

International Legal Research Group on Online Hate Speech

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An introductory report on legal matters regarding online hate speech in Croatia and Europe

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Foreword

ELSA is a non-political, non-governmental, non-profit making, independent organisation which is run by and for students within 1 member countries with more than 300 Local Groups and 38,000 students. The Council of Europe is the human rights partner of ELSA. In 2012 the 'No Hate Speech Movement' was launched by the CoE and ELSA became an official partner of the campaign within which ELSA conducted a Legal Research Group on the Online Hate Speech. 25 European countries have joined this LRG. These national groups investigated the same 11 questions provided by the ELSA International in cooperation with the Council of Europe. The questions relate to legislation and case law on both national and European level. Many of the answers can only serve as a general overview. The 25 national reports will be compiled and made available to students and professionals in the field of free speech and discrimination. The final report seeks to serve as a comparative source that can reflect similarities and differences between the national legislations that are investigated.

Finally, the Croatian LRG was established in September 2013. The following report is a result of the cooperation between six national researchers, two academic advisors, linguistic editors and national coordinator. Some of the questions relate specifically to Croatian law while others required research on international legislation and European Court of Human Rights case law. Requests relating to the Croatian report can be directed to aa.elsacro@gmail.com.

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1. National definition of hate speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?)

"Freedom, equal rights, national equality and equality of genders, pacifism, social justice, respect for human rights, inviolability of ownership, conservation of nature and the

environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution.”

Equality, which is mentioned in Article 3 of the Constitution of the Republic of Croatia¹ as the first of all the values in the Croatian constitutional order, is a standard which represents the fundamental value for pursuing human dignity and providing opportunities for all people. Hate speech and criminal offences motivated by hatred destroy the ideal of equality among the members of a society². Hate speech generally includes all forms of expression (speech, gesture or conduct) which spread, incite, promote and justify racial, ethnic, gender, religious, political, language or other types of hatred. Its intention is to degrade, intimidate or incite violence or prejudices against a person or group on various grounds.³

The Constitution of the Republic of Croatia, as our main legal act, guarantees protection from discrimination for all citizens. It is ensured by the Article 14 that “Every person in the Republic of Croatia has rights and freedoms, regardless of race, skin colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other characteristics.” According to Article 39 of the Constitution, “any reference to or incitement to war or use of violence, to national, racial or religious hatred or any form of intolerance shall be prohibited and punishable by law.”

The Croatian Criminal Code prohibits and punishes hate crime in its Article 87, defining it as “a crime committed based on differences in race, skin colour, religious beliefs, national or ethnic origin, gender, disability, sexual orientation or gender identity”. Public incitement to violence and hatred is defined in Article 325 by the following provision:

“Who through the press, radio, television, computer system or network, at a public gathering or otherwise publicly incites or publicly makes available flyers, images, or other materials that refer to violence or hatred directed against a group of persons or a member of the group because of their race, religion, national or ethnic origin, origin, color, sex, sexual orientation, gender identity, disability or any other characteristic, shall be sentenced with imprisonment up to three years.”

In addition to the Croatian Constitution and Criminal Code⁴, there are several other statutes which prohibit hate speech. Article 3 of the Media Act⁵ prescribes:

“It is forbidden for the media to support and glorify national, racial, religious, sexual or other discrimination or discrimination based on sexual orientation, ideological and national entities and encourage national, racial, religious, sexual or other hostility or intolerance, hostility or intolerance based upon a sexual orientation, violence and war.”

The Gender Equality Act⁶ and Homosexual Partnerships Act⁷ prohibit “discrimination, direct or indirect, on the grounds of gender, marital or family status and sexual orientation”. According to the Report of Ombudsman for 2011, “victims of hate speech in Croatia are most often members of national minorities, especially the Roma and LGBT persons”⁸.

