

COMPARATIVE VIEWS ON A PERMANENT CHALLENGE: HATE SPEECH SANCTIONING IN POLAND AND CROATIA*

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ABSTRACT

Freedom of expression is one of the essential elements of modern democratic states' standard for basic civil rights and freedoms. It is most often guaranteed in the constitutions as well as in ratified acts of European and international law. Still, freedom of speech is not absolute, meaning in certain situations it may be restricted to protect another legal value. A prominent example is hate speech, as a means of spreading hatred, hostility and violence towards a person or a particular group. It is not a closed book but widely regarded as a significant violation of human rights. While there is no doubt it constitutes a freedom of speech abuse, the issue of its sanctioning falls within controversial and multifaceted challenges in terms of legislative regulation. The purpose of this article is to compare Polish and Croatian legal systems on this issue. The research will be based on the comparative method, designed to detect similarities, differences and possible patterns in the subject area of the study and to determine the variables affecting the evaluation of current and developed policies in the area of hate speech responsibility and sanctioning. The specific solutions contained in the national constitutional positions, criminal law, misdemeanor law, related body of doctrine and selected case law show a certain diversity of approaches. It can be said that in the area under consideration we are dealing with variants of the same general concept. The results of the conducted analyses will form the basis for further research in the field of amendment of regulations on the punishment of hate speech in the Polish and Croatian legal systems.

Keywords: criminal law, Croatia, hate speech, misdemeanor law, Poland, sanctioning

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1. SISYPHUS' WORK OF DEFINING HATE SPEECH

In everyday life, hate speech embodies discriminatory social phenomena.¹ There is no generally accepted (legal) definition of hate speech. States as the primary duty bearers are governed by the framework of their jurisdiction and legal terminology.² The challenges often arise due to usage in different contexts and (mis)understanding that occurs mostly from its colloquial use, so undoubtedly it does not belong to easily regulated social occurrences.³ It has been adapted over time to address various situations and capturing a wide scope of expressions, having its lowest common denominator as any expression of discriminatory hate towards people that does not necessarily include a particular consequence.⁴ Regardless of terminological expression, it is not limited to words. Whereas words are most common, there are symbols, images, gestures, music... “semantically oriented, aiming at expressing prejudiced, violently provoking opinions.”⁵ Evaluations and decisions in the hate speech field are usually inherently complex, aiming at balancing different rights, principles, or standards whether it is a matter of making a court decision or forming a legal provision that prohibits it.⁶

Among European legal systems, this speech is not included in the protective coverage of freedom of expression and is often penalized, with implementation of prohibiting provisions coming with difficulties. Existing regulations penalizing certain behaviors enable the reconstruction of the essence of hate speech – the intrinsic acts related to the incitement to violence or other forms of harm, some of them including hate speech as insulting or inciting hatred based on national-

¹ Herceg Pakšić, B., *Holding All the Aces? Hate Speech: Features and Suppression in Croatia*, in: Meškić, Z.; Kunda, I., Popović, D. V., Omerović, E. (eds.), *Balkan Yearbook of European and International Law*, Springer Cham, 2021, pp. 225-247, p. 227

² Papcunová, J.; Martončík, M.; Fedáková, D.; Kentoš, M.; Bozogaňová, M.; Srba, I.; Móro, R.; Píkuliak, M.; Šimko, M.; Adamkovic, M., *Hate Speech Operationalization: A Preliminary Examination of Hate Speech Indicators and Their Structure*, Complex & Intelligent Systems, 2021; Howard, J. W., *Free Speech and Hate Speech*, *Annual Review of Political Science*, Vol. 22, No. 1, 2019, pp. 93-109; Yong, C., *Does Freedom of Speech Include Hate Speech?* *Res Publica*, Vol. 17, No. 4, 2011, pp. 385-403; Knechtle, J. C., *When to Regulate Hate Speech?*, *Dickinson Law Review*, Vol. 110, No. 3, pp. 539-578; Simpson R. M., *Dignity, Harm and Hate Speech*, *Law and Philosophy*, Vol. 32, No. 6, 2013, pp. 701-728

³ Kambovski, V., *Hate Crime and Criminal Aspects of Hate Speech: Macedonian Approach*, *Megatrend Review*, Vol. 10, No. 1, 2013, pp. 323-334, p. 330

⁴ Hate Speech' Explained; A Toolkit, ARTICLE 19 Free Word Centre, 2015, [<https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>], Accessed 15 February 2022, pp. 9-10

⁵ Herceg Pakšić, B., *Tvorba novih standarda u slučajevima teških oblika govora mržnje: negiranje genocida pred Europskim sudom za ljudska prava*, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 67, No. 2, 2017, pp. 229-253, p. 230

⁶ *Ibid.*

ity, race, ethnicity, or religion.⁷ Pursuant Recommendation No. R (97)20⁸, hate speech is considered as any form of expression that spreads, incites, promotes, or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed in aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, immigrants and people of immigrant origin.⁹

Despite the fact that the notion of hate speech does not exist in the Polish legal language, it is a permanent element of legal language – jurisprudence and legal doctrine.¹⁰ The relevant Polish authors emphasize the current (legal) state of play creating a “hierarchy of protection for hate speech victims”.¹¹ Polish public debates are familiar with numerous attempts aiming to build a definition taking into account the reasons of possible hate speech occurrence.¹² Non-governmental organizations in Poland dedicated to monitoring and combating manifestations of racism, anti-Semitism, xenophobia and other forms of discrimination and intolerance, most often refer to the definition formulated by S. Kowalski and M. Tulli.¹³ Accordingly, hate speech includes statements (spoken and written), iconic representations that defame, accuse, mock or humiliate groups and individuals for reasons that are at least partly beyond their control, such as racial, ethnic and religious affiliation, as well as gender, sexual preference, disability or belonging to a “natural” social group, such as inhabitants of a certain territory, representatives of a certain profession, speakers of a certain language...etc.

