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COMPARATIVE AND DOGMATIC ISSUES OF HATE SPEECH-TRADITIONAL AND MODERN ACTS OF COMMISSION*

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ABSTRACT

Given that the criminal offense of Public Incitement to Violence and Hatred seeks to protect public order but also certain groups of individuals and limit freedom of speech, the paper provides a comparative legal analysis of this criminal offense through Anglo-Saxon and continental law and especially refers to the law of EU and EU Member States. The paper analyzes some dogmatic principles of criminal law that explain the conditions when Public Incitement to Violence and Hatred can be committed. Especially, the development of modern technology and modern way of communication and influence considered in the paper the possibility to affect different groups of people through incitement to hate speech. Hate crime precedes different riots that in times of social turbulence can lead to different criminal offenses that affect the economic, cultural, and environmental positive development of society. The paper gives a broader insight into the way this criminal offense can be committed, especially taking into account the act of committing Public Incitement to Violence and Hatred, connecting it to forms of committing this criminal offense in a "non-public" way through the traditional act of commission or using modern technologies (Social Networks, AI,...) and the dogmatic issue of special intent.

Keywords*: EU law, hate speech, non-public commission, special intent*

1. INTRODUCTION

It is impossible to assess the importance of freedom of speech in a democratic society. However, determining the limits of freedom of speech is always problematic.[1]

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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, 2020, pp. 225-248.

When we talk about incitement, we mean encouraging or persuading another to commit a criminal offense. Incitement consists of persuading, encouraging, directing, pressuring, or threatening (under the condition that it is not indirect perpetration) so that another commits a criminal offense. Incitement is defined as influencing others to undertake certain forms of behaviour including committing criminal acts using threats or propaganda.[2] Incitement in international law requires direct and explicit encouragement together with the direct intent to commit a criminal offense or awareness of the likelihood that a criminal offense may be committed and the perpetrator accedes to it.[3] Inciting speech can be implicit where the meaning is undoubtedly given through the social context and the listener's understanding of the message.[4] However, on the issue of hate speech, the author's views, on the world level are not unique.[5]

The Institute of Incitement to Violence and Hatred has a long history. Historically speaking, its development goes back to the crimes against humanity associated with Nazism. History teaches us that the advancement of theories about racial supremacy and their accepted proclamation leads to the inequality of citizens and the physical abuse of members of minority groups.[6] Previous jurisprudence focused primarily on racial hatred and incitement to racial hatred and the fact that such incitement ultimately resulted in genocide.

The challenge for every society is confronting the legal system in defining which speech should be allowed, that is, which speech represents protection from the interference of public authorities. Although there is numerous jurisprudence on what speech is permissible and what speech is not permissible, for example, Anglo-Saxon jurisprudence has not established a clear definition of what speech is permissible and what speech is not permissible.[7] We can say that particularly severe forms of hate speech can be a threat to the functioning of a democratic society and represent a force that can undermine fundamental values such as respect and solidarity. It is a speech that verbally attacks a person or a group of persons because

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2 Fino, A., *Defining Hate Speech*, Journal of International Criminal Justice, Vol. 18, No. 1, 2020, pp. 31-57.

3 Cassese, A., *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 189.

4 International Tribunal for Ruanda, *The Prosecutor v Jean-Paul Akayesu (Trial Judgement),* ICTR-96-4-T par. 557.

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, p. 230.

6 Hughes, G., *Prohibiting Incitement to Racial Discrimination*, The University of Toronto Law Journal, Vol. 16, No. 2, 1966, pp. 229-253.

7 Crane, J., *Defining the unspeakable: Incitement in Halakhah and anglo-american jurisprudence*, Journal of Law and Religion, Vol. 25, No. 2, 2009, pp. 329-356.

of different origins, races, gender, sexual orientation, religion, or other criteria.[8] It is known that words can cause many things, and one of the effects is that they can cause significant evil. Words can cause direct psychological harm, but they can also directly or indirectly affect causing physical violence. In the context of mass violence, words are used to create and reinforce social relations in a negative sense.[9] It is clear that there is freedom of speech, but there are also some limits to freedom of speech. When defining what hate speech is, the judgment of the public is not always important, and it must be an objective judgment that can encourage listeners to act. On the other hand, denying freedom of speech can lead to frustrations that can affect the sense of honour and value as an image of oneself. If speech is forbidden, then different ideas are also forbidden. If speech is prohibited with the best intentions, then speech with bad intentions can easily be prohibited.[10] Namely, if speech is forbidden, then it is possible that the accumulated frustration later manifests itself in the worst possible way in the form of violence. However, we must not forget that hate speech itself can cause incalculable damage to individuals and society as a whole. When analysing hate speech in continental law, a restrictive understanding is necessary because incitement to violence and hatred must be distinguished from other forms of speech such as Insults and Defamation.

The significance of hate speech for the environment is indirect. In times of prosperity culture and environment can develop, but during a crisis in society, unfortunately, culture and environment aren't a priority. That is the reason why this paper aims to analyse from a comparative perspective hate speech that can be committed in a traditional or modern way. Paper on example of Croatia aims to see whether current legislation is sufficient for fighting traditional and modern acts of commission of hate speech from dogmatic point of view.

2. UNITED STATES OF AMERICA

The American approach is characterized by the understanding that there must be absolute freedom of speech and that the market of ideas will crystallize which idea is correct, thus recognizing all forms of expression. In the US, various laws have been enacted to respond to hate speech, such as the Hate Crime Statistics Act, the Religious Vandalism Act, and the Fair Housing Act, which determine compensation or punishment for various forms of hate crime.

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8 Alkiviadou, N., *The Legal Regulation of Hate Speech: The International and European Frameworks,* Croatian Political Science Review, Vol. 55, No. 4, 2018, pp. 203-229.

9 Fyfe, S., *Tracking hate speech as incitement to genocide in international criminal law*, Leiden Journal of International Law, Vol. 30, No. 2, 2017, pp. 523-548.