¹ Constitution of the Republic of Croatia (Official Gazette, 85/10)

² Organization for Security and Co-operation in Europe: *Hate Crimes Law, A practical guide*, <http://www.osce.org/bs/odihr/36429>, 5 October 2013

³ T. Erceg, *Rasna netrpeljivost i govor mržnje. Međunarodni i hrvatski standardi i praksa*, http://www.ombudsman.hr/dodaci/036_izvjestajgovormrznje.pdf, 3 October 2013

⁴ Criminal Code (Official Gazette, 125/11, 144/12)

⁵ Media Act (Official Gazette, 59/04, 84/11, 81/13)

⁶ The Gender Equality Act (Official Gazette, 82/08)

⁷ Homosexual Partnerships Act (Official Gazette, 116/03)

⁸ Pučki pravobranitelj: *Izvrješće o pojavama diskriminacije za 2011. godinu*, <http://www.ombudsman.hr/dodaci/Izvrješće%20A1%C4%87e%20o%20pojavnima%20diskriminacije%20za%202011.pdf>, 5 October 2013

There have been examples of hate speech in Croatia among the members of the authority as well. A few years ago, the county prefect of the Međimurje County made remarks and actions regarding a long-term crisis caused by the segregation of the Roma. In most schools in that county, Roma children were segregated in such a way that they were forced to enter the school through a separate entrance and obliged to take a shower before entering a class.⁹ There is a protection from segregation and discrimination on the basis of national origin provided by Anti-discrimination Act¹⁰ in Croatia within its Article 1.

Hate speech is present in the Croatian society as well. For example, a group of Zagreb skinheads, known for attacking foreigners and the Roma, released a fanzine "SH-ZG" in 2003, which was, according to the press, full of Nazi and racist writings and it was an open invitation to attack Serbs, Jews and the Roma. The first number of their fanzine included a contest named Multicultural guide to Zagreb in which the readers were invited to find gay-bars, Chinese restaurants, pastry shops and crafts held by foreigners. The person who was the most successful in collecting addresses of those places would be given the original white-hood of the Ku Klux Klan, a Molotov cocktail and a baseball bat. In 2009 a group of skinheads attacked Roma in Zagreb and threw Molotov cocktails at them.¹¹

Another example of hate speech occurred when a well known Croatian sports club manager incited to national hatred by stating the following about a Croatian minister on a radio channel¹²:

"He is the biggest hater of Croatia after Khuen Hedervary. He hates everything that begins with Croatian, the Croatian Olympic Committee, Croatian Football Association... You can't see a smile on his face, just fangs from which the blood flows. He is an insult to the Croatian brain. He is a Serb who has never worked in education or sports, he has only lifted some weights and he is the prime minister. He hates Croatia."

In conclusion, hate speech in Croatia is defined by our legislation as an act which spreads, incites, promotes and encourages racial, ethnic, gender, political and religious, language or sexual hatred. It has various consequences, such as human rights violations (some individuals tend to avoid certain places or locations, which is a violation of their freedom of movement), lowering self-esteem, developing feelings of inferiority, stress, fear and depression among individuals repeatedly subjected to hateful remarks or jokes about their race, gender, sexual orientation etc. The worst possible consequence is suicide. A few months ago in Lobar in Krapinsko-zagorska County a tragedy occurred when a minor girl took her life because she was a victim of hate speech - verbally abused, taunted and called names via the popular Internet page called Ask.fm.¹³

2. Contextual elements of Hate Speech

What are the key contextual elements in identifying "hate speech"? Does the multiplying and wide effect of online dissemination always imply a higher potential impact of online hate speech; why?

⁹ T. Erceg, *op. cit* (no 3)

¹⁰ Anti-discrimination Act (Official Gazette, 85/08)

¹¹ Skinski Molotovljevim koktelima u Zagrebu napali Rome, <http://www.index.hr/vijesti/clanak/skinsi-molotovljevim-koktelima-u-zagrebu-napali-rome/439349.aspx>, 8 October 2013

¹² Mamiću prijete zatvor: Tužitelj traži godinu dana zbog 'Jovanovića hrvatomrsca krvavih očnjaka', <http://www.index.hr/sport/clanak/mamicu-prijeti-zatvor-tuzitelj-trazi-godinu-dana-zbog-jovanovica-hrvatomrsca-krvavih-ocnjaka/702500.aspx>, 20 October 2013

¹³ Ubila se zbog nasilja preko Interneta?, <http://www.jutarnji.hr/petnaestogodisnjakinja-se-u-loboru-ubila-zbog-nasilja-preko-interneta-/1105702/>, 8 October 2013

Context plays a crucial role in identifying hate speech because it ensures that limitations on freedom of expression remain justifiable in a free and democratic society.