There is no official hate speech notion in Croatian legal provisions, but its manifestation is prohibited under a different name through several acts. In principle, the main determinants of hate speech consist of public speech with specific content directed at particular protected groups. Its social occurrence as well as the ef-

⁷ Simpson, *op. cit.*, note 2

⁸ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “hate speech”, adopted by the Committee of Ministers on 30 October 1997. Also see Weber A., *Manual on Hate Speech*, Council of Europe Publishing, Strasbourg Cedex, 2009, pp. 9-10, [<https://www.tandis.odihr.pl/bitstream/20.500.12389/20608/1/05895.pdf>] Accessed 15 February 2022

⁹ For more see, Dadak, W., *Przestępstwa motywowane uprzedzeniami (o problemach z analizą przestępczości z nienawiści)*, *Czasopismo Prawa Karnego i Nauk Penalnych*, Vol. XXII, No. 4, 2018, pp. 21-34; Chetty, N.A.; Sreejith, A., *Aggression and Violent Behavior Hate Speech Review in the Context of Online Social Networks*, *Aggression and Violent Behavior*, Vol. 40, No. 5, 2018, pp 108-118

¹⁰ Hołyst, B., *Kryminologiczna ocena agresji werbalnej*, *Ius Novum*, Vol. 14, No. 2, 2020, pp. 17-46

¹¹ Rogalska, E.; Urbańczyk, M., *Złożoność zjawiska mowy nienawiści w pozaprawnym aspekcie definicyjnym*, *Studia Nad Autorytaryzmem i Totalitaryzmem*, Vol. 39, No. 2, 2017, p. 124

¹² Reed, C., *The Challenge of Hate Speech Online*, *Information & Communications Technology Law*, Vol. 18, No. 2, 2009, pp. 79-82

¹³ Kowalski, S., Tulli, M., *Mowa nienawiści. Raport, I. Próba definicji*, [<http://or.icm.edu.pl/monitoring3.htm>], Accessed 10 January 2022

fectiveness of social reaction are the subject of scientific analysis in the legal field, as we will see in this paper. Hate speech, especially on the Internet, has occupied Croatian public and scientific space in various contexts and there are non-governmental organizations that have been dedicated to this issue for years. One recently conducted research revealed that hate speech is quite common in everyday life and mostly oriented towards national and ethnic affiliation, with many respondents having repeated experience as victims, but unwilling to take necessary legal steps for its prosecution. Online content and social networks were labelled as leading challenges and Croatian suppression mechanisms were described as inefficient.¹⁴ However, despite a relatively large public interest and a range of media-exposed cases, the hate speech topic in Croatia is assessed as marginalized.¹⁵

ECRI (European Commission against Racism and Intolerance) General Policy Recommendation No. 15 indicates that hate speech is based on the presumption that a person or a group are superior to others, incites acts of violence or discrimination, undermines respect for minority groups and damages social cohesion. Considering it can have many faces, it is essential to understand what constitutes it and distinguishes it from other speech or statements. Accordingly, hate speech entails the use of one or more particular forms of expression towards a non-exhaustive list of personal characteristics or status.¹⁶ These forms are namely advocacy, promotion or incitement of denigration, hatred, or vilification as well as harassment, insult, negative stereotyping, stigmatization, or threat along with justification of such acts. Personal characteristics or status include race, color, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation. Yet, expressions such as satire or objectively based news reporting and analysis that merely offend, hurt or distress are excluded.¹⁷ Seven years ago, this recommendation pointed out the increase of hate speech through electronic communication and the necessity of media literacy. The last ECRI Report on Croatia from 2018 stated racist and intolerant hate speech in public discourse is rising, mainly directed at Serbs, LGBT, and the Roma people. Also, there is a growth of nationalism, particularly among

¹⁴ Herceg Pakšić, *op. cit.*, note 1, pp. 238-242

¹⁵ Munivrana Vajda, M.; Šurina Marton, A., *Gdje prestaju granice slobode izražavanja, a počinje govor mržnje?* Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, pp. 435-467, pp. 437-438

¹⁶ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 15 on Combating Hate Speech: Adopted on 8 December 2015, [<https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>], Accessed 9 March 2022, p. 16, point 9

¹⁷ *Ibid.*, p. 17, point 13. For more see, Brown, A., *What is Hate Speech? Part 2: Family resemblances*, Law and Philosophy, Vol. 36, No. 5, 2017, pp. 561-613; Paz, M. A.; Montero-Diaz, J.; Moreno-Delgado, A., *Hate Speech: A Systematized Review*, SAGE Open, Vol. 10, No. 4, 2020, pp. 1-12

the youth. Public authorities rarely place anti-hate speech messages in public.¹⁸ In the last ECRI Report on Poland from 2015 it was stated that homophobic statements are a recurrent feature of political discourse, the Muslim community has become a target of online hate speech, racist rhetoric is present, and nationalist groups are becoming more numerous joining with football supporters.¹⁹ A strong remark was made regarding the lack of a Penal Code provision that would explicitly prohibit incitement to violence, hatred and defamation as well as threats based on sexual orientation or gender identity.²⁰

2. LEGAL MECHANISMS FOR HATE SPEECH SUPPRESSION IN POLAND AND CROATIA

In both countries, the constitutional provisions guarantee freedom of expression. In general, Poland and Croatia have passed legislation criminalizing hate speech as one of the modalities to counteract discrimination. Both countries have faced this challenge by supporting the legal prohibition of hate speech, burdened with *inter alia*, criminal law sanctions. Comparison of individual criminal acts shows noticeable differences. The main rationale supporting the criminalization of hate speech is the invocation of other values whose protection “competes” with freedom of expression. It is mainly about human dignity and equality.²¹ We start first with a brief overview of constitutional standards, followed by criminal law positions and finish with analysis of possible misdemeanor law reactions.

2.1. Constitutional Positions Regarding Hate Speech

The most important provision, which explicitly guarantees freedom of expression in the Constitution of the Republic of Poland, is the provision of Article 54 (1) according to which: Everyone shall be guaranteed freedom of expression, collection, and dissemination of information. This provision is a part of the chapter “Personal freedoms and rights”, which undoubtedly influences the direction of interpretation. It has been recognized as a key provision for human functioning in

¹⁸ European Commission against Racism and Intolerance Report on Croatia, CRI (2018)17, (fifth monitoring cycle), adopted on 21 March 2018, published on 15 May 2018, [<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/croatia>] Accessed 21 March 2022, p. 9

¹⁹ European Commission against Racism and Intolerance Report on Poland, CRI (2015)20, (fifth monitoring cycle), adopted on 20 March 2015, published on 9 June 2015, [<https://rm.coe.int/fifth-report-on-poland/16808b59a09>], Accessed 21 March 2022

²⁰ *Ibid*, p. 10

²¹ Guzik, R., *Wolność słowa a mowa nienawiści. Analiza karnoprawna*, Wydawnictwo C.H. Beck, Warsaw, 2021, p. 297

a democratic state ruled by law. Moreover, everyone is entitled to this right, not only a person with the status of a Polish citizen.