10 Hughes, *op. cit.* note 6, p. 363.

In the US, the Supreme Court found that the limitation of speech is possible if a person uses fighting words,[11] because certain forms of expression do not serve the purpose of exchanging ideas in society therefore, they are not protected by the first amendment. Limitation of speech is possible if it represents an actual threat[12], direct incitement[13], intentional public defamation[14], obscenity[15], and child pornography[16]. Courts in the USA analysed the different forms of speeches, in the case of *Roth v United States*[17] and *Beauharnais v Illinois*[18] and concluded that there is speech that is not protected by the Constitution, but it needs to be analysed in an individual context. Unlike many human rights documents, speech cannot be limited simply because it contains hate in its content.[19]

Incitement law in the US analyses the likelihood that certain speech will lead to the commission of illegal acts. Fighting words are not protected by the First Amendment because they are likely to incite violence in society, not because they express the prejudice of the speaker. Namely, ideas may not be suppressed simply because they are wrong or unpopular.[20] The degree of injury can be considered through direct damage and indirect damage. Direct damage is encompassing those actions that the legal order wants to prevent, while indirect damage to fighting words consists in the fact that they can cause immediate damage. Therefore, the state tries to prevent speech that represents indirect damage to society so that no direct damage occurs. Therefore, in the US, the question arises whether, in times of peace and prosperity, it would be possible to incite violence and hatred in society if it is obvious that no injury will occur. The answer is negative because there is no concrete endangerment.[21] Since US law is based on precedents, the paper will present some important rulings.

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11 Supreme Court USA, *Chaplinsky v N.H.*, 315 U.S. 568, 572 (1942).

12 In this case, the existence of intent to intimidate is necessary. Supreme Court USA, *Virginia v Black*, 538 U.S. 343 (2003).

13 Supreme Court USA, *Brandenburg v Ohio*, 395 U.S. 444, 447 (1969).

14 Supreme Court USA, *N.Y. Times v Sullivan*, 376 U.S. 254, 279-80 (1964).

15 Supreme Court USA, *Roth v U.S.*, 354 U.S. 476, 484 (1957).

16 Supreme Court USA, *N.Y. v Ferber*, 458 U.S. 747,764 (1942). The welfare of children is the more important and overriding interest.

17 Supreme Court USA, *Roth v United States,* 354 U.S.C. 476 (1957).

18 Supreme Court USA, *Beauharnais v Illinois* 343 U.S.C. 250 (1952).

19 Saslow, B., *Public enemy: The public element of direct and public incitement to commit genocide*, Case Western Reserve Journal of International Law, Vol. 48, No.1-2, 2016, pp. 417-449.

20 Supreme Court USA, *Texas v Johnson*, 491 U.S. 397 (1989); Fisch, W.B., *Hate Speech in the Constitutional Law of the United States*, The American Journal of Comparative Law, Vol. 50, 2002, pp. 463-492.

21 Crane, *op. cit.* note 7, p. 343.

In the case of *R.A.V. against City of St. Paul, Minnesota*,[22] Court found that R.A.V. was a minor and that he with different actions intended to intimidate the immigrant family so that they would not feel welcome in the neighbourhood. R.A.V. was convicted of a criminal offense. If it is a behaviour that represents an injury or is intended to incite immediate violence, then such behaviour is not protected by the First Amendment to freedom of speech.[23] The distinction between action and speech came before the court in the case of the *U.S. v O'Brien*, where the Supreme Court found that prescribing the burning of draft military ID cards as a criminal offense is not a violation of the First Amendment, and such burning does not constitute freedom of speech. O'Brien was an opponent of the war in Vietnam. The US has mandated that all young men over the age of 18 registers and receive a registration card. O'Brien burned his ID card along with three other friends, claiming that he wanted to express his protest against the Vietnam War. Namely, although O'Brien was free to protest, he had to have an ID card. Taking into account the elements of speech and conclusive actions, it is necessary to see if there is a sufficiently important state interest in regulating non-speech elements. Such restriction of freedom of speech and non-speech elements must meet some requirements such as that: the government must be authorized to act following the Constitution; it must be an important or essential governmental interest; such interest must not be connected to speech restriction (for example, if the speech is about neutral content); the ban on speech must be limited only to the extent that it is essential to an important government interest. Congress has the power to mobilize the military, and the ID allowed the whole system to function normally. Registration and mobilization of the army took place independently of freedom of speech. The court did not see an alternative so that the system could function normally without the draft card, and for this reason, its destruction was prohibited. O'Brien was convicted for non-communicative impact. Namely, O'Brien had other means at his disposal and could express his disagreement in another way, and not by burning the card.

In the case of *Beauharnais v Illinois*,[24] the Supreme Court established that a form of speech that represents libellous, insulting, or fighting words is prohibited. In the case of *Chaplinsky v New Hampshire*,[25] fighting words were defined as those the uttering of which would constitute an injury or an attempt to incite an imminent breach of the public peace.

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22 Supreme Court USA, *R.A.V. v City of St. Paul*, 505 U.S. 377 (1992).

23 Fisch, *op. cit*. note 20, p. 464.

24 Supreme Court USA, *Beauharnais v Illinois,* 343 U.S. 250 (1952).

25 Supreme Court USA, *Chaplinsky v New Hampshire,* 315 U.S. 568 (1942).

In the case of *Brandenburg v Ohio*,[26] the Supreme Court found that only speech that was intended to incite or create an imminent illegal act or was likely to incite or create such an act could be prohibited. The instigator does not have to succeed in intending the audience to commit violence.[27] The Supreme Court ruled that the use of the swastika is a symbolic form of freedom of speech that is protected by the First Amendment and that the swastika itself does not represent fighting words, that is, words spoken or written to incite violence and hatred. The Supreme Court concluded that it was necessary to see whether those listening to such speech were likely to take immediate action in reaction to such speech.[28] A causal link must exist between speech or incitement and potential injury. It is necessary to analyse the speaker, the stated content, and the audience to whom the messages are directed, and if it is not likely that the audience will cause a violation of some legal good, then there is no concrete endangerment.[29]

In US law, speech likely to incite an audience to harm neighbouring persons is properly subject to state interference according to the rights of freedom of speech. As a result of the above, there is a tendency to consider the immediacy of danger through the "clear and present danger test", but this standard does not define "proximity and degree", that is, whether proximity should be interpreted through temporal or spatial immediacy or both.[30] Therefore, it can be concluded that US law protects the primacy of free speech except when there is a clear and imminent danger of illegal action.[31] In addition to the requirement of immediacy, US law also requires the likelihood that the statement will lead to violence.