In general, definitions of hate speech make reference to a number of following components: the content of the speech; the tone (written or oral) of the speech; evaluation of the nature of that speech; the targets (individual or collective) of that speech; and the potential consequences or implications of the speech act.¹⁴

According to the European Court of Human Rights¹⁵ well-established case-law, freedom of expression constitutes one of the essential foundations of the democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. The Court also acknowledges that, as set forth in Article 10 of the European Convention on Human Rights, freedom of expression is subject to exceptions, which, however, must be construed strictly, and the need for any restrictions must be established convincingly. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Court recognises that the Contracting States have a certain margin of appreciation in assessing whether such need exists, but it goes hand in hand with the European supervision, embracing both the legislation and the decisions applying it, even those passed by an independent court. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he or she made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient." In doing so, the Court has to examine whether the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they were based on an acceptable assessment of relevant facts.¹⁶

The examination of circumstances of the case is a method of reasoning favoured by the European Court of Human Rights judges.

In assessing the pressing social need, the Court's case law has established certain parameters - identification criteria - which make it possible to characterize "hate speech" in order to exclude it, or not, from the protection afforded to freedom of expression. The context (concerning the public and political debate in the country¹⁷) and the intention¹⁸ are the two main elements, the combination of which produces the pragmatic force of speech (its ability to convince, to direct the audience, to incite it to commit or not to commit a specific act.) The status of the perpetrator and the form and the impact of the speech are further elements that the Court also takes into account.¹⁹

When taking into consideration the possible consequences of the discourse, the Court finds that identifying persons by name, stirring up hatred for them and exposing them to the possible risk of physical violence justifies an interference with the right to freedom of speech and is considered hate speech.²⁰

¹⁴ G. Titley, *Hate speech online: considerations for the proposed campaign*, Council of Europe, 2012.

¹⁵ The European Court of Human Rights, ECHR hereafter

¹⁶ *Balsyte-Lideikiene v. Lithuania*, app no 26682/95, 4 November 2008

¹⁷ *Ibid.*

¹⁸ *Gunduz v. Turkey*, app no 35071/97, 4 December 2003

¹⁹ F. Tulkens, *When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights*, Seminar on Human Rights for European Judicial Trainers, European Court of Human Rights - European Judicial Training Network, 2012, p. 8.

²⁰ *Surek v Turkey (No. 1)*, app no. 26682/95, 8 July 1999, §62.

Furthermore, in the case of *Soulas and Others v France*²¹, the Court construed the margin of appreciation in such a way as to suggest that the harmful effect of speech depends on historic, demographic and cultural contexts of each country.²²

The multiplying and wide effect of online dissemination does not always mean higher potential impact of online hate speech.

The power of the Internet, i.e. the ease of access, the possibility of remaining anonymous which results in the removal of implicit emotional barriers that exist in personal interactions and the overwhelming amounts of information that people are bombarded with every day, results in people not being easily shocked or offended and a lot of statements not being taken seriously or as being authentic.

This does not mean hate speech online does not deserve governmental response, but that a contextual and case-to-case approach, as the one that ECHR has already established for hate speech, is necessary.

3. Alternative methods of tackling Hate Speech

Denial and the lessening of legal protection under Article 10 of the European Convention on Human Rights are the two ways to tackle hate speech; are there more methods – through national and/or European legislation, jurisprudence or otherwise, to tackle this issue?

The problem with the Internet is that as an international network of computers that does not respect territories or the notion of nation-state, no single country can even attempt to regulate it, even though some have tried to. Although governments have extended traditional hate speech laws to the Internet and have attempted to pass new laws regulating the Internet, these laws have had limited effectiveness.

Differences in national approaches for defining hate speech, anonymity and multijurisdictionality of the Internet prove to be problematic for the enforcement of national laws.

Anonymity makes it hard for local prosecutors and victims to discover the identity of the party responsible for illegal conduct.²³

However, even if the party can be identified, multijurisdictionality means that the prosecutor or victim may face great obstacles in bringing suit against the offending party.²⁴ The risk in this is the mere fact that the propagator can opt for a favourable jurisdiction where there are no such restrictions. Consequently, the propagator is given open floor to evade criminal liability.²⁵ A successful solution for combating online hate speech requires transnational normative orders.²⁶

The Additional Protocol to the Convention on Cybercrime (which is the first major international treaty to address cybercrime) calls upon Member States to take measures at the domestic level to criminalize certain acts of a racist and xenophobic nature (Arts.3-7) but it still leaves open the important question of the ISP's liability. Also, as of 8 October 2013, only 20 Member States have ratified it. Different remedies and inventive approaches to this issue that might have a positive effect also need to be taken into account.