The position of the Constitutional Tribunal in Poland, as expressed in the judgment of 25 February 2014²² indicates that criminalization of incitement to hatred based on national, ethnic, racial, or religious differences or based on irreligion constitutes a restriction of freedom of speech. Freedom of expression is one of the fundamental human rights, essential for human development and self-realization and constitutive of democracy. Freedom of expression protects not only speech received favorably or perceived as harmless or indifferent, but also speech that expresses disapproval, dislike, or antipathy. At the same time, freedom of speech is not absolute.²³

The jurisprudence of the Constitutional Tribunal in Poland stressed that the freedom of expression laid down in Article 54 (1) of the Polish Constitution²⁴ should be understood in the broadest possible sense. This means embracing not only the expression of personal judgments relating to facts and phenomena in all aspects of life, but also the presentation of opinions, suppositions, and forecasts, including information about facts, both real and presumed. In the Court's view, freedom of expression is one of the foundations of a democratic society, a condition for its development and the self-fulfillment of individuals, but it cannot be limited to information and opinions that are favorably received or perceived as harmless or indifferent.²⁵ The compatibility of the constitutional system with the international standards of human rights protection requires a "pro-European" interpretation of the constitutional provisions. This justifies the thesis that the scope of protection of speech in domestic law is, in principle, consistent with that resulting from the ECHR jurisprudence.²⁶ It follows that it is permissible to tune in the incrimination scope regarding speech to incitement to hatred and violence of a racist or

²² Judgment of Constitutional Tribunal from 25 February 2014, SK 65/12

²³ For more see, Mojski, W., *Prawnokarne ograniczenia wolności wypowiedzi w polskim porządku prawnym. Analiza wybranych przepisów*, *Studia Iuridica Lublinensia*, Vol. 12, 2009, pp. 177-196; Machowicz, K., *Jurydyczne uwarunkowania wolności wypowiedzi w Polsce jako kategoria praw człowieka*, *Wydawnictwo KUL, Lublin*, 2012, p. 124; Woiński, M., *O pojęciu przestępstwa z nienawiści (hate crime)*, in: Szczepłocki, P. (ed.), *Przestępstwa z nienawiści w Polsce. Publikacja pokonferencyjna, Stowarzyszenie na Rzecz Lesbijek, Gejów, Osób Transpłciowych oraz Osób Queer „Pracownia Różnorodności”*, Toruń, 2011, pp. 7-28

²⁴ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483, as amended)

²⁵ Constitutional Tribunal of the Republic of Poland of 23 March 2006, K 4/06, OTK ZU 2006, No 3A, Item 32

²⁶ Woiński, M., *Prawnokarne aspekty zwalczania mowy nienawiści*, LexisNexis Polska, Warsaw, 2014, p. 117

xenophobic nature, in particular if it takes the form of public insult, slander or threat.

In Croatia, hate speech is described as a true constitutional category in the sense that related challenges are clearly positioned in the context of human rights and freedoms.²⁷ As in many other countries, freedom of expression has a constitutional level. It encompasses freedom of the press and other media, freedom of speech, public appearance, and freedom of establishing all media institutions. Invitation or incitement to war or use of violence; national, racial, or religious hatred; or any form of intolerance is forbidden and punishable.²⁸ The Croatian system belongs to the European models that, in the constitutional sense, do not stand on the positions of value neutrality, but with an approach advocating for certain fundamental values.²⁹ Manifestations of hate speech are unacceptable given the fact they do not accept equality of citizens, and reject the fundamental democratic postulates³⁰ as well as represent a violation of equality as one of the highest constitutional values.³¹ The Croatian Constitutional Court gave its views many times in questions related to freedom of expression in general, but when it comes to hate speech specifically, in terms of invitation or incitement to violence, hate, intolerance or war, there were not that many opportunities. On several occasions, this court demonstrated general respect for standards related to the European Convention for the Protection of Human Rights and Fundamental Freedoms.³² Respecting the limited scope of this paper we point out that the Croatian legal science contains analyses of constitutional court positions regarding hate speech³³, so, we further focus on an interesting decision regarding a topic causing unequal court practice and significant social tensions: ideological symbols, namely those associated with totalitarian regimes. One of the media-covered decisions was the Šimunić case, which had its epilogue at the European Court of Human Rights. A football player was convicted for shouting “For Home” several times at a football match. While

²⁷ Gardašević, Đ. *Govor mržnje i hrvatski ustavnopravni okvir* in: Kulenović, E. (ed.) *Govor mržnje u Hrvatskoj*, Političke analize, Zagrebu, 2016, pp. 151-185

²⁸ Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014. Arts. 35, 38, 39, 16, 17

²⁹ Hlebec, I.; Gardašević, Đ., *Pravna analiza govora mržnje*, *Pravnik: časopis za pravna i društvena pitanja*, Vol. 55, No. 107, 2021, pp. 9-35, p. 17

³⁰ Kulenović, E. *Sloboda govora i govor mržnje*, in: Kulenović, E. (ed.), *Govor mržnje u Hrvatskoj*, Fakultet političkih znanosti, Zagreb, pp. 21-61

³¹ Herceg Pakšić, B.; Lachner, V. *Hate Speech as a Violation of Human Rights: The Meaning, Implications and Regulation in Criminal Law*, in: Vinković, M. (ed.) *New Developments in EU Labor, Equality and Human Rights Law*, Faculty of Law, Osijek, pp. 295-320, p. 311; Herceg Pakšić, *op. cit.*, note 1, p. 230

³² It is binding in Croatia since 5 November 1997 when the Act on Ratification of the ECHR came into force (Official Gazette-International Treaties No. 18/97)

³³ See earlier mentioned sources of the Gardašević, Đ.

the original meaning was literary and poetic, it had also been used as an official greeting of the *Ustaše* movement (along with following reply “Ready”), which had originated from a totalitarian regime. First instance the misdemeanor court has declared it represents a manifestation of racist ideology, contempt for other people grounded on their religion and ethnicity affiliation³⁴, which was supported by the stance of the High Misdemeanor Court as the second instance rejecting the appeal.³⁵ The Constitutional Court made its point clear dismissing the applicant’s constitutional complaint, finding that the misdemeanor sanctioning, taken place based on the Prevention of Disorders at Sports Competitions Act, had not been disproportionate. Suppression of expressing or inciting hatred based on racial or other affiliation at sporting events is a legitimate aim of punishment.³⁶ Since the procedure continued before the European Court of Human Rights, it was declared that Article 10 does not protect speech incompatible with the values proclaimed and guaranteed by the Convention.³⁷

2.2. Hate Speech and Sanctioning Modalities within the Criminal Law Framework

In Polish criminal law, two provisions have the greatest legal weight: Article 256 and 257 of the Penal Code.³⁸ These criminal offenses are prosecuted *ex officio*.³⁹ Pursuant the provision of the Article 256 of the Penal Code, criminal law liability exists for anyone that publicly propagates the fascist or other totalitarian state system or calls for hatred based on national, ethnic, racial or religious differences or irreligion. The penalty could be in the form of a fine, a restriction/limitation

³⁴ Judgment of the Misdemeanor Court in Zagreb No. PpJ-4877/13 of 8 December 2015