3. THE UNITED KINGDOM WITH EMPHASIS ON NORTHERN IRELAND

In the UK, incitement to hatred has been banned since 1965 under the Race Relations Act. Incitement to hatred based on religion was prohibited in 2006 under the Racial and Religious Hatred Act, and incitement to hatred based on sexual orientation was made punishable under the Criminal Justice and Immigration Act 2008. Incitement is defined as encouragement or as harassment and stirring

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26 Supreme Court USA, *Brandenburg v Ohio*, 395 U.S. 444 (1969).

27 Tanenbaum, R.S., *Preaching terror: Free speech or wartime incitement*, American University Law Review, Vol. 55, No. 3, 2006, pp. 785-819.

28 Benesch, S., *Inciting Genocide, Pleading Free Speech*, World Policy Journal, Vol. 21, No. 2, 2004, pp. 62-69.

29 Crane, *op. cit.* note 7, 331.

30 *Ibid*., p. 336.

31 Hughes, *op. cit.* note 6, p. 367.

up hatred.[32] This is especially important in the case of incitement to hatred since it is directed towards a certain group. Therefore, within the framework of hatred, it is necessary to distinguish and understand those words that are threatening, and those words that are offensive or attacking.[33] Therefore, in UK law, an acceptable defence is that the person merely wanted to express insult or aversion to a group. Nevertheless, the term incitement remains dominant in international law. The term incitement has a more serious tone but is also significant in the criminal law literature because using the term incitement still emphasizes the seriousness of criminal offenses that are the subject of public incitement.

Incitement to hatred has been punishable in Northern Ireland since 1970. Despite being punishable, very few proceedings were brought to court.[34] In 1976, there were changes to the law in which incitement to racial hatred was especially emphasized. However, the intent was marginalized so it was enough that there was a sufficient probability that certain words or materials would incite hatred. No intent was specifically required. The Public Order Act of 1987 regulated incitement to hatred. The aforementioned law prohibits stirring up hatred or arousing fear. Unlike earlier regulations, the law no longer uses the term incitement.[35] Actions that are intended or likely to incite hatred or fear concerning groups defined by religious belief, colour, race, nationality, or ethnic or national origin are now regulated. Sexual orientation and disability were added as protected categories by the Criminal Justice (No.2) Order of 2004. The 1987 Act easies the intent criterion in such a way that an offense exists if a person intends to incite hatred or cause fear or, taking into account all the circumstances, hatred under these circumstances is likely to be stirred up or fear to be provoked. Ultimately, the Justice Act of 2011 prescribes the punishment of chanting, which is chanting at football matches, because chanting is indecent, is sectarian, or consists of threats, insults, or insults towards people with common characteristics of skin colour, race, nationality, ethnic or national origin, religious belief, sexual orientation or disability.

Certainly, different authors in the UK and Northern Ireland agree that perhaps some other ways of fighting against incitement to hatred and violence should be taken into account because this kind of legislation has reshaped hate speech in the

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32 Coliver, S. (ed.), *Striking a balance: Hate Speech, Freedom of Expression and Non-discrimination*, 1992, [https://www.article19.org/data/files/pdfs/publications/striking-a-balance.pdf], Accessed 28 May 2022.

33 Goodall, K., *Incitement Religious Hatred: All Talk and no Substance?,* The Modern Law Review, Vol. 70, No. 1, 2017, pp. 89-113.

34 McVeigh, R., *Incitement to Hatred in Northern Ireland*, Equality Coalition, Northern Ireland, 2018, p. 2.

35 Coliver, *op. cit.* note 32, pp. 267-268.

public and not eradicated it.[36] Namely, the law of Northern Ireland thus erases the difference between hate speech and insults.

4. EUROPEAN LAW

It was previously stated that there are documents of certain bodies that regulate hate speech. Thus, the Recommendation of the Committee of Ministers on Hate Speech from 1997[37] states that hate speech includes expressions that spread, incite, promote or justify a form of hatred based on intolerance, including intolerant expression, discrimination, and hostility.

The Council's Framework Decision 2008/913/PUP for Combating of Certain Forms and Expressions of Racism and Xenophobia from 2008 correctly defines incitement and intent, in opposite to Art. 4. of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: ICERD), which punishes only the spread of ideas. However, the EU has not taken any further measures against the sanctioning of hate speech, for example by civil law. The aforementioned Framework Decision on Racism and Xenophobia determined that all Member States must foresee the following behaviours as punishable by their legislation: 1. public incitement to violence and hatred towards others and members of certain groups based on race, skin colour, religion, national origin, and ethnicity; 2. public incitement to violence with the distribution of leaflets, pictures or other material in public, and 3. public condoning of crimes against humanity, war crimes or aggression, directed against a group, person or member of any of the aforementioned groups, if committed in a manner likely to incites violence or hatred.[38] The Framework Decision foresees the duty to sanction both natural and legal persons. Also, the special maximum for punishing this criminal offense is three years in prison. The Framework Decision on Racism and Xenophobia requires effective, proportionate, and dissuasive sanctions.[39] However,

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[36] Pesinis, A., *The Regulation of Hate Speech,* Budapest, 2015, p. 98, [www.etd.ceu.hu/2016/pesinisantonios.pdf], Accessed 28 May 2022.