²¹ *Soulas and Others v France*, app no. 15948/03, 10 July 2008

²² *Tulkens*, *op. cit.* (n 19), p. 12.

²³ J. Krasovec, *Cyberspace: The Final Frontier, For Regulation?*, *Akron Law Review*, Vol 31. No. 1 (1997), p. 101

²⁴ J. Goldsmith, *Against Cyberanarchy*, 65 *U. CHI. L. REV.* 1199, 1998, p.1216

²⁵ T. McGonagle, *Minorities and Online "Hate Speech": A Parsing of Selected Complexities*, 9 *European Yearbook of Minority Issues*, 2010, p.421

²⁶ C. Ethem, *Internet hate speech: A threat to order public? Identifying the obstacles of regulation*, 2013, p. 10

Part of the solution definitely lies in working with Internet service providers and major online companies. Also, self-regulatory mechanisms and the activity of users should be encouraged. Many sites already allow users to flag offensive content for review. Such mechanisms are based on the Terms of Service, which define what type of content is inappropriate by the owner of a particular website. However, in order to empower the users in this way, first they need to be educated to become fully engaged, thoughtful Web users; which means critically assessing different content, deciphering Web authorship, intended audience, and cloaked political agendas. Users also need to be educated on human rights so they can recognize hate speech and this can be done through carefully thought-out strategies and campaigns that would tackle issues such as discrimination and fight for the principle of equality.

The contribution of civil society and investigative journalism in recognizing hate speech and discussing the core issues that give rise to hate are indispensable in creating a pluralist environment where civil discourse conquers hate. The media should expose hate and injustice, and highlight the problems that minority groups are facing. This has to do with the failure of individual journalists to uphold professional standards and the industry's ethical principles, which is characteristic for present-day sensationalist reporting.

4. Distinction between blasphemy and Hate Speech based on religion

How does national legislation (if at all) distinguish between blasphemy (defamation of religious beliefs) and hate speech based on religion?

Article 40 of the Constitution guarantees "freedom of conscience, religion and public manifestation of religion and other beliefs." "[A]ny reference or incitement to war or to violence, national, racial or religious hatred or intolerance" is forbidden and punishable by Article 39.

Similar provision which guarantees freedom of religion for all citizens can be found in the Criminal Code. Therefore, it is regulated by its Article 130 that "Who denies or restricts freedom of conscience or religion, freedom to manifest religion or other beliefs, shall be sentenced by imprisonment up to one year." Hate speech based on religion is forbidden by Article 325 of the Criminal Code:

"Who through the press, radio, television, computer system or network, at a public gathering or otherwise publicly incites or publicly makes available flyers, images, or other materials that refer to violence or hatred directed against a group of persons or a member of the group because of their race, religion, national or ethnic origin, origin, color, sex, sexual orientation, gender identity, disability or any other characteristic, shall be sentenced with imprisonment up to three years."

On the other hand, blasphemy is not regulated and punishable by Croatian law.

5. Networking sites and the issue of online anonymity

The current debate over "online anonymity" and the criminalization of online hate speech as stated in the "Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems" is under progress; Should networking sites be legally forced to reveal identities of persons at the origin of such online hate speech and is this feasible? What is the current status in your country?

Croatian criminal legislation is aligned with the Convention of Cybercrime of the Council of Europe²⁷, which entered into force in Croatia on 1 July 2004. Its major goal is to prose-

²⁷ Act on confirmation of the Convention of Cybercrime (Official Gazette - International Agreements, 9/2002)

cute offences against confidentiality, integrity, and availability of computer data, offenses related to computer, offenses related to the content and offenses related to infringements of copyright and other rights.²⁸ This Protocol was opened for signature in Strasbourg, on 28 January 2003, on the occasion of the First Part or the 2003 Session of the Parliamentary Assembly.²⁹ Croatia signed it on 26 March 2003, so it is signed but not yet ratified, together with nine other treaties.³⁰ Additional Protocol signatory countries want to be stronger in fight against racism and xenophobia, as well as in combating their spread through the Internet which is why the amendments to the original convention are needed.

New Criminal Code entered into force on 1 January 2013 and it has tried to complement national criminal legislation because such behaviour, contained in the Articles 2, 3, 4 of the Convention is not criminalized in Croatian regulations. Chapter thirty (XXX) is particularly interesting: Crimes against public order and Article 325: "Public incitement to violence and hatred". It contains concrete measures against perpetrators who "... through the print, radio, television, computer system or network, at a public rally or in some other way publicly incites or publicly make available to the public tracts, pictures or other material instigating violence or hatred directed against a group of persons or member of such a group on account of their race, religion, national or ethnic origin, descent, color, sex, sexual orientation, gender identity, disability or any other characteristic, shall be sentenced to imprisonment for a term of up to three years".