³⁵ Judgment of the High Misdemeanor Court of the Republic of Croatia No. Jž-188/2016 of 27 January 2016

³⁶ Decision of the Constitutional Court of the Republic of Croatia, U-III-2588/2016 from 8 November 2016

³⁷ European Court of Human Rights, Case of Šimunić v Croatia, Application no. 20373/17, decision on 29 January 2019. It is interesting that ECtHR did not find it necessary to address the applicability of Article 17 considering it should only be resorted to exceptionally, in extreme cases, so here it was used only as an aid to interpretation. See Guide on Article 17 of the European Convention on Human Rights, Prohibition of abuse of rights, 2021, [https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf], Accessed 2 April 2022, p. 25; Herceg Pakšić, *op. cit.*, note 1, p. 232

³⁸ Act of 6 June 1997 – Penal Code (consolidated text, Journal of Laws 2021, item 2345, as amended). There are no official titles of Polish criminal acts. However, in literature titles are informally assigned: Art. 256 as Propagation of fascism or totalitarianism; Art. 257 as Insulting a group or individual

³⁹ Demczuk, A., *Wolność wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w polskim prawie i praktyce sądowej*, in: Haczkowska, M.; Tereszkiewicz, F. (eds.), *Europejska konwencja o ochronie praw człowieka – praktyka stosowania i funkcjonowanie w przestrzeni europejskiej*, Oficyna Wydawnicza Politechniki Opolskiej, Opole, 2016, pp. 145-156

of liberty (meaning various forms of community service, various obligations referred to in Article 72 § 1), or imprisonment of up to two years. In turn, Article 257 criminalizes public insult of a group of people or public insult or violation of bodily inviolability of a person because of his/her national, ethnic, racial, religious affiliation or irreligiousness. In the case of this offense, the perpetrator is subject to imprisonment for up to three years.

These provisions create certain practical doubts and disputes. Jurisprudence and judicature emphasize the difficulty in interpreting the phrase “incitement to hatred”, meaning that the lack of intent to cause negative emotions to others when publicly speaking in a negative or discriminatory manner to others, leads to the conclusion that a person cannot be attributed with the realization of the elements of this offense.

The essence of inciting to hatred comes down to the content that objectively may cause strong dislike, hostility, anger, or negative evaluation, in relation to a particular group of people, characterized by the differences listed in the provision. Incitement to hatred from article 256 § 1 of the Penal Code is a prohibited act that is very strongly saturated with motivation. This hatred occurs for specific reasons. According to doctrine, the subjective part of the act consists of direct intention. The motivation indicated in the provision is made more specific using the phrase “incites to hatred”. Hatred is a feeling; it expresses a strong negative emotional attitude towards someone or something. However, it is not about hatred nourished by the perpetrator. The perpetrator may also have such an emotion, but it is not necessary for the realization of the elements of this prohibited act. Even if the perpetrator feels hatred towards a certain group of people or a person, he or she may not realize the real reason for such an emotion, or he or she realizes it, but for some reason does not want to admit it aloud and “masks” it by raising national or ethnic issues, etc. From the perspective of the provision of Article 256 § 1 of the Penal Code, this is of no significance. In Poland, the doctrine does not distinguish models of victim selection.

The aim of hate speech is always directed at a group, based on social or biological characteristics, even if its addressee is an individual. It is not only the real group affiliation, but also the perceived one.⁴⁰ Inciting hatred on the grounds of indicated differences is not only the expression of controversial views, but also an obvious abuse of freedom of expression, aimed at national, ethnic, or religious conflicts.⁴¹

⁴⁰ Pałka, K.; Kućka, M., *Ochrona Przed Mową Nienawiści – Powództwo Cywilne Czy Akt Oskarżenia?*, in: Wieruszewski, R.; Wyrzykowski, M.; Bodnar, A.; Gliszczyńska-Grabias, A. (eds.), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Wolters Kluwer Polska Sp. z o.o., Warsaw 2010, pp. 42-54

⁴¹ Mojski, *op. cit.*, note 23, pp. 177-196

The perpetrator does not have to be driven directly by hatred towards the victim. It is enough for the expressed statement to arouse aversion, anger, lack of acceptance and even a feeling of rage towards individual people or social groups, or to maintain or intensify this attitude.⁴² Expressed hateful opinions are becoming more radical, often connected to dangerous brutalization.

The challenge associated with provisions of Articles 256 and 257 of the Penal Code is the boundary concerning freedom of speech. It arises through questions whether the hate speech criminalization poses a threat to freedom of expression and whether this speech should be considered as overstepping the limits of freedom of speech.⁴³ Its criminalisation itself is not allowing it to be considered as speech that deserves legal protection. However, it is often the case in public debates that the strength of arguments as well as respect for human dignity lose importance instead of representing standards of public communication. The initial purpose of speech as exchanging arguments is shifting to evoking emotions, humiliation, presenting a person or a group in a negative light, followed by feelings of aversion or hostility towards a person, a group or a view defined as different or strange, supported with low-quality media reports and the possibility of the Internet reaching a wide audience. An example of such a situation is the occurrence of negative attitudes and speech towards doctors, nurses and their families who cared for people infected with COVID-19.⁴⁴

Incitement to hatred contains a specific direction.⁴⁵ The real reason for directing negative social feelings towards, i.e., some national or ethnic group, can be irrelevant and the motivation may be complex; it regards an attitude, emotions, knowledge, or expectations. The main motive does not have to be a specific ideology,

⁴² Guzik, *op. cit.*, note 21, p. 297

⁴³ For more on the limits of freedom of expression see Biłgorajski, A., *Granice wolności wypowiedzi czy wolność wypowiedzi ponad granicami? Kilka uwag na temat zakresu wolności wypowiedzi w Rzeczypospolitej Polskiej*, in: Biłgorajski A., (ed.), *Wolność wypowiedzi i jej granice. Analiza wybranych zagadnień*, Prace Naukowe Uniwersytetu Śląskiego, Katowice 2014, pp. 11-35; Demenko, A., *Prawnokarna ochrona wolności wypowiedzi. Zarys problemu*, in: Biłgorajski A., (ed.), *Wolność wypowiedzi i jej granice. Analiza wybranych zagadnień*, Prace Naukowe Uniwersytetu Śląskiego, Katowice 2014, pp. 36-49

⁴⁴ Dąbrowska, I., *Internetowy hejt wobec chorych oraz pracowników służby zdrowia w czasach pandemii wirusa SARS-CoV-2 w Polsce*, *Media-Kultura-Komunikacja*, Vol. 1, No. 17, 2021, pp. 89-113