[37] *Council of Europe's Committee of Ministers Recommendation 97 (20) on Hate Speech*, [https://rm.coe.int/1680505d5b], Accessed 28 May 2022.

[38] *212. Tribina Pravnog fakulteta u Zagrebu, Gdje prestaje sloboda izražavanja, a počinje govor mržnje- neke kaznenopravne dileme*, Zagreb, 2017, p. 7, [https://www.pravo.unizg.hr/images/50018419/212%20Surina%20Marton%20Munivrana%20Vajda%20travanj%20L(1).pdf], Accessed 28 May 2022.

[39] On the law of the European Union and the Council of Europe, see more in Herceg Pakšić, B.; Habrat, D., *Comparative Views on a Permanenet Challenge: Hate Speech sanctioning in Poland and Croatia*, ECLIC, 2022, pp. 289-314. Important case law for hate speech are European Court of Human Rights, *Vajnai v Hungary*, App. no. 33629/06, 8 July 2008 and European Court of Human Rights, *Vona v Hungary*, App. no. 35943/10, 9 December 2013.

the Framework Decision also provided the possibility of restrictions for Member States, all following their legal tradition and legal system, which the Republic of Croatia did not take advantage of. Hate speech was implemented in the Criminal Code of the Republic of Croatia (further: CCC) on a broader basis than the Framework Decision required, so the CCC punishes "calls" to violence and hatred towards groups based on their gender, sexual orientation, gender identity or other characteristics, as well as organizing and leading a group as well as an attempt of that criminal offense.[40]

However, hate speech is also present on the Internet today. The fight led by the EU in the framework of the misuse of social networks using Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services in the internal market is insufficient.[41] Namely, according to this EU document, there is ambiguity about the types of services that are provided, so instead of facilitating the fight against hate speech, there are additional difficulties in that fight.[42] Now when we can see that legal provisions in the EU concerning hate speech can be found in ambiguity, the real conclusion is that parameters for AI technology that would suppress hate speech on the Internet can't be established.[43] European Parliament refers to "smart robots" which function with a degree of autonomy using AI. If AI can be used to replacement of humans in suppressing hate speech then AI can commit damage.[44] Ethics Guidelines for Trustworthy AI with the final version published in 2019 prescribes that the use of AI should be based on legality, ethics, and social and technical resilience in favour of humans. Unfortunately, Ethics Guidelines disregard criminal law.[45] Scientists are working on a project of software that could assist persons (police, editors of websites…) towards suspected criminal offenders connecting relevant data with hypotheses of future action.[46] Still, algorithms that fight AI create humans and control humans

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40 *212. Tribina Pravnog fakulteta u Zagrebu, Gdje prestaje sloboda izražavanja, a počinje govor mržnje- neke kaznenopravne dileme*, Zagreb, 2017, p. 7 [https://www.pravo.unizg.hr/images/50018419/212%20Surina%20Marton%20Munivrana%20Vajda%20travanj%20L(1).pdf], Accessed 28 May 2022.

41 Roksandić Vidlička, S.; Mamić, K., *Zlouporaba društvenih mreža u javnom poticanju na nasilje i mržnju i širenju lažnih vijesti: Potreba transplantiranja njemačkog Zakona o jačanju provedbe zakona na društvenim mrežama*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 25, No. 2, 2018, pp. 329-357.

42 *Ibid.*

43 Roksandić, S., Internet sve više postaje svojevrsna arena govora mržnje, [https://www.glas-slavonije.hr/416902/11/Internet-sve-više-postaje-svojevrsna-arena-govora-mrznje], Accessed 19 December 2022 .

44 Vuletić, I.; Petrašević, T., *Is It Time to Consider EU Criminal Law Rules on Robotics?,* Croatian Yearbook of European Law and Policy, Vol. 16, No. 1, 2020, pp. 225-244.

45 *Ibid*., p. 229.

46 *Ibid.,* p. 231.

because of content on the Internet that is ambiguous, ironic, or sarcastic. One of the mechanisms to fight hate speech encompass so-called "hashes", which are part of the metadata of certain content, if it's reported as illegal, such content enters the database of "hashes" and stops such content in the future.[47]

5. GERMANY

The highest courts in Germany have concluded that they strive to protect the truth at all costs and do not look so much at the injury that can result from hate speech in that case. The regulation and prevention of hate speech in Germany are mostly based on bad experiences during the Nazi regime and extremist policies. Germany harmonized its legislation with Art. 19. of the International Covenant on Civil and Political Rights (further: ICCPR) through the limitations of Art. 19 par. 3. of ICCPR. Thus, the StGB proclaims the principle of legality, because each regulation must be precisely determined to enable the addressees to adjust their behaviour. StGB implies the existence of a legitimate aim because it is necessary to protect the rights and reputation of others or to protect national security and public order, health, or morals. Any limitation of freedom of expression must be necessary in a democratic society, that is, it is necessary to prove the necessity and proportionality of individual action, and in particular to prove the direct and immediate connection between expression and a threat to public order. The provision of public incitement to violence and hatred does not require special intent, therefore the court does not need to analyse the motives and aims of the perpetrator and the attitude of the perpetrator that was present in the commission of the specific criminal offense.[48] When the StGB prescribes as punishable hatred directed towards parts of society or specific social groups, it also refers to other groups that are not exhaustively listed in the StGB.[49] Acts of perpetration under the StGB that regulate hate speech are incitement to hatred, incitement to violence or arbitrary measures, defamation through publication or distribution of materials, introducing minors to such materials, or importing, exporting, purchasing, or distributing such materials. In addition to the aforementioned criminal offense, it is also prescribed as punishable in Art. 46 par. 2. of the StGB that a motive that is racist, xenophobic, or of another inhuman or contemptuous nature

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47 Roksandić, S., Internet sve više postaje svojevrsna arena govora mržnje, [https://www.glas-slavonije.hr/416902/11/Internet-sve-više-postaje-svojevrsna-arena-govora-mrznje], Accessed 19 December 2022.