Imprisonment as a legal sanction is not envisaged in the Croatian Criminal Code for the commitment of criminal offenses against honour and reputation on the Internet. The basis of criminal prosecution is a private lawsuit and perpetrators shall be punished by a fine of up to three hundred and sixty daily units. Such punishment is a restriction of the freedom of speech. However, there are problems with determining the identity of perpetrators, lack of jurisprudence and publishing corrections inaccurate, libellous allegations. Online anonymity is generally not regulated, but some aspects are regulated by the Act on Electronic Communications.³¹

Since the new Criminal Code entered into force, there have been examples of judgment against people promoting hate speech over the Internet, and perpetrators have been fined.³² There are also various examples of hate speech on blogs, closed groups of social networks etc where it is difficult to determine the identity of the perpetrator.³³ Most often such acts target minorities and gay population. In most countries (including Croatia), a court order is required in order to get legal access to the data and this can be requested only on grounds of valid evidence when prescribed by law.

Croatia has made significant strides in the fight against these forms of crime, which can be seen in the Progress Report of the Council of Europe 2011. There is visible progress

²⁸ K. Bagović, Sankcioniranje cyber nasilja prema novom Kaznenom zakonu, Ius Info Portal, <http://www.iusinfo.hr/dailycontent/Topical.aspx?id=13063>, visited on 9/10/2013

²⁹ The Convention is amended with Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems adopted by the Council of Europe on 28th January of 2003. So far it has been signed by 28 countries, but it has been ratified by only four: Albania, Cyprus, Denmark and Slovenia. It should be noted that the U.S. stated they do not intend to ratify the Additional Protocol, which is likely to significantly hamper its global acceptance. More on: Vojković, Goran; Štambuk Šunjić, Marija, *Konvencija o kibernetičkom kriminalu i Kazneni zakon Republike Hrvatske*, Zbornik radova Pravnog Fakulteta u Splitu, year 43(2006), no. 1(81)

³⁰ Record of Ministry of Foreign and European Affairs, <http://www.mvep.hr/hr/vanjska-politika/multilateralni-odnosi/vijece-europe-%28ve%29/tabelarni-prikaz-konvencija-vijeca-europe/>, visited on 9/10/2013

³¹ Act on Electronic Communications (Official Gazette, 73/08, 90/11, 133/12, 80/13)

³² *Kažnjen s 5000 kuna zbog govora mržnje na internetu*, Libela, <http://www.libela.org/vijesti/3281-kaznjen-s-5-000-kuna-zbog-govora-mrznje-na-internetu/> visited on 9/10/2013

³³ *Mrzim pedere*, Emeraulde blog, <http://trosjed.net.hr/ekipa/emeraude/blog/6772390/>; *Svi mi koji mrzimo cigane*, Facebook group, <https://www.facebook.com/groups/217537411606011/?fref=ts>

in the changes and harmonization of the national legislation with the EU *acquis* and international conventions. It is particularly important that the Department of high-tech crime be established at police directorate and that this issue be dealt with by specialized police officers. There has also been a successful co-operation with other competent national authorities, for example a continuous cooperation with the Croatian Academic and Research Network and the Institute for Information System. Other important influences arise from CyberCrime @ IPA project that aims to ensure the implementation of the Convention and the Additional Protocol in Southeast European states (Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia, Macedonia and Turkey).³⁴

6. Tackling the notions of “violence”, “hatred” and “clear presence of danger”

Should the notions of “violence” and “hatred” be alternative or cumulative given the contextual approach to “hate speech” (to compare the terms of the additional Protocol and the relevant case-law of ECHR)? What about the notion of “clear and present danger” - adopted by the US Supreme Court and some European countries?

There is no clear definition of hate speech, so the notions of “violence” and “hatred” are to be seen as parts of the concept of “hate speech”, as elements which constitute identification criteria in every case. These notions are merely elements which make a distinction between the expressions falling under the scope of protection granted by the Article 10 and those ones which should be excluded from this protection.