⁴⁵ Michalska-Warias, A., *Przestępstwa przeciwko porządkowi publicznemu*, in: Królikowski, M.; Zawłocki, R. (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz. Art. 222-316*, Wydawnictwo C.H. Beck, Warsaw, 2017, pp. 309-463; Herzog, S., *Przestępstwa przeciwko porządkowi publicznemu*, in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warsaw, 2020, pp. 1688-1769; Wiak, K., *Przestępstwa przeciwko porządkowi publicznemu*, in: Grześkowiak A.; Wiak, K. (eds.), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warsaw, 2019, pp. 1228-1313; Cwiąkałski, Z., *Przestępstwa przeciwko porządkowi publicznemu*, in: Wróbel, W.; Zoll, A., (eds.) *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 212-277d*, Wolters Kluwer, Warsaw, 2017, pp. 482-605

e.g., fascist or totalitarian, nor does it have to be on religious grounds. Sometimes revealing the real reason or motive could prevent achieving the goal. The phrase “incites to hatred” is understood as conduct containing persuasion, encouragement, inducement, and incitement to strong dislike or hostility.⁴⁶ For the incitement to be achieved, it is sufficient that the perpetrator aims at the occurrence of the hostility towards specified persons.⁴⁷ It is irrelevant whether the provocation had an effect. The Supreme Court in Poland has twice interpreted this phrase. In the first decision the court explained that “(...) incitement to hatred, comes down to type of statements that cause feelings of strong dislike, anger, lack of acceptance, even hostility to individuals or entire social or religious groups, to the form of expressions that sustain and intensify negative attitudes and emphasizes the privilege and superiority of a particular nation, ethnic group, race or religion.”⁴⁸ Moreover, in a decision a decade ago this court held that “(...) the causative act of incitement to hatred involves the desire to trigger the strongest negative emotion (akin to “hostility”) towards a particular nationality, ethnic group or race. It does not regard evoking feelings of disapproval, antipathy, prejudice, dislike”.⁴⁹

In Poland, rather frequent proposals to amend the criminal law provisions typifying hate speech offenses⁵⁰ were dictated by the reaction to the changes taking place in the world related to characteristics of certain social groups. Over the years, (unsuccessful) attempts to change the Penal Code provisions were submitted to Parliament several times, aiming to extend the scope of incrimination for hate crimes and hate speech, considering, among others, persons with disabilities.⁵¹ In

⁴⁶ Herzog, *op. cit.*, note 45, p. 1702; Haręza, A., *Wolność słowa w Internecie*, Nowa Kodyfikacja Prawa Karnego, Vol. XX, No. 2882, 2006, pp. 343-344

⁴⁷ Lach, A., *Przestępstwa przeciwko porządkowi publicznemu*, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warsaw 2016, pp. 1103-1167; Gruszecka, D., *Przestępstwa przeciwko porządkowi publicznemu*, in: Giezek J. (ed.) *Kodeks karny. Część szczególna. Komentarz*, Wolters Kluwer, Warsaw, 2021, pp. 1022-1144

⁴⁸ Decision of the Supreme Court of 8 February 2019, IV KK 38/18

⁴⁹ Decision of the Supreme Court of 1 September 2011, V KK 98/11

⁵⁰ Płatek, M., *Mowa nienawiści – przesłanki depenalizacji*, in: Wieruszewski, R.; Wyrzykowski, M.; Bodnar, A.; Gliszczyńska-Grabias, A. (eds.), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warsaw 2010, pp. 55-92; Woiński, M., *Projekty nowelizacji art. 256 k.k.*, in: Wieruszewski, R.; Wyrzykowski, M.; Bodnar, A.; Gliszczyńska-Grabias, A. (eds.), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warsaw 2010, pp. 21-41

⁵¹ See: Parliamentary bill to amend the Act - Penal Code, 6th term, Sejm. No. 4253, [<https://orka.sejm.gov.pl/Druki6ka.nsf/>], Accessed 10 February 2022; Parliamentary bill to amend the Act - Penal Code, 7th term, Sejm. No. 340, [<https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?documentId=BCB32B331B-21B732C12579EB00408447>], Accessed 10 February 2022; Parliamentary bill to amend the Act - Penal Code, 7th term, Sejm. No. 2357, [<https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?documentId=AF-063793536190B7C1257CD10030930>], Accessed 11 February 2022; Parliamentary bill to amend the Act - Penal Code, 8th term, Sejm. No. 878, [<https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?documen>

this regard, amendment of certain provisions was directed at additional protection to groups defined by gender, age, disability, and sexual orientation. The similarities of the proposed changes consisted in adding protective features to the existing catalogue such as disability, gender, gender identity, age, and sexual orientation. The failure to adopt changes covering persons with disabilities was related to challenges of sufficiency in the statutory definition of the “disability” concept and inadequate justification of the inclusion of this additional criterion. In this respect, the Supreme Court in Poland took the stance that systemic and analytical work and research must precede such proposals.⁵² Effective identification of the risks arising from a particular victim characteristic is possible based on an individual assessment, carried out at the earliest possible stage. Such an assessment should be possible for all victims, to determine what specific protective measures they need.⁵³ The personal characteristics along with the nature and circumstances of the act should be considered.⁵⁴

The criminal offense of public denial of Nazi or communist crimes, as well as other criminal offenses against peace, humanity or war crimes are defined in Act of 18 December 1998, at the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation. Colloquially, though imprecisely, it is called “Holocaust denial”. Pursuant Art. 55 of this Act “Who publicly and contrary to the facts denies the crimes referred to in Article 1 point 1, shall be subjected to a fine or imprisonment for up to three years. The judgment shall be made public.”

The Croatian criminal law accepts the view of a limited protection of the freedom of expression and allows interference, due to a necessary balancing with other legal values also deserving criminal law protection (honour and reputation, discrimi-

tId=F8E907EAD05C3F95C1258037003977B7], Accessed 11 February 2022; Parliamentary bill to amend the Act - Penal Code, 9th term, Sejm. No. 465, [<https://sejm.gov.pl/Sejm9.nsf/druk.xsp?documentId=D40686B750C74B51C125859F00357459Sejm>], Accessed 11 February 2022; Parliamentary bill to amend the Act - Penal Code, 9th term, Sejm. No 2024, [<https://sejm.gov.pl/Sejm9.nsf/druk.xsp?documentId=2851BC6F8739C593C12587F10042EF6E>], Accessed 11 February 2022. For more on this topic see Kolendowska-Matejczuk, M., *Ochrona praw ofiar przestępstw z nienawiści w polskim prawie karnym*, in: Mazowiecka, L.; Klaus, W.; Tarwacka A. (eds.), *Z problematyki wiktymologii*. Book dedicated to Professor Ewa Bienkowska, Warsaw 2017, pp. 257-278, p. 266