48 Coliver, *op. cit.* note 32, pp. 164-165.

49 *Country Report: Germany: Responding to „hate speech"*, 2018, p. 13, [https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-%E2%80%98hate-speech%E2%80%99-v3-WEB.pdf], Accessed 28 May 2022.

should be taken into account as an aggravating circumstance when sentencing. StGB punishes Incitement to Hatred according to Art. 130 of the StGB, the attempt to commit a Criminal Offense using Publishing in Art. 130a of the StGB, Dissemination of propaganda material of unconstitutional and terrorist organization in Art. 86 of the StGB and the Use of symbols of the unconstitutional and terrorist organization in Art. 86a of the StGB.

However, as Roksandić and Mamić state, Germany went one step further in regulating hate speech on the Internet by passing a special law, the Network Enforcement Act, which establishes the regulation of social network responsibilities, while prohibited content is defined through the existing StGB.[50] This law recognized the dangers of public insults and defamation, in spreading hate speech.[51]

6. PUBLIC INCITEMENT OF VIOLENCE AND HATRED (ART. 325 OF THE CC IN CROATIA)

Hate speech includes an expression that can include verbal and non-verbal forms of expression. Art. 325 of the Criminal Code in Croatia[52] strives to suppress violence and extremism in society. Currently, the interpretation of Art. 325 of the CCC is that a criminal offense has been committed if there is a call to action, and then a criminal offense under Art. 325 of the CCC should be interpreted as a criminal act of concrete endangerment.

When assessing the likelihood of committing the criminal offense of Public Incitement to Violence and Hatred, we need to analyse the imminence of violence.[53] Nevertheless, Art. 325 of the CCC should be interpreted restrictively, and the existence of a potential disturbance of public order should be required.[54] It is clear that by spreading hate speech according to one of the grounds mentioned in Art. 325 of the CCC, the perpetrator intends at the same time to call public order into question with this statement. Therefore, *ratio legis* is the protection of public order, but also, indirectly, the protection of the rights of a certain group. For the

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50 See more in Roksandić Vidlička; Mamić, *op. cit.*, note 41, p. 341.

51 *Ibid.,* p. 342.

52 Criminal Code of Croatia, Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

53 Fyfe, *op. cit.,* note 9, p. 527.

54 Regarding the prevention of crime, in the last few years, the judicial practice has been more restrictive and it is required that there has been very imminent danger of the public disorder, and not only some abstract violation of legal principles. *212. Tribina Pravnog fakulteta u Zagrebu, Gdje prestaje sloboda izražavanja, a počinje govor mržnje- neke kaznenopravne dileme*, Zagreb, 2017, p. 8, [https://www.pravo.unizg.hr/images/50018419/212%20Surina%20Marton%20Munivrana%20Vajda%20travanj%20L(1).pdf], Accessed 28 May 2022.

criminal offense of Art. 325 of the CCC to be realized, it is necessary to connect a certain statement with a potential disturbance of public order and an imminent potential violation of the rights of a certain group. The aim of Art. 325 of the CCC is to prevent radicalization, recruitment, or propaganda. The glorification of a criminal offense must be distinguished from incitement because glorification does not threaten immediate violence or injury.[55] Constitutions protect provocative and insensitive speech when it causes rage or anger, so for that reason, that speech cannot be criminalized just because it is offensive, or because it is spoken with an emotional charge.[56] But if messages are disseminated in society and to the public to incite others to violence or hatred, such behaviour should be prohibited. Therefore, it is necessary to distinguish offensive from hate speech that has threatening content.

Analysing comments on the web is particularly problematic. This is a virtual world. This is where we run into the danger that only the written word is evaluated more severely than the spoken word because it is not always possible to read all the emotions and the entire context in the written text, which can be of importance and help in determining the intent.[57] However, violence and hatred are two close concepts that can be manifested in different ways, and hatred is a feeling that is created and that precedes violence. It is difficult to imagine the violence that is not previously conditioned by hatred, and these two concepts should be connected in legislation.

Despite the multitude of legal sources and the different understanding of hate speech by different authors, we can certainly mention the content of the UN Rabat Action Plan,[58] which sets a six-fold test that will help judges to determine whether a high threshold has been achieved in hate speech. Therefore, it is necessary to analyse: the context, which is of great importance when assessing whether a specific statement is likely to incite discrimination, hostility or violence against the target group; the speaker's position or status in society should be considered, especially whether it is an individual point of view or an organization's point of view from the perspective of the audience to whom the speech is addressed; intent,

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55 Van Landingham, R. E., *Words We Fear: Burning tweets and politics of incitement*. Brooklyn Law Review, Vol. 85, No. 1, 2019, pp. 37-83.

56 Tsesis, A., *Inflammatory Speech: Offense Versus Incitement*, Minnesotta Law Review, Vol. 97, No. 4, 2013, pp. 1145-1196.

57 More about regulating hate speech on the Internet and problems in European and Croatian legislation, see Roksandić Vidlička; Mamić, *op. cit.* note 41, pp. 329-357.

58 UN Rabat Action Plan, [https://www.ohchr.org/en/documents/outcome-documents/rabat-plan-action], Accessed 06 March 2023.

because negligence and carelessness are not sufficient for the act (conduct) of criminal offense; content and form of speech, so the content of speech constitutes one of the key elements and is a key element of encouragement; extent of the speech, so the scope of the speech includes its reach in terms of the public nature of the speech, the importance of the speech and the size of the audience; and likelihood, including imminence, and reasonable probability of the harm because incitement by definition is a participatory and not perpetration contribution. However, using the Rabat Action Plan when interpreting Art. 325 of the CCC, we should currently focus on concrete endangerment. Namely, the Rabat Action Plan, if we ignore imminence, can be interpreted that it is sufficient an act of an abstract endangerment (...a concrete statement likely to incite to...).