Although most States developed the protection against expressions in legislation at the national level, the elements which are said to be the constitutional elements of “hate speech” differ slightly from one state to another. Article 2 of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems explains the contextual meaning of “racist and xenophobic material” and states that such material “advocates, promotes, incites hatred, discrimination or violence”. The Additional Protocol mentions both notions, so the expression which should not be protected by freedom of expression is the expression which includes either hatred or violence. An expression can be classified as intolerant speech if it represents an intense dislike or enmity, or if it is accompanied by an unlawful use of force directed against a person or a particular group of persons.

The ECHR has also never given a precise definition of “hate speech”. In the case of *Gunduz v. Turkey* the Court refers to hate speech as “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)”.³⁵ It is important to note that this is an “autonomous” concept, insofar as the Court is not bound by the domestic courts’ classification.³⁶ Thus, it is a set of circumstances, a variable of elements (such as violence and hatred), which help to divide what is allowed from what is not.

When the Court faces a restriction of the right to freedom, it is obliged to take into account every element and circumstance of the case. The notions of “violence” and “hatred” are both part of a concept of “hate speech” and should not be seen as a cumulative condition which strictly defines the act of hate speech.

The concept of “*the clear and present danger*” in a similar way states that the limitations upon freedom of speech, press or assembly could be set depending on whether the words

³⁴ Dubrovnik: Počela konferencija o suzbijanju kompjutorskog kriminaliteta, Ministry of Intern Affairs, <http://www.mup.hr/149853/1.aspx>, visited on 9/10/2013

³⁵ *Gunduz v. Turkey*, *op. cit.* (no 18), §41

³⁶ A. Weber, *Manual on hate speech*, Council of Europe Publishing, 2009, p. 3

in a certain case are used in such circumstances or whether they are of such nature as to create a clear and present danger³⁷. Some notions may not seem dangerous on their own, but when combined with circumstances, they create danger. The concept itself is a certain test for the circumstances of the cases in which the authorisation for the limitations on freedom of speech is questionable and as such serves as a tool to confirm whether they are justified or not.

7. Justifying the distinction between articles 10 § 2 and 17 of the European Convention on Human Rights

What are the justifying elements for the difference between the two approaches (exclusion in conformity with Article 17 of the Convention and restriction in conformity with Article 10 § 2 of the Convention) made by the ECHR on hate speech? Can these elements be objectively grounded? What about subsidiarity and margin of appreciation?

When deciding on the possible violation of Art. 10 of the Convention³⁸, the Strasbourg Court practices two different approaches mentioned in the Convention. Firstly, the Court can exclude guaranteed protection by applying Article 17 - prohibition of abuse of rights: "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."

Article 17, also known as an "abuse clause" has a rather general scope. It will ensure that an individual or group cannot use rights granted by the Convention to undermine other rights or democracy³⁹. Such protection exclusion in regard to freedom of expression "is used but in moderation"⁴⁰, as observed by Françoise Tulkens.

Secondly, certain limitation is expressly allowed in the second paragraph of Article 10:

2. 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 in a democratic society, 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.

If the case falls within the ambit of Article 10 with the existence of interference, the Court must examine facts of the case by a triple test:

1) Is the interference prescribed by law?

Not only does the Court examine whether interference has a basis in domestic law, but also the quality of the law itself. In other words, the law has to be accessible and the consequences foreseeable.

³⁷ Definition provided by USLegal, <http://definitions.uslegal.com/c/clear-and-present-danger/>

³⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, transposed to the Croatian legislation by the Act on the confirmation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette - International Agreements, 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10)

³⁹ Cases in which the Court used Article 17 to retract protection of Article 10 include: propagation of National-Socialism, Holocaust denial, advocating the removal of ethnic minorities from the Netherlands. See more in: van Noorloos, Marloes, *Hate Speech Revisited*, Intersentia, 2011

⁴⁰ F. Tulkens, *When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights*, Seminar on Human Rights for European Judicial Trainers, European Court of Human Rights - European Judicial Training Network, 2012

2) Does it pursue a legitimate aim?

Interference can be justified only if it was part of pursuing any of the legitimate aims listed in the paragraph 2 of Article 10.

3) Is it “necessary in a democratic society”?

The Court examines whether reasons adduced by the State are “relevant and sufficient”. *Onus probandi* is upon the State. When analyzing the case, the Court has to consider all factual circumstances “in the light of the case as a whole”⁴¹.

