adequately to discrimination on account of the applicants' ethnic origin and to secure respect for their 'private life'.

In relation to the first point, the judgments build on the general principle set out by the Grand Chamber in the case *Aksu v Turkey*. On that occasion, the Court stated that 'any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group' (*Aksu v Turkey*, cited above, § 58). The Grand Chamber did not specify however under which conditions that severity threshold would be met.

The principle was then applied in a case which presented a factual background virtually identical to the judgments under examination, as it also concerned Bulgarian nationals of Roma ethnic origin who complained about the failure by national authorities to sufficiently react to anti-Roma statements made by the same well-known journalist and politician. The Court again did not articulate a specific test to assess the effects of negative group stereotyping on the private life of its members, but observed that the contested statements 'were way stronger than the statements at issue in Aksu' as they 'clearly sought to portray Roma in Bulgaria as exceptionally prone to crime and depravity, and thus to stigmatise and vilify them' (*Panayotova and Others v Bulgaria*, Application No. 12509/13, Admissibility, 7 May 2019, § 56). The Court thus concluded that Article 8 of the Convention was applicable in that specific case on the basis of an *ad hoc* approach.

Budinova and *Behar* develop the case law on the matter as they elaborate a consistent test for the assessment of the applicability of Article 8 of the Convention. The factors identified by the Court are:

'(a) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position vis-à-vis society as a whole),

(b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype), and

(c) the form and context in which the statements were made, their reach (which may depend on where and how they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity'.

The Court also specifies that none of those factors has to be construed as taking invariably precedence over the others and that 'it is the interplay of all of them that leads to the ultimate conclusion on whether … Article 8 is thus applicable. The overall context of each case – in particular the social and political climate prevalent at the time when the statements were made – may also be an important consideration' (*Budinova and Chaprazov v*

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Bulgaria, cited above, § 63; similarly, *Behar and Gutman v Bulgaria*, cited above, § 67).

By applying this test to the two cases under consideration, the Court observes that (a) both the Roma and Jewish communities are vulnerable minorities in need of special protection; (b) the statements made against them constituted extreme negative stereotyping which portrayed Roma as exceptionally prone to crime and depravity and meant to vilify Jews and to stir up prejudice and hatred towards them. As to the form and context of the statements, the Court noted that (c) the anti-Roma statements were broadcasted in television and radio programmes, repeated in public speeches and published in a book, whereas those against the Jews, although at first published in books which had a limited circulation, had acquired notoriety as the journalist became the chairman of an ascendant political party. Consequently, the Court considers that those statements were capable of having 'a sufficient impact on the sense of identity' of the targeted groups and 'on the feelings of self-worth and self-confidence' of individual members of those minorities to reach the threshold of severity required for the application of Article 8 of the Convention (*Budinova and Chaprazov v Bulgaria*, cited above, § 68; similarly, *Behar and Gutman v Bulgaria*, cited above, § 73).

Turning to the merits of the claims, the Court provides further clarification as to the scope of the State's positive obligation under Article 8 of the Convention. Here again the judgments build on previous case law. The Court recalls the need to strike a proper balance between the aggrieved parties right to respect for their 'private life' and the right of the author of the statements to freedom of expression and that States enjoy a margin of appreciation in making this assessment. The Court's task is to review (not directly the circumstances of the case, but) the reasoning carried out by national courts and it will depart from their conclusion only when it appears that the balancing exercise has not taken in due account of the criteria laid down in its case law.

The Court includes the *prima facie* discriminatory intent of the statements among the factors to be taken into account in the specific circumstances of the case. In particular, discriminatory intent triggers under Article 14 of the Convention the duty to combat ethnic discrimination, which the Court treats as a form of racial discrimination (*Timishev v Russia*, Applications Nos. 55762/00 and 55974/00, Merits and Just Satisfaction, 13 December 2005, § 55; T. Makkonen, *Equal in Law, Unequal in Fact. Racial and Ethnic Discrimination and the Legal Response Thereto in Europe*, cited above, 173 ff). The Court already elaborated this line of reasoning in *Panayotova*, where it clarified that a racial discriminatory intent could reflect on the extent and content of the positive obligations under Article 8, as this 'particularly invidious kind of discrimination … requires special vigilance on

the part of the authorities' (*Panayotova*, cited above, § 57). In that case, however, the principle was not applied to support a finding of violation.