6.1. "Non-public" incitement to violence and hatred

When analysing the act of perpetration, the question arises as to whether the act of incitement must be undertaken in public or whether it can be undertaken secretly, or „not-publicly ". Art. 325 of the CCC states in its name and definition of a criminal offense (being of the criminal offense) that the incitement must be public, but in this case, we must not forget the possibility of substantial contribution and the provision of co-perpetration. For example, printing leaflets but not participating in their public distribution is particularly significant because it represents a substantial contribution, but still, printing leaflets is not an action undertaken in public, but secretly, so the question arises, is it possible to qualify "non-public" action under Art. 325 of the CCC, i.e. for Public Incitement to Violence and Hatred. Also, the question arises in case someone uses AI to create content that will incite violence and hatred but doesn't use it publicly, i.e. in the case when someone else will distribute/activate that content to the public.[59]

Objective theories of criminality, among which the formal-objective theory dominates, start from a restrictive understanding of the concept of the perpetrator of a criminal act, which means that a perpetrator is exclusively a person who has com-

[59] In case the creation of AI material is related with direct connection to public dissemination, without mediator, then rules of criminal responsibility should be applied. According to Vuletić and Petrašević, and Roksandić, Liepina and Ostapchuck, there is possibility of three models of criminal liability for AI. If AI is treated as mere tool, this case enables the liability of indirect offenders (programmer and producer). Second case is possibility of responsibility for the negligence of person for AI, where it is necessary to analyse reasonable foreseeability of the consequence. Third model will represent direct liability model. Vuletić; Petrašević, *op. cit.* note 44, p. 240; Roksandić Vidlička, S.; Liepiņa, L.E.; Ostapchuk, S., *Bioethical and Legal Challenges of Artificial Intelligence and Human Dignity*, in: Jovanović, M.; Virady, T. (eds.), Human Rights in the 21st Century, Eleven International Publishing, 2020, pp. 273-290.

mitted an act of commission, i.e. an act that constitutes the criminal being of a criminal offense.[60] By accepting this theory, the perpetrator of the criminal offense of Public Incitement to Violence and Hatred would be only the person who publicly incites violence and hatred. Persons who act "non-publicly" would commit aiding and abetting according to the formal-objective theory.

Subjective theories, on the other hand, starting from an extensive interpretation, consider a perpetrator to be anyone who, through his actions, in any way contributes to the realization of a criminal offense.[61] The reason for such an interpretation stems from the equalization of the quality of all contributions, that is, the actions by which the criminal offense was committed. In the previous cases, everyone participated in any way in the realization of art. 325 of the CCC, regardless of roles and quality of contribution, are co-perpetrators.

Among the mixed theories of criminality, the most important role is played by the theory of control over the criminal offense (Tatherrschaft). The aforementioned theory was adopted by Croatian legislation from the German legal system.[62] Thus, the theory of power over the criminal offense according to Roxin[63] requires the fulfilment of two assumptions: the existence of a joint decision to commit a criminal offense and the existence of a substantial, essential, noticeable contribution at the stage of the commission of a criminal offense.[64] According to the mentioned characteristics, the power over the action corresponds to direct perpetration, the power over the will of the direct perpetrator corresponds to indirect perpetration, and functional power is the guiding idea for determining co-perpetrators. In this way, Roxin forms the authority over the work of each of the co-perpetrators around the joint plan, given that the plan can only be realized from start to finish if all co-perpetrators fulfil their role. On the other hand, each of the co-perpetrators can ruin the plan if they give up their contribution to the realization of a criminal offense.[65] This means that if the criminal offense could have been committed even without disputed contribution, but the such contribution was valued as substantial during the creation of the plan and the division of roles, this contribution will not lose its

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60 Grozdanić, V.; Škorić, M.; Martinović, I., *Kazneno pravo, Opći dio*, Pravni fakultet, Rijeka, 2013, p. 150.

61 Horvatić, Ž.; Derenčinović, D.; Cvitanović, L., *Kazneno pravo, Opći dio II*, Pravni fakultet, Zagreb, 2017, p. 160.

62 About control over the criminal offense at forms of perpetration see more in Mrčela, M.; Vuletić, I., *Komentar Kaznenog zakona*, Libertin, Rijeka, 2021, p. 239.

63 The author in his textbook analyses these two elements in all places where power over the work is analysed. Roxin, C., *Strafrecht Allgemeiner Teil, Band II.*, Verlag C. H. Beck., Munich, 2003.

64 Sokanović, L.; Mijanić, V., *Delimitation of co-perpetration from aiding and abetting in the criminal offence of robbery*, ST OPEN, Vol. 1, 2020, pp. 1-19.

65 Mrčela; Vuletić, *op. cit.* note 62, p. 239.

co-perpetrator character. The lack of Roxin's conception is that it requires an important contribution in the stage of commission.[66] Therefore, if someone printed leaflets that someone else will distribute, around the city the next night, or created AI content where the mediator is necessary as a connection to the public, inciting to violence and hatred, he will not be punished as a co-perpetrator.

It is correct to understand that it is not logical to deprive a preparatory act of the quality of co-perpetrator contribution only for the reason that it was not realized at the time of the realization of the criminal offense. It is correct to claim that by governing his function, the co-perpetrator directs and controls the criminal offense as a whole. However, this does not mean that for co-perpetrators it is necessary that the criminal offense could not have been committed without individual contribution, it is necessary only that it could not have been committed in the form in which it was planned.[67] Therefore, the quality and meaning of the contribution must be examined in each case.