⁵² Habrat, D., *Protection of Human Dignity as a Basis for Penalization of Hate Speech Against People with Disabilities in Polish Criminal Law*, *Studia Iuridica Lublinensia*, Vol. XXX, No. 4, 2021, pp. 259-279, p. 272

⁵³ Art. 55 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA

⁵⁴ *Ibid.*, Art. 22 and 56

nation prohibition, confidentiality obligation...etc.).⁵⁵ The main incrimination enabling hate speech sanctioning is *Public Incitement to Violence and Hatred* (Article 325 of the Penal Code). This incrimination goes back in Croatian criminal law history - though it existed under a different title in the previous Penal Code versions; however, accompanying judicial standards were almost non-existent due to a general absence of competent decisions (in both courts and state attorneys' offices).⁵⁶

Incrimination was moved several times between chapters with different dominant protected values. In the Penal Code of 1977, *Incitement to National, Racial, and Religious Hatred, Division or Intolerance* was placed among offenses against the Republic of Croatia; afterwards in 1997 *Racial and other Discrimination* was placed among offenses against international values, and finally, in 2011 *Public Incitement to Violence and Hatred* found its place among offenses against public order.⁵⁷ It follows the standards established by Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law⁵⁸ but has wider scope including some grounds not mentioned in the Framework decision. Article 325 has five paragraphs. Pursuant to the first, "Whoever by means of press, radio, television, computer system or network, at a public gathering or otherwise publicly incites or makes publicly available leaflets, images or other materials invoking to violence or hatred towards a group or its members because of their racial, religious, national or ethnic affiliation, language⁵⁹, origin, skin color, gender, sexual orientation, gender identity, disability or any other characteristics, shall be punished by imprisonment for a term not exceeding three years." As evident, in addition to extensive casuistry, the provision abounds in general clauses, leading to the conclusion that any manner of public incitement to violence and hatred towards a group or its members based on any characteristic is punishable. The incrimination scope is rather wide and this "open base" regarding victim selection is followed by danger of over extensive interpretation in practice. This was already noticed in Croatian case law and justifiably criticized.⁶⁰

⁵⁵ Herceg Pakšić, *op. cit.*, note 1, p. 233

⁵⁶ Munivrana Vajda, M. *Zakonska podloga za sankcioniranje govora mržnje-devedestih i danas* in: Dubljević, M.(ed): *Procesuiranje ratnih zločina-jamstvo procesa suočavanja s prošlošću u Hrvatskoj*, Zagreb, Documenta, 2014, pp. 359–371, pp. 360-361

⁵⁷ For detailed overview and changes from 1977 see Herceg Pakšić; Lachner, *op. cit.*, note 31, pp. 312-316

⁵⁸ Official Journal of the European Union, L 328/55 from 6 December 2008

⁵⁹ Category of language was added within the amendments to the Penal Code from 2017. Official Gazette No. 101/17

⁶⁰ Munivrana Vajda and Šurina Marton rightfully criticized the fact that the court interpreted affiliation to police officers and veterans as in compliance with this provision. Munivrana Vajda; Šurina Marton,

The second and third paragraph provide punishment if the act was committed in a group: between six months and five years for the organizer or leader, and up to one year for a participant role. There is visible terminological inconsistency between these two paragraphs mentioning two terms: “group” (par. 2) and “association” (par. 3). Pursuant to par. 2, a group means three or more persons, but there is no explanation for the term “association”. Although it follows from the provision text that the meaning is the same, the terminology should be unified. Incrimination of both modalities is the result of comments Croatia got in 2012 within the fourth ECRI report.⁶¹ The fourth paragraph provides punishments of up to three years imprisonment, for public approval, denial or significant diminishment of genocide, crime of aggression, crime against humanity or war crime appropriate to incite violence or hatred towards a group or its member based on racial, religious, national, or ethnic affiliation, origin, or skin color. These acts can be considered as severe verbal aggression, specifically genocide denial. In related academic research, this topic refers to the complex concept of *denialism*.⁶² Within European systems, there is no uniform approach in criminal law reaction to denialism: it ranges from its complete absence to variants criminalizing only specific denial forms (i.e., Holocaust, Nazi, and communist crimes), to punishing any genocide denial.⁶³ Croatia belongs to the latter group. It is visible that the provision regarding denial of specific criminal offenses is formed in an extensive manner, but what narrows the scope is the fact that it must be made publicly, suitable for incitement to violence or hatred and directed against certain groups⁶⁴ that are more restricted than in the first paragraph provision. The categories of language, gender, sexual orientation, gender identity, disability and the possibility of any other characteristics are left out. This is to some extent understandable given the genocide incrimination in Art. 88 of the Penal Code refers to national, ethnic, racial, or religious groups, but without origin and skin color, so there is also room for alignment. Lastly, since the general

op. cit., note 15, p. 455

⁶¹ European Commission against Racism and Intolerance Report on Croatia (fourth monitoring cycle), CRI (2012) 45, adopted on 20 June 2012, published on 25 September 2012, [<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/croatia>], Accessed 2 March 2022, p. 11

⁶² Lobba, P. *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, The European Journal of International Law, Vol. 26, No. 1, 2015. pp. 237-253, p. 238

⁶³ Herceg Pakšić, *op. cit.*, note 5, p. 238. For an overview of relevant comparative law, see the judgment of the European Court of Human Rights in Dogu Perinçek v Switzerland, Application 27510/08 of 15 October 2015, Part IV, Comparative Law materials, para. 91 - 96 and 255 - 257 and the Report from the Commission to the European Parliament and the Council of 17 January 2014 on the implementation of Council Framework Decision 2008/913 / JHA on combating certain forms and means of expressing racism and xenophobia by criminal means, [<http://eur-lex.europa.eu/legal-content/EN/TXT/?Uri=CELEX%3A52014DC0027>] Accessed 12 February 2022

⁶⁴ Herceg Pakšić, *op. cit.*, note 5, p. 239

provision on attempt is related to a sentence of five years or more, and is applicable only to paragraph 2, it was necessary to provide a special provision dealing with punishment of attempt applicable to paragraph 1 and 4. Concerning the selection of the victim by the perpetrator, Croatian criminal law accepts the discriminatory selection model, meaning selection is based on actual or presumed affiliation to a specific group. This is an objective approach, not requiring the presence of negative emotions towards the victim(s) from the side of the perpetrator. It is not needed to have the proof of “hate”, i.e., hatred as a personal attribute of the perpetrator (hostility model).⁶⁵ In relation to the prevalence of hate speech in everyday life, criminal convictions are rare. Recent judgments confirm that hate verbalization has shifted from offline to online modality, specifically through social networks publishing hateful comments towards people of homosexual orientation⁶⁶, towards police officers and their children⁶⁷, towards members of religious and national groups⁶⁸ or ethnic groups.⁶⁹

In addition, there are criminal law provisions regarding *Incitement to genocide* and *Incitement to crime of aggression* (both criminalized as public and direct) as well as *Incitement to terrorism* (criminalized as public).⁷⁰

2.3. Other Means of Reaction: Misdemeanour Law in Focus

Polish petty offences law does not provide any direct sanctions for certain forms of speech, which could be treated as minor unlawful acts in the area of hate speech.