It is useful to recall the reasoning in *Panayotova*, as by comparing it with the two judgments under examination it is possible to draw the boundaries of the positive obligations so far construed by the Court in this domain. In the first decision the applicants complained that national authorities had failed to open criminal proceedings against the author of the statements. The Court was then called upon to decide under which circumstances positive obligations under Article 8 of the Convention imposed on States a duty to criminalise group defamation. The Court was extremely cautious in approaching this issue – and rightly so. It stated that criminal-law measures might be required with respect to *direct* verbal assaults and *physical threats* motivated by discriminatory attitudes. Differently, negative statements about an ethnic group which did not specifically target and had no concrete relation to the people concerned, although calling for positive measures on the part of the authorities, did not reach the threshold required to trigger an obligation to put in place criminal-law measures. Clearly, this conclusion does not exclude that – in the exceptional circumstances identified by the case law of the Court under Article 10 of the Convention – criminal measures might be justified as falling within the scope of the State's margin of appreciation (*Cumpănă and Mazăre v Romania*, cited above, § 115), but it entails only that the State was not under an obligation to do so in the light of Articles 8 and 14 of the Convention.

The judgments under examination integrate this picture by defining in positive terms what kind of measures the State might be required to put in place to protect the private life of members of the targeted group. As already pointed out, the methodological approach is process-based. The Court examines the reasoning of the domestic judgments, observing that they did not assess the tenor of the anti-Roma and anti-Semitic statements in an adequate manner. In particular, while ascribing considerable weight to the author's freedom of expression, they completely omitted to consider that Article 10 of the Convention affords very limited protection to statements that promote or justify hatred and intolerance towards vulnerable ethnic groups.

Since the national courts failed to carry out the requisite balancing exercise in line with the principles set out in the Court's case law, the Court turns to the facts of the case and offers its own application of those criteria to the circumstances at issue. By removing the lenses of the national courts' reasoning, the Court assesses the circumstances of the case directly, operating as if it were a judge of first instance (R. Chenal, *La Corte europea dei diritti dell'uomo e la nozione di quarta istanza*, in Aa. Vv., *Dialogando sui diritti. Corte di cassazione e CEDU a confronto*, Napoli, 2016, 27).

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On the basis of the language used and the general message conveyed, the Court considers that the anti-Roma statements 'went beyond being a legitimate part of a public debate about ethnic relations and crime in Bulgaria' and 'amounted to extreme negative stereotyping meant to vilify Roma in that country and stir up prejudice and hatred towards them' (*Budinova and Chaprazov v Bulgaria*, cited above, § 93). Similarly, the anti-Semitic utterances 'were meant to vilify Jews and stir up prejudice and hatred towards them' as 'they all rehearsed timeworn anti-Semitic and Holocaust-denial narratives' (*Behar and Gutman v Bulgaria*, cited above, § 104). Therefore, by refusing to grant the applicants the redress they had requested – in the form of a court order compelling the author to apologise publicly and to refrain from making such statements in the future – the Bulgarian authorities had failed to comply with their positive obligation to respond adequately to discrimination on account of the applicants' ethnic origin and to secure respect for their 'private life'.

It is important to stress that, although it is up to national authorities to define the concrete measures by which they intend to comply with their positive obligations, the Court clearly indicates that those measures might be civil in nature. By combining this conclusion with that reached in *Panayotova*, it seems that civil remedies should in fact be the norm in cases related to group defamation, while criminalisation might be tolerated in the exceptional circumstances identified by the jurisprudence of the Court under Article 10 of the Convention, but never imposed under Articles 8 and 14 of the Convention (unless the insults and negative stereotypes are accompanied by direct verbal assaults or physical threats).

5. – The judgments under examination are likely to have a strong impact on the Court's case law on hate speech, as well as on the adjudication of similar cases before the national courts of the States parties to the Convention.