This question arises only in the case of a substantial contribution. Therefore, the person who prints leaflets inciting violence should be punished as a co-perpetrators even though he did not publicly undertake the act of incitement. Although Art. 325 of the CCC in criminal being mentions punishment for the person who makes leaflets available to the public, that term should be interpreted restrictively according to the principle *poenalia sunt restringenda*, encompassing only the person that distributes leaflets to the public, and the printing of leaflets secretly or "non-public" or creation of content using AI, should be interpreted as a substantial contribution in the meaning of the provision of co-perpetration. Further proof of the punishment of "non-public" actions is the possibility of punishing an indirect perpetrator for Public Incitement to hatred and Violence, who, for example, uses an organized apparatus of power and acts as such in a non-public manner because he secretly establishes control over the criminal offense, that is, control over a person (direct perpetrator) who will act publicly. Likewise, Public Incitement to Violence and Hatred is not a criminal offense where only the perpetrator must personally commit action (conduct). Therefore, we can conclude that such non-public action can be label as a non-public act of perpetration,[68] because ultimately the perpetrator who acted secretly will be punished for Public Incitement to Violence and Hatred. Here, the intent of the perpetrator who acts

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66 Sokanović; Mijanić, *op. cit*. note 64, p. 4. On possible important contribution in the stage of preparation, see more in Welzel, H., *Das deutsche Strafrecht*, De Gruyter, Berlin, 1969, p. 111.

67 Novoselec, P., *Opći dio kaznenog prava*, Pravni fakultet Osijek, Osijek, 2016, p. 324.

68 Vukušić, I.; Mišić Radanović, N., *Javno poticanje na nasilje i mržnju kao oblik diskriminacije – kaznenopravni i građanskopravni aspect*, Pravni sistem i zaštita od diskriminacije, Kosovska Mitrovica, 2015, p. 143.

"non-public" is important, because such a perpetrator must have the intent that the result of his action will subsequently manifest itself in public. Here, judicial practice will deal with the content of the term public at, for example, encrypted individual communication between two or more interlocutors, especially if there are perhaps 100 users in a closed group (WhatsApp, Viber, etc.).[69] In this case, we are speaking about incitement to commit a specific criminal offense in the sense of the provision of the General Part of the CCC if members of that group can be individualized,[70] all depending on how "closed type" the group is.

6.2. Intent

To prove the intent to commit Art. 325 of the CCC, it is necessary to see the nature of the propaganda, the persistence, and the ways and methods that were used, considering the facts and circumstances in which they are undertaken.[71] Therefore, the court must analyse what was the true intent of the speaker/instigator. The claim that intent is not required and claim that only the specific circumstances of the case need to be analysed is unacceptable.[72] If the specific circumstances of the case are used to determine the intent of each perpetrator, that is certainly a positive thing, but responsibility based solely on action is unacceptable from the point of view of criminal law. Criminal law should be the *ultima ratio societatis*, and criminal law provisions should be interpreted restrictively, so when analysing the intent, one should pay attention to the seriousness of the stated claim, which must be subsumed under direct or indirect intent. The analysed being of the criminal offense of Public Incitement to Violence and Hatred presupposes intent (direct or indirect), and direct intent may or may not contain an aim. When analysing the direct intent of the first degree, the court can determine, if exists, the aim, that referred to the cause of violence or hatred by its action. Mrčela and Vuletić correctly state that aim isn't necessary for the existence of direct intent and that mo-

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69 On the issue of the term public on communication platforms and the use of artificial intelligence in the fight against hate speech, see more in Roksandić, S., Internet sve više postaje svojevrsna arena govora mržnje, [https://www.glas-slavonije.hr/416902/11/Internet-sve-više-postaje-svojevrsna-arena-govora-mrznje], Accessed 19 December 2022.

70 Kurtović Mišić, A.; Krstulović Dragičević, A., *Kazneno pravo,* Pravni fakultet, Split, 2014, p. 170.

71 Khan, A.A.; Dickey A.A., *Incitement to racial hatred*, Journal of Criminal Law, Vol. 43, No. 1, 1979, p. 48-60.

72 McBride, J.*, ECRI, General policy recommendation 15 on combating hate speech, Defining Public Duties to Tackle Incitement to Hatred whilst Respecting Freedom of Expression*, 2017, p. 50, [https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01], Accessed 28 May 2022.

tives can be referred to some other criminal situation.[73] When choosing the type and measure of punishment, it is necessary to analyse the degree of culpability and purpose of punishment, so it is necessary to establish with what form of culpability criminal offense is committed.[74]

6.2.1. Special intent

The forms of culpability in Croatia are intention or negligence. Art. 325 of the CCC prescribed that this criminal offense can only be committed with direct or indirect intent.[75] Although the legal description today, unlike the CCC/1997, does not require the existence of special intent, it is necessary to see whether special intent is still punishable by this criminal offense. The definition of intent in the CCC is precise because now the CCC directly refers to the elements of the being of the criminal offense.[76] Direct intent includes the situation when the perpetrator wants the act to be committed (direct intent of the first degree), but it also includes situations when the perpetrator is certain of the realization of material elements of the criminal offense (direct intent of the second degree) when the perpetrator is sure that the consequence will occur and nevertheless undertakes the action, although he does not particularly care about the realization of that consequence. The element of awareness in the case of direct intent is defined as awareness of the act, which implies that the perpetrator is aware of all the elements that contain being of a criminal offense. Regarding the elements of the will, direct intent requires want, so the question arises when the perpetrator wants the occurrence of the realization of the being of the criminal offense.[77] While analysing want, it is important not to equate want with desire because they do not always have to match.[78] Want (as a form of direct intent) exists in the case when committing the criminal offense is the aim of the perpetrator's activity, when the criminal offense is for the perpetrator a means to achieve the ultimate aim he wants to achieve, or when he does not care that a certain consequence occurs but is aware that it will certainly occur if he takes the intended action.[79]

The aim as such is not mentioned in Art. 325 of the CCC. This may wrongly lead us to the conclusion that Art. 325 of the CCC does not allow punishment for aim.

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73 Mrčela; Vuletić, *op. cit.* note 62, p. 188.