However, the Court developed the doctrine of margin of appreciation already in 1976 in the case *Handyside v. The United Kingdom*⁴². “This variable discretion is granted to national authorities by the Court when it examines whether a State has violated an applicant’s Convention”⁴³ in meeting their obligations arising from the Convention, but this flexibility does go “hand in hand with European supervision”⁴⁴.

The main substantial difference between those two approaches is justified and objectively founded. Bearing in mind the different forms of expression, as well as the fact that even though certain expressions could hypothetically provoke hatred, these expressions are not necessarily of such intensity as to evoke the “abuse clause” from the Article 17. The principle of proportionality requires different approaches based on the intensity of wrongfulness of the expression or comment. Therefore, in the case of application of “abuse clause”, the Court will not decide on the case based on merits, but it will declare the case to be inadmissible since the expression in issue was of such nature which could destroy fundamental values and thus is excluded from protection. On the other hand, when Article 10 is applicable, the case is admissible and, based on merits and the triple test, the Court declares violation or non-violation of Article 10.

8. Harmonisation of national legislation

Taking into consideration the principle of proportionality, what measures can be taken in order to achieve the harmonisation of national legislations?

The principle of proportionality states that the restriction imposed by national authorities must be the least strict restrictions possible which can achieve the same result and are in compliance with Article 10(2). In other words - when rendering, the Court has to take into account the nature and severity of the penalties since certain flexibility in creating a wide range of restrictions is granted to the Contracting States.

It is important to stress how in the Strasbourg Case Law “whoever exercises his freedom of expression undertakes “duties and responsibilities” the scope of which depends on his situation and the technical means he uses”.⁴⁵ When compared to other media (radio, television, newspapers), the Internet has become one of the most prominent and powerful communication tools due to the recent technological developments. Some possible measures regarding hate speech communicated via the Internet can be the same as the measures for other media; such as criminal penalties, disciplinary penalties, damages in respect of civil proceedings⁴⁶, public apologies or retractions. Other possible measures are

⁴¹ *Zana v Turkey*, app no 18954/91, 25 November 1997

⁴² *Handyside v The United Kingdom*, app no 5493/72, 7 December 1976

⁴³ A. Mowbray, *Cases, Materials, and Commentary on the European Convention on human rights*, Oxford University Press 2012, p 633.

⁴⁴ *Handyside v The United Kingdom*, *op. cit.* (n 41).

⁴⁵ *Ibid.*

⁴⁶ More in: INTERIGHTS manual for lawyers, *Freedom Of Expression Under The European Convention On Human Rights (Article 10)*, October 2009

quite different due to the characteristics of the Internet and its influence, e.g. injunctions preventing publication, posting or streaming, content removal, website blocking, etc.

9. Legal implications of “hate speech”

Is a legally binding definition of “hate speech” on the national level possible? Is this possible and necessary at the international level; why?

Although freedom of speech is guaranteed by the Croatian Constitution, it is still not absolute. The state should limit it by preventing the possibility of abuse, but the limitations should be introduced only if certain conditions are met. In that sense, the Criminal Code prevents that kind of freedom in that it prevents the propagation of racial, religious, sexual, national, ethnic, or hatred based on skin colour or sexual orientation, or other characteristics.

Although the Criminal Code does not contain the explicit definition of hate speech, it can be classified under the notion of hate crimes. This means that it is possible to define it, and also necessary because it represents the final step of extinction of discrimination based mainly on stereotypes. The state should prevent passing hate speech on to the next generations as normal and socially accepted behaviour.

Many international documents contain provisions that may apply to hate speech, such as the United Nations Charter (encourages “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”), the Universal Declaration of Human Rights (“everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”), and the European Convention on Human Rights, which guarantees the enjoyment of the all rights and freedoms set out in the Convention (regardless of gender, race, colour, language, religion, political or any other opinion, national or social origin, association with a national minority, property, birth or other status).

Although these treaties do not contain the mandatory definition and legal sanction against hate speech, they provide guidance for the signatory countries on the definition of hate speech. Each State should adjust the definition to their social status, since the object of hate speech is not the same everywhere. In Italy, for example, illegal migrants are particularly affected by hate speech, as are the Roma people France, and in Australia there have been a lot of racist incidents. The groups affected by this criminal offense have changed during the course of Croatia’s 22-year-old history - at the end of the war hate speech was mainly directed towards the Serbian minority, while after the war it has mainly been directed towards women, the Roma, and homosexuals.