⁶⁵ Prosecuting Hate Crimes. A practical guide, OSCE, Office for Democratic Institutions and Human Rights (ODIHR), Poland 2014, [https://www.osce.org/odihr/prosecutorsguide] Accessed 4 January 2022, pp. 50-51. Also, Munivrana Vajda; Šurina Marton, *op. cit.*, note 15, p. 451

⁶⁶ Through his profile on Facebook, the perpetrator published a comment, related to an earlier event of violence against persons of homosexual orientation with the intention of inciting intolerance: “It is unfortunate that the consequences were not greater...”. Judgment of the Municipal Court in Novi Zagreb no. K-397/20-9 of 27 January 2021

⁶⁷ In his comment on Facebook, the perpetrator was inciting others to hate and violence against police officers and their children, writing “...all of them should be buried like rabbits, both them and their parents, and it should be done publicly as the example to others.” Judgment of the Municipal Court in Zadar no. K-43/20 of 17 September 2020

⁶⁸ In his comment on Facebook, the perpetrator published a photograph with citizens of Serbian nationality leaving the territory of the Republic of Croatia during the military police operation expressing intolerance of them and additionally calling out police officers. Judgment of the Municipal Court in Zadar no. K-568/17 of 31 July 2020

⁶⁹ On his Instagram profile, he posted content aimed at immigrants as a group of a different ethnicity, urging other people to bring weapons to a certain place at a certain time to deal with immigrants. Judgment of the Municipal Criminal Court in Zagreb no. K-181/20-2 of 30 January 2020

⁷⁰ Art. 88 and 89 (both paragraph 3) and 99 of the Penal Code

The Code of Petty Offences⁷¹ contains a group of provisions regarding protection for, broadly understood, public order and peace. Among the offenses consisting of disturbing the peace or public order, the most serious and the most frequently committed offenses include excessive behavior (Art. 51 of the Code of Petty Offences) and public incitement to commit an offense (Art. 52a of the Code of Petty Offences). Such offenses are punishable by imprisonment (5-30 days), the penalty of restriction of liberty for 1 month or a fine (PLN 20-5000). The subject of protection is the right of citizens to undisturbed peace and public order as well as an undisturbed night's rest, meaning that any act that goes beyond the general or customary norms of social behaviour is not allowed.⁷²

If the perpetrator's behaviour consists in shouting thus disrupting peace, public order, or night's rest, depending on the content, it may also be an offence under Art. 256 § 1, or Art. 257 of the Penal Code. In case of the event of a simultaneous commitment of the criminal offence and misdemeanor, Art. 10 of the Code of Petty Offences is applied, meaning it is adjudicated for a crime and a misdemeanour, however, if a penalty or a penal measure of the same type has been ordered for a crime and a misdemeanour, a more severe penalty or penalty measure is imposed.⁷³ It is permissible (pursuant to Article 10) to conduct two parallel or sequential proceedings in the event that separate proceedings concern a different part of the same act.

In Poland, there are also other provisions that may contain elements counteracting hate speech, e.g., in the Labour Code or the provisions implementing EU legislation in the field of equal treatment. For example, despite the broad protection of the freedom of expression, the Polish Constitution allows for restrictions of television broadcasters. Such restrictions are introduced by Art. 18.1 of the Broadcasting Act⁷⁴, according to which programs or other broadcasts must not promote activities contrary to the law, with the Polish *raison d'état*, as well as attitudes and views contrary to morality and social good and they must not contain incitement to hatred or discrimination on the grounds of race, disability, sex, religion, or nationality.⁷⁵

⁷¹ Act of 20 May 1971 – Code of Petty Offences (consolidated text, Journal of Laws 2021, item 2008)

⁷² Decision of the Polish Supreme Court of May 22, 2019, IV KK 219/18

⁷³ Krajnik, S., *Wykroczenia przeciwko porządkowi publicznemu i spokojowi publicznemu*, in: Lachowski, J. (ed.), *Kodeks wykroczeń. Komentarz*, Wolters Kluwer Polska, Warszawa 2021, p. 222

⁷⁴ Act of 29 December 1992 r. - Broadcasting Act (consolidated text, Journal of Laws 2020, item 805 as amended)

⁷⁵ Ossowska-Salamonowicz, D., *Art. 18*, in: Niewęglowski, A. (ed.), *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa 2021, [<https://sip.lex.pl/#/commentary/587837648/635088/nieweglowski-adrian-red-ustawa-o-radiofonii-i-telewizji-komentarz?cm=URELATIONS>], Accessed 22 April 2022

Besides the criminal law mechanism reserved for the most serious hate speech forms, the Croatian system provides misdemeanor law reaction in this area through several legal acts. The Misdemeanours against Public Order and Peace Act⁷⁶ provides sanctions for, *inter alia*, specific forms of expression. Fines and, exceptionally, imprisonment are imposed for offenses under this act, with the possibility of imposing various protective measures. This act is one of the longest-lasting legal acts in Croatia (dates back in 1977), certainly outdated in some respects. The fine (between 27 and 160 EUR) or imprisonment of up to 30 days will be imposed for performance and reproduction of songs, compositions and lyrics or wearing or displaying symbols, texts, images and drawings at a public place, thus disturbing public order and peace (Art. 3b). Another important act is the Prevention of Disorder at Sporting Events Act⁷⁷ aiming to prevent, suppress and sanction inappropriate behaviour, riots, and violence before, during and after sports competitions or sporting events. Pursuant Art. 4, para.1, along with Art. 39, attempt to insert and display a banner, flag or other items with a text, image, sign, or other feature expressing or inciting hatred or violence based on racial, national, regional, or religious affiliation are punishable with a fine (between 267 and 2000 EUR) or imprisonment up to 30 days. Pursuant Art. 4, para.1, along with Art. 39a, singing songs or expressing messages with content expressing or inciting hatred or violence based on racial, national, regional, or religious affiliation, are punishable with a fine (between 667 and 3333 EUR) or imprisonment between 30 and 60 days, and sanctioning can be more severe if the misdemeanour is repeated within a two-year period. The Anti-Discrimination Act⁷⁸ ensures the protection and promotion of equality as one of the highest values. Pursuant to Article 25, a fine (between 667 and 4000 EUR) is provided for violation of dignity with the purpose of causing fear or creating a hostile, degrading or offensive environment based on differences in race, ethnicity, skin colour, gender, language, religion, political or other beliefs, national or social background, wealth, union membership, social status, marital or family status, age, health, disability, genetic inheritance, gender identity or expression and sexual orientation). It is worth mentioning that within Croatian media law there are provisions containing anti hate speech features, as well as the Gender Equality Act⁷⁹ and the Life Partnership of the Same Sex Persons Act⁸⁰ with their provisions on discrimination prohibition.