74 *Ibid.*, p. 289.

75 Vukušić; Mišić Radanović, *op. cit.* note 68, p. 143.

76 Mrčela; Vuletić, *op. cit.* note 62, p. 184.

77 *Ibid.,* p. 187.

78 For detail analysis see in Kurtović Mišić; Krstulović Dragičević, *op. cit.* note 70, p. 135.

79 *Ibid.,* pp. 135-136.

Special intent is a subjective feature of the criminal offense, on which the entire wrong depends. According to the older point of view, the being of criminal offense is fulfilled in objective features, while all subjective features belong to culpability. It soon became clear that there is no basis for such a point of view. Being of a criminal offense contains what is typical for a criminal offense, that is, it indicates the reason why a criminal offense is prohibited, then such a conclusion must be made taking into account the perpetrator's subjective attitude towards the offense. With special intent, the action becomes criminal only if there is also a certain orientation of the will which, therefore, becomes a subjective feature of the being of a criminal offense. If we take into account that the being and unlawfulness are two separate elements of a criminal offense in the Croatian legal system along with the action (conduct) and culpability, it is more precise to talk about the subjective features of the being of a criminal offense because these features belong to the unlawfulness because they are part of the being of a criminal offense.[80] Being of a criminal offense in Art. 325 of CCC no longer mentions the aim of the perpetrator for causing violence and hatred, so it follows that for the realization of Art. 325 of the CCC no longer requires special intent. However, we must not forget here that when the criminal offense is committed with the direct intent of the first degree, then the perpetrator may act with the aim of realizing his activity (in this specific case to cause violence in society). It is a situation when want and desire coincide. Then we can claim that the perpetrator acts with an aim, that is, with a special intention, even though the being of the criminal offense does not mention the aim of causing violence and hatred. A person who acts with a special intention has the desire that his behaviour will lead to a certain aim in the future.[81]

Therefore, it can be concluded that if the criminal offense of Public Incitement to Violence and Hatred is committed with the direct intent of the first degree because the perpetrator acts with the aim of causing violence, then the perpetrator is acting with special intent so there is the possibility of two cases. The special aim can be part of the being of the criminal offense when that special intent cannot be taken into account when determining the punishment because the legislator has already taken aim into account when determining the special minimum and maximum punishment for that particular criminal offense (special intent in the formal

[80] Here it is necessary to emphasize that some authors find the aim of acting in the being of a criminal offense described as a subjective feature of being, and some as a subjective feature of unlawfulness. Nevertheless, Novoselec rightly claims that neither understanding is incorrect. Novoselec, *op. cit.* note 67, pp. 147-148.

[81] Ambos believes that if there is an aim or purpose of the perpetrator's actions, then such behaviour should be understood as dolus directus of the first degree. Ambos in Triffterer, O.; Ambos, K., *Rome Statute of the International Criminal Court (Commentary),* Bloomsbury T&T Clark, London, 2016, p. 762.

sense) or that aim with which the perpetrator acts isn't part of being of a criminal offense but will be considered as a part of direct intent of the first degree when determining the punishment, as is the case with Art. 325 of the CCC (special intent in the substantive sense contained in the direct intent of the first degree). CCC prescribes that the degree of culpability is important when considering and applying punishment for the perpetrator. Mrčela and Vuletić correctly claim that the degree of culpability in this case would be the measure, and not the ground of punishment.[82]

7. CONCLUSION

Analysing the criminal offense of Public Incitement to Violence and Hatred, it is evident from the paper that despite international documents that seek to prevent public incitement to violence and hatred, individual countries and organizations view this issue more liberally (for example, the US) or more restrictively (for example, EU countries). Certainly taking into account the principle of *poenalia sunt restrictenda*, which is related to criminal law, when subsuming speech under the criminal offense of Public Incitement to Violence and Hatred, we need to analyse whether there is the immediacy of causing violence, because if there is no immediacy of causing violence then we can talk about misdemeanours. However, as the sources used in the paper emphasized, the consistency in the processing of hate speech as a criminal offense or misdemeanour is problematic. The goal of the misdemeanours is to act preventively, i.e. eliminate more serious forms of hate speech, which in turn need to be interpreted through criminal offense. The paper also states that despite the definition of Public Incitement to Violence and Hatred, the act of committing the criminal offense (conduct) may also be undertaken "non-public", so we can speak about a „non-public" act of commission. The above derives from the principle of dogmatic of criminal law (a substantial contribution) but also from the general clause used by the criminal offense of Public Incitement to Violence and Hatred in CCC when prescribing conduct, which refers to the expression "or in another way".

Analysing the intent at this criminal offense, the concept of special intent is introduced in the formal and substantive sense (which enables punishment for acting with an aim within the framework of direct intent). We can conclude that there is no change regarding the punishment of special intent concerning the punishment of Art. 174. Racial and Other Discrimination according to the CCC of 1997, because the framework for punishment at that time is the same as today for the basic form of Public Incitement to Violence and Hatred (the special maximum is three

[82] Mrčela; Vuletić, *op. cit.* note 62, p. 289.

years in prison). Namely, according to CCC97, the legislator took into account the behaviour of the perpetrator if he/she acts with the aim of causing hatred or violence already in the being of a criminal offense, and the current CCC enables the evaluation of the behaviour of the perpetrator with the aim of causing violence or hatred through the degree of culpability, and we know that degree of culpability is the measure of punishment.

It is a positive understanding of the legislator of the Republic of Croatia that in the case of Public Incitement to Violence or Hatred, a general clause is used and that attacks on individuals of different social groups are punished based on their characteristics. In this way, the law of the Republic of Croatia objectively evaluates and punishes hate speech. Still, from the criminal law dogmatic, we can see that the Croatian legal system is prepared for traditional and modern acts of commission of hate speech.

Speech that represents the truth and states the facts should be protected so that it can never fall under the category of incitement to violence and hatred.

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