The obstacle to the international definition of hate speech is the unevenness of social awareness. For example, in 2002, Sweden has expanded the definition of hate speech to include threat and the expression of contempt on the basis of sexual orientation, while in some countries this will not happen for years to come. In addition, the barrier could be the content and orientation of definition. In Germany, for example, this would involve a definition which would prevent justifying Nazism, while in Croatia this would be the case with the propaganda of the Ustashe spirit.

“Hate speech is a malignant type of speech the main aim of which is not to mediate ideas, but to hurt, humiliate, offend, intimidate or stimulate violence”.⁴⁷ Since the harmful effects of hate speech are scientifically proven (emotional stress, loss of dignity, hate speech in-

⁴⁷ More in: Alaburić, Vesna, Ograničavanje govora mržnje u demokratskom društvu – teorijski, zakonodavni i praktički aspekti, Hrvatska pravna revija, January 2003

ternalization - the victim starts to believe that the discrimination was valid, which can then easily change from speech to physical violence) requires that each state takes action on a national level, but there should also be mutual cooperation on an international level.

10. Legal implications and differentiation of related notions

What about the notions of “intimidation” and “provocation”, compared to “incitement to hatred”? How are “incitement to hatred”, “intimidation” and “provocation” described in your national legislation? How, if at all, do they differ?

The “incitement to hatred” is described and incriminated in Article 325, paragraph 1 of the Croatian Criminal Act, as an incitement to hatred or violence made publicly against a group of persons or a member of a particular group of persons, through different materials which instigate violence or hatred. It is, therefore, a criminal act for which a penalty of up to three years imprisonment is prescribed. The notion of “intimidation” is mentioned in the articles of the Croatian Anti-discrimination Act. The Anti-discrimination Act was passed in order to protect and promote equality as the highest value of the constitutional order of the Republic of Croatia. The notion of “intimidation” is described as part of the concept of harassment and sexual harassment in Article 3, paragraph 1 of the Act where an act of harassment is any unwanted conduct with the purpose or effect violating the dignity of a person, and creating an intimidating, hostile, degrading or offensive environment. Paragraph 1 is followed by a description of sexual harassment in Paragraph 2 which describes it as an unwanted conduct with an effect (among others) of creating an intimidating environment. The Anti-discrimination Act describes both harassment and sexual harassment are described as forms of discrimination. Intimidation, on the other hand, is a consequence which the act of harassment can provoke, and not an individual act which is specifically regulated and punishable. Article 12 of the Croatian Electronic Media Act prohibits audio and/or audiovisual services which promote and spread hatred or discrimination based on different grounds, as well as anti-Semitism and xenophobia, ideas of fascist, nationalist, communist and other totalitarian regimes. Although the Anti-discrimination Act and the Electronic Media Act have included the elements which are parts of the “hate speech” concept, the notion of “provocation” is not explicitly mentioned, but it is implicitly described as an act of “promotion” or “encouragement”.

In Croatian legal regulation, “incitement to hatred” is a criminal act which is specifically regulated and the penalty for which is imprisonment. The notion of “intimidation” is simply described as a consequence of an act which is regulated as a minor offense. Legal regulation of the Republic of Croatia does not specifically mention “provocation”, or “promotion” and “encouragement”, which could be defined as synonyms for “provocation”, and they are also regulated as minor offenses.

11. Comparative analysis

Comparative analysis: how has the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189) been transposed into the domestic law of the Member States of the Council of Europe?

The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189) requires criminalization of racist and xenophobic propaganda through computer systems, racist and xenophobic motivated threats and insults including denial, gross

minimization, approval of genocide or crimes against humanity (especially those happened during the period of 1940-45).

On 26 March 2008, the Republic of Croatia has signed the additional protocol and it was ratified on 4 July 2008. The Protocol has entered into force in national legislations of twenty Member States of the Council of Europe so far, and on 1 November 2008 it entered into force in Croatia.

The Croatian Committee for Human Rights and National Minorities unanimously proposed to the Croatian Parliament passing of the statute of ratification of the abovementioned Protocol, and the Parliament passed it on 16 May 2008.

The state had the obligation to adjust its material law in accordance with the Additional protocol. The implementation can be seen in Article 325 of the Criminal Code⁴⁸.

The Republic of Croatia decided to put the reserve on the Protocol, by which the Republic of Croatia reserves the right not to require criminal liability if racist and xenophobic material promotes or encourages discrimination that is not connected with hate or violence.

⁴⁸ See in *supra ad. 1*