⁷⁶ Official Gazette No. 41/1977, 47/1989, 55/1989, 83/1989, 47/1990, 55/1991, 29/1994

⁷⁷ Official Gazette No. 117/2003, 71/2006, 43/2009, 34/2011

⁷⁸ Official Gazette No. 85/2008, 112/2012. This Act contains provisions in accordance with Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19 July 2000)

⁷⁹ Official Gazette No. 82/2008, 125/2011, 20/2012, 138/2012, 69/2017

⁸⁰ Official Gazette No. 92/2014, 98/2019

This dual possibility of a repressive reaction in the area of hate speech is overshadowed by the challenge of appropriate demarcation followed by inconsistency in case law. In favour of a more functional and precise solution, positions advocating restrictive criminal law application⁸¹ should be accepted.

The most recent legislative innovation in the field of combating hate speech is the adoption of the new Electronic Media Act.⁸² Debates regarding the modalities of responsibility related to illegal content and behaviour on the Internet began two years earlier, in the beginning of 2019.⁸³ Even though this Act regulates the rights, obligations and responsibilities of legal and natural persons engaged in the provision of audio and audiovisual media services, electronic publishing services and video sharing platforms, most of the discussion focused on the issue of accountability for content published in comments to online articles.⁸⁴ In accordance with relevant provisions, it is prohibited to incite, favor, or promote hatred or discrimination as well as ideas of totalitarian regimes in audio and / or audiovisual media services.⁸⁵ The initial idea foresaw a greater scope of responsibility for platform providers and publishers, but the end result of accountability for user comments is that users will have to be registered, so the responsibility will not fall on the publishers but on the lawbreakers. To avoid being punished, media owners are obliged to change the rules for commenting, namely requiring user registration

⁸¹ See ECtHR, Case of *Stomakhin v Russia*, Application no. 52273/07, 9 May 2018, §117; United Nations Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35,4, [<https://www.refworld.org/docid/53f457db4.html>] Accessed 14 March 2022, point 12; Also, Munivrana Vajda, *op. cit.*, note 56, p. 368

⁸² Official Gazette No. 111/2021

⁸³ Herceg Pakšić, B. *Virtualna komunikacija i izazovi kaznenog prava novog doba*. In: Velki T., Šolić K. (eds.) *Izazovi digitalnog svijeta*, Fakultet za odgojne i obrazovne znanosti ,Sveučilište Josipa Jurja Strossmayera, Osijek, pp. 155-173, p. 161

⁸⁴ The European Court of Human Rights started creating standards in this field in 2015. The first case regarding liability for comments left by users on the Internet information portal: Case of *Delfi As v Estonia*, App. no. 64569/09, 16 June 2015. The Estonian portal Delfi was convicted of defamation published in user comments on its website, but due to the decision of the Estonian courts, it turned to the ECHR in 2009, referring to Art. 10 of the Convention. The ECHR unanimously found that Estonian news portal was justifiably held responsible for the content of anonymous and defamatory comments of its readers

⁸⁵ See Art. 14, Art. 21 par. 4, Art. 24 par. 1 of the Electronic Media Act. Discrimination is based on race or ethnic origin or color, sex, language, religion, political or other belief, national or social origin, property status, membership in trade union, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity, expression or sexual orientation, and anti-Semitism and xenophobia, ideas of fascist, Nazi, communist and other totalitarian regimes

along with clear and easily noticeable guidelines for comments and violation of legislative provisions.⁸⁶

3. CONCLUDING THOUGHTS ON REVEALED COMPARATIVE INSIGHTS

This comparative study revealed many similarities but also differences in the two analyzed legal systems. Consistent with the hypothesis from the outset, it can be said that, in terms of suppressing hate speech, these are indeed variations of the same general concept. Freedom of expression is a constitutionally guaranteed category in Poland and Croatia, and their constitutional courts have had the opportunity to make decisions regarding hate speech, although much less frequently than decisions on other issues in the area of freedom of expression. In both countries, hate speech is described as a constitutional category closely related to human rights and freedoms. Hate speech is present in everyday life, which is particularly evident from, for example, the ECRI reports, with national differences regarding its content and orientation towards certain groups. In both countries, legal terminology does not include the official notion of hate speech, but there are legal mechanisms to address its suppression. Both Poland and Croatia have adopted provisions intended for hate speech suppression, meeting this challenge by supporting the legal ban on hate speech imposing penal law sanctions. The main justification is the invocation of other values, the protection of which competes with freedom of speech. It is mainly about human dignity and equality.

There are specific findings regarding differences. First, within the penal law framework, both systems penalize public hate speech but the scope regarding protected groups significantly differs. Polish provisions fully protect only national, ethnic, racial, religious, or irreligious groups, which is notably narrower than in Croatia, where this list is much broader including racial, religious, national, or ethnic affiliation, language, origin, skin color, gender, sexual orientation, gender identity, disability, but can be even wider due to general clause “or other characteristics”. Despite many attempts, the Polish law has not yet managed to extend the catalog that differs from European standards.

Second, the Polish doctrine does not have a developed discussion or a specific choice on the victim selection model, while Croatia accepts the discriminatory

⁸⁶ Pursuant Art. 94, par. 3. The provider of the electronic publication is responsible for all content published on the electronic publication, including content generated by users if it fails to register the user and if it does not clearly and easily warn the user of commenting rules and violations. Failure to register and warn is subject to a fine for a legal entity in the amount of HRK 10,000.00 to HRK 50,000.00 (in accordance with Art. 99, par. 1, item 8)

selection model as an objective approach. However, the end result in both systems comes down to the same. Within the court process it is not necessary to prove the presence of negative emotions on the perpetrator's side.

Third, as far as the challenges in practice are concerned, the interpretation related to the notion of incitement to hatred prevails in Poland. However, it is believed that real hatred does not have to exist for the existence of the act as well as that real motivation does not have to be revealed. In Croatia, the most significant challenges are inconsistencies in prosecution, especially in misdemeanor law and, on the other hand, the over-extensive interpretation of protected groups.

Fourth, pertinent differences are demonstrated in the role of misdemeanor law in this area. Polish misdemeanor law does not contain incriminations for sanctioning hate speech. In the Croatian system, misdemeanor law has a significant role, providing reaction through several legal acts. The advantages of misdemeanor law over criminal law are emphasized considering the stance that the latter should remain reserved only for the most serious forms.

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