First of all, by setting forth clear criteria for the application of Article 8 to group defamation claim the Strasbourg Court increases the embeddedness of Convention principles into national law as it provides 'objective interpretational criteria that can guide national decision-makers in their application of the Convention at ground level' (R. Spano, *The Future of the European Court of Human Rights. Subsidiarity, Process-Based Review and the Rule of Law*, cited above, 487). The identification of a clear, consistent test makes it easier for national courts to engage in their job as judges of the Convention (J. Gerards, *Procedural Review by the ECtHR: A Tipology*, in J. Gerards and E. Brems (eds), cited above, 150-151). This should allow not only a more widespread and effective application of the substantive rights enshrined in Articles 8 and 10, but also a more efficient division of tasks between the Strasbourg Court and the national courts in line with the principle of subsidiarity (E. Brems, *Positive Subsidiarity and its Implications for the Margin of Appreciation Doctrine*, *Netherlands Quaterly of Human Rights*, 37,

2019, 210). In particular, the integration of the criteria set out by the Court into national judges' reasoning should lead to a decrease in the number of repetitive cases brought to Strasbourg, a better implementation of the process-based review and a more functional use of margin of appreciation.

Moreover, by focusing on the effects of hate speech on the individual members of the group, the development of the case law on positive obligations under Article 8 might increase the attention to the objective harm that group defamation provokes to vulnerable minorities and to the society as a whole, and make less relevant in the legal response to hate speech enquiries into the subject intention of the author.

The risks behind an intention-based approach in racial discrimination cases have been extensively analysed by literature, especially in the domain of racist violence, where the standard of proof required to applicants to prove an *intention* to discriminate is so high that in most cases the Court recognised the violation of the right to life or of inhuman and degrading treatment, but only exceptionally found a substantive violation of Article 14 (R. Rubio-Marín, *Racial and gender-based violence as discrimination under the European Court of Human Rights*, in M. Balboni (ed), *The European Convention on Human Rights and the principle of non-discrimination*, Napoli, 2017, 180 ff; M. Möschel, *Is the European Court of Human Rights' case law on anti-Roma violence "beyond reasonable doubt"?*, in *Human rights law review*, 2012, 12, 115 - 116).

In the context of racist hate speech the disadvantages of an intention-based approach are certainly less severe, as it is much easier to detect intent in the expression of an opinion than in a mere behaviour. Nevertheless, it has been highlighted that even in this domain a harm-based approach as opposed to an intention-based one would be 'more cognisant of the vulnerable and disadvantaged position of most targets of hate speech' and would avoid 'a fraught subjective inquiry into the mental state of the perpetrator' (P.Y. Kuhn, *Reforming the Approach to Racial and Religious Hate Speech*, cited above, 134). From another point of view, a harm-based approach could also prove to be more deferential to freedom of expression, as only those utterances *objectively* able to cause harm to the members of the targeted group's equal standing in society might trigger an obligation for the State to limit freedom of expression, whereas neither a discriminatory intention as such nor the subjective impacts of offensive speech on the victims should be sufficient to reach that conclusion (for a clear distinction between dignity, in the sense of 'basic entitlement to be regarded as a member of society in good standing', and offence, as an inherently subjective reaction, see J. Waldron, *The Harm in Hate Speech*, cited above, 105 ff).

The judgments under examination are an important step forward in protecting ethnic minorities from marginalisation. Studies have shown that the detrimental consequences of racist and ethnic discrimination spread above the direct targets and pass through the generations, provoking a general demoralising effect on the members of the group and creating a

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vicious circle of feelings of low self-worth and self-confidence, hostility towards the outgroups and lack of trust in the public authorities (T. Makkonen, *Equal in Law, Unequal in Fact. Racial and Ethnic Discrimination and the Legal Response Thereto in Europe*, cited above, 83 ff). The Court seems aware of such a risk, as it recognised that race and ethnicity-related insults and negative stereotypes have an impact on the feelings of self-worth and self-confidence of its members (*Budinova and Chaprazov v Bulgaria*, cited above, § 68; *Behar and Gutman v Bulgaria*, cited above, § 73; *Aksu v Turkey*, cited above, § 58). The protection of vulnerable minorities against ethnicity-related defamation appears nowadays particularly urgent, as several Council of Europe member States experience 'a decline towards populist authoritarianism' which calls for the most attentive scrutiny by the Court and the other Council of Europe institutions (E. Brems, *Key Challenges for the ECHR System: Protecting and Empowering Institutions, Human Rights Defenders and Minorities*, *European Convention on Human Rights law review*, 2020, 7). In an era of rising xenophobic and anti-immigrant feelings and political movements public authorities' intervention might prove essential to restore minorities' trust that history will not repeat itself and that they belong to society on an equal standing basis.

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